Midfirst Bank v Morris
2019 NY Slip Op 33313(U)
October 21, 2019
Supreme Court, Suffolk County
Docket Number: 17216/2008
Judge: William G. Ford
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SHORT FORM ORDER **INDEX NO.: 17216/2008**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

x

MIDFIRST BANK,

Plaintiff,

-against-

ASHLEY MORRIS as Administrator, LYNFORD MORRIS, et al.

Defendant.

x

Motion Submit Date: 06/13/19
Mot Seq 009 MD; CASE DISP

PLAINTIFF'S COUNSEL:
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DEFENDANT *PRO SE*:
LYNFORD MORRIS
42 Blacker Street
Brentwood, New York 11717

Read on plaintiff's unopposed motion for consolidation of putatively related matters and for entry of default judgment pursuant to CPLR 602(a) & 3215 respectively, the Court considered the following papers in reaching its determination:

1. Notice of Motion, Affirmation in Support & supporting papers; and upon due deliberation and full consideration of the same; it is

ORDERED that plaintiff's motion pursuant to CPLR 602 for consolidation of this action with a latter action for all purposes is **denied** as follows; and it is further

ORDERED that plaintiff's motion for leave to enter a default judgment as against defendant is hereby **denied**; and it is further

ORDERED that plaintiff's complaint is hereby **dismissed** premised upon plaintiff's failure to demonstrate reasonable excuse for its delay in timely seeking entry of default; and it is further

ORDERED that plaintiff's counsel is hereby directed to serve a copy of this decision and order with notice of entry certified first class mail, return receipt requested upon defendant's counsel and via personal service upon defendant *pro se* forthwith; and it is further

ORDERED that, if applicable, within 30 days of the entry of this decision and order, that defendant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be

required.

Before this Court is plaintiff's residential mortgage foreclosure action concerning a premises more commonly known as 42 Blacker Street, Brentwood, New York 11717. As this is the third decision rendered by this Court concerning the parties in this litigation, the Court presumes familiarity with the salient facts and circumstances which are not reiterated here for the sake of brevity.

Previously, this Court by short-form decision and order dated September 7, 2018 denied defendants' motion to dismiss plaintiff's complaint for foreclosure for failure to timely substitute the now deceased borrower defendant. By that same decision, this Court granted plaintiff's motion to substitute defendant Ashley Morris, her father's estate representative in his stead. Subsequently, this Court by short-form decision and order dated February 19, 2019 denied plaintiff's motion to vacate Supreme Court's (Kent, J. ret.) prior denial of default judgment and order of reference for unexplained and unreasonable delay amounting to *laches*.

Now, plaintiff again moves for entry of default judgment against defendant Morris premised on grounds that she has failed to answer the pleadings in this matter, despite having previously appeared by counsel seeking dismissal of the action as referenced above. Further, founded on the representation that a separate but putatively related second residential mortgage foreclosure action is presently pending before Supreme Court (Pastoressa, J.) entitled ***Midfirst Bank v Ashley Morris*** under Index Number 62568/2013, arising from the same set of operative facts, circumstances and occurrences, and involving identical issues, claims, parties and the subject premises, plaintiff also seeks to transfer and consolidate that latter action with this matter before this Court. Plaintiff's motion is unopposed.

New York CPLR § 602(a) provides that "[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all of the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." Thus, the Court is mindful that a motion to consolidate actions or for a joint trial pursuant to CPLR § 602(a) rests in the sound discretion of the trial court. Absent a showing of prejudice to a substantial right by a party opposing the motion, consolidation for trial should be granted where common questions of law or fact exist (*see, **Mattia v. Food Emporium, Inc.***, 259 AD2d 527 [2d Dept. 1999]). Where common questions of law or fact exist, a motion to consolidate or for a joint trial pursuant to CPLR 602(a) should be granted absent a showing of prejudice to a substantial right by the party opposing the motion (*see **Nationwide Assoc. v. Targee St. Internal Med. Group, P.C. Profit Sharing Trust***, 286 AD2d 717, 730 NYS2d 349; ***Gadelov v. Shure***, 274 AD2d 375, 711 NYS2d 896; ***J & A Vending v. J.A.M. Vending***, 268 AD2d 505, 703 NYS2d 53; ***Perini Corp. v. WDF, Inc.***, 33 A.D.3d 605, 606, 822 N.Y.S.2d 295, 296 [2d Dept. 2006]).

