

Nationstar Mtge. LLC v Lettman

2023 NY Slip Op 33319(U)

September 18, 2023

Supreme Court, Nassau County

Docket Number: Index No. 603298/2020

Judge: David P. Sullivan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT: HON. DAVID P. SULLIVAN,
Supreme Court Justice.

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NATIONSTAR MORTGAGE LLC D/B/A
MR. COOPER,

FORECLOSURE PART

Plaintiffs,

Index No: 603298/2020
Motion Seq. Nos.: 001, 002
Motion Date: 06/13/23
XXX

-against-

PERSHA J. LETTMAN; BLACKNIGHT ASSET
MANAGEMENT, INC., et al.

Defendants.

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The following papers were read on this motion:

1. Plaintiff's NYSCEF Doc No. 23-31,54-75,103-104.
2. Defendant's NYSCEF Doc No. 35-52,92-100,105-107.

Upon the foregoing e-filed documents, the application submitted by the plaintiff, Nationstar Mortgage LLC d/b/a Mr. Cooper [hereinafter the Plaintiff], for an order pursuant to CPLR § 3124 compelling discovery from the defendants, Persha Lettman and Blacknight Asset Management, Inc. [hereinafter collectively the Defendants] (Sequence #001) and the cross motion interposed by the Defendants for an order dismissing the within complaint pursuant to CPLR § 3211 (a) (4) and RPAPL § 1301, as amended by FAPA (Sequence #002), are consolidated for disposition and determined as set forth hereinafter.

On or about November 26, 2013, the Plaintiff commenced an action to foreclose on the mortgage referable to the property situated at 41 Fourth Street, Valley Stream, New York [hereinafter the 2013 Action] (NYSCEF Doc No. 39). On December 5, 2019, the 2013 Action was dismissed due to the Plaintiff's failure to properly serve the Defendants (NYSCEF Doc No. 40). In so holding, the Court directed Defendants' counsel to submit a judgment on notice memorializing the dismissal (*id.*). On or about January 10, 2020, Defendants' counsel served a notice of settlement and proposed judgment [hereinafter the Judgment] (NYSCEF Doc No. 41). However, notwithstanding the Judgment having been served and submitted in January of 2020, it

was “lost” by the clerk’s office and on November 23, 2020, Defendants’ counsel re-served and re-submitted an identical Judgment which was ultimately entered by the Nassau County Clerk on June 9, 2022 (NYSCEF Doc No. 36 at ¶13; NYSCEF Doc No. 41,44,97).

In the interim, on or about February 28, 2020, the Plaintiff commenced a second foreclosure action which was voluntarily discontinued on March 2, 2020 (NYSCEF Doc No. 48,49). On or about March 3, 2020, the Plaintiff commenced the underlying action regarding which it now moves for an order seeking to compel discovery from the Defendants (NYSCEF Doc No. 1). The Defendants oppose the application simultaneously cross moving for dismissal of the within complaint pursuant to RPAPL § 1301.

In moving herein, the Defendants maintain that as the Judgment dismissing the 2013 Action was not entered until June of 2022, the 2013 Action was still pending when the instant action was commenced thus warranting dismissal thereof pursuant to RPAPL § 1301, as amended by FAPA.

RPAPL § 1301 (3), as amended, provides, in relevant part, that “[w]hile the action is pending . . . , no other action shall be commenced or maintained to recover any part of the mortgage debt, including an action to foreclose the mortgage, without leave of the court in which the former action was brought. The procurement of such leave shall be a condition precedent to the commencement of such other action and the failure to procure such leave shall be a defense to such other action.” As relevant here, “[a]n action is deemed pending until there is a final judgment” (*Cooke-Garrett v Hoque*, 109 AD3d 457, 457 [2d Dept 2013]). Further, “[a] judgment is entered by the clerk at the conclusion of an action or proceeding” (*HSBC Bank USA, N.A. v Rubin*, 210 AD3d 73, 77 [2d Dept 2022]) and “[a]n action is not actually concluded until a final judgment is entered” (*id.*). It is undisputed that the Judgment dismissing the 2013 Action was not entered until June 9, 2022. As such, the 2013 Action was still pending when the present action was commenced in March of 2020 which was improperly instituted by the Plaintiff without first having obtained leave of court as mandated by the statute (RPAPL § 1301 [3]). Accordingly, as the Plaintiff failed to procure the requisite court leave before commencing the within action, dismissal is warranted (*id.*).

Based upon the foregoing, it is hereby

ORDERED, that the Plaintiff’s application for an order pursuant to CPLR § 3124 compelling discovery from the Defendants is DENIED (Sequence #001); and it is further

ORDERED, that the Defendants’ cross motion for an order dismissing the within complaint pursuant to CPLR § 3211 (a) (4) and RPAPL § 1301 (3), as amended by FAPA, is GRANTED in accordance with RPAPL § 1301 (3) and the complaint is dismissed (Sequence #002).

All applications not specifically addressed are Denied.

The foregoing constitutes the Decision and Order of the Court.

Dated: September 18, 2023
Mineola, New York

ENTER

David P. Sullivan
HON. DAVID P. SULLIVAN, J. S. C.