Bank of N.Y. Mellon v Izmirligil
2015 NY Slip Op 30641(U)
March 26, 2015
Supreme Court, Suffolk County
Docket Number: 47361-09
Judge: Thomas F. Whelan
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MEMO DECISION & ORDER

INDEX No. 47361-09

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATES:
SUBMIT DATES:
Motion Seq. # 006 - MD
Motion Seq. # 007 - MD
Motion Seq. # 008 - MOTD
CDISP - No

---X

THE BANK OF NEW YORK MELLON,

Plaintiff,

-against-

ARIF IZMIRLIGIL, BOARD OF MANAGERS FOR SAILOR'S HAVEN HOMEOWNERS ASSOCIATION CORP., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. as nominee for E-Loan Center, Inc., MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as nominee for PNC Mortgage Corp. of America, JOHN DOE (said name being fictitious it being the intention of plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the Mortgaged Premises),

Defendants.

---X

ECKERT SEAMANS CHERIN
Attys. For Plaintiff
10 Bank St. - Ste. 700
White Plains, NY 10606

ARIF IZMIRLIGIL
Defendant Pro Se
15 Sailors Court
Miller Place, NY 11764

Upon the following papers numbered 1 to 34 read on the two separate motions by defendant Izmirligil (#006 & #007), respectively and the separate motion by the plaintiff (#008) for an order of reference on default; Notice of motion (#006) and supporting papers 1 - 4; Opposing papers; 5-6; Reply papers 7-9; Memorandum of Law 10-11; Separate [unsigned] Notice of motion (#007) and supporting papers 12-14; Opposing papers: 15-16; Reply papers 17-18; Memorandum of Law 19-21; Separate Notice of motion (#008) and supporting papers 22-24, 25-26 (Affidavit); Opposing papers Entitled "Notice of Rejection" 27-28: Reply papers 29-30; Memorandum of Law 31-32, 33-34; Other Papers Not Considered: Duplicate signed Notice of Motion and supporting papers for recusal order (007); it is,

ORDERED that the defendant Izmirligil's motion (#006) for an order dismissing the complaint as abandoned pursuant to CPLR 3215(c) or by reason of fraud and for cancellation of the notice of pendency is considered under CPLR 3215(c) and CPLR Article 65 and is denied; and it is further

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ORDERED that the separate motion (#007) by defendant Izmirligil for an order of this court recusing it from presiding further over this action is denied; and it is further

ORDERED that the separate motion (#008) by the plaintiff for default judgments on its complaint against the defendants served with process, including the one served as John Doe, together with an order appointing a referee to compute is granted only with respect to claim for foreclosure and sale set forth in the First cause of action in the complaint and is denied with respect to the Second cause of action for declaratory relief; and it is further

ORDERED that the Second cause of action is hereby severed from the First cause of action, which First cause of action shall alone continue herein, and any final judgment of foreclosure and sale entered on the First cause action shall reflect the severance of the Second cause of action as directed herein.

In this mortgage foreclosure action, the obligor/mortgagor defendant, Arif Izmirligil, moves for an order dismissing the complaint as abandoned pursuant to CPLR 3215(c) and on grounds of fraud. This defendant further moves for the recusal of this court, which relief was the subject of a prior motion by him that was denied by order dated May 20, 2014. A separate motion by the plaintiff for an order appointing a referee to compute upon the default all defendants in answering and for the identification of a party served as an unknown is also pending before the court.

First considered is the motion (#006) by defendant Izmirligil to dismiss the complaint and to cancel the notice of pendency recently filed, as the court's determination thereof which may render the other two applications, academic. For the reasons stated, this motion is denied.

CPLR 3215(c) requires that a plaintiff commence proceedings for the entry of a default judgment within one year after the default or demonstrate sufficient cause why the complaint should not be dismissed. Where the plaintiff has made an application to the court for the entry of a default judgment within one year of the defendant's default, even if unsuccessful, the court may not later dismiss the complaint as abandoned pursuant to CPLR 3215(c) (*see* ***Jones v Fuentes***, 103 AD3d 853, 962 NYS2d 263 [2d Dept 2013]; *see also* ***Mortgage Elec. Registration Sys., Inc. v Smith***, 111 AD3d 804, 975 NYS2d 121 [2d Dept 2013]; ***Norwest Bank Minnesota, N.A. v Sabloff***, 297 AD2d 722, 747 NYS2d 559 [2d Dept 2002]; ***Brown v Rosedale Nurseries, Inc.***, 259 AD2d 256, 686 NYS2d 22 [1st Dept 1999]; ***Home Sav. of Am., F.A. v Gkanios***, 230 AD2d 770, 646 NYS2d 530 [2d Dept 1996]). In mortgage foreclosure actions, plaintiffs may not be deemed to have abandoned their foreclosure action under CPLR 3215(c) when they take "the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference under RPAPL 1321[1] within the one year time period imposed by the statute" (***Klein v Cyprian Prop., Inc.***, 100 AD3d 711, 954 NYS2d 170 [2d Dept 2012]; *see* ***Home Sav. of America, F.A. v Gkanios***, 230 AD2d 770, *supra*).

The Appellate Division, Second Department has instructed that in cases wherein no motion is interposed within the one year time limitation period, avoidance of a dismissal of the complaint as abandoned requires the plaintiff to offer a reasonable excuse for the delay in moving for leave to enter a default judgment and must demonstrate a potentially meritorious cause of action (*see* ***Giglio v***

NTIMP, Inc., 86 AD3d 301, 308, 926 NYS2d 546 [2d Dept 2011]; *see also* ***Kohn v Tri-State Hardwoods, Ltd.***, 92 AD3d 642, 937 NYS2d 865, 866 [2d Dept 2012]; ***115-41 St. Albans Holding Corp. v Estate of Harrison***, 71 AD3d 653, 894 NYS2d 896 [2d Dept 2010]; ***Cynan Sheetmetal Prods., Inc. v B.R. Fries & Assoc., Inc.***, 83 AD3d 645, 919 NYS2d 873 [2d Dept 2011]; ***First Nationwide Bank v Pretel***, 240 AD3d 629, 659 NYS2d 291 [2d Dept 1997]). In addition, appellate cases authorities have established that a moving defendant's failure to show prejudice by the plaintiff's delay in moving for the default may tip the balance in favor of a finding of sufficient cause to excuse the delay *provided* an explanation of the delay is advanced which evinces no intent to abandon the action and a meritorious cause of action is shown to exist (*see* ***LNV Corp. v Forbes***, 122 AD3d 805, 996 NYS2d 696, [2d Dept 2014]; ***Brooks v Somerset Surgical Assocs***., 106 AD3d 624, 966 NYS2d 65 [2d Dept 2013]; ***Laourdakis v Torres***, 98 AD3d 892, 950 NYS2d 703 [1st Dept. 2012]; ***LaValle v Astoria Constr. & Paving Corp.***, 266 AD2d 28, 697 NYS2d 605 [1st Dept 1999]; ***Hinds v 2461 Realty Corp***., 169 AD2d 629, 632, 564 NYS2d 763 [1st Dept 1991]). Delays attributable to the parties' engagement in mandatory settlement conference procedures, or in litigation communications, discovery, motion practice and other pre-trial proceedings have been held to negate any intention to abandon the action and are thus excusable under CPLR 3215(c) (*see* ***Brooks v Somerset Surgical Assocs***., 106 AD3d 624, *supra*; ***Laourdakis v Torres***, 98 AD3d 892, *supra*).

Here, the record reveals that the plaintiff did not undertake the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference under RPAPL 1321(1) within the one year time period imposed by the statute. However, the plaintiff has demonstrated, in its opposing papers, that sufficient cause exists for the delay within the contemplation of CPLR 3215(c) due to its engagement in a plethora of litigation activities from which an intent not to abandon its claims for foreclosure and sale is discernable.

The record reveals that the plaintiff commenced this action by filing its summons and complaint with the Clerk on November 30, 2009. The mortgage at issue is one in excess of one million dollars given by the defendant mortgagor, Arif Izmirligil, in July of 2006. The default in payment of monthly amounts due for interest and principal under the note and mortgage occurred on May 1, 2009 and such default continues to date. On December 3, 2009, defendant Izmirligil was served, pursuant to CPLR 308(1), with process bearing the statutorily required notices and warnings and the complaint. Defendant Izmirligil defaulted in timely answering or otherwise appearing in response to such service.

In February of 2010, defendant Izmirligil moved to vacate his default and for leave to serve a late answer. By order dated July 16, 2010, this court denied the motion (#001). The defendant then moved (#002) for leave to renew and reargue his original motion. On September 22, 2010, this court denied the renewal and reargument motion, after which, defendant Izmirligil challenged both orders by taking appeals therefrom. By order dated October 25, 2011, the Appellate Division, Second Department rejected the defendant's claims of error and affirmed both orders of this court (*see* ***Mellon v Izmirligil***, 88 AD3d 930, 931 NYS2d 667 [2d Dept 2011]). The default in answering of defendant Izmirligil, which was admitted in his original moving papers and judicially confirmed in three orders, thus stands as fixed and determined for all purposes in this action.

Thereafter, defendant Izmirligil filed suit against the plaintiff in federal court (N.Y.E.D. CV11-5591) charging it with wrongful foreclosure of the subject mortgage by its institution of this action and with deceptive practices in the origination of the loan and violations of the Fair Debt Collection Practices Act. All of these claims were dismissed upon motion of the plaintiff by order dated April 15, 2013 (*see* Memorandum & Order of the Honorable Leonard D. Wexler, District Court Judge, attached as Exhibit A to the plaintiff's reply papers).

In September of 2013, the plaintiff moved (#003) for an order excusing it from having to comply with certain administratively imposed "vouching requirements" which motion was vigorously opposed by defendant Izmirligil. That motion was granted by order of this court dated January 28, 2014 (*see* ***Bank of New York Mellon v Izmirligil***, 43 Misc3d 409, 980 NYS2d 733 [Sup. Ct. Suffolk County 2014]). Following a substitution of counsel for the plaintiff that occurred in April of 2014, defendant Izmirligil moved to have this court recuse itself, which motion was denied by order dated May 20, 2014.

Defendant Izmirligil took an appeal from both the May 20, 2014 order and the January 14, 2014 order by service of an Amended Notice of Appeal dated July 22, 2014, and moved in the Appellate Division for a stay of this action. That motion was denied by order dated September 19, 2014. On December 10, 2014, the plaintiff interposed its motion (#008) for an order of reference upon default which is decided herein, while defendant Izmirligil filed the two separate motions (#007 & #006) - likewise decided herein - in separate submissions filed on January 6, 2015 and January 16, 2015, respectively.

Based upon its review of the record, the court finds that the plaintiff has effectively demonstrated sufficient cause for the delay in moving for an order of reference within the contemplation of CPLR 3215. In its opposing papers, the plaintiff established that such delay is excusable in light of the plaintiff's conduct in engaging in the multitude of motions, appeals and other litigation exchanges with defendant Izmirligil in this action and in the federal action commenced by the defendant. An intention not to abandon the plaintiff's claim for foreclosure and sale is clearly discernable from these proceedings and from the filing of successive notices of pendency which the plaintiff has undertaken in accordance with CPLR 6516. In addition, the plaintiff established the meritorious nature of its claims for foreclosure and sale against defendant Izmirligil, whose default in answering was first fixed in the order dated July 16, 2010 and a total absence of prejudice by the plaintiff's continued prosecution of its claim against him. For these reasons, the court denies those portions of the defendants' motion for dismissal of the complaint pursuant to CPLR 3215(c).

The remaining portions of defendant Izmirligil's motion to dismiss the complaint (#006), which are premised on grounds of fraud and other alleged improper conduct, are also denied. Defendant Izmirligil's defensive claim of fraud in the underlying transaction by the original lender, if cognizable (*see* ***JoAnn Homes at Bellmore v Dworetz***, 25 NY2d 112, 119, 302 NYS2d 799 [1969]; *cf.*, ***Nassau Trust Co. v Montrose Concrete Prods. Corp.***, 56 NY2d 175, 183, 451 NYS2d 663, 667 [1982]), was waived by his failure to raise it in either a timely motion to dismiss or by answer and by other post transactional conduct (*see* CPLR 3018[b]; ***Confidential Lending, LLC v Nurse***, 120 AD3d

739, 992 NYS2d 77 [2d Dept 2014]; ***Feinstein v Levy***, 121 AD2d 499, 503 NYS2d 821 [2d Dept 1986]), thereby leaving him without a viable claim for dismissal on such grounds. Nor is defendant Izmirligil possessed of procedurally proper or substantively meritorious grounds for dismissal due to the plaintiff's purported lack of standing or its engagement in purported acts of intrinsic or extrinsic fraud during the course of this litigation as these claims have previously been adjudicated as lacking in both procedural and substantive merit by prior order of this court (*see* ***Bank of New York Mellon v Izmirligil***, 43 Misc3d 409, 980 NYS2d 733 [Sup. Ct. Suffolk County 2014]).

The defendant's further demand for cancellation of the notice of pendency is denied. RPAPL § 1331 requires that a notice of pendency must be filed at least 20 days prior to judgment. A lapse in the effectiveness of a notice of pendency is not a jurisdictional defect and a foreclosing plaintiff is statutorily authorized to file successive notices of pendency in a mortgage foreclosure action even after the lapse of prior filed notice (*see* CPLR 6516; ***Maspeth Federal Sav. and Loan Ass'n v Sloup***, 123 AD3d 672, 998 NYS2d 409 [2d Dept 2014]). The defendant's demands for cancellation of the notice of pendency and any all concomitant demands for a dismissal of the complaint on that basis or any others are rejected as unmeritorious. Defendant Izmirligil's motion (#006) is thus denied.

Next considered is the separate motion (#007) by defendant Izmirligil in which he asks this court to recuse itself from further presiding over any further proceedings in this action. This is the second application for this relief advanced by defendant Izmirligil as the first was denied by order of this court dated May 20, 2014. The court declines to address the merits of the defendant's re-assertion of grounds previously advanced by him on his prior motion (#005). To the extent that the instant motion for recusal is premised upon events and circumstances occurring after the interposition of the first motion, it is denied as this court finds that it can remain impartial notwithstanding occurrence of any such subsequent events and/or circumstances. Neither the defendant's filing of a suit in federal court against the undersigned nor the recent newspaper articles and media reports relied upon by the defendant to support this second motion for recusal provide any basis in law or fact for the granting of such motion (*see* Advisory Committee on Judicial Ethics, Opinion 14-121; ***TOA Constr. Co., Inc. v Tsitsires***, 54 AD3d 109, 861 NYS2d 335 [1st Dept 2008]; *purported facts gleaned from newspaper articles provide no basis for judicial findings nor do they constitute matters for which judicial notice may be taken*; ***Chong Min Mun v Soung Eun Hong***, 109 AD3d 732, 971 NYS2d 293 [1st Dept 2013]; ***Merkos L'Inyonei Chinuch, Inc. v Sharf***, 59 AD3d 403, 873 NYS2d 148 [2d Dept 2009]; "*statement in a newspaper article, did not constitute competent evidence*"; ***Platovsky v City of New York***, 275 AD2d 699, 713 NYS2d 358 [2d Dept 2000]; *content of newspaper articles constitute inadmissible hearsay*; ***Young v Fleary***, 226 AD2d 454, 640 NYS2d 593 [2d Dept 1996]; "*Specifically, the newspaper article submitted by the plaintiff in opposition to the respondents' motion for summary judgment constituted inadmissible hearsay*"). The defendant's motion (#007) is thus denied.

Left for determination is the plaintiff's motion (#008) for an order of reference on default and for an order identifying the person served as John Doe to be "Jane Doe" and for the deletion of all other unknown defendants. It is well settled law that a party moving for a default judgment must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to answer or appear (*see* CPLR 3215[f]; ***Woodson v Mendon***

Leasing Corp., 100 NY2d 62, 71, 760 NYS2d 727 [2003]; ***Todd v Green***, 122 AD3d 831, 997 NYS2d 155 [2d Dept 2014]; ***U.S. Bank Natl. Assn. v Razon***, 115 AD3d 739, 981 NYS2d 571, 572 [2d Dept 2014]; ***Diederich v Wetzel***, 112 AD3d 883, 979 NYS2d 605 [2d Dept 2013]; ***Loaiza v Guzman***, 111 AD3d 608, 609, 974 NYS2d 282 [2d Dept 2013]; ***Green Tree Serv., LLC v Cary***, 106 AD3d 691, 692, 965 NYS2d 511 [2d Dept 2013]; ***Dupps v Betancourt***, 99 AD3d 855, 952 NYS2d 585 [2d Dept 2012]).

