APPENDIX "A"

Order of the State of New York Court of Appeals.

Dated March 31, 2020.

State of New York
Court of Appeals

Decided and Entered on the thirty-first day of March, 2020

Present, Hon. Janet DiFiore, *Chief Judge, presiding.*

Mo. No. 2019-995
David Fowler,
Appellant,
et al.,
Plaintiff,
v.
Indymac Bank, FSB, et al.,
Respondents.

Appellant having moved for leave to appeal to the Court of Appeals in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion is denied.

John P. Asiello
Clerk of the Court

APPENDIX "B"

Decision and Order of the Appellate Division, Second Department (Supreme Court of the State of New York).

Dated October 2, 2019.

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

D60802
T/htr

_____AD3d_____

Submitted - May 3, 2019

WILLIAM F. MASTRO, J.P.
REINALDO E. RIVERA
ROBERT J. MILLER
LINDA CHRISTOPHER, JJ.

2018-05730

DECISION & ORDER

David Fowler, appellant, et al., plaintiff,
v Indymac Bank, FSB, et al., respondents.

(Index No. 3908/17)

David Fowler, Mastic, NY, appellant pro se.

Duane Morris LLP, New York, NY (Brett L. Messinger of counsel), for respondent.

In an action, inter alia, to quiet title to real property, the plaintiff David Fowler appeals from an order of the Supreme Court, Suffolk County (Joseph A. Santorelli, J.), dated March 28, 2018. The order, insofar as appealed from, granted that branch of the defendants' cross motion which was pursuant to CPLR 3211(a) to dismiss the complaint.

ORDERED that the order is affirmed insofar as appealed from, with costs.

In January 2006, the plaintiffs David Fowler (hereinafter the appellant) and his now-deceased wife Francine Fowler (hereinafter the decedent) obtained a loan from the defendant Indymac Bank, FSB (hereinafter Indymac), secured with a mortgage against real property located in Mastic. In December 2011, Indymac assigned the mortgage and the note to the defendant Deutsche Bank National Trust Company (hereinafter Deutsche Bank), in its capacity as trustee for a pool of mortgages held as collateral for a mortgage-backed security. The appellant and the decedent allegedly defaulted in payment and, in 2012, Deutsche Bank commenced a foreclosure action against them. The appellant answered and asserted lack of standing as an affirmative defense. The court in that action (hereinafter the foreclosure court), upon denying the parties' cross motions for summary judgment, held a trial on the issue of standing, among other things. The foreclosure court ultimately determined that Deutsche Bank had standing to foreclose upon the subject property.

Around the time of the foreclosure court's standing determination, the appellant

commenced this action against Indymac, Deutsche Bank, and others, on behalf of himself and the decedent. The complaint seeks various forms of relief, all premised on the theory that the mortgage and the note at some point ceased to represent an enforceable security interest in the subject property. The defendants defaulted in answering or appearing, and the appellant moved for a default judgment. The defendants opposed the appellant's motion, and cross-moved to vacate their default, to dismiss the complaint pursuant to, inter alia, CPLR 3211(a)(5), and, in the alternative, for an order compelling the acceptance of an untimely answer. By order dated March 28, 2018, the Supreme Court granted those branches of the defendants' cross motion which were to vacate their default and to dismiss the complaint pursuant to CPLR 3211(a)(5) under the doctrine of collateral estoppel. This appeal ensued.

"The doctrine of collateral estoppel, a narrower species of res judicata, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [emphasis omitted]; *see Tydings v Greenfield, Stein & Senior, LLP*, 11 NY3d 195, 199). "This doctrine applies only 'if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the [party to be bound] had a full and fair opportunity to litigate the issue in the earlier action'" (*City of New York v Welsbach Elec. Corp.*, 9 NY3d 124, 128, quoting *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349). The party seeking the benefit of collateral estoppel bears the burden of proving that the identical issue was necessarily decided in the prior action and is decisive of the present action, and "'[t]he party against whom preclusion is sought bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination'" (*Morrow v Gallagher*, 113 AD3d 827, 828, 829, quoting *City of New York v College Point Sports Assn., Inc.*, 61 AD3d 33, 42).

