

**1027 Belmont Ave. LLC v Federal Natl. Mtge. Assn.**

2018 NY Slip Op 31571(U)

February 16, 2018

Supreme Court, Kings County

Docket Number: 515228/15

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, FRP 3 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 16<sup>th</sup> day of February, 2018.

P R E S E N T:

HON. LAWRENCE KNIPEL,  
Justice.  
-----X

1027 BELMONT AVENUE LLC,  
  
Plaintiff,

- against -

FEDERAL NATIONAL MORTGAGE ASSOCIATION,  
  
Defendant.  
-----X

**DECISION AND ORDER**

Index No. 515228/15

Mot. Seq. No. 2-3

The following e-filed papers read herein:

NYSCEF Docket No.:

Notice of Motion/Cross Motion, Affirmation (Affidavit),  
Memorandum of Law, and Exhibits Annexed \_\_\_\_\_  
Affirmations in Opposition and in Further Support,  
with Exhibits Annexed \_\_\_\_\_

25-35, 36; 38-60  
61; 62-64

In this action pursuant to RPAPL 1501 (4) to cancel and discharge a mortgage, defendant Federal National Mortgage Association (defendant) moves for an order, pursuant to CPLR 2201, staying all proceedings herein pending resolution of its assignor's appeal in the related foreclosure action (*Onewest Bank, FSB v McKay*, index No. 30557/09 [Sup Ct, Kings County] [the foreclosure action]). Plaintiff 1027 Belmont Avenue LLC (plaintiff) cross-moves for an order, pursuant to CPLR 3212, granting it summary judgment on its complaint and, pursuant to CPLR 3211 (a) (7) and (b), dismissing defendant's counterclaim and affirmative defenses.

In the foreclosure action, defendant's assignor, Onewest Bank, FSB (Onewest), sought to foreclose its mortgage on the real property owned by plaintiff's transferor, Michael McKay (McKay). Issue was never joined in the foreclosure action. On February 13, 2014, McKay transferred the underlying property to plaintiff. On February 20, 2014, the Court issued a self-executing order of dismissal of the foreclosure action, pursuant to CPLR 3216 (the initial order), unless Onewest either filed a note of issue or otherwise proceeded to judgment by a date certain – the date that Onewest subsequently failed to meet. On June 5, 2014, the foreclosure action was marked dismissed. On May 28, 2015, Onewest filed with the Kings County Clerk a voluntary discontinuance of the foreclosure action. Approximately two years later, Onewest moved, pursuant to CPLR 5015 (a), to vacate the initial order and to restore the foreclosure action to active calendar. McKay, by counsel, opposed Onewest's motion. Plaintiff never appeared in the foreclosure action, even though its counsel in this action also represented McKay in his opposition to Onewest's motion in the foreclosure action. By order, dated February 16, 2017 (the subsequent order), the Court denied the vacatur of the initial order, ruling that Onewest's intervening discontinuance of the foreclosure action had rendered the initial order moot.<sup>1</sup> Left unaddressed and unresolved by that ruling were the issues of (1) whether the initial order violated CPLR 3216 because no issue was joined; (2) whether McKay, as the former owner of the underlying property, lacked standing to oppose Onewest's motion; (3) whether Onewest's notice of discontinuance of the foreclosure action was ineffective, considering that it was filed *after*

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<sup>1</sup> By order, dated September 28, 2017, the Court denied Onewest leave to reargue the subsequent order.

the dismissal of the action; and (4) whether Onewest had a meritorious defense warranting restoration of the foreclosure action to active calendar. Onewest's appeal of the subsequent order to the Appellate Division, Second Department (No. 2017-05267), is pending.<sup>2</sup>

RPAPL 1501 (4) provides that “[w]here the period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage . . . has expired,” any person with an interest in the property may maintain an action “to secure the cancellation and discharge of record of such encumbrance, and to adjudge the . . . interest of the plaintiff in such real property to be free therefrom.” Here, plaintiff alleges in its complaint that Onewest accelerated the underlying mortgage debt in December 2009 when it commenced the foreclosure action, that Onewest discontinued the foreclosure action in May 2015, and that Onewest or its successor failed to commence a new foreclosure action within six years after the acceleration of the mortgage debt. However, in support of its motion, defendant submitted evidence demonstrating that its assignor appealed from the subsequent order which denied its motion to vacate the initial order and to restore the foreclosure action to active calendar. This evidence demonstrates that, contrary to the allegations set forth in the complaint, the foreclosure action is still pending and unresolved.

CPLR 2201 provides, in relevant part, that “the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just.” “It is well settled that a court has broad discretion to grant a stay in order to avoid the risk of

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<sup>2</sup> By order, dated December 8, 2017, the Second Department permitted McKay to serve and file his respondent's brief by no later than January 5, 2018 (*see Onewest Bank, FSB v McKay*, 2017 NY Slip Op 95010[U]).

inconsistent adjudications, application of proof and potential waste of judicial resources” (*Zonghetti v Jeromack*, 150 AD2d 561, 562 [2d Dept 1989]). Under the circumstances of this case, and in light of the goals of avoiding inconsistent adjudications and preserving judicial resources, the Court, in its discretion, grants defendant’s motion, and denies plaintiff’s cross motion with leave to renew (*see HSBC Bank, USA v Despot*, 130 AD3d 783, 784 [2d Dept 2015]; *see also Delos Megacore Ltd. v Omega Invs. Ltd.*, 152 AD3d 417 [1st Dept 2017]).

Based on the foregoing and after oral argument, it is

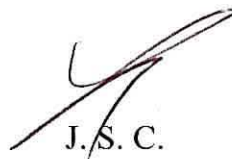
ORDERED that defendant’s motion is *granted*, and this action is *stayed* pending final determination of Onewest’s appeal in the foreclosure action; and it is further

ORDERED that plaintiff’s cross motion for an order, pursuant to CPLR 3212, granting it summary judgment on its complaint and, pursuant to CPLR 3211 (a) (7) and (b), dismissing defendant’s counterclaim and affirmative defenses is *denied* with leave to renew; and it is further

ORDERED that defense counsel shall electronically serve plaintiff’s counsel with a copy of this decision and order with notice of entry and shall electronically file an affidavit of said service with the Kings County Clerk.

This constitutes the decision and order of the Court.

ENTER FORTHWITH,



Justice Lawrence Knipol