

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32**

*Justice*

-----X

HSBC MORTGAGE CORPORATION (USA),  
Plaintiff,

INDEX NO. 110781/2010

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 002, 004

ABDELRAHMAN HARB AKA ABDEL RAHMAN HARB AKA  
ABDERLRAHMAN HARB AKA ABDERL RAHMAN HARB,  
NEW YORK CITY 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,

**DECISION + ORDER ON  
MOTION**

Defendant

-----X

The following papers, numbered 1 _____ to 4 _____, were read on this application to/for		<u>Order of Ref</u>
Notice of Motion/ Petition/ OSC - Affidavits - Exhibits	No(s)	<u>1</u>
Answering Affidavits - Exhibits	No(s)	<u>2</u>
Replying	No(s)	<u>3, 4</u>

The following papers, numbered 1 _____ to 3 _____, were read on this application to/for		<u>Seal/Vacate</u>
Notice of Motion/ Petition/ OSC - Affidavits - Exhibits	No(s)	<u>1</u>
Answering Affidavits - Exhibits	No(s)	<u>2</u>
Replying	No(s)	<u>3</u>

Motion Sequence Numbers 002 and 004 are consolidated for disposition.

The motion (002) by plaintiff for an order of reference is denied and the cross-motion by non-party and proposed intervenor Marble Hill at 29, Inc. ("Marble Hill") to *inter alia* dismiss is granted. The motion (004) by plaintiff to seal its reply to motion sequence 002 and to vacate its default is granted in part and denied in part.

## Background

This foreclosure action concerns a property located at 29 Marble Hill Avenue in the Bronx.<sup>1</sup> Non-party Marble Hill acquired the property in May 2017.

In November 2010, the Court denied plaintiff's motion for an order of reference (cross-motion, exh E). After settlement conferences were held in 2012, the Court issued an order dated September 6, 2012 releasing the case from the mortgage foreclosure settlement part and directing plaintiff to make an ex parte motion to appoint a referee within 90 days (*id.* exh F). Plaintiff failed to comply.

On February 20, 2013, the Court issued an order directing the parties to appear for a status conference on March 19, 2013 (*id.* exh G). The parties failed to appear and the Court issued another order scheduling a conference on May 21, 2013 (*id.* exh H). This order warned that "the failure to comply with this directive will result in the dismissal of Plaintiff's Complaint" (*id.*).

Marble Hill claims that the Court dismissed the case when the parties failed to appear on May 21, 2013. Marble Hill claims that plaintiff did nothing until filing the instant motion for an order of reference in November 2017. It argues that the case should be dismissed because plaintiff abandoned the case.

Plaintiff argues that Marble Hill has to move to vacate the default of the borrower (defendant Harb) before it can seek to dismiss the case. Plaintiff claims that even if Marble Hill had moved to vacate Harb's default, it has no reasonable excuse or meritorious defense. Plaintiff also claims that the case was not dismissed and there is no order dismissing the case.

---

<sup>1</sup> Although the property address is listed as the Bronx, the premises is technically located in New York County (*see Sarah Harrison Smith, Hooked on the Bronx, Legally Manhattan's*, NY Times, Nov. 16, 2012).

## Discussion

CPLR 3404 provides that “A case in the supreme court or a county court marked “off” or struck from the calendar or unanswered on a clerk’s calendar call, and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute. The clerk shall make an appropriate entry without the necessity of an order”

The Court grants Marble Hill’s cross-motion. Contrary to plaintiff’s claim that the case was not dismissed, a review of The Supreme Court Records On-Line Library (“SCROLL”) shows that the case was marked disposed on May 21, 2013. While plaintiff is correct that there was no order dismissing the case on SCROLL, CPLR 3404 does not require such an order and Justice Rakower’s order dated April 11, 2013 warned that if the parties didn’t show up on May 21, 2013, the case would be dismissed (cross-motion, exh H). The absence of a specific order does not eliminate the clear and obvious inference that the case was marked disposed because plaintiff did not show up for a court -ordered conference.

And plaintiff does not adequately explain why it did nothing between May 21, 2013 and November 2017. In reply, plaintiff insists that it entered into a trial modification plan with Harb in October 2014, but that Harb failed to comply with his obligations. Plaintiff alleges that it “was compelled to move forward with its foreclosure on or about September 22, 2015” (Plaintiff’s reply, ¶ 15) although plaintiff does not explain what it actually did to move the case forward. Certainly, there is no reason why plaintiff did not immediately move for an order of reference after Harb purportedly defaulted on the trial modification plan. Plaintiff then mentions that the mortgage was transferred in November 2016.

This procedural history recounted *by plaintiff* shows that plaintiff did nothing to monitor its case. It ignored multiple court orders to show up for a conference and the case was marked

disposed. The Court also observes that plaintiff ignored another Court order directing it to make an ex parte motion for an order of reference within 90 days of September 2012 (cross-motion exh F). Simply put, in this case, plaintiff decided to ignore the Court numerous times and now seeks to prosecute its case years after it was marked disposed. The fact that plaintiff tried to settle with Harb is not an excuse for why plaintiff did nothing for so long.

There is only one conclusion from the procedural history of this case: plaintiff abandoned this action. It started a case in 2010, ignored three Court directives and failed to make any inquiries about the case from September 2012 until November 2017. A phone call or visit to the part assigned or even checking the case on SCROLL would have revealed that the case was marked disposed. Instead, plaintiff did nothing and now bizarrely argues that the case was not dismissed. The Court recognizes that Court notices sometimes get missed. But this is not a case where plaintiff seeks to vacate a few months after a dismissal. Rather, it requests relief from the Court after doing nothing for nearly five years.

And, while plaintiff was doing nothing, Marble Hill claims it acquired the property in reliance on the fact that this case was marked disposed. This is, of course, the reason why courts try to ensure that cases are moved expeditiously and why even a minimal effort by plaintiff to move the case would have prevented the instant situation.

### **Summary**

It may be that plaintiff simply lost track of the case and inadvertently let the case remain disposed. But that does not excuse failing to do anything with the case for four and a half years. The Court has no choice but to grant Marble Hill's cross-motion to dismiss and to deny plaintiff's motion to appoint a referee as well as the branch of MS 004 that seeks to vacate the dismissal. However, the Court grants the portion of plaintiff's motion (MS 004) that seeks to

redact the reply affirmation to MS 002. Plaintiff claims it inadvertently failed to redact social security numbers, loan numbers, check numbers and payee CD numbers.

Accordingly, it is hereby

ORDERED that the motion (MS 002) for an order of reference is denied and the cross-motion by Marble Hill at 29, Inc. to dismiss is granted to the extent that the Court acknowledges that the case had already been dismissed on May 21, 2013, and the clerk is directed to enter judgment accordingly, without costs or disbursements (the judgment may be worded that the dismissal is "as of May 21, 2013", or "nunc pro tunc" or something similar, at the clerk's discretion) upon presentation of the proper papers therefor; and it is further

ORDERED that the motion (MS 004) is denied to the extent it sought to vacate the dismissal and granted only to the extent that plaintiff may amend the exhibits as requested in its moving papers and Exhibit H to MS 004 shall be included in the records of the County Clerk in place of the original reply affirmation for MS 002 upon presentation of proper papers by plaintiff, and the clerk is authorized to accept the redacted papers and return the unredacted papers; and it is further

ORDERED that plaintiff shall serve a copy of the redacted reply papers on counsel for Marble Hill at 29, Inc. within 60 days of notice of entry, who (upon receipt of the redacted papers) shall destroy all copies of plaintiff's initial reply papers for MS 002.

7/26/13  
DATE

ARLENE P. BLUTH, J.S.C.  
**HON. ARLENE P. BLUTH**

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE