

481E21 LLC v HSBC Bank USA
2017 NY Slip Op 30513(U)
March 21, 2017
Supreme Court, Kings County
Docket Number: 501378/16
Judge: Johnny Lee Baynes
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At an IAS Part 68 of the Supreme Court of the State of New York, held in and for the County of Kings at the Courthouse thereof, at 360 Adams Street, Brooklyn, NY 11201, on the 7th day of February, 2017

PRESENT:

HON. JOHNNY L. BAYNES

JSC.

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Index No. 501378/16

481E21 LLC,

Plaintiff,

-against-

DECISION AND ORDER

HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE UNDER THE POOLING AND SERVICING AGREEMENT DATED AS OF SEPTEMBER 1, 2006, FREMONT HOME LOAN TRUST 2006,

Defendants.

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Plaintiff, 481E21 LLC (hereinafter "Plaintiff") moves by Notice of Motion dated April 15, 2016, for an Order pursuant to CPLR § 3215 for a default judgment as against the defendant HSBC Bank USA, National Association, as Trustee under the pooling and servicing agreement dated as of September 1, 2006, Fremont Home Loan Trust 2006 (hereinafter "Defendant") or, in the alternative, granting summary judgment in favor of plaintiff pursuant to CPLR § 3212 and RPAPL § 150(4) discharging the defendant's mortgage on the property known as 481 East 21st Street, Brooklyn, NY (Tax map designation Block 5164, Lot 43) (hereinafter the "Property").

Defendants', Cross-Moved by Notice of Motion dated, October 31, 2016, for an Order pursuant to CPLR § 3012(d) to compel Plaintiff to accept HSBC's late Answer to the Complaint. That motion was granted after oral argument but decision on plaintiff's motion was reserved by

the Court.

The Complaint herein was commenced by Summons and Complaint on or about February 1, 2016 and was served upon defendant's authorized agent on February 4, 2016. Thereafter, plaintiff states it served Notice pursuant to CPLR § 3215 on Defendant with additional service of the Summons and Complaint. Defendant did not file its Answer until March 18, 2016, subsequent to the due date of March 4, 2016.

CPLR § 3012(d) provides that "the court may extend the time to appear or plead or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default". In this instance, defendant relies upon the fact that the summons and complaint were served at a branch as a defense against their delay. And while compelling, this is not the sole factor the Court must consider in determining a motion for leave to serve a late answer pursuant to CPLR § 3012(d). Rather, defendant must make a two-fold showing. First defendant "must demonstrate that there is a reasonable excuse for the delay and a potentially meritorious defense to the action". *Private Capital Group v Hosseini*, 86 AD3d 554 [2d Dept 2011]; *Citimortgage, Inc. v Brown*, 83 AD3d 644 [2d Dept 2011]. Thus, even if defendant has a reasonable excuse for the default, it must show a likelihood of success on the merits of the action.

On or about December 3, 2015, plaintiff purchased the property from Sydney Huggins (hereinafter "Huggins"). Since that time, plaintiff has remained in possession of the property and is currently in possession. Huggins purchased the premises from Donnaley Farrier (hereinafter "Farrier") on April 17, 2012. On or about July 13, 2006, Farrier duly executed and delivered a Mortgage to Mortgage Electronic Registration Systems, Inc. (hereinafter "MERS") as Nominee for Fremont Investment & Loan (hereinafter "Fremont") to secure the sum of \$640,000.00.

Thereafter, and on or about August 3, 2007, Fremont filed a Summons and Complaint against Farrier in Supreme Court, Kings County, Index No. 28644/07, wherein it claimed Farrier was in default with respect to said Mortgage. When Farrier missed the April 1, 2007, payment on said Mortgage, Fremont elected to call due the entire amount secured by the Mortgage and commenced the aforementioned foreclosure action. That mortgage forms the basis of the instant action.

Accordingly, because Fremont has already elected to call due the entire amount secured by this mortgage, the six-year statute of limitations in which to commence a foreclosure action began to run on August 3, 2007, the date the aforementioned action was filed with the Court. *Loiacono v Goldberg*, 240 AD2d 476 [2d Dept 1997]. The Second Department, in *Loiacono*, held that once the mortgage is accelerated, the entire amount is due and the Statute of Limitations begins to run. The action filed by Fremont was dismissed by Hon. Lawrence Knipel on April 10, 2014. The basis for dismissal was Fremont's failure to prosecute the action. It has been almost three years and that Order of dismissal has never been vacated. Nor have defendants ever gained possession of the premises. As a result of the foregoing, plaintiff seeks cancellation of the mortgage pursuant to RPAPL § 1501(4).

Defendant does not dispute that it was served with the instant action. Defendant does not dispute that it failed to timely Answer the Complaint. Yet, defendant must now, in Order to interpose its Answer, assert a meritorious defense on the merits. After failing to vacate the Order of Dismissal entered by Judge Knipel, defendant now seeks to resurrect an already dismissed case which it could not resurrect either by motion to vacate or appeal as any time in which to do either of those things is long past.

HSBC claims its failure to prosecute its action was "inadvertent", however, whether it

was or was not is irrelevant given that the time in which to address such a claim has expired. Thus, the defendant can show no meritorious defense and it would be an abuse of this Court's discretion to refuse to grant plaintiff's motion for a default judgment. As plaintiff correctly points out, with respect to a note payable in installments, there are separate causes of action for each installment accrued and the statute of limitations began to run on the date each installment becomes due and is defaulted upon. *Morrison v Zagloul*, 88 AD3d 856, 858 [2d Dept 2011]. However, once the acceleration clause in a mortgage is exercised, the entire amount is due, and the statute of limitations begins to run on the entire mortgage debt. *Loiacono v Goldberg*, 240 AD2d 476 [2d Dept 1997].

Based upon the foregoing, plaintiff seeks Summary Judgment in its favor pursuant to CPLR § 3215 and RPAPL § 1501 discharging the defendant's mortgage on the premises.

Summary judgment, while a drastic remedy, is warranted when there are no factual disputes to be resolved by the trier of fact. *Mallard Construction Corp v County Fed Savings*, 32 NY2d 285 [1973], whether all issues to be resolved are strictly issues of law, *Long Island RR Co v Northport Industrial Corp.*, 42 NY2d 455 [1977], or when the uncontroverted facts can only be determined in one fashion as a matter of law. *Alvord and Swift v Stewart and Miller Constr. Co., Inc.*, 46 NY2d 276 [1978]. "It is well settled that 'the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'" *Olan v Ursino*, 235 AD2d 406 [AD2d 1997].

Once this showing is made, the burden shifts to the party opposing the motion for Summary Judgment. *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]. In considering a motion for summary judgment, the Court must view all facts in a light most favorable to the non-

moving party. *See, Zuckerman v City of New York*, 49 NY2d 557 [1980]. As set forth herein, plaintiff has made a prima facie showing that it is entitled to discharge of the subject mortgage. Defendant has failed to provide evidence that there are facts which require a trial of the instant matter, even if it had not defaulted in answering the Complaint.

Rather, Fremont chose to accelerate the mortgage in the prior action; neither defendant nor Fremont vacated the dismissal of the prior action. Switching parties from Fremont, the servicer, to HSBC, in no way alters this circumstance. As a result, this Court cannot allow defendant to use the instant action to revive the prior extinguished, matter and the motion must be granted and the cross-motion denied as academic.

WHEREFORE, it is hereby

ORDERED and ADJUDGED that Plaintiff's Motion pursuant to CPLR § 3215 for entry of a default judgment in favor of plaintiff is granted; and it is further

ORDERED and ADJUDGED that Plaintiff's Motion for Summary Judgment pursuant to CPLR 3212 and RPAPL §1501(4) discharging the defendant's mortgage on the property known as 481 East 21st Street, Brooklyn, NY with tax map designation Block 5164 Lot 43 is granted in all respects; and it is further

ORDERED and ADJUDGED that the County Clerk shall enter said discharge in its records.

The foregoing Constitutes the Decision and Order of the Court.

ENTER

Johnny L. Baynes
clerk
KINGS COUNTY CLERK
FILED
2017 MAR 21 AM 9:50
JOHNNY L. BAYNES, JSC
HON. JOHNNY LEE BAYNES