

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1424

CA 15-00517

PRESENT: SCUDDER, P.J., SMITH, CENTRA, PERADOTTO, AND CARNI, JJ.

BAC HOME LOANS SERVICING, LP, FORMERLY KNOWN AS
COUNTRYWIDE HOME LOANS SERVICING LP,
PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

KENNETH MAESTRI, ALSO KNOWN AS KENNETH V. MAESTRI,
DEFENDANT-RESPONDENT.

FRENKEL LAMBERT WEISS WEISMAN & GORDON, LLP, BAY SHORE (MICHELLE
MACCAGNANO OF COUNSEL), FOR PLAINTIFF-APPELLANT.

Appeal from an order of the Supreme Court, Onondaga County
(Deborah H. Karalunas, J.), entered January 3, 2014. The order denied
the motion of plaintiff to vacate an order dismissing the complaint.

It is hereby ORDERED that the order so appealed from is
unanimously reversed on the law without costs, the motion is granted,
the order dated December 13, 2012 is vacated and the complaint is
reinstated.

Memorandum: In this mortgage foreclosure action, plaintiff
appeals from an order that denied its motion seeking to vacate an
order dated December 13, 2012, in which Supreme Court sua sponte
dismissed the complaint as abandoned pursuant to CPLR 3215 (c). We
agree with plaintiff that the court erred in denying the motion. The
court erred in dismissing the complaint sua sponte inasmuch as "[u]se
of the [sua sponte] power of dismissal must be restricted to the most
extraordinary circumstances, and no such extraordinary circumstances
are present in this case" (*Midfirst Bank v Bellinger*, 117 AD3d 1520,
1522 [internal quotation marks omitted]; see *HSBC Bank USA, N.A. v
Alexander*, 124 AD3d 838, 839). Indeed, a plaintiff has not abandoned
a foreclosure action where, as here, the plaintiff has taken the
preliminary step toward obtaining a default judgment of foreclosure
and sale by moving for an order of reference within one year of the
defendant's default (see *HSBC Bank USA, N.A.*, 124 AD3d at 839; *Klein v
St. Cyprian Props., Inc.*, 100 AD3d 711, 712).

Entered: December 31, 2015

Frances E. Cafarell
Clerk of the Court