In the mortgage foreclosure arena, a claim for foreclosure is further governed by RPAPL § 1321 and appellate case authorities. Pursuant thereto the claim is established by the plaintiff's production of the note and mortgage together with evidence of default in payment or a default in other obligations giving right to the remedy of foreclosure and sale which the mortgagor willingly conferred upon the lender in exchange for the advancement of the mortgage loan monies (*see* ***One West Bank, FSB v DiPilato***, 124 AD3d 735, 998 NYS2d 668 [2d Dept 2015]; ***U.S. Bank Natl. Assn. v Razon***, 115 AD3d 739, *supra*). Here, the moving papers sufficiently established the plaintiff's entitlement to an order of reference upon default as it included due proof of service of the summons and complaint, defaults in answering on the part of the mortgagor defendant and all other defendants joined herein by service of the summons and complaint and the existence of facts that constitute the plaintiff's possession of viable claims for foreclosure and sale as required by RPAPL § 1321 and CPLR 3215(f) (*see* ***Citimortgage, Inc. v Chow Ming Tung***, ___ AD3d ____, 2015 WL 1213591 ***U.S. Bank Natl. Ass'n v Poku***, 118 AD3d 980, 989 NYS2d 75 [2d Dept 2014]; ***U.S. Bank Natl. Assn. v Razon***, 115 AD3d 739, *supra*; ***Green Tree Serv., LLC v Cary***, 106 AD3d 691, *supra*; ***King v King***, 99 AD3d 672, 951 NYS2d 565 [2d Dept 2012]; ***Integon Natl. Ins. Co. v Noterile***, 88 AD3d 654, 930 NYS2d 260 [2d Dept 2011]).

That the plaintiff, here, has no obligation to establish its standing to maintain this action is clear as is it now well established that the issue of a foreclosing plaintiff's standing is not an element of its claim unless a due and timely defense of standing is asserted by a defendant possessed of such defense (*see* ***One West Bank, FSB v DiPilato,*** 124 AD3d 735, 998 NYS2d 668 [2d Dept 2015]; ***Deutsche Bank Natl. Trust Co. v Islar***, 122 AD3d 566, 996 NYS2d 130 [2d Dept 2014]; ***Plaza Equities, LLC v Lamberti***, 118 AD3d 688, 986 NYS2d 843 [2d Dept 2014]; ***Bank of New York v McCall***, 116 AD3d 993, 985 NYS2d 255 [2d Dept 2014]; ***Wells Fargo Bank Minn., N.A. v Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). As outlined above, the issue of the plaintiff's standing was never put in issue by the due and timely service of an answer or otherwise.

To successfully defeat the plaintiff's motion, defendant Izmirligil was required to advance a valid jurisdictional or abandonment defense (*see* ***Schwartz v Reisman***, 112 AD3d 909, *supra*; ***U.S. Bank N.A. v Gonzalez,*** 99 AD3d 694, 694–695, *supra*; ***McGee v Dunn,*** 75 AD3d 624, 625, 906 NYS2d 74 [2d Dept 2010]), as his right to vacate his default was lost by his unsuccessful appeal of the orders of this denying that relief (*see* ***Mellon v Izmirligil***, 88 AD3d 930, *supra*). A review of the opposing papers submitted by the defendant reveals a failure to demonstrate any jurisdictional or abandonment defenses for the reasons outlined above.

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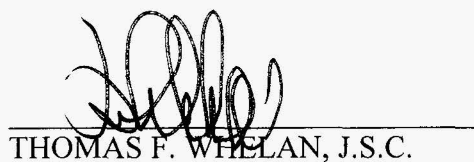
The plaintiff is thus entitled to a default judgment against defendant Izmirligil and the person served as John Doe and all of the other defendants joined as parties to the plaintiff's pleaded claim for foreclosure and sale which is advanced in the First cause of action set forth in the complaint. The plaintiff is further awarded the relief requested CPLR 1024 and the appointment of a referee to compute pursuant to RPAPL § 1321.

However, the moving papers failed to address, let alone establish, the plaintiff's possession of cognizable claims for the relief demanded in its Second cause of action, namely, a judgment pursuant to RPAPL Article §1501 declaring the invalidity and extinguishment of a prior mortgage lien allegedly held or owned by defendant Mortgage Electronic Registration Systems Inc., [MERS] as nominee of defendant, PNC Mortgage Corp. of America. The complaint is devoid of factual allegations from which cognizable claims for this declaratory relief are discernable and none were advanced in the moving papers (*see* CPLR 315[f]; RPAPL Article 15; ***Woodson v Mendon Leasing Corp***., 100 NY2d 62, 71, *supra*). The plaintiff is thus not entitled to an order fixing the defaults of the MERS defendant nor PNC Bank who are the targets of the plaintiff's Second cause of action for declaratory relief extinguishing their prior liens. The Second cause of action is thus severed from the First cause of action, which alone shall continue herein. Any final judgment of foreclosure and sale entered on the First cause action shall reflect the severance of the Second cause of action directed herein.

Proposed Order appointing referee to compute, as modified by the court, has been signed simultaneously herewith.

DATED: March 26, 2015



THOMAS F. WHELAN, J.S.C.