

Wells Fargo Bank, N.A. v Wagner
2012 NY Slip Op 33138(U)
April 13, 2012
Sup Ct, Suffolk County
Docket Number: 44597/2009
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX NO. 44597/2009

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

COPY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

WELLS FARGO BANK, N.A. AS
 INDENTURE TRUSTEE UNDER THE
 INDENTURE RELATING TO IMH ASSETS
 CORP., COLLATERALIZED ASSET-
 BACKED BONDS SERIES 2005-6,

Plaintiff,

-against-

SABRINA WAGNER, ASHLEY SMITH,
 JERRY MAGNASON,

Defendants.

ORIG. RETURN DATE: JUNE 14, 2011
 FINAL SUBMISSION DATE: AUGUST 18, 2011
 MTN. SEQ. #: 002
 MOTION: MD

ORIG. RETURN DATE: JUNE 23, 2011
 FINAL SUBMISSION DATE: AUGUST 18, 2011
 MTN. SEQ. #: 003
 CROSS-MOTION: XMOT D

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Upon the following papers numbered 1 to 9 read on this motion FOR
JUDGMENT OF FORECLOSURE AND CROSS-MOTION TO EXTEND TIME TO ANSWER.
 Notice of Motion and supporting papers 1-3; Notice of Cross-motion and supporting papers
4-6; Affirmation in Opposition to Cross-motion and in Further Support of Motion 7;
 Replying Affirmation and supporting papers 8, 9; it is,

ORDERED that this motion by plaintiff, WELLS FARGO BANK, N.A.,
 AS INDENTURE TRUSTEE UNDER THE INDENTURE RELATING TO IMH
 ASSETS CORP., COLLATERALIZED ASSET-BACKED BONDS SERIES 2005-6

("plaintiff"), for a Judgment of Foreclosure and Sale, is hereby **DENIED** in light of the Court's ruling on the instant cross-motion; and it is further

ORDERED that this cross-motion by defendant, SABRINA WAGNER ("defendant"), for an Order:

(1) pursuant to CPLR 2101 (f), recognizing the acceptance of a pleading untimely served, due to a waiver of objection;

(2) alternatively, pursuant to CPLR 3012 (d), extending defendant's time to appear or plead herein;

(3) pursuant to CPLR 3012 (d), compelling the acceptance of a pleading untimely served, upon such terms as may be just;

(4) pursuant to CPLR 5015 (a) (3), dismissing the action based upon fraud, misrepresentation, or other misconduct of an adverse party;

(5) pursuant to CPLR 3211 (a) (1), dismissing the action based upon documentary evidence of a stipulation of discontinuance between the parties;

(6) pursuant to CPLR 3211 (a) (5), dismissing the action based upon a stipulation of discontinuance between the parties;

(7) pursuant to CPLR 3211 (a) (4), dismissing the action based upon another action pending between the same parties for the same cause of action in a court of any state or the United States;

(8) pursuant to CPLR 3012 (d) and 5015 (a) (1), permitting defendant to appear and file an answer and proceed upon the merits to trial;

(9) vacating the order of reference granted to plaintiff herein;

(10) pursuant to RPAPL 1303 and 1304, dismissing the action for failure to serve upon defendant the notices required by those statutes; and

(11) pursuant to CPLR 6516, vacating the Notice of Pendency filed herein upon the basis of improper successive filing of Notices of Pendency,

is hereby **GRANTED**, pursuant to CPLR 3012 (d), solely to the extent provided hereinafter. The Court has received opposition to defendant's application from plaintiff.

Based upon the defendant's default in the payment of the monthly installments payable on December 1, 2008 and each month thereafter, plaintiff commenced this foreclosure action on or about November 13, 2009. Defendant failed to timely interpose an answer to the complaint or to appear in this action.

By Order dated November 15, 2010, this Court granted plaintiff's *ex parte* application for an Order of Reference. The Court noted therein that a settlement conference was held in this matter on October 14, 2010, pursuant to CPLR 3408.

Plaintiff has now filed the instant application for a Judgment of Foreclosure and Sale, on notice to all defendants, and defendant has filed the instant cross-motion for the relief described hereinabove. The Court shall first address defendant's cross-motion.

Defendant informs the Court that there were two foreclosure actions commenced against her with respect to a mortgage affecting her property located at 105 Hickory Street, Port Jefferson Station, New York, but that she was not aware that two actions had been filed. Defendant "believes" that she was served with papers for one of the actions, but she is unaware as to which one. Further, defendant claims that she was never served with notices pursuant to either RPAPL 1303 or 1304.

Defendant alleges that plaintiff commenced a prior action against her on or about July 21, 2009, under Index No. 28631/2009, which was unilaterally discontinued by plaintiff by Stipulation of Discontinuance and Cancellation of Lis Pendens dated January 21, 2010. Although denominated a stipulation, it only bears the signature of plaintiff's counsel, as none of the defendants had appeared at that time. Defendant contends that the instant action was commenced while the first action was still pending. As such, defendant claims that the multiple actions were the source of confusion, and resulted in her believing that there was not an active foreclosure action being pursued against her. Thus, she was not aware that she needed to serve an answer to the instant complaint.

Notwithstanding the foregoing, defendant served an answer herein on May 17, 2011. Defendant alleges that plaintiff's counsel rejected the answer as untimely by Notice of Rejection dated May 20, 2011; however, defendant argues that the rejection was untimely under CPLR 2101 (f), having been served on May 23, 2011, or thereafter.

Moreover, defendant argues that the stipulation of discontinuance in the first action was applicable to *all* matters pending and should be applicable herein as well, and that the stipulation was with prejudice. In the alternative, defendant argues that she has proffered a reasonable excuse for failing to timely interpose an answer to the complaint, and seeks to compel plaintiff to accept her answer untimely served. Furthermore, if the Court were to compel plaintiff to accept defendant's untimely answer, defendant seeks dismissal of this action based upon another action pending, and a lack of jurisdiction over defendant for failure to serve the proper notices pursuant to RPAPL 1303 and 1304.

In opposition hereto, plaintiff argues that defendant had ample notice of this action and participated in settlement conferences in an attempt to resolve the matter. Plaintiff alleges that the first action was discontinued without prejudice, and that defendant has failed to proffer a reasonable excuse for her default in appearing in this action. Further, plaintiff contends that defendant was served with the only notice required, under RPAPL 1303.

CPLR 3012 (d) provides that "[u]pon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default" (CPLR 3012 [d]).

Here, under the circumstances presented, the Court finds that defendant has proffered a reasonable excuse for the failure to timely serve an answer, to wit: her confusion as a result of the prior action having been discontinued after the instant action was commenced. Therefore, given the lack of willfulness on the part of defendant, and the strong public policy in favor of resolving cases on the merits, defendant's motion is **GRANTED** solely to the extent that her default in appearing herein is vacated (*see Giacomelli v Guiducci*, 36 AD3d 853 [2007]; *Giladi v City of New York*, 34 AD3d 733 [2006]; *Jolkovsky v Legeman*, 32 AD3d 418 [2006]; *Kaiser v Delaney*, 255 AD2d 362 [1998]; *I.J. Handa, P. C. v Imperato*, 159 AD2d 484, *supra*; *see also 2M Realty Corp. v Boehm*, 13 AD3d 361 [2004]). Plaintiff shall accept as timely defendant's Verified Answer served on or about May 17, 2011.

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However, those branches of defendant's motion to dismiss this action are **DENIED**. Plaintiff has alleged and submitted proof of service upon defendant of the notice pursuant to RPAPL 1303, and the Court finds that the notice required pursuant to RPAPL 1304 is inapplicable to the subject loan. The Court notes that nowhere in defendant's papers does she deny defaulting under the note and mortgage being foreclosed herein. Moreover, the Court finds that the prior action was discontinued without prejudice (see CPLR 3217 [c]; *Maurischat v County of Nassau*, 81 AD3d 793 [2011]), which therefore does not act as a bar to the instant action.

In view of the foregoing, this application by plaintiff for a Judgment of Foreclosure and Sale is **DENIED** at this juncture, without prejudice.

The foregoing constitutes the decision and Order of the Court.

Dated: April 13, 2012

HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

 X NON-FINAL DISPOSITION