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INDEX NO. 2009-04896

SUPREME COURT : STATE OF NEW YORK
I.A.S. PART XXI : SUFFOLK COUNTY

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

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DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR MORGAN STANLEY ABS CAPITAL I INC. TRUST 2006-HE3

Plaintiff

-against-

RUTH QUINCHE, MANUEL TENECORA, MILTON BUENO and NUVE BUENO

Defendants

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ORDER AND JUDGMENT

Motion Sequence: 004-MD CASEDISP
Original Return Date: December 23, 2015

Motion Sequence: 005-XMG CASEDISP
Original Return Date: February 3, 2016

Premises

48 Sundial Lane
Bellport, Town of Brookhaven, New York
0200-900.00-01.00-103.000

Plaintiff has applied to this Court (Seq. 004) for an Order vacating the dismissal of this matter and restoring same to the Court's active calendar. Defendant RUTH QUINCHE has, in opposition, cross-moved (Seq. 005) for an Order, *inter alia*, directing cancellation and discharge of the mortgage of record. Though afforded more than ample time to do so, Plaintiff has failed to interpose any responsive or opposing papers to Defendant's cross-motion.

Plaintiff, through its predecessor counsel Steven J. Baum P.C., commenced this action claiming foreclosure of a mortgage dated January 13, 2006 in the original amount of $ 127,623.60. Said mortgage was given to secure an Adjustable Rate Note of the same date and was recorded with the Clerk of Suffolk County on January 23, 2006 in Liber 21219 of Mortgages, Page 405. Plaintiff acquired the same by Assignment dated September 16, 2008 which was recorded with the Clerk of Suffolk County on September 30, 2008 in Liber 21755 of Mortgages, Page 666. Said Mortgage constitutes a first lien upon residential real property known as 48 Sundial Lane, Bellport, Town of Brookhaven, New York.

The within action was commenced on February 10, 2009 inasmuch as it was alleged that Defendant RUTH QUINCHE had defaulted on the installment which came due on May 1, 2008. Thereafter and on December 28, 2011, the law firm of Gross Polowy & Orlans was substituted as counsel for Plaintiff. Subsequently and on July 31, 2015, the firm of Kozeny McCubbin & Katz was substituted as counsel for Plaintiff.

On April 23, 2009, Plaintiff moved for the appointment of a Referee, which was granted. Thereafter and in compliance with CPLR § 3408, mandatory foreclosure settlement conferences were convened on no less than nine separate occasions. Following the entry of Administrative Order AO548/10 and an inordinately lengthy period in which there was no activity on the matter, the Court issued an order which scheduled a conference for September 19, 2012. A representative from the office of Plaintiff's counsel appeared thereat, the matter was addressed, the Court directed resumption of prosecution within sixty days else the matter would be subject to dismissal. Thereafter and though not required to do so, the Court granted an additional period of time in which to resume prosecution in deference to the HUD Moratorium (HUD no. 12-167 dated October 30, 2012) which was issued following Hurricane Sandy. Upon the failure of Plaintiff to resume prosecution, the Court issued an Order dated February 26, 2013 which dismissed the action. The Order was mailed on that date by the Court to Plaintiff's then-counsel of record and to all parties.

Plaintiff now applies, by Notice of Motion dated November 19, 2015 for an Order vacating the dismissal and restoring the matter to the Court's calendar. This application was filed some 32 months and 24 days after the dismissal order was granted. In its application, Plaintiff invokes the authority contained within CPLR § 5015(a)(1), asserting that it has both a reasonable excuse for its default and a meritorious cause of action against Defendant RUTH QUINCHE. The Court is prepared, at this juncture, to review Plaintiff's application *in toto* and, in particular, the asserted reasonableness of its excuse for not making a timely application.

The Affirmation of Corey Robson Esq. dated November 19, 2015 asserts verbatim, in Paragraph 8 thereof, as follows "*The Plaintiff has a reasonable excuse for its default. The Plaintiff's attorney was substituted as attorney of record in July 2015. Plaintiff [sic] prior attorney proceeded with the Judgment of Foreclosure and Sale but same was denied as moot as the matter had yet to be restored. Plaintiff's prior attorney was late in filing the Judgment of Foreclosure and Sale. However, now the Plaintiff has the required documents and proper affidavits to proceed with the Judgment of Foreclosure and Sale in this matter. Therefore with a reasonable excuse and meritorious cause of action, the dismissal should be vacated and the matter restored to the active calendar.*" This affirmed statement in and of itself is a clear admission that for at least the preceding thirty two plus months, Plaintiff has apparently not been in a position to proceed nor did it deem is necessary or advisable to ask the Court for an extension of time in which to do so.

Although Plaintiff's moving papers do not articulate just what the "*...required documents and proper affidavits...*" may be, appended as Exhibit F to the motion papers is an Affirmation of one Dennis Jose Esq. which is dated April 21, 2014 and which purports to be made in compliance with AO548/10 and its progeny. Affording Plaintiff the benefit of every reasonable inference and presuming that this Exhibit is intended to stand as the necessary document, the date that it bears is some one year, seven months and twenty nine days prior to the date of the motion that is now before the Court. No excuse or explanation has been advanced as to the lapse of time between the date of that Affirmation and the date of the motion.

In assessing the reasonableness of the excuse proffered, the Court can consider the length of time that has elapsed between the rendition of the order at issue and the application to vacate (in this case, almost 33 months), *Dominguez v. Carioscia 1 AD 3d 396 (2nd Dept. 2003)*. Indeed, it is instructive to note that in the matter of *Dominguez v. Carioscia 1 AD 3d 396 (2nd Dept. 2003)*, the Appellate Division found that there was no reasonable excuse advanced for a delay of sixteen months. Moreover, in the matter of *DeLisca v. Courtesy Transportation Ltd. 6 AD 3d 646 (2nd Dept. 2004)*, the Court determined that there was no reasonable excuse for a delay of six months in seeking relief.

In addition to the foregoing, the provisions of CPLR § 5015(a)(1) mandate that such an application be made within one year following service of the order or judgment at issue. Here, the Order of dismissal was rendered and served by the Court on February 26, 2013, thereby triggering the one year period in which relief could be sought. Plaintiff's application was dated November 19, 2015, which is 32 months and 24 days thereafter. Hence, the application is untimely on its face and no explanation has been advanced by Plaintiff to account for this passage of time.

Plaintiff's counsel has failed to advance any reasonable or detailed excuse for its delay in this matter. Almost thirty three months elapsed between the date of the Order of Dismissal and the application to vacate it. The excuse advanced by Plaintiff is both vague and wholly devoid of specificity. An excuse which is amorphous is not reasonable, *Dugan v. Belik 170 AD 2d 746 (3rd Dept. 1991)* and cannot be sustained.

Parentnetically, the Court notes that were it to grant Plaintiff's application at this late date, Defendant would be severely prejudiced by Plaintiff's unexplained and inordinate delay.

In view of the lack of the advancement of any reasonable excuse for the delay, as mandated by CPLR § 5015(a)(1), the Court need not consider whether or not the Plaintiff's claims are meritorious. Hence, Plaintiff's application must be denied.

The Court next turns its attention to Defendant's unopposed application, which seeks relief of both great substance and significance.

Defendant argues, without any opposition, that the six year Statute of Limitations as set forth in CPLR § 213(4) has run its course, thereby barring any action by Plaintiff insofar as it concerns enforcement of the note and the mortgage. The provisions of CPLR § 213(4) are as follows: *"The following actions must be commenced within six years:...(4) an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein;"*. In applying the clear language of the foregoing statute, the limitations period to the matter that is *sub judice* expired either on May 1, 2014 (six years from the claimed date of default) or February 10, 2015 (six years from the date of the commencement of the within action). According to well settled law, the statute of limitations begins to run upon acceleration of the underlying debt, *Federal National Mortgage Ass'n v. Mebane 208 AD 2d 892 (2nd Dept. 1994)*. Though not made clear to this Court, it is beyond dispute that acceleration could not have occurred later than the date upon which the action was commenced.

Defendant thus requests that in accordance with RPAPL § 1501(4) that the mortgage at issue herein be cancelled and discharged of record inasmuch as the applicable statute of limitations has expired. That statute reads, in pertinent part, as follows:

> *"4. Where the period allowed by the applicable statute of limitations for the commencement of an action to foreclose a mortgage...has expired, any person having an estate of interest in the real property subject to such encumbrance may maintain an action...to secure the cancellation and discharge of record of such encumbrance, and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom...In any action brought under this section it shall be immaterial whether the debt upon which the mortgage or lien was based has, or has not, been paid..."*

In the matter that is presently before the Court, there is more than ample admissible proof to demonstrate that the mortgage debt had been accelerated and that the acceleration had not been revoked; that Plaintiff had timely commenced a suit claiming foreclosure of the mortgage; that the action was dismissed and was neither revived nor restored within the statutory period prescribed by CPLR § 213(4). In addition, there has been no claim that the mortgagee and not Defendant is in possession of the property. In short, Defendant has fully satisfied all of the mandates contained within RPAPL § 1501(4), thus entitling her to the affirmative relief sought in the cross-motion.

In addition to the foregoing and under the principles of law that are applicable to an action to foreclose a mortgage (especially inasmuch as the both the Adjustable Rate Note and the Mortgage expressly permit recovery of counsel fees), Defendant is entitled to recovery of reasonable attorney's fees and costs for her expenditures as they relate to the within matter. Based upon the Affirmation of FRED m. SCHWARTZ ESQ., Defendant is awarded the total sum of $ 2,504.00, consisting of reasonable attorney's fees of $ 2,459.00 and out of pocket disbursements of $ 54.00. Plaintiff shall also reimburse Defendant for any and all fees levied by the Clerk of Suffolk County that are incident to discharge of the mortgage of record. Said fees and costs shall be paid by Plaintiff to defendant's counsel within thirty days of the date of service of a copy of this Order and Judgment.

It is, therefore,

ORDERED that the application by Plaintiff (Seq. 004)shall be and the same is hereby denied in its entirety; and it is further

ORDERED that the cross-application by Defendant (Seq. 005) shall be and is hereby granted in its entirety; and it is further

ORDERED that the mortgage dated January 13, 2006, in the amount of $ 127,623.60, given by RUTH QUINCHE unto NEW CENTURY MORTGAGE CORPORATION and recorded with the Clerk of Suffolk County on January 23, 2006 in Liber 21219 of Mortgages at Page 405, as may have been assigned of record, shall be and the same is hereby cancelled, annulled, voided, discharged and is unenforceable and of no force and effect; and it is further

ORDERED that the Clerk of Suffolk County, upon payment of the proper fees, if any, shall cause the aforesaid mortgage to be cancelled and discharged of record; and it is further

ORDERED that within thirty days of service of a copy of this Order and Judgment with Notice of Entry, Plaintiff shall remit the sum of $ 2,504.00, together with any and all fees that may be imposed by the Clerk of Suffolk County in effecting the discharge of record of the mortgage herein; and it is further

ORDERED that any relief not specifically granted herein shall be and the same is hereby denied.

This shall constitute the Decision, Judgment and Order of this Court.

Dated: December 20, 2016
Central Islip, New York

HON. JEFFREY ARLEN SPINNER
J.S.C.