

Wells Fargo Bank, N.A. v Cardiello

2023 NY Slip Op 34478(U)

November 7, 2023

Supreme Court, Kings County

Docket Number: Index No. 46913/2007

Judge: Cenceria P. Edwards

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At an IAS Term, Part FRP1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 25th day of May, 2022.

PRESENT:

HON. CENCERIA P. EDWARDS, C.P.A.,

Justice

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WELLS FARGO BANK, NATIONAL ASSOCIATION,
AS TRUSTEE FOR MORGAN STANLEY ABS
CAPITAL I INC. TRUST 2007- HE4, MORTGAGE
PASS-THROUGH CERTIFICATES, SERIES 2007-HE4,

Plaintiff(s),

-against-

ROSEMARIE CARDIELLO, et al.,

Defendant(s).

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ORDER

Calendar #(s): 46

Index #: 46913/2007

Mot. Seq. #(s): 2

The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Notice of Motion/Order to Show Cause/Petition/Cross-Motion and
Affidavits (Affirmations) and Exhibits _____

5-26

Opposing Affidavits (Affirmations) and Exhibits _____

Reply Affidavits (Affirmations) and Exhibits _____

On December 28, 2007, this action was commenced to foreclose a mortgage encumbering the residential property at 1537 East 54th Street in Brooklyn, New York. It is alleged in the complaint that defendant-borrower Rosemarie A. Cardiello has failed to make the monthly installment payments, starting with the payment due on September 1, 2007.

Plaintiff made two prior motions seeking an order of reference, the first, an ex parte application denied by order of the Court (Wayne Saitta, J.), filed October 22, 2009, and the second via notice of motion, withdrawn January 7, 2011. There is no indication that any further activity

occurred in this matter until a status conference was held on January 16, 2014, pursuant to which the Court (Lawrence Knipel, J.), invoking CPLR 3216, ordered this action dismissed “unless [P]laintiff files a note of issue or otherwise proceeds by motion for entry of judgment within 90 days...” (NYSCEF doc. #24). Thereafter, on July 24, 2014, the Court administratively dismissed the action, *sua sponte*, for Plaintiff’s failure to comply with the conditional order of dismissal.

Plaintiff now moves to vacate said conditional order and restore this action to the calendar, contending that the order and resultant *sua sponte* dismissal were improper under CPLR 3216. A conditional order of dismissal “may have the same effect as a valid 90-day notice pursuant to CPLR 3216” (*U.S. Bank N.A. v Spence*, 175 AD3d 1346, 1348 [2d Dept 2019] [internal quotation marks omitted]). However, such an order is defective where, as here, “it did not state that the plaintiff’s failure to comply with the notice ‘will serve as a basis for a motion’ by the court to dismiss the action for failure to prosecute” (*HSBC Bank USA, N.A. v Garnes*, 186 AD3d 1620, 1621 [2d Dept 2020], quoting CPLR 3216[b][3]). Moreover, in these circumstances, it is also improper for a complaint to have been “administratively dismissed, without a motion, and without the entry of any formal order by the Supreme Court dismissing the complaint” (*id.*, citing *Cadichon v Facelle*, 18 NY3d 230, 235-236 [2011] and *U.S. Bank N.A. v Spence*, 175 AD3d at 1348). Accordingly, this branch of Plaintiff’s motion will be granted, provided that Plaintiff complies with the conditions set forth below.

Plaintiff additionally moves, pursuant to CPLR §3215 and RPAPL §1321, for an order, *inter alia*, granting a default judgment against the purportedly non-answering defendants, appointing a referee to compute the amount due and examine whether the Property may be sold as one parcel. “A plaintiff seeking leave to enter a default judgment under CPLR § 3215 must file proof of: (1) service of a copy or copies of the summons and the complaint, (2) the facts

constituting the claim, and (3) the defendant's default" (*CitiMortgage, Inc. v Weaver*, 197 AD3d 1087, 1088 [2d Dept 2021] [internal quotation marks omitted; *see* CPLR § 3215[f)]). None of the defendants named in this mortgage foreclosure action have appeared in opposition to this motion.

The proponent of a motion always bears the burden to affirmatively demonstrate entitlement to the relief sought, and this includes articulating coherent legal arguments supported by admissible evidence. In the affirmation of its attorney submitted in support of this motion, Plaintiff sparsely recites the procedural history of this case and then asserts, only in conclusory fashion, that it is entitled to a default judgment because these defendants have failed to timely answer the complaint. At no point in this affirmation does Plaintiff specifically articulate when any defendant was served, by which method, when service was deemed complete, and when each defendant's answer was due. Rather than present specific facts and legal arguments in support of its position, Plaintiff has simply appended to its motion a series of affidavits of service, with no page reference to each defendant, and does not even attempt to qualitatively verify that the defendants were properly served with the summons and complaint, and that their time to answer or appear has expired. Additionally, Plaintiff's affirmation does not remotely attempt to substantiate or even discuss any facts/law to support Plaintiff's claims.

It is not this Court's responsibility to sift through Plaintiff's submissions or engage in a "fishing expedition" of over 90 pages with no specific page reference in Plaintiff's attorney affirmation, in order to identify and substantiate the factual and legal assertions upon which Plaintiff's motion for a default judgment is, or should be, predicated, and then determine the veracity and accuracy thereof. The paucity of Plaintiff's attorney affirmation, including its failures to present the supporting facts and to apply the relevant law, is improper and requires that this Court deny this branch of the motion. Hence, Plaintiff may renew this branch of the motion upon

proper papers, after it has satisfied all of the conditions for restoring this action to active status, as set forth in this decision and order.

Moreover, the Court is troubled by the age of this old foreclosure action. Plaintiff has not proffered a reasonable excuse for its failure to prosecute this action during the more than four-year period in between the October 22, 2009 issuance of the order denying its application for an order of reference, and the January 16, 2014 status conference, pursuant to which the Court issued the conditional dismissal order that is the subject of this motion.¹ Nor do Plaintiff's moving papers proffer an explanation for its failure to resume prosecution before the July 24, 2014 *sua sponte* dismissal, which, it is noted, occurred more than six months after the status conference, and thus, far exceeded the 90 days provided for in the order. The Court also cannot help but note that after the dismissal, this case remained dormant for more than seven years, until Plaintiff made the instant motion on November 16, 2021. In total, the delay in the prosecution of this foreclosure action surpasses 12 years, and Plaintiff's papers are silent about this. Upon consideration of any renewed application for default judgment and an order of reference, Plaintiff must provide a reasonable justification for the extensive delays catalogued above. Failure to make an adequate showing of sufficient cause may result in the Court tolling all interest and fees which have accumulated during the more than 12-year period of delays.

Accordingly, the portion of the above-referenced motion by Plaintiff seeking to vacate its default is GRANTED to the extent that it is:

¹ Plaintiff states that its second application for an order of reference, Motion Seq. #1, marked fully submitted on November 24, 2010, was withdrawn on January 7, 2011, before a decision was issued. As Plaintiff proffered no explanation for the withdrawal, the Court does not credit this as prosecuting the action. In any event, this 6-week period during which the motion existed comprises a tiny portion of the more than 12-year delay.

ORDERED that this action is conditionally restored, provided that neither Plaintiff nor its privies has brought another action against the borrower-defendant(s) and/or their privies to recover any part of the underlying mortgage debt; and it is further

ORDERED that within 30 days of entry of this Order, Plaintiff shall file an affidavit averring that it is in compliance with RPAPL 1301(3), specifically stating that no other action or proceeding, in any court or tribunal, has been commenced or maintained to recover any part of the same debt secured by the subject mortgage, or, alternatively, if other actions to recover any part of the subject mortgage debt were brought, Plaintiff shall state in the affidavit all of the parties to those other action(s), the date of the respective commencement(s) of those actions, the outcome of the action(s), including whether any part of the debt has been collected, and Plaintiff shall also provide information sufficient to identify said action(s) within the relevant court records; and it is further

ORDERED that simultaneous with the filing of the above-referenced affidavit, Plaintiff shall email a copy of same to this Court in accordance with the published Part Rules; and it is further

ORDERED that within 30 days of entry of this Order, Plaintiff shall serve this Order with Notice of Entry by overnight mail upon the borrower-defendant to her last known residence, and to the borrower-defendant's attorney (if any), and to all other parties entitled to notice of proceedings in this action; and it is further

ORDERED that, to the extent that the present owners of the real property encumbered by the subject mortgage are not among those ordinarily deemed to be entitled to notice of proceedings in this action, Plaintiff shall also serve this Order with Notice of Entry upon them, in the same manner prescribed above; and it is further

ORDERED that within 10 days after service of Notice of Entry of this Order, Plaintiff shall file proof of same and email a copy to this Court in accordance with the published Part Rules; and it is further

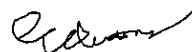
ORDERED that this matter shall be fully restored to the calendar upon Plaintiff's submission of adequate proof of strict compliance with all conditions set forth above; and it is further

ORDERED that the portion of Plaintiff's application for, *inter alia*, a default judgment and an order of reference is **DENIED** in its entirety, with leave to renew upon proper papers addressing the deficiencies articulated above.

The foregoing constitutes the Decision and Order of this Court.

ENTER:

Dated: November __7__, 2023



Hon. Cenceria P. Edwards, JSC, CPA

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KINGS COUNTY CLERK
FILED