Here, the evidence submitted by the defendants in support of their cross motion was sufficient to establish that the issue decisive of the present action was necessarily decided by the foreclosure court when it determined that Deutsche Bank had standing to foreclose upon the subject property (*see DeMartino v Lomonaco*, 155 AD3d 686, 687; *74 Eldert, LLC v Sharp*, 138 AD3d 819, 820). In response, the appellant failed to demonstrate the absence of a full and fair opportunity to contest that determination, which was made following a trial (*see Shaid v Consolidated Edison Co. of N.Y.*, 95 AD2d 610, 614). Accordingly, we agree with the Supreme Court's determination granting that branch of the defendants' cross motion which was pursuant to CPLR 3211(a)(5) to dismiss the complaint under the doctrine of collateral estoppel (*see DeMartino v Lomonaco*, 155 AD3d at 687; *Hanspal v Washinton Mut. Bank*, 153 AD3d 1329, 1331-1332; *74 Eldert, LLC v Sharp*, 138 AD3d at 820; *MLCFC 2007-9 ACR Master SPE, LLC v Camp Waubeeka, LLC*, 123 AD3d 1269, 1272-1273).

In addition, the appellant failed to request leave to amend his complaint, and the Supreme Court did not err in declining to grant such relief sua sponte (*see Inter-Community Mem. Hosp. of Newfane v Hamilton Wharton Group, Inc.*, 93 AD3d 1176, 1177-1178; *Baron v Pfizer, Inc.*, 42 AD3d 627, 630).

We need not reach the parties' remaining contentions in light of the foregoing.

MASTRO, J.P., RIVERA, MILLER and CHRISTOPHER, JJ., concur.

ENTER: Aprilanne Agostino

Aprilanne Agostino
Clerk of the Court

APPENDIX "C"

Order of the Supreme Court of the State of New York-Suffolk County.

Dated March 28, 2018.

SHORT FORM ORDER

INDEX No. 3908/2017
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:
Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 10-20-17
SUBMIT DATE 2-15-18
Mot. Seq. # 01 - MD
X-Mot. Seq. # 02 - MG
Mot. Seq. #03- MD

---X

DAVID FOWLER AND FRANCINE FOWLER (DECEASED),

Plaintiffs,

-against-

INDYMAC BANK, FSB, ET AL.,

Defendants.

---X

DAVID FOWLER
Pro Se Plaintiff
4 NAVY PL
MASTIC, NY 11950

DUANE MORRIS, LLP
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NEW YORK, NY 10036

Upon the following papers numbered 1 - 47 read on this motion for default judgment, to dismiss & for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8 (#01) & 38 - 44 (#03) ; Notice of Cross Motion and supporting papers 9 - 30 (#02) ; Answering Affidavits and supporting papers 31 - 37 (#02) & 45 - 47 (#03) ; ~~Replying Affidavits and supporting papers ___ ; Other ___ ; (and after hearing counsel in support and opposed to the motion) it is;~~

In this action plaintiff David Fowler moves for an order granting a default judgment against the defendants. The defendants oppose that application and cross move for an order dismissing the complaint based upon res judicata and collateral estoppel. The plaintiff opposes that application and separately moves for an order granting summary judgment.

A foreclosure action was commenced under Index number 38293/2012. David Fowler and Francine Fowler were defendants in that action. Justice Thomas F. Whalen held a trial on the foreclosure action on August 7, 2017. The Court rendered its decision on the only two outstanding issues on the same date. The two issues were: (1) standing of the plaintiff; and (2) compliance with RPAPL 1304. The decision after trial held that "the plaintiff had possession of this note prior to the commencement of this action"... "therefore, possessing the requisite standing to commence this action." The Court further held that "all affirmative defenses addressed to the issue of standing are struck from the answer, and that issue is established as satisfied pursuant to CPLR 3212(g)."

A defendant seeking to vacate a default in appearing or answering the complaint in an action on the ground of excusable default must demonstrate a reasonable excuse for the default and a

potentially meritorious defense to the action (***Codoner v Bobby's Bus Co., Inc.***, 85 AD3d 843, 844, 925 NYS2d 352 [2d Dept 2011], *citing* CPLR 5015 [a] [1]; ***Citimortgage, Inc. v Brown***, 83 AD3d 644, 919 NYS2d 894 [2011]; ***US Consults v APG, Inc.***, 82 AD3d 753, 917 NYS2d 911 [2011]; ***Hageman v Home Depot U.S.A., Inc.***, 25 AD3d 760, 761, 808 NYS2d 763 [2006]; ***Fekete v Camp Skwere***, 16 AD3d 544, 545, 792 NYS2d 127 [2005]; *see also* ***Anamdi v Anugo***, 229 AD2d 408, 644 NYS2d 804 [2d Dept 1996]). The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the trial court (see, ***Bardales v Blades***, 191 AD2d 667, 595 NYS2d 553 [2d Dept 1993]).

Preliminarily, the defendants have demonstrated both a reasonable excuse for their default in failing to answer as well as the existence of potentially meritorious defenses to the action (*see* ***Weinstein v Schacht***, 98 AD3d 1106, 950 NYS2d 711 [2d Dept 2012]; ***Citimortgage, Inc. v. Brown***, 83 AD3d 644, 919 NYS2d 894 [2d Dept 2011]; *see also* ***U.S. Bank Nat'l Assn. v. Slavinski***, 78 AD3d 1167, 912 NYS2d 285 [2d Dept 2010]). Accordingly, the default must be vacated.

Since the defendants have satisfactorily demonstrated a reasonable excuse for their delay in serving response papers and the existence of a potentially meritorious defenses to the claim, the motion for a default judgment is denied. (*See, generally*, ***Blake v United States of America***, 109 AD3d 504, 505, 970 NYS2d 465 [2d Dept 2013]).

Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity (***Buechel v Bain***, 97 NY2d 295, 303, 766 NE2d 914, 740 NYS2d 252 [2001], citing ***Ryan v New York Tel. Co.***, 62 NY2d 494, 500 [1984]). In ***Buechel v Bain***, 97 NY2d 295, 766 NE2d 914, 740 NYS2d 252 (2001), *cert denied* 535 US 1096, 122 S Ct 2293, 152 L Ed 2d 1051 (2002), the Court of Appeals noted:

> There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling (*see* ***Gilbert v Barbieri***, 53 NY2d 285, 291, 423 NE2d 807, 441 NYS2d 49 [19811). The litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party (see id.). The party to be precluded from relitigating the issue bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination.

The equitable doctrine of collateral estoppel is grounded in the facts and realities of a particular litigation, rather than rigid rules. The policies underlying its application are avoiding

relitigation of a decided issue and the possibility of an inconsistent result (*D'Arata v New York Cent. Mut. Fire Ins. Co., 76 N.Y.2d 659, 664 [1990]).*

The Court in *Nachum v Ezagui*, 83 AD3d 1017, 1018-1019 [2nd Dept 2011], outlined the doctrine of collateral estoppel and stated that

> "Under the doctrine of collateral estoppel, a party is precluded from relitigating an issue which has been previously decided against him in a prior proceeding where he [or she] had a full and fair opportunity to litigate such issue" (*Luscher v Arrua*, 21 AD3d 1005, 1007, 801 NYS2d 379 [2005]; see *Westchester County Correction Officers Benevolent Assn., Inc. v County of Westchester*, 65 AD3d 1226, 1227, 885 NYS2d 728 [2009]; *Franklin Dev. Co., Inc. v Atlantic Mut. Ins. Co.*, 60 A.D.3d 897, 899, 876 NYS2d 103 [2009]). "The two elements that must be satisfied to invoke the doctrine of collateral estoppel are that (1) the identical issue was decided in the prior action and is decisive in the present action, and (2) the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior issue" (*Luscher v Arrua*, 21 AD3d at 1007; see *Buechel v Bain*, 97 NY2d 295, 303-304, 766 NE2d 914, 740 NYS2d 252 [2001], cert denied 535 US 1096, 122 S Ct 2293, 152 L Ed 2d 1051 [2002]; *Westchester County Correction Officers Benevolent Assn., Inc. v County of Westchester*, 65 AD3d at 1227; *Franklin Dev. Co., Inc. v Atlantic Mut. Ins. Co.*, 60 AD3d at 899). The party seeking to invoke the doctrine of collateral estoppel "bears the burden of establishing that the identical issue was necessarily decided in the prior action, and the party to be estopped bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination'" (*Leung v Suffolk Plate Glass Co., Inc.*, 78 AD3d 663, 663-664, 911 NYS2d 376 [2010], quoting *Mahler v Campagna*, 60 AD3d 1009, 1011, 876 NYS2d 143 [2009]).

Here, the evidence submitted by the defendants demonstrated, prima facie, that the identical issues raised by the plaintiff in this action, related to their lack of standing, was within the scope of the prior foreclosure action, under Index number 38293/20102, which was decided by Justice Whalen on August 7, 2017. Plaintiff did not appeal Justice Whalen's decision dismissing his affirmative defenses and granting summary judgment. The plaintiff has failed to submit any evidence sufficient to raise a triable issue of fact that he lacked a full and fair opportunity to litigate the standing issues raised in the complaint.

Accordingly, the defendants' motion for an order dismissing the complaint is granted.

The Court has examined the plaintiff's remaining contentions and finds them to be without merit.

The foregoing constitutes the decision and Order of this Court.

Dated: March 28, 2018

HON. JOSEPH A. SANTORELLI
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION