

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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Submitted - December 15, 2016

REINALDO E. RIVERA, J.P.
SHERI S. ROMAN
COLLEEN D. DUFFY
VALERIE BRATHWAITE NELSON, JJ.

2016-00399

DECISION & ORDER

First United Mortgage Banking Corp., appellant,
v Frederick Lawani, et al., defendants.

(Index No. 41749/07)

Borchert & LaSpina, P.C., Whitestone, NY (Helmut Borchert and Robert W. Frommer of counsel), for appellant.

In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Kings County (Silber, J.), dated May 27, 2014, which (1) denied its unopposed motion for an order of reference, for leave to enter a default judgment against the defendants upon their failure to appear or answer the complaint, and to amend the caption, and (2), sua sponte, directed the dismissal of the complaint.

ORDERED that on the Court's own motion, the notice of appeal from so much of the order as, sua sponte, directed the dismissal of the complaint is deemed to be an application for leave to appeal from that portion of the order, and leave to appeal is granted (*see* CPLR 5701[c]); and it is further,

ORDERED that the order is reversed, on the law, without costs or disbursements, and the matter is remitted to the Supreme Court, Kings County, for further proceedings consistent herewith before a different Justice.

In this action to foreclose a mortgage, the Supreme Court denied the plaintiff's unopposed motion, inter alia, for an order of reference and, sua sponte, directed the dismissal of the complaint. According to the order appealed from, the court conducted an independent Internet

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investigation of certain records and digital tax maps purportedly maintained by, among others, the New York City Department of Finance. Based upon the court's research, and without citing to any legal authority, the court concluded that certain discrepancies warranted dismissal of the action.

The Supreme Court erred in, sua sponte, directing the dismissal of the complaint. "A court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal" (*U.S. Bank, N.A. v Emmanuel*, 83 AD3d 1047, 1048; see *Deutsche Bank Natl. Trust Co. v Martin*, 134 AD3d 665; *Nationstar Mtge., LLC v Wong*, 132 AD3d 825; *FCDB FF1 2008-1 Trust v Videjus*, 131 AD3d 1004). Here, the court was not presented with any extraordinary circumstances warranting the sua sponte dismissal of the complaint. We caution that a dismissal based almost entirely upon an independent Internet investigation, especially one conducted without providing notice or an opportunity to be heard by any party, is improper and should not be repeated (see *HSBC Bank USA, N.A. v Taher*, 104 AD3d 815, 818). Accordingly, under the circumstances of this case, we deem it appropriate to remit the matter to the Supreme Court, Kings County, before a difference Justice, for further proceedings on the complaint, including a determination on the merits of the subject motion.

RIVERA, J.P., ROMAN, DUFFY and BRATHWAITE NELSON, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Aprilanne Agostino". The signature is written in a cursive, flowing style.

Aprilanne Agostino
Clerk of the Court