SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **IAS MOTION 37EFM**

Justice

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DEUTSCHE BANK NATIONAL TRUST COMPANY, AS INDENTURE TRUSTEE, FOR NEW CENTURY HOME EQUITY LOAN TRUST 2005-3,

Plaintiff,

- v -

HUBERT POTOTSCHNIG, JOSEPH RAIA, GEORGE GALLETTI, BOARD OF MANAGERS OF CENTRAL PARK PLACE CONDOMINIUM, DOUGLAS FARALDI, JOHN DOE

Defendants.

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INDEX NO. 850142/2019

MOTION DATE 03/04/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 33, 34, 35, 36, 37 were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is hereby ordered that defendants' motion to dismiss is denied.

Background

On or about May 20, 2005, defendant Hubert Pototschnig executed an adjustable rate note ("the note") promising to pay the principal amount of $620,000.00, plus interest starting at 7.4%. The note was payable by initial monthly installments of $4,292.76 that were to commence on July 1, 2005.

The note was secured by a simultaneously executed mortgage to New Century Mortgage Corporation ("New Century") in the amount of $620,000.00 recorded in the Office of the New York City Register ("the register") on August 1, 2005 (CRFN Number 2005000427872). Said mortgage was corrected by a Correction Mortgage ("the Correction") filed with the register on December 9, 2005. The original mortgage listed, under the property's description, Unit 23B, which was handwritten next to the crossed-out typed unit number 49D. The Correction properly recorded defendant's unit number as 49D. An affidavit from a First American agent, Patrick Brown, explained that the mortgage was being rerecorded because the unit was listed incorrectly. Defendant denied that he ever saw or executed the Correction.

On December 22, 2008, a letter indicated that the mortgage service company was going to help the "struggling" defendant maintain homeownership through a modification loan ("the Modification"). The letter stated that the Modification lowered interest rates, fixed the interest rate for five years, brought the account current, and waived any unpaid late charges. The letter listed a telephone number to call if the borrower did not agree to the modified terms.

On February 1, 2009, defendant defaulted on the mortgage payment due on that date. On February 19, 2010, New Century sent a notice of intent to foreclose, informing defendant that failure to pay the amount due within 30 days of the dated letter could result in acceleration of the sums secured by the note and the mortgage and in the sale of the property.

On June 30, 2010, New Century purported to assign to plaintiff Deutsche Bank National Trust Company ("As Indenture Trustee, For New Century Home Equity Loan Trust 2005-3") the mortgage that defendant executed on May 20, 2005 and rerecorded by the Correction on December 9, 2005. The assignment stated that the mortgage was assigned with all of its obligations.

On July 16, 2010, plaintiff filed a mortgage foreclosure action against defendant, among other parties, seeking "principal, interest, costs, late charges, expenses of sale, allowances and disbursements, reasonable attorney's fees if provided in the mortgage, and monies advanced paid secured by the mortgage." The complaint also sought to extinguish any interest and rights of the defendant in the mortgaged property (301 W 57th Street 49D, New York, NY 10019).

On April 3, 2013, plaintiff filed a motion for summary judgment. Defendant failed to make the mortgage payment due on December 1, 2013 and subsequent dates. On April 23, 2015, prior to the assigned judge's having decided plaintiff's motion, defendant also filed a motion for summary judgment, requesting that the action be dismissed, asserting, among other things, that plaintiff lacked standing because New Century went bankrupt in 2007 and, thus, did not exist and could not have assigned the note and mortgage in 2010. On July 13, 2016, the Court granted defendant's motion for summary judgment, dismissing the complaint without prejudice. Plaintiff never perfected an appeal.

On June 27, 2019, plaintiff commenced the instant mortgage foreclosure action against defendant, "seeking the principal, interest, taxes, insurance, and cost (as well as attorney's fees); to extinguish defendant's rights in the property; and related relief."

