

Equity Inv. & Mtge. Co. v HSBC Bank, USA, N.A.

2017 NY Slip Op 33176(U)

June 20, 2017

Supreme Court, Orange County

Docket Number: Index No. EF000118-2017

Judge: Catherine M. Bartlett

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X
EQUITY INVESTMENT AND MORTGAGE
COMPANY,

Plaintiff,

-against-

HSBC BANK, USA, NATIONAL ASSOCIATION,
AS TRUSTEE etc.,

Defendant.

To commence the statutory time
period for appeals as of right
(CPLR 5513 [a]), you are
advised to serve a copy of this
order, with notice of entry,
upon all parties.

Index No. EF000118-2017
Motion Date: June 15, 2017

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The following papers numbered 1 to 4 were read on Defendant's motion for an order
vacating its default in answering and other relief:

Notice of Motion - Affirmation / Exhibits	1-2
Affirmation in Opposition / Exhibits	3
Reply Affirmation	4

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

This is an action pursuant to RPAPL §1501(4) to cancel and discharge a mortgage.

Defendant holds a mortgage on the premises in question. Plaintiff is successor in interest to the
mortgagor. Defendant's 2014 action to foreclose the mortgage was dismissed on December 1,
2015 for non-appearance at a scheduled conference. After Defendant's motion to vacate that

dismissal was denied on July 19, 2016, Plaintiff commenced this action on January 5, 2017, alleging that further efforts by Defendant to enforce the note and mortgage are barred by the statute of limitations. Defendant failed to timely answer the complaint, and now moves pursuant to CPLR §§ 3012(d), 2004 and 2005 to vacate its default in answering and extend its time to answer; for dismissal of Plaintiff's complaint pursuant to CPLR §3211(a)(7), and in the alternative for leave to file and serve its proposed answer and counterclaim.

CPLR §3012(d) provides:

Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.

“To extend the time to answer the complaint and to compel the plaintiff to accept an untimely answer as timely, a defendant must provide a reasonable excuse for the delay and demonstrate a potentially meritorious defense to the action (*see* CPLR 3012[d]....)” *Mannino Development, Inc. v. Linares*, 117 AD3d 995 (2d Dept. 2014). *See, HSBC Bank USA, NA v. Lafazan*, 115 AD3d 647, 648 (2d Dept. 2014); *Maspeth v. Federal S & L Ass'n v. McGown*, 77 AD3d 889, 890 (2d Dept. 2010); *Ryan v. Breezy Point Cooperative, Inc.*, 76 AD3d 523, 524 (2d Dept. 2010).

“Whether there is a reasonable excuse for a default is a discretionary, *sui generis* determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits.” *Gomez v. Trimarchi*, 137 AD3d 972, 973 (2d Dept. 2016); *Fried v. Jacob Holding, Inc.*, 110 AD3d 56, 60 (2d Dept. 2013). “In its discretion, the court may accept law office failure as an excuse (*see* CPLR 2005)”, provided that the claim of law office failure is

“supported by a ‘detailed and credible’ explanation of the default or defaults at issue.” *Blake v. United States*, 109 AD3d 504, 505 (2d Dept. 2013).

This action was commenced on January 5, 2017. Defense counsel was retained on February 14, 2017, and promptly secured from Plaintiff’s attorney an extension of time to answer to February 28, 2017. Defense counsel avers:

21. The months of late January and February were uncharacteristically busy for this firm due to an atypical number of court-ordered depositions, mandatory court appearances where adjournments were not granted, appellate court deadlines, various motions, and most significantly, the resignation of a senior associate, whose departure resulted in a temporary, but unusually high volume of work, for all of the attorneys at the firm.

22. As a result of the uncharacteristically high volume of work...I inadvertently included the stipulation and answer in this action on a list of papers that I had sent out in February.

23. The number of court-ordered depositions, appellate briefs, and mandatory conferences requiring my attendance subsided at the beginning of April, and the firm also retained a new litigation associate to assist with the overall workload of the firm, who started on April 3, 2017.

24. Upon a review of my files, I discovered the oversight at issue in this motion and immediately reached out to EIMC’s counsel on April 25, 2017 to obtain is consent to late-file an answer “the next week.” He denied the request on April 26, 2017....

While Defendant’s attorney “dropped the ball”, the delay in answering was brief and the circumstances show that it was not the product of willfulness on the part of Defendant or its attorney. Given the totality of the circumstances, the court finds Defendant’s claim of law office failure credible, and accepts it as a reasonable excuse for the default in answering.

Defendant has also shown that it has a potentially meritorious defense to Plaintiff’s action. RPAPL §1501(4) authorizes an action to secure the cancellation and discharge of record of a mortgage, and to adjudge the estate or interest of the plaintiff in the encumbered real

property to be free therefrom,

“[w]here the period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage, or to enforce a vendor’s lien, has expired.”

The six (6) year statute of limitations governing foreclosure actions runs from the acceleration of the mortgage debt. *See, Federal National Mortgage Ass’n v. Mebane*, 208 AD2d 892, 894 (2d Dept. 1994); *Clayton National v. Guldi*, 307 AD2d 982 (2d Dept. 2003). Defendant asserts that the statute of limitations has not expired because the mortgage debt here was accelerated upon commencement of the 2014 foreclosure action. Plaintiff has submitted no evidence to the contrary. While the issue cannot be resolved at this juncture (wherefore Defendant’s motion to dismiss must be denied), Defendant has sufficiently shown that it has a potentially meritorious defense to Plaintiff’s action.

Given the strong public policy in favor of resolving cases on the merits, the absence of demonstrable prejudice to Plaintiff, and the clear prejudice Defendant would sustain from the loss of its mortgage lien by default, Defendant’s motion to vacate its default in answering and extend the time to answer is granted.

It is therefore

ORDERED, that Defendant’s motion to vacate its default in answering and extend its time to answer is granted, and it is further

ORDERED, that Defendant’s motion to dismiss Plaintiff’s complaint is denied, and it is further

ORDERED, that Defendant’s proposed “Answer with Counterclaim”, annexed to Defendant’s motion papers as Exhibit “L”, is deemed filed and served as of the date of this

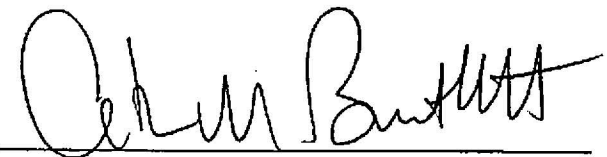
Order, and it is further

ORDERED, that Plaintiff shall reply to the Counterclaim within the time required by the Civil Practice Law and Rules, and it is further

ORDERED, that a preliminary conference is scheduled herein for August 8, 2017 at 9:00 a.m. in Courtroom No. 5 at the Orange County Courthouse, 285 Main Street, Goshen, New York.

The foregoing constitutes the decision and order of this Court.

Dated: June 20, 2017 ENTER
Goshen, New York



HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE