

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT

Opteum Fin. Servs., LLC v. Einersen

2026 NY Slip Op 01205 · No. 2023-11573 · Decided March 4, 2026

SUMMARY

The Appellate Division, Second Department, reversed an order denying Opteum Financial Services, LLC's unopposed motion to vacate a sua sponte dismissal of its mortgage foreclosure action for failure to prosecute and to restore the action to the active calendar. The court held that the Supreme Court lacked power to dismiss under CPLR 3216 because the record did not show that the required 90-day notice had been properly served. The court also denied the defendants' motion to dismiss the appeal as academic.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Angela G. Iannacci, J.P.; Lara J. Genovesi, J.; Paul Wooten, J.; Laurence L. Love, J.
JURISDICTION	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
DECIDED	March 4, 2026
DOCKET	2023-11573
DISPOSITION	reversed
PROCEDURAL POSTURE	In a mortgage-foreclosure action, the plaintiff appealed from an order denying its unopposed motion to vacate a sua sponte dismissal for failure to prosecute under CPLR 3216 and to restore the action to the active calendar.
STANDARD OF REVIEW	Review of the legal propriety of the Supreme Court's dismissal under CPLR 3216 and denial of the motion to vacate; the Appellate Division determined whether the lower court had the power to dismiss the action under the statutory conditions.
PRECEDENTIAL VALUE	Published

PARTIES

Opteum Financial Services, LLC v. Michael Einersen, Catherine Einersen, other defendants

TOPICS

foreclosure

appellate procedure

civil procedure

motions to dismiss

PRACTICE AREAS

mortgage foreclosure

civil procedure

appellate procedure

QUESTIONS PRESENTED

1. Whether the Supreme Court had authority to dismiss the foreclosure action for failure to prosecute under CPLR 3216 when the record contained no evidence that the required 90-day written demand was properly served.
2. Whether the plaintiff was entitled to vacatur of the dismissal order and restoration of the action to the active calendar.
3. Whether the defendants' motion to dismiss the appeal as academic should be granted.

HOLDINGS

1. A court may not dismiss an action under CPLR 3216 unless the statutory conditions precedent are satisfied, including proper service of a written 90-day demand containing the required warning regarding dismissal for failure to proceed. Because the record did not establish proper service, the Supreme Court lacked power to dismiss the action.
2. The plaintiff's unopposed motion to vacate the unauthorized dismissal order and restore the action to the active calendar should have been granted.
3. The defendants' motion to dismiss the appeal as academic was denied.

KEY QUOTATIONS

“An action cannot be dismissed pursuant to CPLR 3216(a) “unless a written demand is served upon the party against whom such relief is sought in accordance with the statutory requirements, along with a statement that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him [or her] for unreasonably neglecting to proceed””

“Consequently, the Supreme Court was without power to dismiss the action”

FACTUAL BACKGROUND

Opteum commenced a mortgage-foreclosure action against Michael and Catherine Einersen and others in November 2007. Although the Supreme Court issued a purported 90-day notice directing Opteum to resume prosecution and file a note of issue, the record contained no evidence that the notice was properly served on

Opteum. The court then sua sponte dismissed the complaint under CPLR 3216, and later denied Opteum's unopposed motion to vacate that dismissal and restore the action.

PROCEDURAL HISTORY

The plaintiff commenced the foreclosure action in November 2007, and the defendants answered. The Supreme Court directed the plaintiff to resume prosecution and serve and file a note of issue within 90 days, then sua sponte dismissed the complaint under CPLR 3216 after the plaintiff failed to comply. In 2017, the plaintiff moved to vacate the dismissal and restore the action; the motion was unopposed but denied by the Supreme Court, Westchester County. The Appellate Division reversed and granted the motion. In a separate decision and order on motion included with the opinion, the court denied the defendants' motion to dismiss the appeal as academic.

DISPOSITION

reversed

REMAND INSTRUCTIONS

The Supreme Court's order entered October 25, 2017, was reversed, and the plaintiff's motion to vacate the June 14, 2012 dismissal order and restore the action to the active calendar was granted.

CASES CITED

- Deutsche Bank Natl. Trust Co. v. Bastelli, 164 AD3d 748
- BankUnited v. Kheyfets, 150 AD3d 948
- Cadichon v. Facelle, 18 NY3d 230
- Marinello v. Marinello, 171 AD3d 906
- Element E, LLC v. Allyson Enters., Inc., 167 AD3d 981
- Patel v. MBG Dev., Inc., 41 AD3d 682
- Krause v. Lobacz, 131 AD3d 1128
- Docteur v. Interfaith Med. Ctr., 90 AD3d 814
- Schwartz v. Nathanson, 261 AD2d 527

OPINION

Opteum Fin. Servs., LLC v. Einersen 2026 NY Slip Op 01205

PER CURIAM.

Opteum Fin. Servs., LLC v Einersen (2026 NY Slip Op 01205) Opteum Fin. Servs., LLC v Einersen 2026 NY Slip Op 01205 Decided on March 4, 2026 Appellate Division, Second 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 4, 2026

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Second Judicial Department ANGELA G. IANNACCI, J.P.

LARA J. GENOVESI

PAUL WOOTEN

LAURENCE L. LOVE, JJ. 2023-11573

(Index No. 22939/07) [*1]Opteum Financial Services, LLC, appellant, v Michael Einersen, etc., et al., defendants. Robertson, Anschutz, Schneid, Crane & Partners, PLLC, Westbury, NY (Joseph F. Battista of counsel), for appellant. DECISION & ORDER In an action to foreclose a mortgage, the plaintiff appeals from an order of the Supreme Court, Westchester County (Alan D. Scheinkman, J.), entered October 25, 2017. The order denied the plaintiff's unopposed motion to vacate an order of the same court dated June 14, 2012, sua sponte, directing dismissal of the complaint pursuant to CPLR 3216 for failure to prosecute, and to restore the action to the active calendar. ORDERED that the order entered October 25, 2017, is reversed, on the law, without costs or disbursements, and the plaintiff's unopposed motion to vacate the order dated June 14, 2012, and to restore the action to the active calendar is granted. In November 2007, the plaintiff commenced this action against the defendants Michael Einersen and Catherine Einersen (hereinafter together the defendants), among others, to foreclose a mortgage. The defendants interposed an answer to the complaint. By notice dated December 27, 2011 (hereinafter the 90-day notice), the Supreme Court directed the plaintiff to resume prosecution of the action and serve and file a note of issue within 90 days after receipt of the notice. The plaintiff failed to comply with the 90-day notice, and, in an order dated June 14, 2012, the court, sua sponte, directed dismissal of the complaint pursuant to CPLR 3216, without further notice to the parties. In July 2017, the plaintiff moved to vacate the order dated June 14, 2012, and to restore the action to the active calendar. The motion was unopposed. In an order entered October 25, 2017, the court denied the motion. The plaintiff appeals. "CPLR 3216 permits a court, on its own initiative, to dismiss an action for want of prosecution where certain conditions precedent have been complied with" (Deutsche Bank Natl. Trust Co. v Bastelli , 164 AD3d 748 , 749, quoting BankUnited v Kheyfets , 150 AD3d 948, 949 ; see CPLR 3216[b][3]). An action cannot be dismissed pursuant to CPLR 3216(a) "unless a written demand is served upon the party against whom such relief is sought in accordance with the statutory requirements, along with a statement that the default by the party upon whom such notice is served in complying with such demand within said ninety day period will serve as a basis for a motion by the party serving said demand for dismissal as against him [or her] for unreasonably neglecting to proceed" (Deutsche Bank Natl. Trust Co. v Bastelli , 164 AD3d at 749-750 [emphasis and internal quotation marks omitted], quoting Cadichon v Facelle , 18 NY3d 230, 235 ; see CPLR 3216[b][3]; Marinello v Marinello , 171 AD3d 906 , 908; Element E, LLC v Allyson Enters., Inc. , 167 AD3d 981 , 982; Patel v MBG Dev., Inc. , 41 AD3d 682, 683). Here, there is no evidence in the record that the 90-day notice pursuant to CPLR 3216 was ever properly served upon the plaintiff (see Deutsche Bank Natl. Trust Co. v Bastelli , 164 AD3d at 750; BankUnited v

Kheyfets , 150 AD3d at 949). Consequently, the Supreme Court was without power to dismiss the action (see Krause v Lobacz , 131 AD3d 1128, 1129-1130 ; Docteur v Interfaith Med. Ctr. , 90 AD3d 814, 815). Since the complaint was not properly dismissed pursuant to CPLR 3216, the Supreme Court should have granted the plaintiff's unopposed motion to vacate the order dated June 14, 2012, and to restore the action to the active calendar (see Element E, LLC v Allyson Enters., Inc. , 167 AD3d at 982-983; Patel v MBG Dev., Inc. , 41 AD3d at 683 ; Schwartz v Nathanson , 261 AD2d 527, 528). IANNACCI, J.P., GENOVESI, WOOTEN and LOVE, JJ., concur.

2023-11573 DECISION & ORDER ON MOTION

Opteum Financial Services, LLC, appellant, v Michael Einersen, etc., et al., defendants. (Index No. 22939/07) Motion by the defendants Michael Einersen and Catherine Einersen, inter alia, to dismiss the appeal, in effect, on the ground that it has been rendered academic. By decision and order on motion of this Court dated August 2, 2024, the motion was held in abeyance and referred to the panel of Justices hearing the appeal for determination upon the argument or submission thereof. Upon the papers filed in support of the motion and the papers filed in opposition thereto, and upon the submission of the appeal, it is ORDERED that the motion is denied. IANNACCI, J.P., GENOVESI, WOOTEN and LOVE, JJ., concur. ENTER: Darrell M. Joseph Clerk of the Court