

Canteros v JPMorgan Chase Bank, N.A.

2012 NY Slip Op 32383(U)

August 20, 2012

Supreme Court, Suffolk County

Docket Number: 10-15693

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 3-22-12 (#001)
MOTION DATE 4-19-12 (#002 & #003)
ADJ. DATE 5-10-12
Mot. Seq. # 001 - MD
 # 002 - XMotD
 # 003 - XMotD

-----X
MIGUEL CANTEROS, FRANCISCA :
CANTEROS and FCMC, INC., :
 :
 :
 : Plaintiffs, :
 :
 : - against - :
 :
JPMORGAN CHASE BANK, N.A., AS TRUSTEE: :
FOR THE REGISTERED HOLDERS OF ABFS :
MORTGAGE LOAN TRUST 2002-4, :
MORTGAGE PASS-THROUGH CERTIFICATES :
SERIES 2002-4, OCWEN LOAN SERVICING, :
LLC, AS SUCCESSOR IN INTEREST TO :
AMERICAN BUSINESS CREDIT, INC., JUSTIN :
LITE, AS REFEREE, MEDALLION FUNDING :
CORP. AND COUNTY OF SUFFOLK, :
 :
 : Defendants. :
-----X

ALLAN D. GRECCO, ESQ.
Attorney for Plaintiffs
131 Route 25A, Suite 4
Rocky Point, New York 11778

KNUCKLES, KOMOSINSKI & ELLIOTT, LLP
Attorney for Defendants JP Morgan Chase
& Ocwen Loan Servicing
565 Taxter Road, Suite 590
Elmsford, New York 10523

DENNIS M. COHEN, ESQ., Suffolk Cty Attorney
By: Jacqueline Caputi, Esq.
Attorney for Defendant County of Suffolk
H. Lee Dennison Building
100 Veterans Memorial Highway
P.O. Box 6100
Hauppauge, New York 11788-0099

Upon the following papers numbered 1 to 44 read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-15; Notice of Cross Motion and supporting papers 16-29; 40-42; Answering Affidavits and supporting papers 30-39; 43-44; Replying Affidavits and supporting papers ; Other ; it is,

ORDERED that this motion (seq. #001) by defendants JPMorgan Chase Bank, N.A., as Trustee for the Registered Holders of ABFS Mortgage Loan Trust 2002-4, Mortgage Pass-Through Certificates Series 2002-4 and Ocwen Loan Servicing, LLC, as Successor in Interest to American Business Credit, Inc. for an Order, pursuant to CPLR 3215, granting a default judgment against defendant County of Suffolk, and for an Order, pursuant to CPLR 3212, granting summary judgment against plaintiffs, and to amend the caption to substitute The Bank of New York Mellon, As Indenture Trustee For The Registered Holders of ABFS Mortgage Loan Trust 2002-4, Mortgage Pass-Through Certificates, Series 2002-4 as the proper party defendant is denied; and it is further

ORDERED that this cross-motion (seq. #002) by plaintiffs for an Order, pursuant to CPLR 3212, granting summary judgment on their complaint is determined herein; and it is further

ORDERED that this cross-motion (seq. #003) of defendant County of Suffolk for an Order, pursuant to CPLR 3215 (c), dismissing plaintiffs' complaint and the cross-claims of defendant JPMorgan Chase Bank, N.A., as Trustee is granted solely as to dismissal of plaintiffs' complaint as against it.

By promissory note dated November 1, 2002, non-party Cositas Deli Grocery Corp. agreed to repay a loan provided by non-party American Business Credit, Inc. ("American Business") in the sum of \$245,000.00. The note was signed by non-party Rodolfo Bonilla in his capacity as president and secretary of the corporation. Said note was secured by a mortgage dated October 31, 2002, on property known as 201 Medford Avenue, in the Town of Brookhaven, State of New York and signed by non-parties Rodolfo Bonilla and Marcelo Cajamarca. Prior to said transaction, plaintiff Miguel Canteros and his wife, plaintiff Francisca Canteros, had purportedly sold the subject property to Rodolfo Bonilla and Marcelo Cajamarca. The mortgage of plaintiffs Canteros to non-party Medallion Funding Corp. on the property in the sum of \$75,000.00 was subordinated by subordination agreement dated October 31, 2002 to the American Business mortgage.

American Business commenced a foreclosure action on March 24, 2004, against Cositas Deli Grocery Corp., Marcello Cajamarca a/k/a Marcelo Cajamarca, Rodolfo Bonilla, Miguel A. Canteros and Francisca Canteros under Index Number 7887/2004. Subsequently, on January 21, 2005, American Business filed for Chapter 11 bankruptcy and the case was converted to a Chapter 7 bankruptcy on May 17, 2005.

On August 8, 2005, defendant County of Suffolk ("County") obtained title to the subject property by tax deed at a tax sale for unpaid real estate taxes. Although plaintiffs Canteros had purportedly sold the property to Rodolfo Bonilla and Marcelo Cajamarca, their names still appeared on County tax records as the owners of the property. On or about December 19, 2005, plaintiffs Canteros paid \$31,121.09 for the unpaid real estate taxes to redeem the subject property from defendant County.

American Business executed an "assignment of mortgage" dated January 17, 2006, assigning the mortgage and note to defendant JPMorgan Chase Bank, N.A., as Trustee for the Registered Holders of ABFS Mortgage Loan Trust 2002-4, Mortgage Pass-Through Certificates Series 2002-4 ("JPMorgan"). The assignment was filed in the Suffolk County Clerk's Office on March 24, 2006. By Order dated June 4, 2006, JPMorgan was substituted as plaintiff in the foreclosure action under Index Number 7887/2004 and an Order of reference was granted. Thereafter, by Order dated June 14, 2006 (Berler, J.), JPMorgan was granted summary judgment in the foreclosure action. The Court's computerized records indicate that on that same date the case was disposed.

Later, by "Suffolk County quitclaim deed" dated April 29, 2010, plaintiffs Canteros obtained title to the subject property. Plaintiffs Canteros and FCMC, Inc. commenced the instant action on April 30, 2010, to quiet title to the subject property by having the County issue a corrected deed to their company,

plaintiff FCMC, Inc., and for the cancellation and discharge of the subject mortgage. By an allonge dated May 31, 2011 to the subject note, JPMorgan purportedly transferred the note to non-party The Bank of New York Mellon, As Indenture Trustee For The Registered Holders of ABFS Mortgage Loan Trust 2002-4, Mortgage Pass-Through Certificates, Series 2002-4 (“BNY”).

Defendants JPMorgan and Ocwen Loan Servicing, LLC, as Successor in Interest to American Business Credit, Inc. (“Ocwen”) now move, pursuant to CPLR 3215, for a default judgment against defendant County for failure to answer or otherwise appear in this action and to void the County’s tax deed as violating the existing automatic stay pursuant to 11 U.S.C. § 362 (a). The County cross-moves pursuant to CPLR 3215 (c) dismissing plaintiffs’ complaint and the cross-claim of JPMorgan and Ocwen on the ground that more than one year has elapsed since the County’s default in answering.

With respect to the County’s cross-motion, the express language of CPLR 3215 (c) is mandatory, that courts “shall” dismiss claims for which default judgments are not sought within the requisite one year period, inasmuch as those claims are then deemed abandoned (*see* CPLR 3215 [c]; *Giglio v NTIMP, Inc.*, 86 AD3d 301, 926 NYS2d 546 [2d Dept 2011]; *Butindaro v Grinberg*, 57 AD3d 932, 871 NYS2d 317 [2d Dept 2008]). The instant action was commenced on April 30, 2010, and the County admits in its cross-motion papers that it never served an answer. “The one exception to the otherwise mandatory language of CPLR 3215 (c) is that the failure to timely seek a default on an unanswered complaint or counterclaim may be excused if ‘sufficient cause is shown why the complaint should not be dismissed’ (CPLR 3215 [c]). This Court has interpreted this language as requiring both a reasonable excuse for the delay in timely moving for a default judgment, plus a demonstration that the cause of action is potentially meritorious” (*Giglio v NTIMP, Inc.*, 86 AD3d 301, 308, 926 NYS2d 546; *see Ryant v Bullock*, 77 AD3d 811, 908 NYS2d 884 [2d Dept 2010]; *Solano v Castro*, 72 AD3d 932, 902 NYS2d 95 [2d Dept 2010]; *115-41 St. Albans Holding Corp. v Estate of Harrison*, 71 AD3d 653, 894 NYS2d 896 [2d Dept 2010]; *Sicurella v 111 Chelsea, LLC*, 67 AD3d 996, 888 NYS2d 752 [2d Dept 2009]). Plaintiffs have failed to address the first prong of reasonable excuse (*see 115-41 St. Albans Holding Corp. v Estate of Harrison*, 71 AD3d 653, 894 NYS2d 896; *Sicurella v 111 Chelsea, LLC*, 67 AD3d 996, 888 NYS2d 752).

