Deutsche Bank Natl. Trust Co. v Phillips
2017 NY Slip Op 31200(U)
May 31, 2017
Supreme Court, Suffolk County
Docket Number: 38385/2009
Judge: Howard H. Heckman, Jr.
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

PRESENT:
HON. HOWARD H. HECKMAN JR., J.S.C.

INDEX NO.: 38385/2009
MOTION DATE: 06/23/2016
MOTION SEQ. NO.: 001 MG
002 MD

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DEUTSCHE BANK NATIONAL TRUST CO.,

Plaintiffs,

-against-

JOHN D. PHILLIPS III, et. al.

Defendants.

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PLAINTIFFS' ATTORNEY:
ROSICKI, ROSICKI & ASSOCIATES, P.C.
26 HARVESTER AVENUE
BATAVIA, NY 14020

DEFENDANT PRO SE:
JOHN D. PHILLIPS III
42 ARGONNE ROAD
HAMPTON BAYS, NY 11946

Upon the following papers numbered 1 to 14 read on this motion ; Notice of Motion/ Order to Show Cause and supporting papers 1- 10 ; Notice of Cross Motion and supporting papers 11-12 ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers 13-14 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by Deutsche Bank National Trust Co., seeking an order: 1) restoring this action to the active calendar; 2) granting a default judgment; 2) discontinuing this action against the defendant identified as Antoinette Phillips and the defendants designated as "John Does" and "Jane Does"; 3) deeming all non-appearing defendants in default; 4) amending the caption; and 5) appointing a referee to compute the sums due and owing to the plaintiff in this mortgage foreclosure action is granted; and it is further

ORDERED that the cross motion by defendant John D. Phillips III seeking an order pursuant to CPLR 3215(c) dismissing plaintiff's complaint as abandoned and cancelling the notice of pendency filed by the plaintiff is denied; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of the Court; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared and not waived further notice pursuant to CPLR 2103(b)(1),(2) or (3) within thirty days of the date of this order and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff's action seeks to foreclose a mortgage in the original sum of $175,000.00 executed by defendant John D. Phillips III on January 26, 2007 in favor of JPMorgan Chase Bank, N.A. On that same date the defendant executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. The plaintiff became the owner and holder of the promissory

note and mortgage as a result of an assignment dated March 24, 2009.. Plaintiff claims that the defendant has defaulted in making timely monthly mortgage payments since October 1, 2008. Plaintiff's motion seeks an order granting a default judgment based upon defendant Murphy's failure to serve an answer and for the appointment of a referee.

In support of the cross motion and in opposition to plaintiff's motion, defendant John D. Phillips submits an affidavit and claims that the lender's delay in prosecuting this foreclosure action requires that the complaint be dismissed as abandoned. Defendant contends that he has been seriously prejudiced by plaintiff's delay in prosecuting this action.

In response, the plaintiff submits an attorney's affirmation and argues that its motion to restore must be granted since the December 12, 2014 office part purge which marked the action off calendar was not dispositive of this action but was merely a clerical error. Plaintiff also argues that no basis exists to dismiss the complaint as abandoned since the bank has acted in a manner consistent with its intent not to abandon prosecution of this action. Plaintiff claims that after its representatives appeared at three court mandated settlement conferences with the action being marked "not settled" based upon the defendant's default in appearing at the conference, the subsequent delay in prosecution was caused by the strict certification requirements mandated by Administrative Orders 548/10 and 431/11 of the Chief Administrative Judge. Plaintiff claims that every effort was made to comply with the certification requirements and that a further delay was caused by the change in mortgage servicers which occurred in June, 2013. Plaintiff contends that additional verifications were necessary from the incoming mortgage servicer to ensure the accuracy of the mortgage documents and once received in full by May, 2016, the plaintiff immediately served this motion. Plaintiff also claims that the delay in seeking a default judgment has clearly not prejudiced the defendant as he concedes that he has continued to reside in the premises without making any payments required under the terms of the note and mortgage.. Plaintiff also claims that there is sufficient evidence, in the form of an affidavit from the mortgage servicer's representative, to establish the plaintiff's right to foreclose.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material question of fact from the case. The grant of summary judgment is appropriate only when it is clear that no material and triable issues of fact have been presented (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957)). The moving party bears the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851 (1985)). Once such proof has been proffered, the burden shifts to the opposing party who, to defeat the motion, must offer evidence in admissible form, and must set forth facts sufficient to require a trial of any issue of fact (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 (1979)).

Entitlement to summary judgment in favor of the foreclosing plaintiff is established, prima facie by the plaintiff's production of the mortgage and the unpaid note, and evidence of default in payment (*see Wells Fargo Bank N.A. v. Erobobo*, 127 AD3d 1176, 9 NYS3d 312 (2nd Dept., 2015); *Wells Fargo Bank, N.A. v. Ali*, 122 AD3d 726, 995 NYS2d 735 (2nd Dept., 2014)).

CPLR 3215(c) provides that "if the plaintiff fails to take proceedings for the entry of judgment within one year after a 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." It is, however, not necessary for a plaintiff to actually obtain a default judgment within one year to avoid dismissal but rather it is enough that the plaintiff timely takes preliminary steps toward a default judgment of foreclosure and sale by moving for an order of reference to establish that it initiated proceedings for entry of judgment (CPLR 3215(c); *Wells Fargo Bank, N.A. v. Combs*, 128 AD3d 812, 10 NYS3d 121 (2nd Dept., 2015)). "As long as proceedings are being taken which manifest an intent not to abandon the case but to seek a judgment, the action should not be subject to dismissal" (*Brown v. Rosedale Nurseries*, 259 AD2d 256, 686 NYS2d 22 (1st Dept., 1999); *Aurora Loan Services, LLC v. Gross*, 139 AD3d 772, NY Slip Op 03691 (2nd Dept., 2016)). Where no motion is interposed within the one year time limitation period, a plaintiff is required to establish "sufficient cause" why the complaint should not be dismissed which requires a showing of a reasonable excuse for the delay and of a potentially meritorious cause of action (*see Wells Fargo Bank, N.A. v. Bonanno*, 146 AD3d 844, 2017 NY Slip Op 00211 (2nd Dept., 2017); *Maspeth Federal Savings & Loan Association v. Brooklyn Heritage, LLC*, 138 AD3d 793, 28 NYS3d 325 (2nd Dept., 2016); *Aurora Loan Services, LLC v. Hiyo*, 130 AD3d 763, 13 NYS3d 554 (2nd Dept., 2015); *Pipinias v. J. Sackaris & Sons, Inc.*, 116 AD3d 749, 983 NYS2d 587 (2nd Dept., 2014); *Giglio v. NTIMP, Inc.*, 86 AD3d 301, 926 NYS2d 546 (2nd Dept., 2011); *Kohn v. Tri-State Hardwoods, Ltd.*, 92 AD3d 642, 937 NYS2d 865 (2nd Dept., 2012)). The determination of whether an excuse is reasonable in any given instance is committed to the discretion of the motion court (*HSBC Bank USA, N.A. v. Grella*, 145 AD3d 669, 44 NYS3d 56 (2nd Dept., 2016); *Maspeth Federal Savings & Loan Association v. Brooklyn Heritage, LLC, supra.*)). Delays attributable to the parties participation in mandatory settlement conferences 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 excusable under CPLR 3215(c)(*see HSBC Bank USA, N.A. v. Grella, supra.; Brooks v. Somerset Surgical Associates*, 106 AD3d 624, 966 NYS2d 65 (2nd Dept., 2013); *Laourdakis v. Torres*, 98 AD3d 892, 950 NYS2d 703 (1st Dept., 2012)).

Court records reveal that the defendant was served with the summons and complaint pursuant to CPLR 308(4) ("nail and mail") on October 1, 2009 with filing completed on October 7, 2009. Defendant defaulted in appearing in this action by failing to serve an answer within thirty days of the completion of service on October 17, 2009. Court records indicate that plaintiff's representative appeared for a court mandated settlement conferences on March 30, 2010, June 10, 2010 and August 4, 2010, and that the defendant defaulted in appearing on August 4, 2010, causing this action to be referred to an IAS Part as an active mortgage foreclosure action. On December 30, 2014 the clerk's office purged this action by marking it off the active calendar.

The initial issue to be determined is defendant's cross motion concerning whether the action should be dismissed as abandoned pursuant to CPLR 3215(c), since such a finding would render academic the plaintiff's default judgment motion. The statute required plaintiff to seek a default judgment prior to November 16, 2010, unless sufficient cause is shown why the complaint should not be dismissed. Case law requires a showing of a reasonable excuse and a meritorious claim (*see 115-41 St. Albans Holding Corp. v. Estate of Harrison*, 71 AD3d 653, 894 NYS2d 896 (2nd Dept., 2010); *Cyman Sheetmetal Products, Inc. v. B.R. Fries & Associates, Inc.*, 83 AD3d 645, 919 NYS2d 873 (2nd Dept., 2011); *First Nationwide Bank v. Pretel*, 240 AD2d 629, 659 NYS2d 291 (2nd Dept., 1997)).

