

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

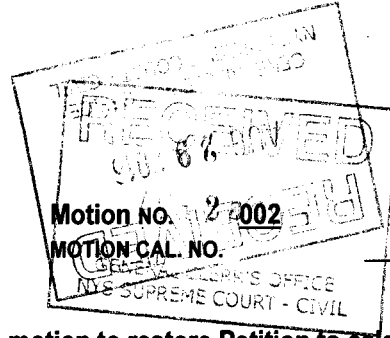
In the Matter of the Application of
**BETHELITE COMMUNITY CHURCH,
GREAT TOMORROW ELEMENTARY SCHOOL,**
Petitioner,
For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules

INDEX NO. 103377/04

MOTION DATE 06-29-2016

- Against -

THE DEPARTMENT OF ENVIRONMENTAL PROTECTION
OF THE CITY OF NEW YORK, THE CITY OF NEW YORK,
MICHAEL BLOOMBERG, Mayor, NEW YORK CITY
DEPARTMENT OF FINANCE, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, ABC CORPORATION
1-100, JANE ROE, JOHN DOE,



The following papers, numbered 1 to 6 were read on this motion to restore Petition to calendar, vacate default judgment, consolidate with foreclosure action, allow amendment of answer in foreclosure action and allow Respondent time to answer petition.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	<u>1-2</u>
Answering Affidavits — Exhibits	<u>3-4</u>
Replying Affidavits	<u>5-6</u>

FILED
AUG 29 2016

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon a reading of the foregoing papers, it is ordered that this motion by Petitioner brought by Order to Show Cause to: (1) Restore this Proceeding to the court's calendar, (2) Consolidating this Proceeding with the tax lien foreclosure action commenced by NYCTL 1998-2 Trust and the Bank of Mellon v. Bethelite Community Church actions pending in Supreme Court New York County under index number 113197/09 (hereinafter Action No. 2), (3) vacating the judgment entered on default in Action No. 2, (4) granting Petitioner leave to interpose an amended answer in Action No. 2 and (5) vacating the Notice of foreclosure sale and staying the foreclosure sale pending the determination of the consolidated proceeding, is granted as stated herein.

Petitioner is a Baptist Church which owns property located at 36 West 123rd. Street New York, New York (hereinafter the "property"). Petitioner is a religious corporation that operates a church, a private Christian school, a homeless shelter and a children's breakfast program on the property. Aside from the church and school the property contains apartments that house the pastor, a church administrator, a full-time teacher and two homeless families. Petitioner alleges that all of the uses of the property are for religious purposes, educational purposes, as a homeless shelter and are necessary for the church.

Petitioner commenced this Article 78 proceeding on March 4, 2004 to vacate the Department of Environmental Protection of the City of New York's (hereinafter "DEP" and or "Respondent") judgment denying Petitioner an exemption for water and sewer charges, to annul all assessments, charges and penalties and to vacate a tax lien. DEP had denied Petitioner an exemption for water and sewer charges finding that portions of the property (two apartments) were not tax exempt.

After denying Petitioner's exemption Respondent through the Department of Finance sold its tax lien for the Sewer and water charges to the Bank of New York, as collateral agent and custodian. The Bank of New York commenced an action to foreclose on the tax lien, titled NYCTL 1999-1 TRUST and THE BANK OF NEW YORK, as Collateral agent and Custodian for NYCTL TRUST 1999-1 v. BETHELITE COMMUNITY BAPTIST CHURCH, THE AMERICAN BAPTIST EXTENSION CORP., TOMORROW'S ELEMENTARY SCHOOL, ET AL, under index number 104110/03 (hereinafter "Action No. 1). Petitioner sought a stay of Action No. 1 pending the outcome of this Article 78 proceeding. By order dated June 14, 2004 the Hon. Kibbie F. Payne granted Petitioner a stay of Action No. 1 pending the determination of this Article 78 proceeding (see moving papers Exhibits C and E).

Respondents cross- moved pre-answer to dismiss the petition and the court, Shirley Werner Kornreich, J.S.C., in a 13 page decision denied Respondents' pre-answer cross-motion, granted the petition, annulled and vacated the assessments, charges and penalties levied on the property by DEP; vacated and annulled the tax liens arising from the assessments, charges and penalties imposed by DEP on the property, and granted Petitioner an exemption from water and sewer charges from 1985 to the date of the court's decision. (see moving papers Exhibit A).

Justice Kornreich's decision was appealed to the Appellate Division First Department , which affirmed it on March 9, 2006. The Appellate Division's decision was appealed to the Court of Appeals which, by decision dated June 7, 2007, reversed the Appellate Division and remitted the case to the lower court to allow Respondents to submit an answer and for further proceedings. It was the Opinion of the Court that "the Supreme Court erred in granting the petition without first affording Respondents an opportunity to answer". (see Appendix in Respondents' Affirmation in opposition).

The Petition was restored to the court's calendar but Respondents did not submit an answer. The bank did not seek to lift the stay imposed by Justice Payne in foreclosure action No. 1. Instead it transferred its rights to the tax lien to a second Trust (essentially to itself) which on September 17, 2009 commenced a second foreclosure action titled NYCTL 2005-A TRUST AND THE BANK OF NEW YORK MELLON, as Collateral Agent and Custodian v. BETHELITE COMMUNITY BAPTIST CHURCH, ET AL, filed under index number 113197/09 (Action No. 2). Petitioner submitted an answer to this second action on October 21, 2009 (see moving papers Exhibits F and G).

Petitioner at all times was represented by Anthony C. Jones, Esq., but unbeknown to Petitioner Mr. Jones was suspended from the practice of law in January 27, 2009 and remains suspended to this day (see moving papers Exhibit H). Mr. Jones by stipulation between counsel, faxed on October 8, 2008, withdrew from further representation of Petitioners in the Article 78 proceeding, although he served and filed an answer on their behalf in foreclosure action No. 2. Mr. Jones failed to prosecute

this Article 78 proceeding which was subsequently administratively dismissed for failure to prosecute.¹ He also failed to oppose a motion for summary judgment in foreclosure action No. 2, and a judgment of foreclosure and sale was granted on default on December 17, 2015. The approximate amount of the tax lien has grown to \$1,028,939.34 dollars on a property worth approximately \$10,000, 000.00 dollars (see Respondents' Exhibit 3 and moving papers Exhibits G , H, I and J).

In support of their motion Petitioners provide the affidavit of James Manning, the Church's Pastor. Pastor Manning states under oath that he first learned of Mr. Jones' (their former attorney) default when he received a notice of sale of the property in January 2016, and that shortly after receiving the notice he retained counsel to make this application. He further states that if the premises are sold at foreclosure thousands of lives will be affected and the church will lose property worth approximately \$10 million dollars, thereby irreparably harming the Harlem community and the church. Finally, he states that the church has a meritorious claim and defense, and is likely to prevail because Supreme Court previously found that the church is exempt from the payment of sewer and water charges, therefore no tax is due. (see James Manning Affidavit annexed to the moving papers).

Respondents oppose the motion and argue that since the proceeding was dismissed for failure to prosecute, Petitioner must demonstrate , but has failed to do so: (1) that it has a meritorious cause of action, (2) a reasonable excuse for the delay in prosecuting the proceeding, and (3) a lack of intent to abandon the proceeding. Respondents allege that Petitioner's action demonstrate that it abandoned this proceeding long ago. As such, Respondents request that petitioner's motion to restore this proceeding to the court's calendar be denied. In the alternative, if the court were to grant the motion to restore, Respondent requests that they be granted time to submit an answer.

The Bank opposes the motion and asks that it be denied in its entirety. It argues that the tax liens are valid and were properly assigned to the current collateral agent and plaintiff in foreclosure action No. 2, NYCTL 1998-2 TRUST.

A plaintiff wishing to restore an action after it has been dismissed for failure to prosecute must generally demonstrate (1) a reasonable excuse for the failure to timely restore, (2) a meritorious cause of action, (3) a lack of intent to abandon the matter, and (4) a lack of prejudice to the opposing party (*Basetti v. Nour*, 287 A.D.2d 126, 731 N.Y.S.2d 35 [2nd. Dept. 2001]). Where a plaintiff fails to satisfy all four components the motion to restore will be denied. Law office failure is not a reasonable excuse (see *Stancati v. Weber*, 17 A.D.3d 447, 792 N.Y.S.2d 612 [2nd. Dept. 2005]). However, when the delay in moving to restore the action to the court's calendar is in large part due to law office failure following the departure of the managing attorney of the law firm representing plaintiff, such delay does not establish a willful default or an intent to abandon the action (*Indrunas v. Escher Construction Corp.*, 277 A.D.2d 28, 716 N.Y.S.2d 10 [1st. Dept. 2000]), nor is there prejudice to the defendant when the proof is not likely to turn on accounts of witnesses with dim memories of long ago events (*Salzano v. Mastrantonio, M.D.*, 267 A.D.5, 699 N.Y.S.2d 45 [1st. Dept. 1999]).

¹ The papers do not state when the Petition was dismissed.

Petitioner has demonstrated a reasonable excuse for the failure to timely restore this proceeding, it had no knowledge that the action had been dismissed for failure to prosecute, or that its attorney was suspended from the practice of law. According to the un rebutted affidavit of Pastor Manning, it did not know that a default judgment had been entered until he was served with the notice of sale in the foreclosure action. The suspension of petitioner's counsel and his subsequent withdrawal from representation by stipulation, without seeking leave of the court and without notifying petitioners, demonstrates that there was no willful default or an intent to abandon this matter. The previous decision of this court, Shirley Werner Kornreich, J., shows that petitioner has a meritorious claim. As such, petitioner has met all four prongs, warranting the granting of its motion to restore this proceeding to the calendar of the court. Finally, Respondents have not yet submitted an answer to the petition in this proceeding.

Similarly for the same reasons the judgment of foreclosure and sale obtained on default should be vacated. In accordance with CPLR 5015(a)(1) to vacate a default a party must provide the court with a reasonable excuse and a meritorious defense. Petitioner has provided the court with a reasonable excuse, the failure of its attorney to act on its behalf and oppose the motion for summary judgment due to his suspension, and a meritorious defense, being that it may not owe Respondents any money. As such that branch of the motion is granted, the default judgment and foreclosure sale are vacated.

Pursuant to CPLR §602, consolidation lies within the discretion of the Court, but is generally favored where there are common questions of law or fact, unless the party opposing the motion demonstrates prejudice of a substantial right. The burden is on the party opposing the motion to demonstrate prejudice. *Amcan Holdings, Inc. v. Torys LLP*, 32 A.D. 3d 337, 821 N.Y.S. 2d 162 (N.Y.A.D. 1st Dept. 2006).

Although a review of the record indicates that judicial economy would be served by consolidating since this proceeding and the foreclosure action on the tax lien (Action No. 2) arise out of common questions of fact and involve common questions of law (involving the same dispute between Petitioner and Respondent over payment of sewer and water charges), consolidation is not warranted where the matters don't need to be resolved at the same time. As such the branch of the motion seeking consolidation is denied.

CPLR § 6301 grants this court the power to issue an order directing the defendant to perform an act for the benefit of plaintiff, or to refrain from performing an act which would be injurious to the plaintiff. A preliminary injunction may be granted under CPLR article 63 when the party seeking such relief demonstrates (1) a likelihood of success on the merits; (2) the prospect of irreparable injury and (3) a balance of equities tipping in the moving party's favor (*Doe v. Axelrod*, 73 N.Y. 2d 748, 532 N.E.2d 1272, 536 N.Y.S.2d 44 [1988]).

Petitioner has demonstrated all three prongs necessary for the granting of an injunction. There is a likelihood of success on the merits, there will be irreparable damage if the property is sold and a balancing of the equities tips in its favor given the varied services petitioner provides to the community. Accordingly that branch of the motion seeking a stay of the foreclosure action is granted and the same is stayed pending determination of this Article 78 Proceeding and a further order from this court.

CPLR 3025 allows a party to amend pleadings at any time by leave of court or by stipulation. Leave shall be freely given upon such terms as may be just. Petitioner seeks leave to amend its answer in the foreclosure action as annexed to the moving papers in its exhibit P. Since the judgment is vacated amendment of the answer is permitted.

Finally, Respondents will be given an opportunity to serve and file their answer on petitioner, and with the court, after service on them of a copy of this order with notice of entry.

Accordingly, it is ordered that the motion is granted to the extent of (1) restoring this petition to the calendar of the court, (2) vacating the judgment of foreclosure and sale dated December 17, 2015 in Action No. 2, obtained on default of Petitioner, (3) staying the foreclosure action until this Article 78 proceeding is determined, (4) permitting petitioner to amend its answer in the foreclosure action as annexed to the moving papers, and (5) permitting Respondents to interpose an answer to this petition after service of a copy of this order with notice of entry, and it is further

ORDERED that the remainder of the motion is denied, and it is further

ORDERED that this proceeding is restored to the calendar of this court, and it is further

ORDERED that within 20 days from the date of entry of this order, petitioner serve a copy of this order with notice of entry on the Respondents and all other parties, the county clerk (Room 141B) and the General Clerk's Office Trial Support Clerk (Room 119), who are directed to restore this proceeding to the calendar of the court and it is further

ORDERED that the judgment of foreclosure and sale dated December 17, 2015 obtained on default in an action entitled NYCTL 1998-2 TRUST AND THE BANK OF NEW YORK MELLON, AS COLLATERAL AGENT AND CUSTODIAN V. BETHELITE COMMUNITY BAPTIST CHURCH, A/K/A BETHELITE COMMUNITY CHURCH, ET AL, INDEX NUMBER 113197/09 (Action No. 2), is vacated and of no further force and effect, and it is further

ORDERED that petitioner is permitted to amend its answer in the foreclosure action (Action No. 2) as annexed to the moving papers and serve the same on the plaintiff in the foreclosure action (Action No. 2) within 30 days from the date of entry of this order, and it is further

ORDERED that the foreclosure action (Action No. 2) is hereby stayed, pending a determination in this Article 78 proceeding and a further order from this court, and it is further

ORDERED that Respondents serve and file an answer to the petition within 30 days from the date of service on their attorney of a copy of this order with notice of entry, and it is further

ORDERED that the motion to consolidate this proceeding with the foreclosure action filed under index number 113197/09 (Action No. 2) is denied.

Dated: August 24, 2016

ENTER:



Manuel J. Mendez
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FILED

AUG 29 2016

COUNTY CLERK'S OFFICE
NEW YORK