Citimortgage, Inc. v Schumacher
2015 NY Slip Op 32483(U)
November 20, 2015
Supreme Court, Suffolk County
Docket Number: 13-25477
Judge: Thomas F. Whelan
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SHORT FORM ORDER

INDEX No. 25477-13

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 10/6/15
ADJ. DATES 11/6/15
Mot. Seq. # 003 - MG
Mot. Seq. # 004 - XMD
CDISP Y____ N X

CITIMORTGAGE, INC.,

Plaintiff,

-against-

GENE W. SCHUMACHER, ANNETTE E. SCHUMACHER, CITIBANK, NA, "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.

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Upon the following papers numbered 1 to 13 read on this motion by plaintiff for an order of reference upon default and cross motion by the defendants to dismiss or to vacate their defaults and extend their time to answer ; Notice of Motion/Order to Show Cause and supporting papers 1 - 4 ; Notice of Cross Motion and supporting papers 5-8 ; Answering Affidavits and supporting papers 9-10 ; Replying Affidavits and supporting papers 11-12 ; Other 13 (military affidavit) ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#003) by the plaintiff for an order of reference on default, the deletion of the unknown defendants as parties and an order appointing a referee to compute amounts due under the terms of the note and mortgage that are the subject of this foreclosure action is considered under CPLR 3215 and RPAPL§ 1321 and is granted; and it is further

ORDERED that the cross motion (#004) by the mortgagor defendants for a dismissal of this action as abandoned pursuant to CPLR 3215(c) or an order vacating their default in answering by extending their time to answer is considered under CPLR 2004 and 3102(d) and is denied.

This mortgage foreclosure action was commenced in September of 2013 to foreclose the lien of a mortgage given by the Schumacher defendants to the plaintiff on November 28, 2005 to secure a mortgage note of the same date likewise given. Following the initialization of this action upon the filing of a Request for Judicial Intervention in October of 2013, it was assigned to the specialized mortgage foreclosure conference part. The matter was conferenced by quasi judicial personnel assigned to such part on February 7, 2013, after which, the conference was adjourned to May 9, 2014. Shortly after the first conference, the mortgagor defendants moved by motion (#001) returnable March 19, 2014, for an order extending their time to answer, but such motion was held "in abeyance" pending the release of the action from the specialized mortgage foreclosure conference part (*see* 22 NYCRR 202.12-a). Such release occurred on May 9, 2014 as the mortgagor defendants failed to appear for the settlement conference scheduled for that day. The action was then assigned to the case inventory of the Honorable Elizabeth H. Emerson, J.S.C. and the defendants' motion (#001) for relief pursuant to CPLR 3012(d), which the plaintiff vigorously opposed, was calendared before Justice Emerson on May 29, 2014 and marked submitted on that date.

By order dated October 30, 2014 [Emerson, J], the defendants' motion (#001) was denied due to the defendants' failure to establish a reasonable excuse for their default in answering. The court stated, however, that the denial was "without prejudice" and noted that certain loss mitigation documents referred to in the moving papers were not attached thereto.

The defendants thereafter moved again for a vacatur of their default and an extension of time to answer by a notice of motion (#002) returnable before Justice Emerson on December 23, 2014. On January 2, 2015, this action was transferred to the case inventory of this court and the defendants' second motion to vacate their default was re-calendared on January 9, 2015 and marked submitted for determination to the undersigned on that date. The second motion to vacate was forcefully opposed by the plaintiff on both substantive and procedural grounds. By order dated January 13, 2015, this court rejected each of the claims upon which the defendants' second motion (#002) to vacate their default and for leave to serve a late answer were premised.

The plaintiff now moves (#003) for an order of reference upon the default in answering of all of the defendants served with process, the deletion of the unknown defendants and an order appointing a referee to compute. The obligor/mortgagor defendants Schumacher, oppose the plaintiff's motion in cross moving papers (#004) in which they seek a dismissal of the complaint as abandoned by the plaintiff pursuant to CPLR 3215(c) or an order vacating their default and extending their time to appear by service of the proposed answer attached to the cross moving papers.

First considered is the cross motion (#004) by the Schumacher defendants as determination thereof may render the plaintiff's motion, academic, due to demands for dismissal of the plaintiff's complaint as abandoned pursuant to CPLR 3215(c). That statute requires that a plaintiff commence proceedings for the entry of a default judgment within one year after the default or demonstrate sufficient cause why the complaint should not be dismissed. Where the plaintiff has made an application to the court for the entry of a default judgment within one year of the defendant's default, even if unsuccessful,

the court may not later dismiss the complaint as abandoned pursuant to CPLR 3215(c) (*see* ***GMAC Mtge., LLC v Todaro,*** 129 AD3d 666, 9 NYS3d 588 [2d Dept. 2015]; ***Wells Fargo Bank, N.A. v Combs,*** 128 AD3d 812, 2015 WL 2214013 [2d Dept 2015]; ***HSBC Bank, USA, N.A. v Alexander,*** 124 AD3d 839, 4 NY3d 47 [2d Dept 2015]; ***Mortgage Elec. Registration Sys., Inc. v Smith***, 111 AD3d 804, 975 NYS2d 121 [2d Dept 2013]; ***Jones v Fuentes***, 103 AD3d 853, 962 NYS2d 263 [2d Dept 2013]; ***Norwest Bank Minnesota, N.A. v Sabloff***, 297 AD2d 722, 747 NYS2d 559 [2d Dept 2002]; ***Brown v Rosedale Nurseries, Inc***., 259 AD2d 256, 686 NYS2d 22 [1st Dept 1999]; ***Home Sav. of Am., F.A. v Gkanios***, 230 AD2d 770, 646 NYS2d 530 [2d Dept 1996]).

The Appellate Division, Second Department has instructed that in cases wherein no motion is interposed within the one year time limitation period, avoidance of a dismissal of the complaint as abandoned requires the plaintiff to offer a reasonable excuse for the delay in moving for leave to enter a default judgment and must demonstrate a potentially meritorious cause of action (*see* ***Giglio v NTIMP, Inc***., 86 AD3d 301, 308, 926 NYS2d 546 [2d Dept 2011]; *see also* ***Kohn v Tri-State Hardwoods, Ltd.***, 92 AD3d 642, 937 NYS2d 865, 866 [2d Dept 2012]; ***115-41 St. Albans Holding Corp. v Estate of Harrison***, 71 AD3d 653, 894 NYS2d 896 [2d Dept 2010]; ***Cynan Sheetmetal Prods., Inc. v B.R. Fries & Assoc., Inc***., 83 AD3d 645, 919 NYS2d 873 [2d Dept 2011]; ***First Nationwide Bank v Pretel***, 240 AD3d 629, 659 NYS2d 291 [2d Dept 1997]). In addition, appellate cases authorities have established that a moving defendant's failure to show prejudice by the plaintiff's delay in moving for the default may tip the balance in favor of a finding of sufficient cause to excuse the delay *provided* an explanation of the delay is advanced which evinces no intent to abandon the action and a meritorious cause of action is shown to exist (*see* ***LNV Corp. v Forbes***, 122 AD3d 805, 996 NYS2d 696 [2d Dept 2014]; ***Brooks v Somerset Surgical Assocs***., 106 AD3d 624, 966 NYS2d 65 [2d Dept 2013]; ***Laourdakis v Torres***, 98 AD3d 892, 950 NYS2d 703 [1st Dept 2012]; ***LaValle v Astoria Constr. & Paving Corp***., 266 AD2d 28, 697 NYS2d 605 [1st Dept 1999]; ***Hinds v 2461 Realty Corp***., 169 AD2d 629, 632, 564 NYS2d 763 [1st Dept 1991]). Delays attributable to the parties' engagement in mandatory settlement conference procedures, or in litigation communications, discovery, motion practice and other pre-trial proceedings have been held to negate any intention to abandon the action and are thus excusable under CPLR 3215(c) (*see* ***Brooks v Somerset Surgical Assocs***., 106 AD3d 624, *supra*; ***Laourdakis v Torres***, 98 AD3d 892, *supra*).

