

Washington Mutual Bank v Dratel

2012 NY Slip Op 32927(U)

December 5, 2012

Sup Ct, Suffolk County

Docket Number: 0023721/2008

Judge: John J.J. Jones Jr

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SHORT FORM ORDER

COPY

INDEX NO.: 0023721/2008
SUBMIT DATE: 10/3/2012
MTN. SEQ.#: 003

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

Present:

HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 9/28/2012
MOTION NO.: MOT D

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WASHINGTON MUTUAL BANK F/K/A :
WASHINGTON MUTUAL BANK, FA, :

Plaintiff, :

-against- :

WILLIAM M. DRATEL, SHARYN L. LAWALL, :
MORTGAGE ELECTRONIC REGISTRATION :
SYSTEMS, INC. AS NOMINEE AND MORTGAGEE :
OF RECORD, AMERICA'S WHOLESALE LENDER, :
THE BRIDGEHAMPTON NATIONAL BANK, MCM :
HOME INC., "JOHN DOES" and "JANE DOES," :
said names being fictitious, parties intended :
being possible tenants or occupants of :
premises, and corporations, other entities or :
persons who claim, or may claim, a lien :
against the premises, :

Defendants. :

-----X

Upon the following papers numbered 1 to 37 read on this application for an order dismissing the within action for lack of prosecution; Notice of Motion/Order to Show Cause and supporting papers 1-16 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 17-29 ; Replying Affidavits and supporting papers 30-37 ; Other _____; it is

ORDERED that this application for an order dismissing the within action for lack of prosecution, or in the alternative, curtailing the accrued interest on the mortgage indebtedness which is the subject of the within foreclosure action is denied in part and granted in part.

The defendants acknowledge that they are indebted on a note in the amount of \$3,737,500.00 secured by a mortgage on real property located at 77 Jericho Road, East Hampton, New York. The action to foreclose the mortgage was commenced on June 25, 2008 by the filing of a summons and complaint. Defense counsel filed a Notice of Appearance dated July 30, 2008, on behalf of the defendant William M. Dratel [“the defendant” or “Dratel”], waiving the service of all papers and of notices of all proceedings in the action except notice of hearing for referee to compute, notice of sale and notice of proceedings to obtain surplus monies.

Defense counsel wrote the first of two letters to plaintiff’s counsel on December 18, 2009, suggesting that a benefit would inure to all parties if the matter proceeded to a foreclosure sale by a stipulation agreeing to the sum due and agreeing to the entry of judgment of foreclosure and sale signed by the parties. Defense counsel offered to provide a form stipulation to achieve this and “invite[d the plaintiff] to proceed in this regard as soon as possible.” A follow-up letter was sent to plaintiff’s counsel on January 5, 2009, which, the plaintiff does not dispute, was likewise ignored by plaintiff’s counsel.

The plaintiff made two applications for an Order of Reference. The first was denied by order of this Court dated January 20, 2009. The plaintiff withdrew the second Order of Reference on October 14, 2010. The plaintiff does not dispute that after the withdrawal of the second Order of Reference, it did nothing to pursue a judgment of foreclosure or follow-up with defense counsel to accept a confession of judgment.

On April 30, 2012, defense counsel served a 90 day notice on the plaintiff. See *CPLR* § 3216. Still, the plaintiff did not serve and file an Order of Reference, or move to vacate the demand or to enlarge the 90-day period pursuant to *CPLR* 2004, or attempt to resurrect the defendant’s early invitation in 2008 to stipulate to judgment in its favor.

On August 23, 2012, slightly more than three weeks after the expiration of the ninety day period, the defendant moved for a dismissal of the complaint or, in the alternative, a curtailment of the accrued interest on the mortgage indebtedness as of the date the plaintiff withdrew its second Order of Reference, October 14, 2010.

