

Deutsche Bank Natl. Trust Co. v Galasso

2015 NY Slip Op 31114(U)

June 26, 2015

Supreme Court, Suffolk County

Docket Number: 2013-63010

Judge: Jeffrey Arlen Spinner

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This opinion is uncorrected and not selected for official publication.

At an I.A.S. Part 21 of the Supreme Court of the State of New York in and for the County of Suffolk, at the Courthouse thereof in Riverhead, New York on the 26th day of June, 2015.

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

**DEUTSCHE BANK NATIONAL TRUST
COMPANY As Trustee For The Holders
Of GSAMP Trust 2004-AR1 Mortgage Pass
Through Certificates Series 2004-AR1,**

Plaintiff

- against -

**JOHN GALASSO, FIA CARD SERVICES N.A.
f/k/a MBNA AMERICA BANK N.A., DISCOVER
BANK, TOWN SUPERVISOR TOWN OF
HUNTINGTON, CSC HOLDINGS INC. LEGAL
DEPARTMENT, PEOPLE OF THE STATE OF
NEW YORK, FIA CARD SERVICES a/k/a
BANK OF AMERICA and "JOHN DOE" and
"MARY DOE,"(Said names being fictitious, it
being the intention of plaintiff to designate any
and all occupants, tenants, persons or
corporations, if any, having or claiming an
interest in or lien upon the premises being
foreclosed herein),**

Defendants

Index No.: **2013-63010**

Mot. Seq. 001-MD CASEDISP
Initial Return Date: 12/05/2014

**ORDER UPON PLAINTIFF'S MOTION
FOR AN ORDER OF REFERENCE**

Plaintiff, through its predecessor counsel, commenced this action claiming foreclosure of a first mortgage encumbering premises known as 49 Lieper Street, Huntington Station, Town of Huntington, New York. Said Mortgage was given by Defendant JOHN GALASSO unto ARGENT MORTGAGE COMPANY LLC on February 3, 2004 to secure a Fixed Rate Note in the amount of \$ 380,000.00 and same was recorded with the Clerk of Suffolk County on May 13, 2004 in Liber 20744, Mp 223. Said mortgage was ultimately acquired by Plaintiff through a series of mesne Assignments.

According to Plaintiff, Defendant defaulted in payment of the installment that came due and owing on October 1, 2007, which remains uncured to date. Plaintiff's action was commenced on September 24, 2013 by the filing of a summons, verified complaint and notice of pendency with the Clerk of Suffolk County. Thereafter, service was effected upon Defendant JOHN GALASSO on October 24, 2013 in accordance with CPLR § 308(2). Said Defendant did not formally appear, answer or move within that time period. Plaintiff's notice of motion and supporting papers were filed with the Court on November 26, 2014. Plaintiff's motion papers were filed some one year and nineteen days subsequent to the date of default by Defendant. Plaintiff's papers do not address this passage of time nor do they advance any excuse or explanation for the delay. Appended to Plaintiff's moving papers is an Affidavit which avers that a copy of the summons was served by mail upon Defendant JOHN GALASSO on October 18, 2014. There is no evidence that the moving papers were served upon him nor is there any additional evidence of compliance with CPLR § 3215.

In response to Plaintiff's motion (which obviously was not served), Defendant JOHN GALASSO appears *pro se* and interposes a document which prays for dismissal, primarily upon a claim of improper service. Plaintiff counters with a document styled "Notice Of Return And Rejection" asserting that Defendant's papers are "improperly formatted" whatever that expression may mean. The Court is well aware that nowhere in the Civil Practice Laws & Rules are there any such grounds for rejection. Moreover, it is both the practice and policy of this Part to afford considerable leeway to those who appear without benefit of counsel, especially in proceedings involving the foreclosure of a residential mortgage. Indeed, it is, and always been, the policy of New York Courts that documents and pleadings that are filed be construed liberally, affording the benefit of every favorable inference to the party that interposes the papers in controversy. In point of fact, CPLR § 3026 directs the Court to ignore defects so long as parties' substantial rights are not prejudiced. Distilled to its essence, the rule is that substance must prevail over form in every respect, *Dulberg v. Mock* 1 NY 2d 54 (1956).

A review of Plaintiff's papers raises a series of questions of substance, all of which have been either glossed over or ignored by Plaintiff. Counsel's Affirmation dated November 12, 2014 asserts that the prerequisite written notice of intent to foreclose was mailed to Defendant on October 14, 2008, almost six years prior to the commencement of this action. Further, it is claimed that the RPAPL § 1304 Notice was mailed to Defendant on March 18, 2013. No explanation is advanced for the foregoing hiatus, raising serious questions regarding both good faith and statutory compliance by Plaintiff. The Court is constrained to note that the index number was purchased but six days before the expiration of the applicable statute of limitations as codified in CPLR § 213(4).