In the mortgage foreclosure arena, delays in the prosecution of cases may fairly be attributable to various legislative enactments and administratively rules which are aimed at resolving foreclosure actions in a manner favorable to mortgagors. These legislative enactments and rules have dramatically slowed the pace of residential mortgage foreclosure actions pending at the time of such enactments or rule were adopted and have caused serious delays in the institution of new actions (*see* Laws of 2008, Ch. 472 § 3–a as amended by the Laws of 2009 Ch. 507 § 10; CPLR 3408; 22 NYCRR 202.12-a). The seemingly endless imposition of new procedural mandates include the scheduling of a mandatory settlement conference pursuant to CPLR 3408, which was extended by administrative rule to include multiple conferences (*see* 22 NYCRR 202.12-a[c][6], the holding of all motions "in abeyance" during the conference process; 22 NYCRR 202-12-a[7], the merit based vouching requirements that were imposed upon counsel for a foreclosing plaintiff in all pending cases by court administrators) (*see* A.O.

548/10, amended by A.O. 431/11; and A.O. 208/13), which are now the subject of CPLR 3012-a for cases commenced after August 30, 2013.

In addition, many servicers and/or lenders are subject to a host of federal regulations adopted on a temporary basis in 2013 and formally thereafter in January of 2014 which subject certain banks to sanctions in the form of money damages if they commence or continue the prosecution of claims for foreclosure and sale in cases wherein the borrower may be eligible for a loan modifications of other loss mitigation alternatives under federal programs (*see* CFPB Regulation X @ 12 C.F.R. Part 1024, Chapter X, Subpart C, §§ 1024.39;-1024.41). Other stays on prosecution of foreclosure actions subject to federal jurisdiction were put in place by FEMA in 2011 and 2012 due to the effects of hurricanes Irene and Sandy.

As a consequence of these statutory and regulatory frameworks, motions for orders of reference are often first made after the one year time limitation period imposed by CPLR 3215(c), the purpose of which, is to prevent the prosecution of stale claims (*see* ***Giglio v NTIMP, Inc***., 86 AD3d 301, *supra*). Sufficient cause to justify a belated motion for a default judgment has thus been held to have been demonstrated where such delays were engendered by the action remaining in the specialized mortgage foreclosure conference part for multiple conferences over many months, during which time, all motions are to be held in "abeyance" until the action was released from the conference part (*see* 22 NYCRR 202.12-a[c][6]; 202-12-a[7]; ***Aurora Loan Serv., LLC v Brescia, Cach, LLC***, 2013 WL 5823057, *2 [Sup Ct., Suffolk County, 2013]; ***Onewest Bank, FSB v Navarro***, 41 Misc3d 1238[A], 2013 WL 6500194 [Sup. Ct., Suffolk County, 2013]; ***BAC Home Loans Serv., L.P. v Bordes***, 36 Misc3d 1203[A], 957 NYS2d 263 [Sup. Ct., Queens County, 2012]; ***BAC Home Loans Serv., L.P. v Maurer***, 36 Misc3d 1210[A], 957 NYS2d 263 [Sup. Ct., Suffolk County, 2012]; *see also* ***Wells Fargo Bank, N.A. v Pasciuta***, 20154 WL 3975583 [Sup Ct. Suffolk County, Index No 22235/12]). Sufficient cause has also been held to justify a belated default judgment motion where the delay in prosecuting the action is caused by the plaintiff's inability to comply with the requirements of Administrative Orders numbered 548/10, 431/11 and or A.O. 208/13 (*see* ***Deutsche Bank Natl. Trust Co. v Pascarella***, 39 Misc3d 1227[A], 971 NYS2d 70 [Sup. Ct. Suffolk County 2013]; ***BAC Home Loans Serv., LP v Maurer***, 36 Misc3d 1210[A], 957 NYS2d 263 [Sup. Ct. Suffolk County, 2012]) or due to the placement of a hold on the plaintiff's case under federal regulation and emergency stays (*see* ***U.S. Bank Natl. Asss'n. v John***, 2015 WL 5098353 [Sup. Ct. Suffolk County 2015]). These holdings find support from appellate case authorities issued in other contexts where the delay is attributable to the parties' engagement in litigation communications, discovery matters, motions and/or settlement talks which negates any intention to abandon and is thus excusable under CPLR 3215(c) (*see* ***Brooks v Somerset Surgical Assocs***., 106 AD3d 624, *supra*; ***Laourdakis v Torres***, 98 AD3d 892, *supra*).