Notably, the plaintiff did not cross move for an Order of Reference. Rather, the plaintiff opposed the motion arguing that issue was not joined by the filing of a Notice of Appearance on the defendant’s behalf; failing joinder of issue as required by *CPLR*

3216 (b) (1), the ninety day requirement for a want of prosecution dismissal was not satisfied. See generally, *Smith v. Sheen*, 216 A.D.2d 147 (1st Dept. 1995).

Normally, assuming that issue was joined, upon receipt of a 90-day demand, the plaintiff is required to comply either by serving and filing an Order of Reference or by moving, before the default date, to vacate the demand or to enlarge the 90-day period pursuant to *CPLR* 2004. *Sagino v. Brook*, 92 A.D.3d 860, 860 (2d Dept. 2012); *Garcia v North Shore Long Island Jewish Forest Hills Hosp.*, 98 A.D.3d 644 (2d Dept. 2012). Having failed to pursue either of the foregoing options, the plaintiff is then obligated to demonstrate a reasonable excuse for the delay and a potentially meritorious cause of action to avoid the sanction of dismissal. *CPLR* 3216[e]; *Umeze v. Fidelis Care New York*, 17 N.Y.3d 751 (2011), reversing 76 A.D.3d 873; *Baczkowski v. Collins Construct. Co.*, 89 N.Y.2d 499, 504 (1997).

Although the plaintiff claims that the filing of a formal notice of appearance does not satisfy the requirement that issue have been joined pursuant to *CPLR* 3216 (b) (1), it nevertheless proffered an excuse for the delay. The excuse amounted to a somewhat vague explanation that the plaintiff has been reviewing the loan documents and court filings pursuant to Administrative Order 431/11- apparently for two years. This suspect explanation completely ignores, as does the remainder of the plaintiff's opposition papers, that three years ago the plaintiff refused to acknowledge two overtures to sign a confession of judgment dispensing with any need to formally apply for a judgment of foreclosure.

What is eminently clear from the papers, however, is that the plaintiff has a meritorious cause of action as candidly admitted by defense counsel. Assuming, without deciding, whether a formal Notice of Appearance satisfies the joinder requirement of 3216 (b) (1), the court believes, in the exercise of its discretion, that dismissing the action would only serve to delay the inevitable, a judgment of foreclosure and sale of the premises.

A dismissal pursuant to *CPLR* 3216 is not a dismissal on the merits and the plaintiff here could, in light of the defendant's continuing default on the debt, merely commence another foreclosure action. Under the circumstances, the existence of a meritorious cause of action, even in the absence of a reasonable excuse for the delay in prosecuting the action, warrants an order directing the plaintiff to submit an Order of Reference within thirty days of the date of this order, or the action will be dismissed without prejudice. Alternatively, the parties may opt to enter into a stipulation agreeing to the sum due and to the entry of a judgment of foreclosure and sale.

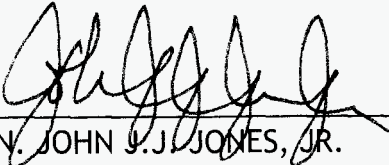
That branch of the defendant's motion which requested the court, in the exercise

of its equity jurisdiction, to limit the interest due on the mortgage is granted. Assuming the plaintiff moves forward with the Order of Reference in the requisite time provided herein, or allows the action to be dismissed and commences a second action, the computation of interest will be calculated from the defendant's default to the date when the plaintiff withdrew its second Order of Reference in this action, October 14, 2010.

CPLR 5001 (a) provides that in an equitable action, interest and the rate and date from which it is computed is within the court's discretion. A mortgage foreclosure action is no exception. *See e.g., Preferred Group of Manhattan Inc. v. Fabius Maximus, Inc.*, 51 A.D.3d 889, 890 (2d Dept. 2008), citing *Danielowich v. PBL Dev.*, 292 A.D.2d 414 (2d Dept. 2002).

This constitutes the order of the court.

DATED: 5 Dec. 2012


 HON. JOHN J. JONES, JR.
 J.S.C.

CHECK ONE: FINAL DISPOSITION

NON-FINAL DISPOSITION

TO:

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