Fink v JPMorgan Chase Bank, N.A.
2017 NY Slip Op 31733(U)
July 21, 2017
Supreme Court, Queens County
Docket Number: 705411/2015
Judge: Pam B. Jackman-Brown

NEW YORK SUPREME COURT - COUNTY OF QUEENS

IAS PART 19

Present: Hon. Pam Jackman Brown, JSC

----------X **Index No. 705411/2015**

STEWART R. FINK, DONNA FINK,

Motion Date: 04/27/17

Plaintiffs,

Cal. No. 83

-against-

Mot. Seq. No.: 001

JPMORGAN CHASE BANK, N.A. f/k/a JPMORGAN CHASE BANK SUCCESSOR BY MERGER TO BANK ONE, N.A. f/k/a THE FIRST NATIONAL BANK OF CHICAGO, AS TRUSTEE UNDER THAT CERTAIN POOLING AND SERVICING AGREEMENT DATED AS OF SEPTEMBER 1, 1995 FOR RTC MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 1995-2, OCWEN LOAN SERVICING, LLC, BANK OF AMERICA, N.A., JPMORGAN CHASE BANK AS TRUSTEE FOR RESIDENTIAL FUNDING CORPORATION,

Defendants.

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Recitation, as required by CPLR § 2219(a), of the following papers e-file numbered 13 to 23 and 27 to 46 read on this motion by Plaintiffs for an Order: (1) granting judgment on default upon the Plaintiffs' first cause of action against each defendant which has defaulted in answering the complaint; (2) granting summary judgment upon Plaintiffs' first cause of action against defendant Ocwen Loan Servicing, LLC pursuant to CPLR § 3212 and striking the answer of said defendant as it applies to Plaintiffs' first cause of action; (3) severing Plaintiffs' second and third cause of action upon granting judgment against all defendants; (4) excising from the caption the name of Stewart R. Fink; (5) amending the caption of the action to reflect the removal of Stewart R. Fink as a party plaintiff; (6) awarding costs and disbursements to Plaintiff; and (7) for such other and further relief as to this court may deem just and proper.; and Defendants' notice of cross-motion seeking an Order: (1) pursuant to CPLR § 3215(c), or alternatively, pursuant to CPLR §§ 2004, 3012(d) and 3211(a)(1) and (7) to dismiss Plaintiffs' complaint in its entirety; (2) for further and different relief as this Court deems just and proper.

	PAPERS E-FILE NUMBERED	
	Papers	Exhibits
Notice of Motion for Partial Summary Judgment - Exhibits, Affirmations and Affidavits Annexed	13-23	A-G
Notice of Cross-Motion - Exhibits, Affirmations and Affidavits Annexed	27-38	1-10
Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Summary Judgment Pursuant to CPLR § 3215 and in Support of Cross-Motion to Dismiss	39	
Affirmation in Reply and in Opposition to Cross-Motion - Exhibits, Affirmations and Affidavits Annexed	40-45	A-E
Reply Affirmation in Further Support of Motion to Dismiss	46	

Upon the papers listed above, this Notice of Motion is hereby decided in accordance with this Decision/Order.

Upon the foregoing papers, it is ordered that the motion by Plaintiffs for an Order: (1) pursuant to CPLR § 3215, granting judgment on default upon the Plaintiff's first cause of action against JPMorgan Chase Bank, N.A. f/k/a JPMorgan Chase Bank Successor by Merger to Bank One, N.A. f/k/a the First National Bank of Chicago, as Trustee under that Certain Pooling and Servicing Agreement Dated as of September 1, 1995 for RTC Mortgage Pass-through Certificates, Series 1995-2 (hereinafter "Chase PSA RTC"), JPMorgan Chase Bank as Trustee for Residential Funding Corporation (hereinafter "Chase RFC") (hereinafter collectively "Chase Defendants"), Bank of America, N.A. (hereinafter "BOA"), (hereinafter collectively "Non-Answering Defendants"); (2) granting summary judgment upon Plaintiffs' first cause of action against defendant Ocwen Loan Servicing (hereinafter "Ocwen"), LLC pursuant to CPLR § 3212 and striking the answer of said defendant as it applies to Plaintiffs' first cause of action; (3) severing Plaintiffs' second and third cause of action upon granting judgment against all defendants; (4) excising from the caption the name of Stewart R. Fink; (5) amending the caption of the action to reflect the removal of Stewart R. Fink as a party plaintiff; and (6) awarding costs and disbursements to Plaintiff is granted in part and denied in part.

Upon the foregoing papers, it is ordered that the cross-motion by Defendants for an Order: (1) pursuant to CPLR § 3215(c), or alternatively, pursuant to CPLR §§ 2004, 3012(d) and 3211(a)(1) and (7) to dismiss Plaintiffs' complaint in its entirety is denied.

This is an action to quiet title to certain real property located at 179-39 Tudor Road, Jamaica, New York 11432, Block: 7238, Lot: 34 (hereinafter "Subject Property").

On February 3, 1989, Plaintiffs executed and delivered the original note and mortgage in the sum of $200,000.00 to Anchor Savings Bank (hereinafter "Anchor"). On November 29, 1983, Anchor assigned the mortgage to America's First Mortgage Corporation (hereinafter "AFMC"). Also on November 29, 1993, Plaintiffs entered into an additional mortgage agreement with AFMC in the amount of $107,527.34 and entered into a consolidation and modification agreement whereby both mortgages were consolidated to form a single obligation in the principle amount of $306,000.00. Pursuant to the agreement, as a prerequisite to acceleration of the debt and the commencement of a foreclosure action, written notice of default must be sent by the holder of the note upon default. By assignment dated October 10, 1995, the consolidated agreement was assigned to the First National Bank of Chicago, as trustee (hereinafter "FNBC"). FNBC changed its name to Bank One, N.A. Thereafter, JP Morgan Chase Bank, successor to Bank One, N.A., formerly known as FNBC, as trustee, assigned the consolidation agreement to Chase RFC by assignment dated April 28, 2004.

Plaintiffs ultimately defaulted on the payments to be made pursuant to the consolidated agreement. On October 22, 2004, written notice of the default was forwarded to Plaintiffs by the Collections Department of BOA and on March 4, 2005, JP Morgan Chase Bank commenced an action to foreclose a mortgage encumbering the Subject Property. In a short form order, dated September 9, 2005, this Court dismissed the action since the bank "failed to establish that the election to accelerate the mortgage was proper." On January 22, 2007, BOA sent Plaintiffs a notice of default. On March 22, 2007, Non-Appearing Defendants commenced a second foreclosure action related to the Subject Property. In a short form order, dated April 2, 2008, this Court dismissed the action, with prejudice, since the banks "failed to establish that [BOA] was the note holder authorized to send the notice of default, which was a prerequisite to acceleration of the loan and commencement of a foreclosure action under the terms of the mortgage".

On May 26, 2015, Plaintiff commenced this action by filing a summons, complaint, and notice of pendency. On July 1, 2015, Plaintiffs and Defendant BOA executed a stipulation extending Defendant BOA's time to respond to the complaint until August 7, 2015. On July 9, 2015, Plaintiffs and Defendants Chase PSA RTC and Chase RFC entered into a stipulation extending Chase Defendants' time to respond to the

complaint until July 30, 2015. Thereafter, Plaintiffs agreed to extend Chase Defendants' time to respond to the complaint until the parties terminated ongoing settlement discussions. In a letter, dated October 29, 2016, Plaintiffs counsel requested production of certain information and advised counsel for Non Appearing Defendants to interpose an answer to the complaint within 10 business days if those requests could not be satisfied. On September 25, 2015, Defendant Ocwen interposed a verified answer to the complaint. All other defendants have failed to answer or appear within the time allowed.

Now, upon motion, Plaintiffs seek an Order, *inter alia*, pursuant to RPAPL Art. 15, granting leave of this Court to grant judgement on Plaintiff's first cause of action pursuant to RPAPL § 1501(4) on default upon the non-appearing Defendants. Non-Appearing Defendants oppose the application. Plaintiff's application is granted in part and denied in part.

"A plaintiff's right to recover upon a defendant's default in answering is governed by CPLR [§] 3215 ... which requires that the plaintiff state a viable cause of action" (*Venturella-Ferreti v Ferretti*, 74 AD3d 792, 793 [2d Dept 2010] quoting *Fappiano v City of New York*, 5AD3d 627, 628 [2d Dept 2004]). "Where a valid cause of action is not stated, the party moving for judgment is not entitled to the requested relief, even on default" (*Venturella-Ferreti*, 74 AD3d at 793 quoting *Cardo v Board of Mgrs. Jeffereson Vil. Condo 3*, 29 AD3d 930, 932 [2d Dept 2006]).

