

ORIG

MDEC

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

FILED

APR 28 2015

COUNTY CLERK
QUEENS COUNTY

-----X
HSBC BANK USA, NATIONAL ASSOCIATION,
AS TRUSTEE FOR LUMINENT MORTGAGE
TRUST 2007-1,

Plaintiff,

Index

-against-

MEMORANDUM DECISION
AFTER TRIAL

; WASHINGTON MUTUAL
BANK, FA; CITY OF NEW YORK
ENVIRONMENTAL CONTROL BOARD;
"JOHN DOE" and "JANE DOE" said names being
fictitious, it being the intention of Plaintiff to
designate any and all occupants of premises being
foreclosed herein,

BY: TRACY CATAPANO-FOX
COURT ATTORNEY
REFEREE

Defendants.

FILED

APR 28 2015

COUNTY CLERK
QUEENS COUNTY

-----X

By order of the Honorable Jeremy S. Weinstein, this residential foreclosure matter was referred to me on January 20, 2015, to hear and determine all issues. Plaintiff commenced this action on December 23, 2011, for a judgment of foreclosure against defendant. Issue was joined on January 11, 2012, and plaintiff filed the note of issue on February 20, 2013.

The trial was scheduled for February 9, 2015, but defendant submitted an affirmation of engagement one week prior and the trial was adjourned to March 16, 2015. On that date, both sides appeared but plaintiff requested a further adjournment because it did not bring the original note or loan documents, nor did plaintiff have a witness with personal knowledge of the facts. Defendant was present and objected to the adjournment, because it was not given prior notice of plaintiff's

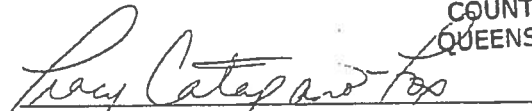
request and had incurred the expense of bringing an expert witness to court for trial. The court offered a one-day adjournment for plaintiff to present its witnesses and evidence, provided that plaintiff would be able to proceed, and would permit defendant's expert to testify out of turn in order to prevent further expense to defendant. However, when the court questioned plaintiff about its ability to present evidence the next day, plaintiff stated that it would not be prepared to proceed the following day, nor was it certain when it would ever be able to proceed with the trial. Defendant then moved for a dismissal with prejudice and costs, while plaintiff consented only to a dismissal without prejudice, and both parties asked for a ruling on the motion.

Based upon the above, it is held that this action is dismissed with prejudice and costs. Plaintiff filed a note of issue on February 20, 2013, stating its readiness for trial over two years before the matter was set for trial. On January 20, 2015, plaintiff further indicated its ability to proceed to the Trial Scheduling Judge, and consented to be referred for a bench trial. At no time prior to the morning of March 16th did plaintiff indicate that it did not possess the loan documents and was unable to proceed. The court provided plaintiff with the opportunity for a reasonable adjournment to prosecute its case, but plaintiff presented no argument or evidence of any ability to proceed with this action. Plaintiff's failure to present any witnesses or evidence for its case, nor any reasonable explanation for its failure to do so, demonstrates exceptional circumstances that warrant dismissal with prejudice, in the interests of justice, and costs. (*See Palmer v. Fox*, 28 AD2d 968 [4th Dept. 1967], *aff'd* 22 NY2d 667 [1968].) As plaintiff has not demonstrated an ability to prosecute its case, to present witnesses and evidence to support its Complaint now or in the future without good cause, this matter must be dismissed on the merits. (*See CPLR §5013; Fetterman v. Evans*, 204 AD2d 888 [3rd Dept. 1994].)

Accordingly, it is hereby
ORDERED that defendant's motion to dismiss is granted and plaintiff's Complaint is
dismissed with prejudice, and it is further
ORDERED that defendant is entitled to reasonable costs incurred for the preparation for trial
to be paid by plaintiff, and it is further
ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 20, 2015

FILED
APR 28 2015
COUNTY CLERK
QUEENS COUNTY


Tracy Catapano-Fox, Esq.
Court Attorney-Referee

FILED
APR 28 2015
COUNTY CLERK
QUEENS COUNTY