On January 28, 2020, defendant filed a motion, pursuant to CPLR 3211(a)(5), to dismiss this action on the ground that res judicata bars it. Defendant scheduled oral arguments for February 14, 2020 at 9:30 AM. On February 7, 2020, plaintiff requested an adjournment of the argument scheduled for February 14, 2020. Plaintiff sent the request to a judge not presiding over the instant case (Hon. Arlene Bluth). On February 18, 2020, after realizing its mistake, plaintiff resubmitted its adjournment request, with apologies, to this Court. On March 4, 2020, plaintiff filed its affirmation in opposition, arguing that defendant's motion failed to comply with CPLR 2214(b). Also on March 4, 2020, defendant filed an amended motion to dismiss, scheduled for March 9, 2020 at 9:30 AM

Discussion

Time for service of notice and affidavits

CPLR 2214(b) states, in pertinent part:

> Time for service of notice and affidavits. A notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be

> heard. Answering affidavits shall be served at least two days before such time. Answering affidavits and any notice of cross-motion, with supporting papers, if any, shall be served at least seven days before such time if a notice of motion served at least sixteen days before such time so demands; whereupon any reply or responding affidavits shall be served at least one day before such time.

The purpose of CPLR 2214(b) is to afford the answering party an opportunity to address the movants arguments. However, courts do not strictly enforce this rule. In Piquette v City of New York, the court held that although defendant made its motion improperly, this error did not prejudice the plaintiff and that the Supreme Court should have decided the motion on its merits. Piquette v City of New York, 4 A.D.3d 402, 403, (2nd Dep't 2004). Thus, this Court denies plaintiff's request to deny or not consider this motion.

Here, defendant demands that answering papers, if any, be served seven days prior to the return date. Defendant's request permitted compliance with CPLR 2214(b) because the return date was greater than two weeks. Additionally, defendant filed an amended motion, thus providing another opportunity for plaintiff to submit an answer. As in Piquette, where the procedural irregularity did not prejudice plaintiff, here, plaintiff was not prejudiced either because it had ample time to oppose the motion. Therefore, defendant's motion should be decided on its merits. Id at 402, 403. For the foregoing reason, this Court denies plaintiff's request to dismiss defendant's motion or to deny it solely on procedural ground.

Res judicata

The crux of defendant's motion is that this Court should dismiss the instant action on the ground of res judicata. The New York Court of Appeals has held as follows:

> The law of the case doctrine is part of a larger family of kindred concepts, which includes res judicata (claim preclusion) and collateral estoppel (issue preclusion). These doctrines, broadly speaking, are designed to limit relitigation of issues.

People v Evans, 94 NY2d 499, 502 (2000). Pursuant to the rule of res judicata, a valid final judgment bars future actions between the same parties based on the same cause of action. Paramount Pictures Corp. v Allianz Risk Transfer AG, 31 NY3d 64 (1st Dep't 2018). Here, defendant argues that res judicata bars the instant action because the prior mortgage foreclosure action was between the same parties, was based on the same mortgage, and was resolved by a valid final judgment. This Court finds defendant's argument unavailing because two subject mortgage foreclosure actions arose from two separate defaults giving rise to separate and independent causes of action; and the prior action was not disposed on the merits.

Defendant's failure to pay the mortgage installments due on February 1, 2009 and subsequent payments gave rise to the prior cause of action. Defendant's failure to pay the mortgage due on December 1, 2013 and subsequent payments gave rise to the instant mortgage foreclosure action.

Both mortgage foreclosure actions were based on the mortgage the defendant executed. Defendant's argument that the Correction was invalid due to a recording error is unavailing. The Correction simply fixed a clerical error and, therefore, does not negate either party's intent to

have entered into the mortgage agreement. The note the defendant executed indicated the correct unit number under the property description. Examined all together, the parties clearly agreed to mortgage unit 49D; and, a recording error should not invalidate a mortgage where both parties mutually assented.

Defendant claims the Modification does not exist because only plaintiff executed the agreement. A letter accompanying the Modification explained that the modification's purpose was to aid "struggling borrowers experiencing financial hardship" who were unable to pay the agreed upon monthly installments. Moreover, the letter clearly stated that if the borrower did not agree with the new terms, he/she/they must contact the provided number. There is no evidence defendant disputed the Modification. Whether the Modification existed or not, defendant, unquestionably, failed to comply with either the original mortgage or the Modification.

As noted above, the prior action was not disposed on its merits, thus barring this case based on res judicata would be unfair because plaintiff has not had a full and fair opportunity to litigate its claim.

Conclusion

For the reasons stated herein, the instant motion is hereby denied.

6/29/2020
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE