

State of New York  
Supreme Court, Appellate Division  
Third Department  
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Albany, NY 12224



FIRST  
CLASS PERMIT NO. 2097 ALBANY NY 12224

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State of New York  
Supreme Court, Appellate Division  
Third Judicial Department

Decided and Entered: March 18, 2021

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CHASE HOME FINANCE, LLC,  
Plaintiff,

v

ALEX SHOUMATOFF,  
Respondent,  
et al.,  
Defendants.

MEMORANDUM AND ORDER

U.S. BANK TRUST NATIONAL  
ASSOCIATION, as Trustee for  
1900 CAPITAL TRUST III,  
as Assignee of CHASE HOME  
FINANCE, LLC,  
Appellant.

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Calendar Date: February 5, 2021

Before: Garry, P.J., Lynch, Aarons, Pritzker and Reynolds  
Fitzgerald, JJ.

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Adam Leitman Bailey, PC, New York City (Jeffrey R. Metz of  
counsel), for appellant.

L. Blake Morris, New York City, for respondent.

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Aarons, J.

Appeal from an order of the Supreme Court (Ellis, J.),  
entered September 9, 2019 in Essex County, which, among other

things, granted defendant Alex Shoumatoff's motion to dismiss the complaint against him for failure to prosecute.

In 2007, plaintiff commenced this mortgage foreclosure action against defendant Alex Shoumatoff (hereinafter defendant) after he allegedly failed to make payments due under a note. Following joinder of issue, defendant served a 90-day demand in 2017, upon plaintiff's counsel, among others, demanding that plaintiff resume prosecution of the action and serve and file the note of issue within 90 days of receipt of the demand. The note of issue was not filed and, in May 2019, defendant moved for, among other things, dismissal of the complaint under CPLR 3216. Meanwhile, the note and mortgage were assigned to U.S. Bank Trust National Association, as Trustee for 1900 Capital Trust III (hereinafter U.S. Bank). Plaintiff opposed defendant's motion and cross-moved for, among other things, an extension of time to file the note of issue. Supreme Court granted defendant's motion, to the extent that defendant sought dismissal under CPLR 3216, and denied, as moot, the other requested relief. The court also denied plaintiff's cross motion. This appeal ensued.<sup>1</sup>

U.S. Bank contends that Supreme Court erred in granting that part of defendant's motion seeking dismissal because there was insufficient proof regarding the service of the 90-day demand. We disagree. A 90-day demand must be served "by registered or certified mail" (CPLR 3216 [b] [3]). The record contains an affidavit of service from the individual who served the 90-day demand. The individual averred therein that he served the 90-day demand "by [f]irst [c]lass [m]ail and by [c]ertified [m]ail, [r]eturn [r]eceipt [r]equested." Contrary to U.S. Bank's assertion, any failure by defendant to submit tracking numbers or certified mailing receipts was not fatal under the circumstances of this case in proving how the 90-day demand was served. Given that defendant submitted proof from an individual with personal knowledge regarding the service of the 90-day demand, defendant established that the 90-day demand was served in accordance with the requirements of CPLR 3216 (see Die

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<sup>1</sup> U.S. Bank, as plaintiff's assignee, may prosecute this appeal (see CPLR 1018).

Matic Prods., Inc. v Flair Intl. Corp., 23 AD3d 513, 514 [2005]).

Because there was no compliance with the 90-day demand, the party seeking to avoid dismissal had to demonstrate a "justifiable excuse for the delay and a good and meritorious cause of action" (Di Simone v Good Samaritan Hosp., 100 NY2d 632, 633 [2003] [internal quotation marks and citation omitted]; see Agnellino v Town of Tioga, 18 AD3d 1007, 1007 [2005]). The opposition to defendant's motion advanced only a conclusory and unsubstantiated claim of law office failure by plaintiff's prior counsel as the justifiable excuse. Although the failure to detail and substantiate a claim of law office failure would justify dismissal of the complaint (see HSBC Bank USA, N.A. v Izzo, 177 AD3d 648, 649 [2019], lv denied 35 NY3d 906 [2020]; Fenner v County of Nassau, 80 AD3d 555, 556 [2011]; Melius v Pletman, 202 AD2d 880, 882 [1994], lv dismissed and denied 84 NY2d 903 [1994]), even when presented with an unjustifiable excuse, a court still retains some residual discretion to refuse dismissal of a complaint as a penalty under CPLR 3216 (see Baczowski v Collins Constr. Co., 89 NY2d 499, 504 [1997]).

In our view, the record demonstrates that a meritorious cause of action exists and that defendant has suffered minimal prejudice. Additionally, plaintiff previously moved for summary judgment, thereby evincing a lack of intent to abandon the action. This motion was not decided on the merits but was deemed a nullity by Supreme Court based upon issues concerning who was counsel of record for plaintiff. Indeed, prior to the motion being deemed a nullity, it was originally assigned to a different justice, then removed from the calendar, subsequently reassigned and remained dormant for a significant period before being eventually restored to the calendar. In other words, some of the delay in this case was not attributable to plaintiff. Taking into account that CPLR 3216 is "extremely forgiving of litigation delay" (Baczowski v Collins Constr. Co., 89 NY2d at 503), as well as the public policy of resolving disputes on the merits (see Baptist Health Nursing & Rehabilitation Ctr., Inc. v Baxter, 140 AD3d 1386, 1388 [2016]), defendant's motion, under the particular circumstances of this case, should have been

denied to the extent that it sought dismissal of the complaint, and plaintiff's cross motion should have been granted to the extent that it sought an extension of time to file the note of issue (see King v Jordan, 243 AD2d 951, 953 [1997]; compare Olejak v Town of Schodack, 295 AD2d 679, 680 [2002]).

Finally, defendant, in his motion, and plaintiff, in its cross motion, sought other relief that Supreme Court found to be moot based on its determination. In view of our determination herein and because the parties did not brief those issues that the court deemed to be moot, the matter must be remitted for a determination on those issues.

Garry, P.J., Lynch, Pritzker and Reynolds Fitzgerald, JJ., concur.

ORDERED that the order is reversed, on the law, with costs, and matter remitted to the Supreme Court for further proceedings not inconsistent with this Court's decision.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger  
Clerk of the Court