Although plaintiff's motion is unopposed, the Court's analysis does not end there. This Court has previously determined that a pattern of delay and possibly neglect has attended this matter on the plaintiff's part. Arguing in support of its applications plaintiff acknowledges this action's history and attendant delay but seeks to attribute it to a combination of actions taken and decisions of prior counsel, to defendant's passing unbeknownst to counsel, court delays and complications. The applications are supported by *inter alia* present counsel's affirmation, but not by an affidavit of anyone with direct firsthand knowledge concerning this matter's

procedural history. Nevertheless, as referenced above, this Court is now well familiar with this matter's history.

Plaintiff fails to persuade this Court that all of the attendant delays accompanying prosecution of this matter have not worked substantial prejudice against defendants in this matter. Put differently, having previously determined that plaintiff committed *laches* in the prosecution of this case, plaintiff's present application for consolidation has done nothing by way of renewing or rearguing the issue of reasonable excuse explaining plaintiff's failure to take reasonable steps in moving this 2008 action forward in the present: 2019. Rather, having encountered difficulties and procedural hurdles all throughout the maintenance of this action, plaintiff sought to reduce exposure to an adverse outcome and commenced another action against decedent's estate representative, defendant Morris here. That matter is before a different justice of this Court. It appears that that action similarly suffers from delay, plaintiff having not taken any steps to move that action along, the last appearance before the Foreclosure Settlement Conference Part having occurred on December 8, 2014, with no further motion practice noted in the court file.

Thus, this Court adheres to its prior determination that the unreasonable and unexplained delays are attributable to plaintiff's dilatory conduct. Having given this Court no justification for the same, this Court **denies** plaintiff's application to transfer the second action, sought without consent of the other court, and consolidation of the 2014 matter to this antiquated 2008 litigation. To do so would permit the potential of substantial prejudice to the defendant, despite the fact that defendant to date has failed to answer the pleadings.

Accordingly, plaintiff's motion for consolidation is **denied**.

Turning next to the merits of plaintiff's application for entry of default, the Court begins its analysis noting that " '[a] party's right to recover upon a defendant's failure to appear or answer is governed by CPLR 3215' " (***U.S. Bank, N.A. v. Razon***, 115 AD3d 739, 740, 981 NYS2d 571, *quoting* ***Beaton v. Transit Facility Corp.***, 14 AD3d 637, 637, 789 NYS2d 314; *see* ***Todd v. Green***, 122 AD3d 831, 831–832, 997 NYS2d 155). "Thus, a plaintiff moving for a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to appear or answer" (*see* CPLR 3215[f]; ***Triangle Props. # 2, LLC v. Narang***, 73 AD3d 1030, 1032, 903 NYS2d 424; ***DLJ Mortg. Capital, Inc. v United Gen. Tit. Ins. Co.***, 128 AD3d 760, 761, 9 NYS3d 335, 336 [2d Dept 2015]).

Generally, where a party has defaulted in appearing or answering a complaint, he or she will be "deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (***Mortgage Elec. Registration Sys., Inc. v. Smith***, 111 AD3d 804, 806, 975 NYS2d 121 [citations and internal quotation marks omitted]; ***Boudine v Goldmaker, Inc.***, 130 AD3d 553, 554, 14 NYS3d 405, 407 [2d Dept 2015]).

It is well settled that public policy favors the resolution of cases on the merits. Courts have broad discretion to grant relief from pleading defaults where the moving party's claim or defense is meritorious, the default was not willful, and the other party is not prejudiced (see, ***Cleary v East Syracuse-Minoa Cent. School Dist.***, 248 AD2d 1005; ***Lichtman v Sears, Roebuck & Co.***, 236 AD2d 373).

Generally, a process server's affidavit of service constitutes prima facie evidence of proper service" (***Scarano v. Scarano***, 63 AD3d 716, 716, 880 NYS2d 682; *see* ***NYCTL 2009–A Trust v. Tsafatinos***, 101 AD3d 1092, 1093, 956 NYS2d 571; ***Countrywide Home Loans Servicing, LP v. Albert***, 78 AD3d 983, 984, 912 NYS2d 96). Bare and unsubstantiated denials are insufficient to rebut the presumption of proper service (*see* ***Wachovia Bank N.A. v. Greenberg***, 138 AD3d 984, 985, 31 NYS3d 110; ***Wells Fargo Bank, N.A. v. Christie***, 83 AD3d 824, 825, 921 N.Y.S.2d 127; ***Wachovia Mtge. Corp. v Toussaint***, 144 AD3d 1132, 1133, 43 NYS3d 373, 374 [2d Dept 2016]).

"Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavits" (*see* ***Edwards, Angell, Palmer & Dodge, LLP v. Gerschman***, 116 AD3d 824, 825, 984 NYS2d 392; ***Simonds v. Grobman***, 277 AD2d 369, 370, 716 NYS2d 692; ***Mtge. Elec. Registration Sys., Inc. v Losco***, 125 AD3d 733, 733, 5 NYS3d 112, 113 [2d Dept 2015]).

A defendant who has failed to appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action to avoid the entering of a default judgment or to extend the time to answer (***Ennis v. Lema***, 305 A.D.2d 632, 633, 760 N.Y.S.2d 197, 198-99 [2d Dept. 2003]). The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the trial court (*see* ***McHenry v. San Miguel***, 54 AD3d 912, 864 NYS2d 541; ***Thompson v. Steuben Realty Corp.***, 18 AD3d 864, 795 NYS2d 470; ***Gambardella v. Ortov Lighting, Inc.***, 278 A.D.2d 494, 495, 717 N.Y.S.2d 923 [2d Dept. 2000]).

Furthermore, as applicable here, it is settled that the mere denial of receipt of the legal process is insufficient to rebut the presumption of proper service created by the affidavit of service (*see* ***Commissioners of State Ins. Fund v. Nobre***, *Inc.*, 29 AD3d 511, 816 NYS2d 493; ***Truscello v. Olympia Constr.***, 294 AD2d 350, 741 NYS2d 709; ***De La Barrera v. Handler***, 290 AD2d 476, 736 NYS2d 249; ***Trini Realty Corp. v Fulton Ctr. LLC***, 53 AD3d 479, 480, 861 NYS2d 743, 744–45 [2d Dept 2008]; ***Wassertheil v Elburg, LLC***, 94 AD3d 753, 753–54, 941 NYS2d 679, 680 [2d Dept 2012]).

However, plaintiff is also charged with knowledge of the caveat that pursuant to CPLR 3215(c), "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after [a defendant's] 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" (***JBBNY, LLC v Begum***, 156 AD3d 769, 771, 67 NYS3d 284, 286 [2d Dept 2017]).

Thus, the Appellate Division has recently reaffirmed that "CPLR 3215(c) is:

> strictly construed, as "[its] language ... is not, in the first instance, discretionary, but mandatory, inasmuch as courts shall dismiss claims ... for which default judgments are not sought within the requisite one-year period, as those claims are then deemed abandoned. [It] further provides, however, that the failure to timely seek a default may be excused if sufficient cause is shown why the complaint should not be dismissed. To establish the sufficient cause required by CPLR

> 3215(c), "the party opposing dismissal must demonstrate that it had a reasonable excuse for the delay in taking proceedings for entry of a default judgment and that it has a potentially meritorious action

(***U.S. Bank N.A. v Stewart***, 174 AD3d 551, 551-52, 103 NYS3d 139, 140 [2d Dept 2019][internal citations omitted])

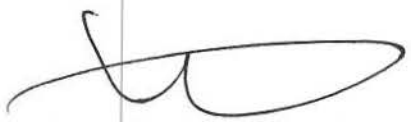
"Sufficient cause requires a showing of a reasonable excuse for the delay in timely moving for leave to enter a default judgment, plus a demonstration that the cause of action is potentially meritorious" (***HSBC Bank USA, N.A. v Seidner***, 159 AD3d 1035, 1035-36, 74 NYS3d 282, 284 [2d Dept 2018]).

Here, without a doubt, delays have caused plaintiff to seek entry of default far beyond the 1-year period under CPLR 3215(c). Plaintiff argues that it is not responsible, but rather, decedent's passing, difficulties in identifying the estate representative, delays with the court in filing the appropriate actions under the correct index number, are in combination responsible for all the delay this Court cited as justification for finding plaintiff guilty of *laches*. That notwithstanding, the Court notes that this action commenced more than a decade ago. Even assuming for the purposes of the present application, that it would be fairer and more appropriate to measure the relevant time period from when defendant Morris appeared by counsel seeking dismissal of the action in the latter part of February 2017, that application was determined by this Court in September 2018. Thereafter, plaintiff unsuccessfully sought an order of reference in late December 2018, which was denied in February 2019. Plaintiff then waited an additional 4 months to consolidate the latter 2013 action with no real activity, and at the same time to default defendant for her failure to join issue.

For many of the same reasons that plaintiff's application to consolidate is unsuccessful, so must plaintiff's motion for default judgment fail. Plaintiff has not provided a reasonable excuse for failing to seek entry of default within the mandatory and requisite statutory timeframe. Accordingly, plaintiff's motion for entry of default judgment is **denied.**

The foregoing constitutes the decision and order of this Court.

Dated: October 21, 2019
Riverhead, New York



WILLIAM G. FORD, J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**