

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,  
FIRST DEPARTMENT

Wilmington Sav. Fund Socy. v. Hyo Choong Sung

2020 NY Slip Op 1956 (App. Div. 2020) · No. 11280; 850163/15 · Decided March 19, 2020

SUMMARY

The Appellate Division, First Department, affirmed an order denying a nonparty appellant's motion to vacate prior orders and a foreclosure judgment and to dismiss the action as abandoned under CPLR 3215(c). The court held that the plaintiff provided a reasonable excuse for its delay in seeking a default judgment and that the record otherwise showed no abandonment of the action.

CASE DETAILS

|                       |                                                                                                                                                                           |
|-----------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of the State of New York, Appellate Division, First Department                                                                                              |
| WRITING FOR THE COURT | Renwick, J.P.; Gische, J.; Mazzarelli, J.; Webber, J.; Singh, J.                                                                                                          |
| JURISDICTION          | New York                                                                                                                                                                  |
| DECIDED               | March 19, 2020                                                                                                                                                            |
| DOCKET                | 11280; 850163/15                                                                                                                                                          |
| DISPOSITION           | affirmed                                                                                                                                                                  |
| PROCEDURAL POSTURE    | Nonparty appellant appealed from an order denying its motion to vacate prior orders and a foreclosure judgment and to dismiss the action as abandoned under CPLR 3215(c). |
| STANDARD OF REVIEW    | Abuse of discretion; the Appellate Division reviewed whether the motion court providently exercised its discretion in denying dismissal under CPLR 3215(c).               |
| PRECEDENTIAL VALUE    | Published opinion                                                                                                                                                         |
| PARTIES               | West Fork Capital Equities, LLC v. Wilmington Savings Fund Society                                                                                                        |

TOPICS

- default
- foreclosure
- appellate procedure
- civil procedure

PRACTICE AREAS

- Civil procedure
- Foreclosure
- Appellate procedure

## QUESTIONS PRESENTED

1. Whether the action should be dismissed as abandoned under CPLR 3215(c) because plaintiff delayed in seeking a default judgment against the appellant.
2. Whether the motion court properly denied the request to vacate the prior orders and judgment of foreclosure and sale.

## HOLDINGS

1. Dismissal was not warranted because plaintiff provided a reasonable excuse for its delay in seeking a default judgment against the appellant and the record otherwise demonstrated that plaintiff had not abandoned the action.
2. The arguments supporting vacatur of the prior orders and judgment of foreclosure and sale were unavailing.

## KEY QUOTATIONS

*“The motion court providently exercised its discretion in denying appellant's motion to dismiss the action pursuant to CPLR 3215(c).”* ([\*1])

## FACTUAL BACKGROUND

Plaintiff commenced a foreclosure action and obtained an order granting summary judgment and a subsequent judgment of foreclosure and sale. Plaintiff delayed in seeking a default judgment against the appellant because its counsel inadvertently moved only against the non-appearing defendants. The record nevertheless showed that plaintiff had not abandoned the action.

## PROCEDURAL HISTORY

Supreme Court, New York County, previously granted plaintiff's motion for summary judgment and entered a judgment of foreclosure and sale. The court denied West Fork Capital Equities, LLC's motion to vacate those orders and judgment and to dismiss the action as abandoned. The Appellate Division, First Department, unanimously affirmed.

## DISPOSITION

affirmed

## CASES CITED

- LaValle v. Astoria Constr. & Paving Corp., 266 A.D.2d 28 (1st Dep't 1999)
- Street Snacks, LLC v. Bridge Assoc. of Soho, Inc., 156 A.D.3d 556, 557 (1st Dep't 2017)

## OPINION

PER CURIAM.

Wilmington Sav. Fund Socy. v Hyo Choong Sung (2020 NY Slip Op 01956) Wilmington Sav. Fund Socy. v Hyo Choong Sung 2020 NY Slip Op 01956 Decided on March 19, 2020 Appellate Division, First Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on March 19, 2020 Renwick, J.P., Gische, Mazzarelli, Webber, Singh, JJ. 11280 850163/15 [\*1]Wilmington Savings Fund Society, etc., Plaintiff-Respondent, vHyo Choong Sung, et al., Defendants. West Fork Capital Equities, LLC, etc., Nonparty Appellant. Fox Horan & Camerini LLP, New York (Anthony R. Filosa of counsel), for appellant. Knuckles, Komosinski & Manfro, LLP, Elmsford (Max T. Saglimbeni of counsel), for respondent.

Order, Supreme Court, New York County (Judith N. McMahon, J.), entered October 24, 2018, which denied nonparty appellant's motion to vacate an order, same court (Carol Edmead, J.), entered on or about February 8, 2017, granting plaintiff's motion for summary judgment; to vacate a judgment of foreclosure and sale, same court (McMahon, J.), entered June 14, 2018; and to dismiss the action, pursuant to CPLR 3215(c), as abandoned, unanimously affirmed, without costs.

The motion court providently exercised its discretion in denying appellant's motion to dismiss the action pursuant to CPLR 3215(c). Plaintiff provided a reasonable excuse for its delay in seeking a default judgment against appellant, i.e., an inadvertent error by plaintiff's counsel in moving for a default judgment against the "non-appearing" defendants only (see *LaValle v Astoria Constr. & Paving Corp.*, 266 AD2d 28 [1st Dept 1999]), and the record otherwise demonstrates that plaintiff did not abandon this action (see e.g. *Street Snacks, LLC v Bridge Assoc. of Soho, Inc.*, 156 AD3d 556, 557 [1st Dept 2017]).

We have considered appellant's remaining arguments, including those in support of vacating the court's prior orders and judgment, and find them unavailing. THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT. ENTERED: MARCH 17, 2020 CLERK