

At an IAS Part 2 of the Supreme Court of the State of New York, held in and for the County of Queens at the Court House located at 88-11 Sutphin Blvd, Jamaica, New York on the ____ day of September 2017

Present: Honorable Allan B Weiss,
Justice

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Index # 701532/2015

**WELLS FARGO BANK NATIONAL
ASSOCIATION,**

Plaintiff,

-- against --

ORAL ARGUMENT
REQUESTED

ORDER TO SHOW
CAUSE

SHAJU MIAH, et al,

Defendants.

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SIR:

PLEASE TAKE NOTICE, that upon the Affirmation of Craig Saunders, Esq., affirmed on September 21, 2017, the affidavit of SHAJU MIAH, sworn to on the 21st day of September 2017, the consent to change attorney of SHAJU MIAH, dated September 21, 2017, and upon the exhibits annexed hereto and made a part hereof, and upon all the papers and proceedings heretofore filed and had herein;

LET Plaintiff show cause before me or one of the Judges of this Court at a Motion Term of the Supreme Court of the State of New York, at The Central Compliance Part room 25 thereof, to be held at the Courthouse located at 88-11 Sutphin Blvd, Jamaica, New York, County of Queens, City and State of New York, on the ____ day of October

2017, at 2:15 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, WHY an Order should not be entered as follows:

1. Restoring the prior Order to Show Cause, listed in the Court's record as "RESTORE TO CALENDAR" to the calendar of this Court, which was "MARKED OFF" by this Court on March 23, 2017;
2. Granting a stay of the transfer of the deed for the foreclosure of sale of 74-30 Woodside Avenue pending the hearing and determination of this motion; and it is further

ORDEREED that pending the hearing and determination of this motion let Plaintiff or agents of same be stayed from taking any action to enforce the foreclosure judgment sought to be dismissed in the underlying action.

SUFFICIENT, cause appearing therefore, let service of a copy of this Order together with the papers upon which it is based upon by personal service or overnight upon Alexander Phengsiaroun, Esq. of Shapiro, Dicaro & Barak, LLC, attorney for Plaintiff, Wells Fargo Bank, 175 Miles Crossing Blvd, Rochester, New York 14624 and the referee on or before the ____ day of _____ 2017 be deemed good and sufficient service.

ENTER

J.S.C.

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

Index # 701532/2015

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**WELLS FARGO BANK NATIONAL
ASSOCIATION,**

Plaintiff,

-- against --

**AFFIRMATION IN
SUPPORT OF
MOTION TO
DISMISS**

SHAJU MIAH, et al,

Defendants.
-----X

Craig Saunders, Esq. an attorney duly authorized to practice law before the Courts of the State of New York, hereby affirms the following to be true, pursuant to CLPR § 2106 and under penalty of perjury.

1. I am the incoming attorney of record for defendant Shaju Miah and am familiar with the facts and pleadings of this matter. I submit this affirmation in support of the instant motion for an Order:
 - a. Restoring the prior Order to Show Cause (attached hereto as Exhibit "A"), listed in the Court's record as "RESTORE TO CALENDAR" to the calendar of this Court, which was "MARKED OFF" by this Court on March 23, 2017;
 - b. Granting a stay of the transfer of the deed for the foreclosure of sale of 74-30 Woodside Avenue pending the hearing and determination of this motion.

STATEMENT OF FACTS

2. The relevant statement of facts is contained in the within Order to Show Cause which was signed by the Honorable Allan B. Weiss on March 2, 2017 (e-filed document number 81 and attached hereto as Exhibit "A"). Based on the signed Order to Show Cause, it is indisputable that Judge Weiss found sufficient merit to grant defendant Miah's application.
3. On March 23, 2017, the Order to Show Cause was "marked off" the calendar. Prior counsel has advised me that she never appeared before Judge Weiss and was unaware it was marked off the calendar until she was advised of the pending sale. I contacted opposing counsel, Alexander Phengsiaroun, Esq., who advised me that both he and Ms. Hercules appeared on March 23, 2017, but that Ms. Hercules did not have a working copy of her motion papers and as such, the Order to Show Cause was marked off the calendar. Ms. Hercules disputes this account.
4. A motion to restore only requires a minimal showing of the potential merit of the cause of action. Enax v. New York Telephone Company, 280 A.D.2d 294, 295 (1st Dept. 2001). It is respectfully submitted that the only reason that the Order to Show Cause was marked off the calendar was due to due law office failure of Ms. Hercules. Law office failure (People's United Bank v. Latini Tuxedo Management, LLC, 95 A.D.3d 1285, 1286, 944 N.Y.S.2d 909, 910 (2nd Dept. 2012)) is a reasonable excuse for having this matter restored to the active calendar. Courts have consistently recognized that law office failure may constitute a reasonable excuse as a grounds on a motion to restore. Bischoff v.

Hoffman, 112 A.D.2d 659, 660 (2nd Dept. 2013); Kaufman v. Bauer, 36 A.D.2d 481, 483 (1st Dept. 2007) Further, the Second Department has repeatedly held that a party should not be deprived of his day in court. See Ubaydov v. Kenny's Fleet Maintenance, Inc., 817 N.Y.S.2d 518, 519 (2nd Dept. 2006); O'Loughlin v. Delisser, 788 N.Y.S.2d 860 (2nd Dept. 2005); also Burgess v. Brooklyn Jewish Hosp., 707 N.Y.S.2d 462 (2nd Dept. 2000); Joseph T. Ryerson & Son, Inc. v. Petito, 519 N.Y.S.2d 947, 948 (2nd Dept. 1987); Katz v. Knoesel Service Center, Inc., 499 N.Y.S.2d 107 (2nd Dept. 1986). There is no reason why defendant should not have the opportunity to defend this action. It is his belief that the statute of limitations has run and he plans on vigorous defending this action. As such, the relief being sought is restoring the signed March 12, 2017 Order to Show Cause to the calendar so that it could be argued.

5. Regardless of the above, my client has become the innocent victim in all of this. He was advised that the Order to Show Cause was still pending. If he was successful he would own outright the real property in question. If not, he would have paid off the mortgage. In no event did he plan on losing the property. He also has absolutely no intent of abandoning this matter.
6. Attached as Exhibit "D" is the requisite notice letter to opposing counsel since a stay is being requested.
7. Prior counsel advises that on Tuesday of last week (September 19, 2017) she brought an Order to Show Cause seeking different relief which was denied by Judge Weiss.

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