Citimortgage, Inc. v Lamonaca
2018 NY Slip Op 33760(U)
September 28, 2018
Supreme Court, Queens County
Docket Number: Index No. 700363/2014
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS Part 14
Justice

CITIMORTGAGE, INC.,
Plaintiff(s),

- against -

MARY LAMONACA, et al.,
Defendant(s).

Index No. 700363 2014

Motion Date May 29, 2018

Motion Cal. No. 2

Motion Seq. No. 1

The following papers read on this motion by plaintiff for an order appointing a referee to compute; and on this cross motion by defendant Mary LaMonaca (defendant) for an order granting her leave to file a late answer and dismissing plaintiff's complaint.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits	EF24-39
Notice of Cross Motion - Affidavit - Exhibits	1-5
Answering Affirmation - Exhibits	EF43-44
Reply	6-9

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff commenced this action to foreclose a mortgage on January 16, 2014. Defendant was served, pursuant to CPLR § 308 (2), on January 25, 2014, and the affidavit of service was e-filed on February 4, 2014. She failed to timely answer or appear. Also on February 4, 2014, plaintiff filed a Request for Judicial Intervention to schedule a Residential Mortgage Foreclosure Settlement Conference. The matter first appeared in the Foreclosure Conference Part on April 4, 2014, and 20 times thereafter over an approximate three-and-

one-half year period, until the matter was released on August 22, 2017. By Residential Foreclosure Conference Order of that date (Evans, CA-R), it was indicated that "the parties are on the verge of advancing this matter toward resolution." Thus, the parties agreed to a consensual stay until November 28, 2017 in order to permit defendant to serve newly formulated package information. Thereafter, on December 27, 2017, plaintiff e-filed the instant motion, and defendant e-filed her cross motion on April 20, 2018.[1]

In support of plaintiff's motion for, inter alia, an order of reference, plaintiff presents, among other things, the affirmation of regularity of its counsel, a copy of the pleadings, affidavits of service upon all defendants, including that defendant who was served herein as "John Doe," a copy of the loan documents, and the affidavit of merit of Sue Jorden, Vice President - Document Control of plaintiff, who indicates the circumstances of defendant's default under the terms of the note and mortgage. Plaintiff's counsel states that, none of the defendants herein timely answered or appeared, nor sought an extension of time to do so and, as such, are in default, except for cross-moving defendant, whose counsel filed a Notice of Appearance for purposes of settlement conferences only. Finally, counsel argues that the matter should not be dismissed pursuant to CPLR § 3215 (c) for plaintiff's failure to timely seek judgment by default since the parties were engaged in settlement negotiations from April 2014 to August 2017.

In opposition to the motion and in support of her cross motion, defendant submits, inter alia, her affidavit. Therein, she explains that she is a 75-year old senior citizen who has lived in the mortgaged premises for 36 years. In November 2008, her family bore the loss of her son, causing her to suffer from depression and anxiety. Thereafter, she and her husband struggled to make monthly mortgage payments. Upon receipt of process, her husband and daughter enlisted the assistance of Lester & Associates (the firm) to represent them in this action. Defendant – due to her mental state – was not involved in the process, but was informed by her husband that the firm was representing them in this action, which included the filing of an answer. In connection with such representation, defendant gathered numerous documents, and signed correspondence prepared on the firm's letterhead. When defendant received notice of the settlement conference, she and her husband contacted the firm, who advised that they would not appear unless more money was paid. Thus, the couple appeared at the first conference *pro se*, and eventually reached JASA - Legal Services for the Elderly in Queens (JASA). At that time, defendant discovered that the firm, among other things, did not file an answer and also provided misinformation to plaintiff's counsel regarding defendant's non-interest in loss mitigation. As a result, defendant served and filed a Notice

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1. By order dated June 28, 2018, this court issued a *sua sponte* order granting defendant poor person relief, *nunc pro tunc*, pursuant to CPLR § 1101 (a), with respect to the filing of her cross motion.

of Discharge of the firm, dated July 2, 2014. Per defendant, the firm has still not provided her with her legal file.

During the next three years, defendant and her husband were actively involved in and appeared for settlement conferences, together with the assistance of JASA. When the matter was released from the Foreclosure Conference Part, the matter was close to being settled (as evidenced by the language appearing in the conference order, noted, *supra*). As defendant was preparing to submit a new application, her husband died unexpectedly on December 6, 2017. Defendant avers that, given all of these circumstances and, further, had she known that the firm had not filed an answer, she would have sought other help to do so at that time. Moreover, defendant points out that motion practice is typically stayed during settlement conferences.

Defendant also asserts that she has meritorious defenses to this action, which warrant the relief sought, to wit: plaintiff's failure to demonstrate compliance with RPAPL § 1304, lack of standing, and unclean hands (as to the tolling of interest). Defendant notes the lack of prejudice to plaintiff if her cross motion were granted, citing the fact that plaintiff, too, did not make its motion until this time and, thus, if plaintiff's delay is excused, her delay should be as well.

In opposition to the cross motion and in further support of its motion, plaintiff argues that defendant's relief is barred by laches, citing the fact that her time to answer expired over four years ago, thereby causing prejudice to plaintiff. Furthermore, plaintiff states that defendant has not demonstrated a reasonable excuse for the delay, *e.g.*: her excuse accrued after she had already defaulted in answering the complaint; participation in settlement negotiations does not constitute a reasonable excuse as a matter of law; her claim of law office failure is unsubstantiated; and an answer was never filed until the cross motion was filed. Plaintiff further argues that defendant's claimed defenses to this action are without merit, as plaintiff has established its entitlement to judgment on its action to foreclose the mortgage.

In reply, defendant, inter alia, points out the disingenuousness of plaintiff's position: that it should somehow be excused for its delay in moving for an order of reference (to avoid the CPLR 3215 [c] dismissal mandate) due to settlement conferences, but defendant should not be excused for the delay in making her application for that same reason. Defendant also reiterates that she was misled by the firm regarding it having answered the complaint and that she cannot provide certain documentary proof, again pointing out that the firm has not turned over the client file. Finally, she counters the argument that plaintiff has established its standing or that it complied with RPAPL § 1304.

CPLR § 3012 (d), Extension of Time to Appear or Plead, provides that "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." A defendant seeking to do so must establish both a reasonable excuse and a potentially meritorious defense to the action (*see U.S. Bank N.A. v Dedomenico*, 162 AD3d 962 [2d Dept 2018]; *Wells Fargo Bank, N.A. v Pelosi*, 159 AD3d 852 [2d Dept 2018]; *Bank of Am., N.A. v Welga*, 157 AD3d 753 [2d Dept 2018]; *Stewart Tit. Ins. Co. v Bank of N.Y. Mellon*, 154 AD3d 656 [2d Dept 2017]). The determination of what constitutes a reasonable excuse lies within the sound discretion of this court (*see Welga*, 157 AD3d at 754; *Stewart Tit. Ins. Co.*, 154 AD3d at 661). Relevant factors to consider include the extent of the delay, the excuse offered, willfulness, prejudice to the opposing party, and the strong public policy of deciding cases on their merits (*see Kim v Strippoli*, 144 AD3d 982 [2d Dept 2016]).

Under the circumstances of this case, the court finds that defendant's excuse of the firm's law office failure, which resulted in her having failed to timely answer the complaint, is sufficiently detailed and credible so as to be reasonable (*cf. U.S. Bank, N.A. v Barr*, 139 AD3d 937 [2d Dept 2016]. Contrary to plaintiff's contention, this proffered excuse did occur prior to the date of default. It was only during settlement conferences with the court that defendant discovered that the firm did not, in fact, file an answer on her behalf. That, coupled with the mandates of 22 NYCRR 202.12-a (c) (7) – which suspends motion practice during settlement conferences (*see e.g. U.S. Bank, N.A. v Dorvelus*, 140 AD3d 850 [2d Dept 2016]), so as to permit the parties to engage in settlement discussions in good faith to reach a mutually agreeable resolution, without simultaneously being forced to litigate (*see also* 22 NYCRR 202.12-a [c] [4]) – provide an adequate explanation for the belated filing.

Moreover, the court finds that defendant has set forth potentially meritorious defenses to this actoin. Contrary to plaintiff's position that those defenses are waived since defendant failed to raise them in a timely answer or motion to dismiss, this is precisely the reason for defendant's cross motion, to wit: to compel the acceptance of an answer which was otherwise untimely filed (*cf. Nationstar Mtge. v Avella*, 142 AD3d 594 [2d Dept 2016]; *Chase Home Fin., LLC v Garcia*, 140 AD3d 820 [2d Dept 2016]). Moreover, and more particularly noted with respect to RPAPL § 1304, plaintiff's reliance upon, inter alia, *Flagstar Bank, FSB v Jambelli* (140 AD3d 829 [2d Dept 2016]) is inapposite. Therein, the Court held that plaintiff is not required to disprove an RPAPL § 1304 defense and, thus, should not face dismissal for failure to do so when seeking a default against a defendant. However, the *Jambelli* Court noted that "the defendants neither opposed the motion nor cross-moved for other relief." Here, since defendant is, indeed, cross-moving to vacate her default, and further since no judgment by default against her has been issued, her RPAPL § 1304 defense may be properly considered.

While those defenses sounding in, inter alia, lack of standing and lack of compliance with RPAPL § 1304 potentially have merit, defendant has not – as a matter of law – established her entitlement to outright dismissal, as plaintiff has sufficiently raised questions of fact as to those issues (*see e.g. BAC Home Loans Serv., LP v Rychik*, 161 AD3d 924 [2d Dept 2018]).

Accordingly, the branch of plaintiff's motion for an order of reference is denied. The branch of the motion for an order amending the caption to substitute "John Smith" in the place and stead of" John Doe" and "Mary Doe" is granted and the caption is hereby amended as such.[2] The branch of the motion seeking judgment by default against all defendants is granted except for judgment by default against defendant cross-movant herein. Defendant's cross motion is granted only to the extent that her proposed verified answer, annexed to the cross motion as Exhibit A thereto, is deemed timely served upon the entry date of this order.

A copy of this order is being mailed to plaintiff's new counsel (a Consent to Change Attorney was e-filed on August 7, 2018), defendant, and JASA on this date.

Dated: September 28, 2018

J.S.C.

FILED

OCT 4 2018

COUNTY CLERK
QUEENS COUNTY

2. It is possible that the "John Smith" served herein as "John Doe" is defendant's husband, now deceased (compare affidavit of service upon "John Smith" and affidavit of service upon defendant). If so, the parties, upon further motion, shall address that issue and whether a stay applies.