Here, the record reveals that the plaintiff did not undertake the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference under RPAPL 1321(1) within the one year time period imposed by the statute nor within one year of the May 9, 2014 release of this action from the specialized mortgage foreclosure conference part. However, the plaintiff has demonstrated, in both its moving papers and opposing papers, that its claim for foreclosure and sale is

meritorious. The plaintiff further demonstrated the existence of sufficient cause under CPLR 3215(c) for the delay in moving to fix the defaults in answering due to the plaintiffs' engagement in a plethora of litigation activities from which an intent not to abandon its claim for foreclosure and sale is discernable, including its defense of the two prior motions interposed by the defendants, in which they sought relief from their default in answering. The delay in the submission for determination of the defendants' first motion was due to the holding of same in abeyance for a period of four months during the CPLR 3408 conference process, during which the defendants' defaulted in appearing for the second conference. A further delay of nearly five months for issuance occurred between the submission of the motion and the issuance of the determination thereon by the Justice then assigned to this action. Determination of the defendants' second motion is attributable to the administrative transfer of this action from the case inventory of Justice Emerson to this court in January of 2015. None of these delays implicate fault or complicity on the part of the plaintiff. Moreover, the absence of any demonstration of prejudice to the Schumacher defendants tips the balance in favor of a finding of good cause shown on the part of the plaintiff. The defendants have enjoyed the use of the mortgaged premises since September 1, 2011, when the default in payment occurred, without making any payments of amounts due under the note and mortgage, while the plaintiff has undertaken efforts to preserve the premises by, among other things, its payment of taxes and insurance. Those portions of the defendants' cross motion wherein they seek dismissal of the complaint as abandoned pursuant to CPLR 3215(c) are thus denied.

The remaining portions of the defendants' cross motion (#004) in which they seek an order vacating their defaults in answering and leave to serve a late answer are denied. The law of the case doctrine precludes consideration of the merits of this third motion for a vacatur of the default in answering by the defendants as the grounds advanced are the same as those previously raised, including a purported lack of understanding of the clear directives and express warnings to answer the complaint and to speak to an attorney that were set forth in the summons served upon the defendants in September of 2013 (*see* ***Viva Dev. Corp. v United Humanitarian Relief Fund***, 108 AD3d 619, 620, 968 NYS2d 379 [2d Dept 2013]; ***Discover Bank v Quader***, 105 AD3d 892, 962 NYS2d 911 [2d Dept 2013]; ***JMP Pizza, LLC v 34th St. Pizza, LLC***, 104 AD3d 648, 960 NYS2d 318 [2d Dept 2013]; ***47 Thames Realty, LLC v Robinson***, 85 AD3d 851, 852, 925 NYS2d 585 [2d Dept 2011]).

In addition, controlling appellate case authorities have repeatedly held that a party in default is precluded from making successive motions to vacate defaults on grounds previously advanced or upon those which could have been advanced (*see* ***LaSalle Natl. Bank v Odato***, 126AD3d 675, 2 NYS3d 360 [2d Dept 2015]; ***Eastern Sav. Bank, FSB v Brown***, 112 AD3d 668, 670, 977 NYS2d 55 [2d Dept 2013]; ***Lambert v Schreiber***, 95 AD3d 1282, 1283, 944 NYS2d 902 [2d Dept 2012]). Even if it were otherwise, the court finds no merit in the defendants' latest attempt to gain relief from their default in answering and to appear herein by answer as no reasonable excuse nor meritorious defense nor other ground for such relief has been advanced (*see* ***Woodson v Mendon Leasing Corp***., 100 NY2d 62, 760 NYS2d 727 [2d Dept 2002]; ***Chase Home Fin., LLC v Minott***, 115 AD3d 634, 635, 981 NYS2d 757 [2d Dept 2014]; ***Katz v Marra***, 74 AD3d 888, 891, 905 NYS2d 204 [2d Dept 2010]). Those portions of the defendants' cross motion wherein they seek to vacate their default and to appear herein by service of a late answer are thus denied.

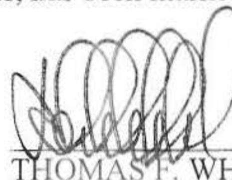
The plaintiff's motion-in-chief for an order of reference upon the default in answering of all defendants served with process is granted. A party moving for a default judgment must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to answer or appear (*see* CPLR 3215[f]; ***Todd v Green***, 122 AD3d 831, 997 NYS2d 155 [2d Dept 2014]; ***U.S. Bank Natl. Assn. v Razon***, 115 AD3d 739, 981 NYS2d 571, 572 [2d Dept 2014]; ***Diederich v Wetzel***, 112 AD3d 883, 979 NYS2d 605 [2d Dept 2013]; ***Loaiza v Guzman***, 111 AD3d 608, 609, 974 NYS2d 282 [2d Dept 2013]; ***Green Tree Serv., LLC v Cary***, 106 AD3d 691, 692, 965 NYS2d 511 [2d Dept 2013]; ***Dupps v Betancourt***, 99 AD3d 855, 952 NYS2d 585 [2d Dept 2012]). Here, the moving papers sufficiently established the plaintiff's entitlement to an order of reference upon default as it included due proof of service of the summons and complaint, defaults in answering on the part of the mortgagor defendants and all other defendants joined herein by service of the summons and complaint and the existence of facts that constitute the plaintiff's possession of viable claims for foreclosure and sale (*see* ***Woodson v Mendon Leasing Corp.***, 100 NY2d 62, 71, 760 NYS2d 727 [2003]; ***U.S. Bank Natl. Ass'n v Poku***, 118 AD3d 980, 989 NYS2d 75 [2d Dept 2014]; ***U.S. Bank Natl. Assn. v Razon***, 115 AD3d 739, *supra*; ***Green Tree Serv., LLC v Cary***, 106 AD3d 691, *supra*; ***King v King***, 99 AD3d 672, 951 NYS2d 565 [2d Dept 2012]; ***Integon Natl. Ins. Co. v Noterile***, 88 AD3d 654, 930 NYS2d 260 [2d Dept 2011]).

To successfully defeat the plaintiff's motion, the defendants were required to demonstrate that they are not in default or that they possess a jurisdictional or abandonment defense or grounds for vacatur of their default (*see* ***U.S. Bank Natl. Ass'n. v Dorestant***, 131 AD3d 467, 15 NYS2d 142 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Krauss***, 128 AD3d 813, 10 NYS2d 257 [2d Dept 2015]). A review of the submissions of the defendants reveals that they failed to demonstrate any basis for the denial of the plaintiff's motion. Accordingly, the plaintiff is entitled to an order awarding it a default judgment against each of the known defendants named in the caption, the deletion as party defendants of the unknown defendants and an order appointing a referee to compute.

In view of the foregoing, the plaintiff's motion (#003) is granted while the cross motion (#004) of the Schumacher defendants is denied.

The proposed Order of reference attached to the plaintiff's moving papers, as modified by the court to reflect the issuance of this memo decision and order, has been marked signed.

Dated: November 20, 2015



THOMAS F. WHELAN, J.S.C.