Plaintiff attributes its delay in seeking judgment to a prolonged effort to comply with administrative orders enacted during this time period, coupled with additional complications in compiling the required confirmation of accuracy of the documents maintained by the mortgage lender resulting from a change in mortgage loan servicer in June, 2013. The initial Chief Administrative Judge's Order (AO/548/10) requiring plaintiff's attorney, in certain mortgage foreclosure actions, to submit an affirmation confirming the accuracy of the claims set forth in the complaint was issued on October 20, 2010. Shortly thereafter, that Administrative Order was replaced by a second order (AO/431/11), which revised the form for the required attorney affirmation. This second Administrative Order was issued on March 2, 2011. In August, 2013, CPLR 3012-b further amended the certification requirements in mortgage foreclosure actions.

There is no question but that these required certifications, imposed within a month of the one year period within which plaintiff could have sought a default judgment, caused significant delay in the prosecution of then pending mortgage foreclosure actions. By requiring attorney affirmations to certify the accuracy of the allegations set forth in complaints, counsel for mortgage lenders were obligated to take the time to obtain access to original documents to verify each of the significant contentions set forth in the foreclosure complaints. The imposition of these requirements imposed a duty on bank attorneys to confirm the accuracy of any papers submitted in support of an application for judgment and provide a reasonable explanation for delay in seeking an order of reference in this case, particularly in view of the initial imposition of the original Administrative Order on October 20, 2010 and the status of this then pending action, which had only months earlier been the subject of a settlement conference (August, 2010) and which was eleven months after defendant's default.. Moreover, plaintiff has submitted additional proof providing a reasonable excuse for the delay, based upon the fact that the initial mortgage servicer (Chase) that was attempting to aid counsel to obtain the required verifications was replaced in June, 2013 by the current mortgage servicer, Select Portfolio Servicing, Inc. resulting in further delay. As to the required showing of a meritorious claim, the evidence is undisputed that the defendant has not made a payment due under the terms of the mortgage and note since September, 2008. Based upon these circumstances the plaintiff has submitted sufficient evidence that sufficient cause exists to show why the complaint should not be dismissed (*see Aurora Loan Services, LLC v. Gross*, 139 AD3d 772, 32 NYS3d 249 (2nd Dept., 2016)).

With respect to plaintiff's application to restore this action as an active foreclosure case, court records indicate that this action was administratively purged by the clerk on December 30, 2014. Such administrative activity cannot dismiss an action pursuant to CPLR 3404 where no note of issue has been filed since such pre-note cases are the subject of the requirements of CPLR 3216 (*see Deutsche National Bank Trust Co. v. Cotton*, 147 AD3d 1020, 46 NYS3d 913 (2nd Dept., 2017); *BankUnited v. Kheyfets*, 2017 WL 2126424, 2017 NY Slip Op 03923 (2nd Dept., 2017)). No basis therefore exists to deny plaintiff's motion to restore the action as an active foreclosure case particularly in view of the fact that there has been no prejudice resulting from the delay in case activity.

Finally with respect to plaintiff's motion for a default judgment and the appointment of a referee, plaintiff has submitted evidence to prove the bank's entitlement to a default judgment. The submission of an affidavit from the mortgage servicer's vice president satisfies the business records exception to the hearsay rule and establishes the fact that the defendant has defaulted under the terms of the mortgage by failing to make timely monthly mortgage payments since October 1, 2008 (*see*

SRMOF II 2012-I Trust v. Tella, 139 Ad3d 599, 33 NYS3d 25 (1st Dept., 2016); *Bank of New York Mellon v. Traore*, 139 AD3d 1009, 32 NYS3d 283 (2nd Dept., 2016)).

The bank, having proven entitlement to a default judgment, it is incumbent upon the defendant to submit relevant, evidentiary proof sufficiently substantive to raise genuine issues of fact concerning why the lender is not entitled to foreclose the mortgage. Defendant has wholly failed to do so. Defendant has not submitted an affidavit in opposition to the plaintiff's motion denying his default in making payments due under the terms of mortgages and promissory note and therefore plaintiff's motion must be granted.

Accordingly, defendant's cross motion is denied and plaintiff's motion seeking an order granting a default judgment and for the appointment of a referee must be granted. The proposed order for the appointment of a referee has been signed simultaneously with the execution of this order.

Dated: May 31, 2017

Hon. Howard H. Heckman Jr.

J.S.C.