

Wells Fargo Bank, N.A. v Eitani

2014 NY Slip Op 33820(U)

July 30, 2014

Supreme Court, Kings County

Docket Number: 507424/13

Judge: Gloria M. Dabiri

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At IAS Part 2 of the Supreme Court of the State of New York, Kings County, on the 30th day of July, 2014.

PRESENT: Hon. Gloria M. Dabiri, JSC

Wells Fargo Bank, N.A., As trustee, In Trust For The Registered Holders of Park Place Securities, Inc. Asset-Backed Pass Through Certificates, Series 2005-WCW1,

SHORT FORM ORDER

Plaintiff(s)

Index No. 507424/13

-against -


Eitani, Et. Al.,

Defendant(s)

| The following papers numbered <u>1</u> to <u>4</u> read on this motion | Papers Numbered |
|--|-----------------|
| Notice of Motion - Order to Show Cause and Affidavits (Affirmations) Annexed | 1-2 |
| Answering Affidavit (Affirmation) | 3 |
| Reply Affidavit (Affirmation) | 4 |
| Affidavit (Affirmation) | |
| Pleadings - Exhibits | |

Upon the foregoing papers, defendant David Cohan seeks an order dismissing this mortgage foreclosure action pursuant to CPLR 3211[a][5] and CPLR 213. Defendant contends that the entire mortgage debt was accelerated more than eight years prior to the commencement of this action on November 25, 2013. In opposition, plaintiff argues that a prior action to recover on the subject mortgage was timely commenced on November 16, 2005 under Index No. 35176/05 (first action). The first action was dismissed on August 1, 2013 pursuant to CPLR 3215[c] (Knipel, J.). Plaintiff avers that the current action was properly recommenced within six months of dismissal of the first action according to the savings clause of CPLR 205[a].

Under the circumstances of this case the dismissal of the first action was not for a neglect to prosecute, pursuant to CPLR 3216 or otherwise, and, thus, CPLR 205 may be applied (see *Marrero v Nails*, 114 AD3d 101, 104 [2013]). Significantly, in the first action, plaintiff obtained a default judgment and Order of Reference on June 6, 2008 (*Klein v St. Cyprian Props., Inc.*, 100 AD3d 711 [2012]; *Home Sav. of Am., F.A. v. Gkanios*, 230 AD2d 770 [1996]) and a general pattern of delay in proceeding with the litigation had not been demonstrated (CPLR 205[a]). Accordingly, the motion of defendant is denied.

ENTER, 
JSC
HON. GLORIA DABIRI
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