

Wells Fargo Bank v Aucapina
2018 NY Slip Op 32268(U)
September 17, 2018
Supreme Court, Suffolk County
Docket Number: 49395/09
Judge: Thomas F. Whelan
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COPY

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

P R E S E N T :

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 4/13/17
ADJ. DATE: 8/31/18
Mot. Seq. # 002 - MG
Mot. Seq. # 003 - XMD
Conference 9/26/18 cancelled
CDISP Y__ N x

-----X
WELLS FARGO BANK, :
 :
 :
 Plaintiff, :
 :
 :
 -against- :
 :
 :
 BLANCA AUCAPINA a/k/a BLANCA CALLE, :
 JAIME P. AUCAPINA, LUIS AUCAPINA, :
 STRUCTURED ASSET SECURITIES :
 CORPORATION MORTGAGE PASS :
 THROUGH CERTIFICATES, SERIES 2006-ARSI, :
 "JOHN DOE" said name being fictitious, it being :
 the intention of plaintiff to designate any and all :
 occupants of the premisses being foreclosed herein :
 and any corporations or entities, if any, having or :
 claiming an interest or lien upon the mortgaged :
 premises, :
 :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 11 read on this motion to appoint as referee to compute among other things and cross motion to dismiss; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers: 5-7; Opposing papers: 8-9; Reply papers 11; Other 10 (affirmation); (~~and after hearing counsel in support and opposed to the motion~~) it is,

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ORDERED that the portion of the motion (#002) by the plaintiff for, among other things, default judgments and the appointment of a referee to compute, is granted; and it is further

ORDERED that the portion of the motion (#002) by the plaintiff seeking an order to consolidate this action with another action commenced by the plaintiff and arising out of the same circumstances entitled WELLS FARGO BANK v LUIS AUCAPINA bearing Suffolk County Index No. 35482/2012 is considered under CPLR 602 and is granted. Accordingly, related action entitled *Wells Fargo Bank, NA v Luis Aucapina*, bearing index number 35482/2012 is hereby consolidated and merged into the above action and shall bear *Index No. 49395/09*. The caption is hereby amended to reflect this consolidation as follows:

WELLS FARGO BANK,

Plaintiff,

-against-

BLANCA AUCAPINA a/k/a BLANCA CALLE,
JAIME P. AUCAPINA, LUIS AUCAPINA,
STRUCTURED ASSET SECURITIES
CORPORATION MORTGAGE PASS
THROUGH CERTIFICATES, SERIES 2006-ARSI,

Defendants.

and it is further

ORDERED that all future proceedings shall be captioned accordingly and counsel are advised to duly note the change in the caption and the index number now assigned to this consolidated action, namely 49395/09; and it is further

ORDERED that upon receipt of this order, the Clerk of the Court shall remove all papers filed in the related action bearing index number 35482/12 and file same in the file maintained under index number 49395/09; and it is further

ORDERED that the Calendar Clerk shall, upon receipt of this order, mark the related action bearing index number 35482/12, *disposed by consolidation* in the court's electronic filing system and shall note the amendment of the caption of the action bearing index number 49395/09 to reflect the consolidation directed herein. The Calendar Clerk is further directed to *cancel the compliance conference now scheduled in action bearing Index No. 35482/12 for September 26, 2018*; and it is further

ORDERED that the cross motion (#003) by the defendants, Blanca Aucapina, Jaime P. Aucapina and Luis Aucapina, to dismiss the action, is denied in its entirety; and it is further

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ORDERED that plaintiff is directed to file a notice of entry within five days of receipt of this Order pursuant to 22 NYCRR § 202.5-b(h)(2).

This is an action for foreclosure on residential property situate in East Hampton, NY. In essence, on January 16, 2008, defendant, Blanca Aucapina, borrowed \$557,000.00 from plaintiff's predecessor in interest and executed a promissory note and, together with Jaime Aucapina and Luis Aucapina, a mortgage. Since March 1, 2009, the defendant has failed to pay the monthly installments due and owing. This action (Index No. 49395/09) was commenced by filing on December 18, 2009 ("Action #1"). According to the record before the Court, moving defendant, Blanca Aucapina, was served pursuant to CPLR 308(1) on February 17, 2010, and Jaime Aucapina was served pursuant to CPLR 308(2) on December 26, 2009. No further activity took place until plaintiff substituted its counsel and incoming counsel's review of the file revealed that defendant, Luis Aucapina, had not been served. Plaintiff therefore commenced a separate action on November 21, 2012, under Suffolk County Index Number 35482/2012 ("Action #2") against Luis Aucapina. The complaint noted that plaintiff would subsequently move to consolidate Action #2 with the instant Action #1. Luis Aucapina was served four days later on November 24, 2012 pursuant to CPLR 308(2). Plaintiff later discovered that the affidavit of service upon Luis Aucapina contained an incorrect index number. Plaintiff therefore served Mr. Aucapina again, via CPLR 308(4), on November 27, 2013.

The record reflects that the parties participated in five (5) CPLR 3408 settlement conferences between October 25, 2013 and September 4, 2014 after which, the action was marked "not settled" by a presiding quasi judicial employee assigned to the specialized mortgage foreclosure conference part. On October 24, 2014, a Notice of Appearance was filed on behalf of the defendants by The Law Office of Elliot S. Schlissel, Esq. On March 29, 2016, defendant Blanca Aucapina moved (#001) for an order granting an extension of time to answer the complaint. The plaintiff opposed the motion and sought to consolidate the instant Action #1 with Action #2. The motion was submitted for decision and, on August 17, 2016, the Court issued an Order denying defendant's application (#001), finding that defendant failed to establish a reasonable excuse for her default. The Court noted that the plaintiff's application was improper as it was not made via cross motion. A Consent to Change Attorney was subsequently executed on November 27, 2016 replacing defendants' counsel with current counsel.

On March 13, 2017, plaintiff submitted the instant motion (#002) for default judgment against all defendants, the appointment of a referee to compute, and consolidation of Actions #1 and #2. The defendants opposed the motion and cross moved (#003) for dismissal. Thereafter, the matters languished within the Court's system until Action #2 was transferred to this Part pursuant to Administrative Order 32-18 dated April 19, 2018. Action #1 was thereafter transferred to this Part pursuant to Transfer Order dated August 16, 2018 (Pastoressa, J.S.C.). Both motions were submitted for decision on August 31, 2018.

The Court will first consider the cross motion as determination thereof may render determination of the plaintiff's motion, academic.

The defendants contend that because the plaintiff did not move for the relief sought herein within one year of the defendants' defaults in Actions #1 and #2, the complaint should be dismissed

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pursuant to CPLR 3215©. Additionally, the defendant Luis Aucapina alleges that service upon him was not in compliance with CPLR 306-b, and thus surmises that both Actions #1 and #2 must be dismissed. For the reasons that follow, the Court denies the cross motion.

CPLR 3215(c) provides that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned . . . unless sufficient cause is shown why the complaint should not be dismissed" (CPLR 3215[c]; *HSBC Bank USA, N.A. v Hasis*, 154 AD3d 832, 833, 62 NYS3d 467 [2d Dept 2017], citing *Wells Fargo Bank, NA v Bonanno*, 146 AD3d 844, 45 NYS3d 173 [2d Dept 2017]). To avoid dismissal, the plaintiff need not actually obtain nor specifically seek the default judgment within one year (see *HSBC Bank USA, NA v Hasis*, 154 AD3d at 833, *supra*; see also *Wells Fargo Bank, N.A. v Daskal*, 142 AD3d 1071, 1072, 37 NYS3d 353 [2d Dept 2016]).

A defendant may waive the right to seek relief under CPLR 3215(c) by serving an answer or taking "any other steps which may be viewed as a formal or informal appearance" (*HSBC Bank USA, Natl. Assn. v Grella*, 145 AD3d 669, 44 NYS3d 56 [2d Dept 2016] quoting *Meyers v Slusky*, 139 AD2d 709, 527 NYS3d 464 [2d Dept 1988]; see *DeLourdes Torres v Jones*, 26 NY3d 742, 772, 27 NYS3d 468 [2016]; *HSBC Bank USA v Lugo*, 127 AD3d 502, 503, 9 NYS3d 6 [2d Dept 2015]; *Hodson v Vinnie's Farm Mkt.*, 103 AD3d 549, 959 NYS2d 440 [2d Dept 2013]; *Gilmore v Gilmore*, 286 AD2d 416, 730 NYS2d 239 [2d Dept 2001]). The Second Department recently reaffirmed the rule that a defendant may waive the right to seek relief under CPLR 3215(c) by his or her conduct (see *Bank of America, N.A. v Rice*, 155 AD3d 593, 63 NYS3d 486 [2d Dept 2017]).

Here, the record reflects that the defendants filed a Notice of Appearance through counsel on October 24, 2014. A "defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer" (CPLR 320[a]). Additionally, pursuant to CPLR 320(b), "[a]n appearance of the defendant is equivalent to personal service of the summons upon him, unless an objection to jurisdiction under CPLR 3211(a)(8) is asserted by motion or in the answer as provided in [CPLR 3211]" (CPLR 320[b]). The defendants have thus waived any claims to relief under CPLR 3215(c). The Court, therefore, denies the defendants' application to dismiss the complaint as abandoned pursuant to CPLR 3215(c).

The Court notes with respect to Mr. Aucapina's appearance in Action #1, that "[t]he absence of a necessary party in a mortgage foreclosure action simply leaves that party's rights unaffected by the judgment of foreclosure and sale" (see *Central Mtge. Co. v Davis*, 53 NYS3d 325, 328, 149 AD3d 898, 900 [2d Dept 2017] citing *Marine Midland Bank v Freedom Rd. Realty Assoc.*, 203 AD2d 538, 539, 611 NYS2d 34 [2d Dept 1994]; see also *Glass v Estate of Gold*, 48 AD3d 746, 747, 853 NYS2d 159 [2d Dept 2008]; *Scharaga v Schwartzberg*, 149 AD2d 578, 579–580, 540 NYS2d 451 [2d Dept 1989]), and is not a basis for dismissal. Notably, however, he appeared in the action with the filing of the Notice of Appearance on October 24, 2014 thus precluding his request for dismissal pursuant to CPLR 306-b.

The Court notes that Actions #1 and #2 remained separate and distinct until plaintiff's application was considered and until further Order of this Court. Thus, any challenges to Action #2 prior to such Order should have been raised within Action #2 and under that Index Number. To the extent such issues were raised in the defendants' cross motion, the Court finds the challenges to be

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improper, and will not consider same.

The Court grants plaintiff's request to consolidate Actions #1 and #2 pursuant to CPLR 602. "A motion to consolidate two or more actions rests within the sound discretion of the trial court" (*American Home Mtge. Servicing, Inc. v Sharrocks*, 92 AD3d 620, 622, 938NYS2d 202 [2d Dept 2012]; citing CPLR 602; see *Matter of Long Is. Ind. Group v Board of Assessors*, 72 AD3d 1090, 1091, 900 NYS2d 128 [2d Dept 2010]; *North Side Sav. Bank v Nyack Waterfront Assoc.*, 203 AD2d 439, 610 NYS2d 862 [2d Dept 1994]). Consolidation is warranted where common questions of law or fact exist, "unless the opposing party demonstrates prejudice to a substantial right" (*American Home Mtge. Servicing, Inc. v Sharrocks*, 92 AD3d at 622, *supra*, citing *Alizio v Perpignano*, 78 AD3d 1087, 1088, 912 NYS2d 132 [2d Dept 2010]; see *Pierre-Louis v DeLonghi Am., Inc.*, 66 AD3d 855, 856, 887 NYS2d 632 [2d Dept 2009]; *Glussi v Fortune Brands*, 276 AD2d 586, 714 NYS2d 516 [2d Dept 2010]).

The actions here "arise from the same transaction, concern the same parties, and involve common questions of law and fact" (*Scotto v Kodsi*, 102 AD3d 947, 948, 958 NYS2d 740 [2d Dept 2013] citing *Viafax Corp. v Citicorp Leasing, Inc.*, 54 AD3d 846, 850, 864 NYS2d 479 [2d Dept 2008]). Notably, the defendants fail to demonstrate that consolidation would result in prejudice to a substantial right (see *Scotto v Kodsi*, 102 AD3d at 948, *supra* [citations omitted]). This branch of plaintiff's motion for consolidation is therefore granted.

In light of the above, the Court finds that the plaintiff has sufficiently demonstrated its entitlement to the relief requested on this motion (see CPLR 3212, 3215, 1003 and RPAPL §1321; *Wells Fargo Bank, N.A. v Ali*, 122 AD3d 726, 995 NYS2d 735 [2d Dept 2014]; *Central Mtge. Co. v McClelland*, 119 AD3d 885, 991 NYS2d 87 [2d Dept 2014]; *Peak Fin. Partners, Inc. v Brook*, 119 AD3d 916, 987 NYS2d 916 [2d Dept 2014]; *Plaza Equities, LLC v Lamberti*, 118 AD3d 688, 986 NYS2d 843 [2d Dept 2014]; *Flagstar Bank v Bellafiore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]).

Accordingly, the plaintiff's motion (#002) is granted and defendants' cross motion (#003) is denied in its entirety. The Court simultaneously signs the proposed Order, as modified.

DATED: 9/17/18


 THOMAS F. WHELAN, J.S.C.