Plaintiff commenced this proceeding with the filing of a summons, complaint, and notice of pendency on May 26, 2015. Plaintiff submitted proof of service upon Non-Appearing Defendants. Pursuant to a stipulation, Defendant BOA's time to respond to the complaint was extended until August 7, 2015 and Defendants Chase PSA RTC's and Chase RFC's time to respond to the complaint was extended until July 30, 2015. The foregoing Defendants failed to either appear, answer, or make a motion raising any objection to the complaint prior to the agreed upon deadline. While it is undisputed that the parties were attempting to resolve the issues between them until, on or about, November 4, 2016 and that the delay prior to that date was largely attributable to those ongoing settlement negotiations, upon termination of settlement discussions the foregoing Defendants, without reasonable excuse, failed to timely respond to the complaint. However, contrary to Plaintiffs' contention, the proof submitted in support of their motion failed to set forth sufficient facts to establish a proper acceleration of the debt and thus failed to demonstrate a prima facie case under RPAPL § 1501(4). Since Plaintiff failed to sustain its burden under CPLR § 3215(f), Plaintiffs' application seeking a default judgment against the non-appearing or non-answering Defendants is denied. Further, Plaintiffs' application, pursuant to CPLR § 3212, granting summary judgment upon Plaintiffs' first cause of action against Ocwen is denied. Accordingly, Plaintiffs'

application severing Plaintiffs' second and third cause of action is denied.

Further, Plaintiffs' application for an Order excising Stewart R. Fink from the caption and amending the caption of the action to reflect the removal of Stewart R. Fink as a party plaintiff is granted.

The Court now turns to Defendants Chase PSA RTC's and Chase RFC's cross-motion to dismiss the complaint pursuant to CPLR § 3215(c), CPLR § 3211(a)(1) and (7) or, alternatively, pursuant to CPLR §§ 2004 and 3012(d).

Here, pursuant to the stipulations executed by the parties and the ongoing settlement negotiations, Defendants defaulted in November of 2016 by failing to serve a timely response to the complaint upon the termination of said discussions. Thereafter, on December 30, 2016, Plaintiffs filed the instant motion for a default judgment. Thus, Plaintiffs' application was made within one year after Defendants' default.'

Moreover, even if Defendants are deemed to have been in default upon the expiration of the time to respond to the complaint pursuant to the executed stipulations by the parties Plaintiffs had sufficient cause for the delay.

The language of CPLR § 3215(c) "requires both a reasonable excuse for the delay in timely moving for a default judgment, plus a demonstration that the cause of action is potentially meritorious. The determination of whether an excuse is reasonable in any given instance is committed to the sound discretion of the motion court" *(Giglio v NTIMP*, 86 AD3d 301, 308 [2d Dept 2011]).

"The doctrine of judicial estoppel precludes a party from framing his pleadings in a manner inconsistent with a position taken in a prior judicial proceeding. However, the doctrine will be applied only where a party to an action has secured a judgment in his or her favor by adopting a certain position and then has sought to assume a contrary position in another action simply because his or her interests have changed" (*Bono v Cucinella*, 298 AD2d 483, 484 [2d Dept 2002][internal quotation marks omitted]).

Here, the delay was largely attributable to the ongoing settlement negotiations between the parties. Additionally, although Plaintiffs failed to show a proper acceleration they demonstrated a potentially meritorious claim pursuant to RPAPL § 1501. Moreover, the doctrine of judicial estoppel is inapplicable and does not bar Plaintiffs from contending that the debt on the subject mortgage was properly accelerated as this Court, in prior foreclosure proceedings, directed dismissal on the basis that plaintiffs had failed to demonstrate a proper acceleration of the debt.

Accordingly, movant Defendants' application to dismiss the complaint, pursuant to CPLR § 3215(c) and CPLR 3211(a)(1) and (7) is denied.

A party's application under CPLR § 2004 to extend its time to answer "must be made prior to the expiration of the original time to answer" (*Keith v New York State Teachers' Retirement System*, 56 AD2d 671, 672 [3d Dept 1977]). After the time to answer expires, the party cannot avoid the consequence of being in default by moving for an extension of time to answer, and the proper procedure is to move to open the default (*Id*).

In this proceeding, Defendants time to answer had expired prior to Defendants' instant application. Accordingly, Defendants' application, pursuant to CPLR § 2004, is denied.

Pursuant to CPLR § 3012, "upon the application of a party, the court may extend the time to appear or plead ... upon such terms as may be just and upon a showing or reasonable excuse for delay or default."

Here, movant Defendants have failed to proffer a reasonable excuse for their delay in responding to the complaint. Defendants failed to respond to the complaint until filing the instant cross-motion three months after the parties terminated settlement negotiations. In light of the ongoing cloud of title to the Subject Property, Defendants delay caused prejudice to Plaintiffs. Accordingly, Defendants application, pursuant to CPLR § 3012, is denied.

Submit Order.

Dated: July 31, 2017
Jamaica, NY

HON. PAM JACKMAN BROWN, JSC

FILED
JUL 31 2017
COUNTY CLERK
QUEENS COUNTY