In the matter that is *sub judice*, the Court must be necessarily guided by the express statutory provisions of CPLR § 3215(c), which read as follows:

Default not entered within one year. If the Plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision does not constitute an appearance.

According to the foregoing plain language, the statute mandates dismissal of this action, absent a showing by Plaintiff of sufficient cause for the delay. The statute does not draw any distinction between a delay that is *de minimis* and one that is substantial. Too, the language of the statute is mandatory and not permissive and the Court is without discretion in application except insofar as it concerns the sufficiency of any proffered excuse.

Though not expressly disclosed to this Court by Plaintiff, a mandatory foreclosure settlement conference pursuant to CPLR § 3408 was scheduled for March 31, 2014. Defendant requested an adjournment thereof in light of his inability to appear on that date, whereupon it was adjourned by the Clerk of the Court to June 3, 2014. The Court's computerized database reflects that Defendant failed to appear at the adjourned conference, subsequently advising by letter that he did not wish to appear without counsel. Thus, Plaintiff was on notice that Defendant, while technically in default of appearance and pleading, had at least a modicum of interest in addressing his default as well as Plaintiff's claims.

That said, in order for an action to survive dismissal made under the provisions of CPLR § 3215(c), it is incumbent upon applying party (in this case, Plaintiff) to demonstrate both a meritorious cause of action coupled with "sufficient cause" for its delay in proceeding to judgment following default by Defendant, Rendelman v. Southside Hospital 141 AD 2d 521 (2nd Dept. 1988). As stated *infra*, the provisions of the statute's application are mandatory and not discretionary except insofar as it relates to the determination by the Court as to the sufficiency of the excuse advanced, Perricone v. City of New York 62 NY 2d 661 (1984), Morton v. Morton 136 AD 2d 902 (4th Dept. 1988).

Though statutorily obligated to do so, Plaintiff has failed to advance any excuse whatsoever for the passage of more than one year between Defendant's default and its application for judgment. Moreover, the unexplained passage of almost six years between the time of the alleged default and the date of the commencement of this action raises serious and glaring questions (albeit unanswered) as to whether or not Plaintiff is acting in good faith herein. While it is beyond dispute that a mortgage and the obligations that it secures are contracts, it is equally true that an action to foreclose a mortgage is a suit in equity and hence, all of the rules and tenets of equity are fully extant in the context of such an action, Jamaica Savings Bank v. M. S. Investment Co. 274 NY 215 (1937). Hence, in such a proceeding, the Supreme Court is vested with the jurisdiction to do that which ought properly be done. In the instant matter, it is apparent to this Court that the delays have been created by Plaintiff's inaction. Moreover, Plaintiff has failed to advance even so much as a scintilla of an excuse as to its unexplained delays in proceeding herein. Rather, the picture painted before the Court is one of a Plaintiff that has failed, in more than one instance and for reasons unknown to the Court, to enforce whatever rights it may have. Accordingly, this Court, bound both by the mandatory language of the statute and the silence of Plaintiff, is left with no alternative whatsoever but to direct dismissal of this action.

It is, therefore,

ORDERED that Plaintiff's application for an Order of Reference pursuant to RPAPL § 1321 (seq. 001) shall be and the same is denied in its entirety; and it is further

ORDERED that Defendant JOHN GALASSO'S application to dismiss this action shall be and the same is hereby granted in its entirety; and it is further

ORDERED that in accordance with CPLR § 3215(c), this action shall be and is hereby dismissed due to Plaintiff's unexplained and unexcused delay in proceeding; and it is further

ORDERED that the any and all Notices of Pendency filed with the Clerk of Suffolk County shall be and the same are hereby cancelled and discharged of record; and it is further

ORDERED that Plaintiff shall remit to the Clerk of Suffolk County any and all such fees as may required to effect cancellation of record of the Notices of Pendency; and it is further

ORDERED that a copy of this Order shall be appended to any and all future complaints and applications wherein foreclosure of the subject mortgage is may claimed; and it is further

ORDERED that any future actions claiming foreclosure of the mortgage that is the subject of this action shall be referred to the undersigned upon the filing of a Request for Judicial Intervention; and it is further

ORDERED that any relief not specifically granted herein is denied.

Dated: June 26, 2015
Central Islip, New York

ENTER:


JEFFREY ARLEN SPINNER, J.S.C.

TO:

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FINAL DISPOSITION

NON-FINAL DISPOSITION

SCAN

DO NOT SCAN