In addition, plaintiffs have failed to demonstrate a meritorious cause of action against the County. The deed dated December 26, 2006 and filed in the Suffolk County Clerk’s Office on June 11, 2007, purportedly transferring the property from Rodolfo Bonilla and Marcelo Cajamarca to FCMC, Inc. is void inasmuch as Rodolfo Bonilla and Marcelo Cajamarca no longer had any interest in the property to convey to anyone on that date. At that time, the County was the owner of the property. When plaintiffs Canteros paid the sums to redeem the property, they did so on behalf of the prior owners. Plaintiffs have failed to submit a copy of their original deed to the property, or the deed in which they transferred their interest to Rodolfo Bonilla and Marcelo Cajamarca and proof of filing. Thus, it is unclear who was the record owner of the subject property just prior to the County’s purchase at the tax sale. However, it is clear that the relief that plaintiffs request, that the County deed the property to plaintiff FCMC, Inc. as the redeeming owner is neither valid nor meritorious inasmuch as FCMC, Inc. has never had any interest in the property. Therefore, plaintiffs’ complaint against the County is dismissed as abandoned.

However, regarding dismissal of the cross-claim of JPMorgan and Ocwen against the County, “[i]n instances where an answer is not demanded in response to a cross claim, the denial that is ‘deemed’ to have been made under CPLR 3011 will foreclose any motion for a default judgment on the cross claim and, by extension, foreclose dismissal of such a cross claim even where no default motion is made within one year as required by CPLR 3215 (c)” (see *Giglio v NTIMP, Inc.*, 86 AD3d 301, 310, 926 NYS2d 546). Inasmuch as the cross claim herein was not asserted demanding an answer, it is deemed denied, and cannot be dismissed pursuant to CPLR 3215 (c) (*id.*). Therefore, the request by defendant County for dismissal of the cross claim based on failure to prosecute is denied, and the request by defendants JPMorgan and Ocwen for a default judgment on their cross claim is denied, and the cross-claim of JPMorgan and Ocwen against the County is severed and continued.

Defendants JPMorgan and Ocwen also seek summary judgment against plaintiffs. However, JPMorgan has asserted no counterclaims against plaintiffs in its answer and therefore has no direct claims against plaintiffs upon which to obtain summary judgment relief. Therefore, its request for summary judgment is denied.

Defendants JPMorgan and Ocwen further seek to amend the caption to substitute The Bank of New York Mellon, As Indenture Trustee For The Registered Holders of ABFS Mortgage Loan Trust 2002-4, Mortgage Pass-Through Certificates, Series 2002-4 as the proper party defendant. JPMorgan submitted the allonge to the note establishing the assignment of the note to BNY subsequent to the commencement of the action (see *Deutsche Bank Trust Co. Americas v Codio*, 94 AD3d 1040, 943 NYS2d 545 [2d Dept 2012]). The assignment of a promissory note also effectuates assignment of the mortgage (*U.S. Bank Nat. Assn v Dellarmo*, 94 AD3d 746, 942 NYS2d 122 [2d Dept 2012]; *Bank of New York v Silverberg*, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754, 890 NYS2d 578 [2d Dept 2009]; see *GRP Loan, LLC v Taylor*, 95 AD3d 1172, 945 NYS2d 336 [2d Dept 2012]). Pursuant to CPLR 1018, “the action may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action” (see *GRP Loan, LLC v Taylor*, 95 AD3d 1172, 945 NYS2d 336). “The determination to substitute or join a party pursuant to CPLR 1018 is within the discretion of the trial court” (*NationsCredit Home Equity Servs. v Anderson*, 16 AD3d 563, 564, 792 NYS2d 510 [2d Dept 2005]; see *CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759, 761, 931 NYS2d 638 [2d Dept 2011]). JPMorgan fails to inform of the outcome of the bankruptcy proceeding of American Business and whether it was concluded prior to the execution of the “assignment of mortgage” dated January 17, 2006. Thus, it is unclear under what circumstances JPMorgan originally obtained the mortgage documents prior to the assignment to BNY. Therefore, the Court declines to amend the caption at this juncture until such information is provided.

Plaintiffs cross-move for summary judgment on their complaint. Their remaining claims include dismissal of the action under Index Number 7887/2004 and to relieve Justin Lite as referee. Said request is not properly before this Court as the motion for that relief has been made under the incorrect index number. The request for relief must be made by motion in the appropriate action under Index Number 7887/2004. Plaintiffs also seek a cancellation of the subject mortgage and that defendants JPMorgan and Ocwen be barred from any interest in the subject property on the ground that the notice of pendency in the action under Index Number 7887/2004 has expired. A new notice of pendency may be filed in a

Canteros v JPMorgan Chase
 Index No. 10-15693
 Page 5

mortgage foreclosure action despite the cancellation or expiration of a previous one (*see Sears Mtge. Corp. v Yaghoobi*, 19 AD3d 402, 796 NYS2d 392 [2d Dept 2005]; *Bankers Trust Co. of California, N.A. v Lifson*, 5 AD3d 710, 776 NYS2d 288 [2d Dept 2004]). In any event, said relief must also be sought in the appropriate action under Index Number 7887/2004.

Plaintiffs further seek a cancellation of the subordinate mortgage to Medallion. The relief sought against defendant Medallion is based on the contents of the affidavit of plaintiff Miguel Canteros that no payment has been made to Medallion since October 2002 such that the statute of limitations has run for the collection of the debt. RPAPL 1501 (4) provides that “[w]here the period allowed by the applicable statute of limitation for the commencement of an action to foreclose a mortgage ... has expired,” any person with an estate or interest in the property may maintain an action “to secure the cancellation and discharge of record of such encumbrance, and to adjudge the estate or interest of the plaintiff in such real property to be free therefrom” (RPAPL 1501 [4]). Plaintiffs Canteros made a *prima facie* showing of their entitlement to judgment as a matter of law by establishing that no payment has been made to Medallion since October 2002, and that the commencement of a foreclosure action would be time-barred by the applicable six-year statute of limitations (*see CPLR 213 [4]; JBR Constr. Corp. v Staples*, 71 AD3d 952, 897 NYS2d 223 [2d Dept 2010]; *Corrado v Petrone*, 139 AD2d 483, 526 NYS2d 845 [2d Dept 1988]; *see also Plaia v Safonte*, 45 AD3d 747, 847 NYS2d 101 [2d Dept 2007]). Defendant Medallion failed to submit any opposition to the cross-motion and thus failed to raise a triable issue of fact as to whether the statute of limitations was tolled or revived (*see Corrado v Petrone*, 139 AD2d 483, 526 NYS2d 845; *Rack v Rushefsky*, 5 AD3d 753, 773 NYS2d 569 [2d Dept 2004]). Therefore, plaintiffs Canteros are entitled to cancellation and discharge of record of the subordinate mortgage on the subject property in favor of Medallion and are granted summary judgment on said claim (*see RPAPL 1501 [4]; Corrado v Petrone*, 139 AD2d 483, 526 NYS2d 845). Plaintiffs are to serve a copy of this Order upon the County Clerk of Suffolk County who is directed to make an appropriate entry in the county records.

Dated: August 20, 2012


 Hon. Joseph Farneti
 Acting Justice Supreme Court

___ FINAL DISPOSITION X NON-FINAL DISPOSITION