Deutsche Bank Trust Co. Ams. v Smith
2018 NY Slip Op 32408(U)
September 26, 2018
Supreme Court, Suffolk County
Docket Number: 20774/08
Judge: Thomas F. Whelan

SHORT FORM ORDER

INDEX No. 20774/08

COPY

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

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 4/2/18
SUBMIT DATE: 8/24/18
Mot. # 001 - MD
CDISP Y____ N x

DEUTSCHE BANK TRUST COMPANY AMERICAS, f/k/a BANKER'S TRUST COMPANY, as Trustee and Custodian,

Plaintiff,

-against-

DAVID J. SMITH, JR., SOUTHSIDE HOSPITAL, ASTORIA FEDERAL SAVINGS & LOAN ASSN., successor to the Long Island Savings Bank, FSB, RYAN & HENDERSON, PC, RAPID OIL SERVICE, INC., CHASE MANHATTAN BANK USA, NA, BETHPAGE FEDERAL CREDIT UNION, MRC RECEIVABLES CORP., WARDEL McCULLOUGH SFERRAZZA & KEENAN PLLC, PEOPLE OF THE STATE OF NEW YORK, NEW YORK STATE COMMISSIONER OF TAXATION & FINANCE TAX COMPLIANCE - CHILD SUPPORT DIVISION, CLERK OF THE SUFFOLK COUNTY DISTRICT COURT, COUNTY OF SUFFOLK, COMMISSIONER OF TAXATION AND FINANCE, STATE OF NEW YORK, TOWN SUPERVISION TOWN OF BABYLON, UNITED STATES OF AMERICA - INTERNAL REVENUE SERVICE, "JOHN DOES" and "JANE DOES" said names being fictitious, parties intended being possible tenants or occupants of premises and corporations, other entities or persons who have, claim or may claim, a lien against or other interest in the premises,

Defendants.

LEOPOLD & ASSOC., PLLC
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Armonk, NY 10504

RONALD D. WEISS, ESQ.
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Upon the following papers numbered 1 to 7 read on this motion to dismiss ; Notice of Motion/Order to Show Cause and supporting papers 1 - 3 ; Notice of Cross Motion and supporting papers: ; Opposing papers: 4-5 ; Reply papers 6-7 ; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (#001) by the defendant, David J. Smith, Jr., to dismiss the action, is denied in its entirety; and it is further

ORDERED that plaintiff is directed to file a motion for the appointment of a referee to compute and for default judgment no later than 60 days of the entry date of this Order; and it is further

ORDERED that if and when plaintiff prevails in the instant foreclosure action, the Court tolls the accumulation and collection of interest, costs, and attorneys' fees that accrued from November 13, 2012 through the forthcoming date on which plaintiff files it's motion for the appointment of a referee to compute and default judgment; and it is further

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 located in Westhampton, NY. In essence, on July 3, 2007, defendant David Smith, Jr. borrowed $644,000.00 from the plaintiff's predecessor-in-interest and executed a promissory note and mortgage. Seven months later, on January 1, 2008, the defendant failed to pay the monthly installment due and owing, and any payments due thereafter. The instant action was commenced by filing on May 25, 2008 (Action #1). Shortly thereafter, on June 3, 2008, defendant David Smith, Jr. was served with the complaint pursuant to CPLR 308(2). Mr. Smith, Jr. did not interpose an answer or pre-answer motion within the time frame provided for in CPLR 320(a) and 3012(a).

The plaintiff filed its Request for Judicial Intervention on November 12, 2009. A foreclosure settlement conference was held on January 13, 2010, at which the defendant failed to appear. Thereafter, on April 21, 2010, the plaintiff commenced a separate action under Suffolk County Index Number 12284/2010 (Action #2) against judgment creditors that were not named in Action #1. The complaint noted that plaintiff would subsequently move to consolidate Action #2 with the instant Action #1. Plaintiff proceeded with Action #2, and filed a motion for service by publication upon a defendant who could not be located. That motion was granted on August 18, 2010 (Spinner, J.S.C.), and the Order resettled by Order dated December 10, 2010 (Spinner, J.S.C.). The plaintiff thereafter received notice from the Court of a foreclosure settlement conference scheduled for Action #2 on November 13, 2012. The plaintiff attended, but no defendants appeared and the matter was released from further conferencing.

On September 19, 2013, a Consent to Change Attorney was served by plaintiff replacing counsel Rosicki, Rosicki & Assoc., PC with Leopold & Associates. The form used, however, incorporated the caption for Action #1 and the index number for Action #2. A review of the Court's records reveals that the Court's computer was not updated to reflect new counsel, presumably as a result of the conflicting caption and index number information on the Consent form.

The defendant now moves (#001) within Action #1 for dismissal on several grounds. First,

defendant alleges that the plaintiff has failed to seek a default judgment within one year of the defendant's default pursuant to CPLR 3215(c). In addition, the defendant challenges plaintiff's compliance with RPAPL§ 1304, standing, plaintiff's untimely filing of the Request for Judicial Intervention, failure to file a Notice of Pendency. The motion was originally returnable April 2, 2018 and, after several conferences with the parties before the Court, the motion was ultimately submitted for decision on August 24, 2018.

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]). As long as "proceedings" are being taken that manifest "an intent not to abandon the case but to seek a judgment, the case should not be subject to dismissal" (***Wells Fargo Bank, NA v Daskal***, 142 AD3d 1071, 1073, 37 NYS3d 353 [2d Dept 2016], *citing* ***Brown v Rosedale Nurseries***, 259 AD2d 256, 257, 686 NYS2d 22 [1st Dept 1999]; ***US Bank NA v Dorestant***, 131 AD3d 467, 469, 15 NYS3d 142 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Combs***, 128 AD3d 813,813, 10 NYS3d 257 [2d Dept 2015]; ***Klein v St. Cyprian Props., Inc.***, 100 AD3d 711, 712, 954 NYS2d 170 [2012]; ***Pisciotta v Lifestyle Designs, Inc.***, 62 AD3d 850, 852, 879 NYS2d 179 [2d Dept 2009]; ***Icon Equip. Distribs. v Gordon Envtl. & Mech. Corp.***, 272 AD2d 579, 579 709 NYS2d 426 [2d Dept 2000]).

Prior to the economic crisis of 2008 and the legislative response thereto, the Second Department took a less constrictive position in determining such motions. In fact, in ***Myers v Slutsky***, 139 AD2d 709, 527 NYS2d 464 (2d Dept 1988), the Court held:

> While it is true that the section contains the word "shall", it should be noted that the use of the word "shall" is not a final and conclusive test of the intent of the Legislature. The fact that a statute is framed in mandatory words such as "shall" or "must" is of slight, if any, importance on the question (McKinney's Cons Laws of NY, Book 1, Statutes §177, at 344).

Further, even in a case where the excuse offered was rejected, the court, in ***DiMartino v New York State Dept. of Taxation and Finance***, 150 AD2d 633, 541 NYS2d 844 (2d Dept 1989), would not dismiss the action and held:

> While we agree that the plaintiff's excuse for the delay is not persuasive, the drastic remedy of dismissal of the complaint is inappropriate under the circumstances presented here (citation omitted).

Numerous cases often rejected such applications (*see* ***Iorizzo v Mattikow***, 25 AD3d 762, 807 NYS2d 663 [2d Dept 2006] [nine year delay]; ***Countrywide Home Loans, Inc. v Brown***, 19 AD3d 638, 797 NYS2d 295 [2d Dept 2005]; ***State Farm Mut. Auto. Ins. Co. v Rodriguez***, 12 AD3d 662, 784 NYS2d 875 [2d Dept 2004]; ***North Fork Bank v Cantico Intl., Ltd.***, 284 AD2d 442, 726 NYS2d 570 [2d Dept 2001]; ***Grajales v Freihofer Baking Co.***, 283 AD2d 608, 725 NYS2d 553 [2d Dept 2001];

Icon Equip. Dist. Inc. v Gordon Envtl. & Mech. Corp., 272 AD2d 579, 709 NYS2d 426 [2d Dept 2000]; ***Magliore v Barber***, 283 AD2d 614, 725 NYS2d 870 [2d Dept 2001]; ***Grenport Bank v Ginyard***, 253 AD2d 451, 675 NYS2d 314 [2d Dept 1998]; ***First Nationwide Bank v Pretel***, 240 AD2d 629, 659 NYS2d 291 [2d Dept 1997]; ***Needleman v Burger King, Inc.***, 237 AD2d 339, 655 NYS2d 68 [2d Dept 1997]; ***Umlic-One, Inc. v Cahill Trust***, 236 AD2d 390, 654 NYS2d 574 [2d Dept 1997]; ***Flora Co. v Ingilis***, 233 AD2d 418, 650 NYS2d 24 [2d Dept 1996] [delay was de minimis]; ***Bank of New York v Gray***, 228 AD2d 399, 643 NYS2d 422 [2d Dept 1996]; ***Goldberg v Progressive Credit Union***, 213 AD2d 595, 624 NYS2d 927 [2d Dept 1995] [default motion made "shortly after the required time limitation of CPLR 3215(c)"]; ***Ingenito v Grumman Corp.***, 192 AD2d 509, 596 NYS2d 83 [2d Dept 1993]).

The plaintiff's failure to move for judgment within one year after a default may be excused in those cases wherein "sufficient cause is shown why the complaint should not be dismissed" (CPLR 3215[c]). Sufficient cause is measured by the proffer of a reasonable excuse for the delay in moving and a showing of the meritorious nature of the complaint (*see* ***Gigilo v NTIMP, Inc.***, 86 AD3d 301, 926 NYS2d 546 [2d Dept 2011]). The determination of whether there is a reasonable excuse is a matter left to the sound discretion of the Supreme Court (*see* ***Bank of New York Mellon v Adago***, 155 AD3d 594, 63 NYS3d 495 [2d Dept 2017]; ***Wells Fargo Bank, N.A. v Kahana***, 153 AD3d 1300, 59 NYS3d 705 [2d Dept 2017]; ***Park Lane N. Owners , Inc. v Gengo***, 151 AD3d 874, 58 NYS3d 81 [2d Dept 2017]).

In the instant action, the Court finds that the plaintiff has demonstrated a reasonable excuse for not moving for judgment within one year after the defendant's default in answering. First, it was determined after the settlement conference held on January 13, 2010 that a second action would be required to name additionally required defendants, and that the second action would be subject to consolidation with the instant action. Once Action #2 was commenced on April 21, 2010, service by publication was required to ensure that jurisdiction would be obtained over all necessary parties. When service was complete, the Court scheduled a foreclosure settlement conference for November 13, 2012, but the defendant failed to appear on such date. The plaintiff also indicates that it had to comply with new OCA affirmation requirements and that the defendant filed for bankruptcy in 2013, staying prosecution of the matter for several months. The Court finds that all of these factors, when considered together with the meritorious nature of the complaint, constitute sufficient cause as to why the complaint should not be dismissed.

Under the circumstances of this case, the Court exercises its discretion in finding that the plaintiff proffered a reasonable excuse for plaintiff's delay (*see* ***Bank of New York Mellon v Adago***, 155 AD3d 594, *supra*; ***HSBC Bank USA, N.A. v Hasis***, 154 AD3d 832, *supra* ["a substantial delay"]; ***JPMorgan Chase Bank, Natl. Assn. v Kaushal***, 156 AD3d 772, 65 NYS3d 734 [2d Dept 2017] [delay in court-ordered submission]; ***Wells Fargo Bank, N.A. v Kahana***, 153 AD3d 1300, *supra* [six year delay]; ***Bank of New York Mellon v Izmirligil***, 144 AD3d 1067, 44 NYS3d 44 [2d Dept 2016]; ***Golden Eagle Capital Corp. v Paramount Mgt. Corp***., 143 AD3d 670, 38 NYS3d 438 [2d Dept 2016]; ***Maspeth Fed. Sav. and Loan Assn. v Brooklyn Heritage, LLC***, 138 AD3d 793, 28 NYS3d 325 [2d Dept 2016]; ***BAC Home Loans Serv., LP v Reardon***, 132 AD3d 790, 18 NYS3d 664 [2d Dept 2015]; ***Citimortgage, Inc. v Kowalski***, 130 AD3d 558, 13 NYS3d 468 [2d Dept 2015]).

The defendant has not demonstrated any prejudice by the plaintiff's delay in moving for the default, which ultimately "tips the balance in favor of the plaintiff" (*see* ***U.S. Bank Nat. Assn v Bibi***, 2015 NY Slip Op. 31054[U], 2015 WL 3915906 [Sup Ct, New York County 2015] *citing* ***Countrywide Home Loan Servicing, L.P. v Crespo***, 46 Misc3d 1226[A], 13 NYS3d 849 [Table] [Sup Ct., Suffolk County, Whelan, J., 2015]). Notwithstanding, however, the recovery of interest is within the court's

discretion in an action of an equitable nature. "The exercise of that discretion will be governed by the particular facts in each case, including any wrongful conduct by either party" (***BAC Home Loans Servicing, L.P. v Jackson***, 159 AD3d 861, 74 NYS3d 59 [2d Dept 2018], citing ***Prompt Mtge. Providers of N. Am., LLC v Zarour***, 155 AD3d 912, 915, 64 NYS3d 106 [internal quotation marks omitted] [2d Dept 2017]; *see* CPLR 5001[a]; ***LaSalle Bank, N.A. v Dono***, 135 AD3d 827, 829, 24 NYS3d 144 [2d Dept 2016]; ***US Bank N.A. v Williams***, 121 AD3d 1098, 1101–1102, 995 NYS2d 172 [2d Dept 2014]; ***Dayan v York***, 51 AD3d 964, 965, 859 NYS2d 673 [2d Dept 2008]; ***Preferred Group of Manhattan, Inc. v Fabius Maximus, Inc.***, 51 AD3d 889, 890, 859 NYS2d 236 [2d Dept 2008]).

Upon review of the unusual circumstances of this case, the Court finds that the defendant was prejudiced by the delay due to the continued accrual of interest while the action was not progressing. Thus, while no extraordinary circumstances exist to warrant dismissal (*see* ***Onewest Bank, FSB v Michel***, 143 AD3d 869, 39 NYS3d 485 [2d Dept 2016], *citing* ***Aurora Loan Servs., LLC v Gross***, 139 AD3d 772, 32 NYS3d 248 [2d Dept 2016]; ***Citimortgage, Inc. v Espinal***, 136 AD3d 857, 23 NYS3d 251 [2d Dept 2016]; ***HSBC Bank USA, N.A. v Alexander***, 124 AD3d 838, 4 NYS3d 46 [2d Dept 2015]; ***Maidenbaum v Ellis Hosp.***, 47 AD2d 683, 364 NYS2d 233 [3d Dept 1975]), the Court, upon its own motion, determines that the interest, costs and attorneys fees on the loan are hereby tolled from November 13, 2012 (that is, the date of the last foreclosure settlement conference scheduled) through the date forthwith that the plaintiff files its notice of motion for an order appointing a referee to compute and for default judgment, which shall be filed within 60 days of the entry date of this Order (*see* ***Greenpoint Mtge. Corp. v Lamberti***, 155 AD3d 1004, 63 NYS3d 866 [2d Dept 2017] [citations omitted]).

To the extent the defendant argues that plaintiff will not suffer any prejudice from dismissal and that the plaintiff's prior correspondence to the Court conceded to such relief, same is of no moment, as plaintiff's current opposition to the motion indicates its intent to proceed with the action.

Finally, the Court notes that the defendant remains in default in this action, as he failed to answer or otherwise respond to the complaint and, by doing so, has waived all potential defenses (*see* ***Washington Mutual Bank, FA v Milford-Jean-Gille***, 153 AD3d 754, 59 NYS3d 781 [2d Dept 2017]; ***MidFirst Bank v Ajala***, 146 AD3d 875, 44 NYS3d 771 [2d Dept 2017]; ***Emigrant Bank v Marando***, 143 AD3d 856, 39 NYS3d 83 [2d Dept 2016]; ***HSBC Bank USA, Natl. Assn. v Hasis***, 154 AD3d 832, 62 NYS3d 467 [2d Dept 2017]; ***Bank of America, N.A. v Agarwal***, 150 AD3d 651, 57 NYS3d 153 [2d Dept 2017]). Thus, the additional challenges raised regarding RPAPL § 1304, plaintiff's standing, the filing of the Request for Judicial Intervention and notice of pendency filing, are not properly before the Court.

In light of the above, the defendant's motion (#001) is denied.

DATED: 9/26/18

THOMAS F. WHELAN, J.S.C.