

Wells Fargo Bank, N.A. v Cancel
2015 NY Slip Op 30894(U)
May 19, 2015
Supreme Court, Suffolk County
Docket Number: 20746/2011
Judge: James C. Hudson
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**Supreme Court of the County of Suffolk
State of New York - Part XL**

PRESENT:

HON. JAMES HUDSON
Acting Justice of the Supreme Court

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WELLS FARGO BANK, NA

Plaintiff,

-against-

DORCAS CANCEL
DEAN SANTIAGO
NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE
UNITED STATES OF AMERICA
"JOHN DOE #1" to JOHN DOE #10," the last 10
names being fictitious and unknown to plaintiff, the
persons or parties intended being the persons or
parties, if any, having or claiming an interest in or
lien upon the mortgaged premises described in the
verified complaint,

Defendants.

x-----x

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**SEQ. NOS.:001-MG
003-MD**

HOGAN, LOVELLS US LLP,
Attorneys for Plaintiff Wells Fargo Bank, NA
By: Lisa J. Fried, Esq.,
Stacey A. Lara, Esq., and
Gabrielle B. Ruda, Esq.
875 Third Avenue
New York, NY 10022

MCcABE, WEISBERG & CONWAY, PC
Attorney for Plaintiff Wells Fargo Bank, NA
145 Huguenot Street, Suite 201
New Rochelle, NY 10801

JAMES F. MISIANO, ESQ.
Attorney for Defendants (John Doe)
Jeffrey Rueb and Maria Rueb
510 Broadhollow Road, Suite 110
Melville, NY 11747

DORCAS CANCEL & DEAN SANTIAGO
Defendants *Pro Se*
146 Third Avenue
Brentwood, NY 11717

UNITED STATES OF AMERICA
258 Cadman Plaza West
Brooklyn, NY 11788

Upon the following papers numbered 1-34 read on this Motions/Order to Show Cause for Summary Judgment and Cross Motion for Dismissal; Notice of Motion/ Order to Show Cause and supporting papers 1-19; Notice of Cross Motion and supporting papers 20-29; Answering Affidavits and supporting papers 30-31; Replying Affidavits and supporting papers 32-33; Other 34; (and after hearing counsel in support and opposed to the motion),

ORDERED, that Plaintiff's motion (Seq.# 1) for Summary Judgment in its favor and against the Defendants is granted (CPLR §3 212). It is further

ORDERED, that Defendants "John Doe" a/k/a Jeffrey Rueb and Maria Rueb's motion (Seq.#3) for Dismissal on the basis of Plaintiff's failure to enforce a default within a year is denied (CPLR § 3215[c]).

The case at bar is an action to foreclose upon a note and mortgage. Plaintiffs have established, via documentary evidence, that a sum of money was loaned to Defendants, Joan Santiago, Dorcas Cancel and Dean Santiago, secured by a mortgage on a parcel of realty and not repaid as per the terms of the written agreement between the parties. Defendants Jeffrey and Maria Rueb are tenant/occupants of the *locus in quo*. Plaintiff has moved for judgment in its favor pursuant to CPLR § 3212.

Summary Judgment is a drastic remedy to be granted only when the Court determines there is no clear triable issue of fact. Even the color of a triable issue forecloses the remedy (*Benincasa v. Garrubbo*, 141 A.D.2d 636,529 N.Y.S.2d 797 [2d Dept 1988]). In a dispute where the facts are uncontroverted, as in the matter at hand, and the intent of the parties can be discerned from the face of the contract between the parties, the Court is confined to an interpretation of law and the matter is "ripe" for Summary Judgment (*American Exp. Bank Ltd. v. Uniroyal Inc.*, 164 A.D.2d 275, 562 N.Y.S.2d 613 [1st Dept., 1990], appeal denied 77 N.Y.2d 807).

The inviolability of contract is a fundamental principle of the law and as a general rule a party entering into an unambiguous contract contemplating lawful activity shall be held to their word (*Vivir of L I, Inc. v. Ehrenkranz*,127 A.D.3d 962, --- N.Y.S.3d ----, 2015 WL 1651485 [2nd Dept. April 15th, 2015]). In the case before us, Plaintiff has proved the existence of a clearly worded written contract (*i.e.*, the note and mortgage) and that Defendants/mortgagors received substantial benefits therefrom. The sole issue for the Court's consideration at this juncture is the motion by Jeffery and Maria Rueb for dismissal pursuant to CPLR § 3215[c]. CPLR § 3215[c] provides:

"Default not entered within one year. If the Plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the Defendant under this subdivision does not constitute an appearance in the action.

In his eloquent brief, Defense counsel urges us to apply the holding in *Wayloo v. Sheikh* 2 A.D.3d 629, 768 N.Y.S.2d 338 [2nd Dept.2003] wherein the Court dismissed a complaint as abandoned and held “The Plaintiff also failed to demonstrate good cause why he did not seek to enter a judgment... until almost three years after [Defendant’s] default in answering or appearing” (Id. at 630 citing *Opia v. Chukwu*, 278 A.D.2d 394, 718 N.Y.S.2d 71; *Richards v. Lewis*, 243 A.D.2d 615, 663 N.Y.S.2d 233; *Ewart v. Maimonidies Medical Ctr.*, 239 A.D.2d 543, 657 N.Y.S.2d 210). After reviewing the moving and responding papers, we find Defendants’ case law to be distinguishable from the authority this Court considers to be controlling.

It is beyond cavil that in order for a Plaintiff to avoid the penalty of dismissal under CPLR § 3215[c] for failing to move upon a default within a year, the following must be demonstrated to the Court’s satisfaction: (1) a reasonable excuse for the delay and (2) a meritorious claim (*Kohn v. Tri-State Hardwoods, Ltd.*, 92 AD3d 642, 937 N.Y.S.2d 865, 866 [2d Dept 2012]; *Giglio v. NTIMP, Inc.*, 86 AD3d 301, 308, 926 N.Y.S.2d 546 [2d Dept 2011]; 115–41 *St. Albans Holding Corp. v. Estate of Harrison*, 71 AD3d 653, 894 N.Y.S.2d 896 [2d Dept 2010]; *Cynan Sheetmetal Prods., Inc. v. B.R. Fries & Assoc., Inc.*, 83 AD3d 645, 919 N.Y.S.2d 873 [2d Dept 2011]; *First Nationwide Bank v. Pretel*, 240 AD3d 629, 659 N.Y.S.2d 291 [2d Dept 1997]).

Additionally, “...appellate case authorities have established that a moving Defendants’ 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.” (*Countrywide Home Loans Servicing, L.P. v. Crespo*, Slip Copy, 46 Misc.3d 1226(A), 2015 WL 1036390 [Supreme Suffolk Co.2015, Whelan J.] citing, *LNV Corporation v. Forbes*, 122 AD3d 805, 996 N.Y.S.2d 696, [2d Dept 2014]; *Brooks v. Somerset Surgical Assocs.*, 106 AD3d 624, 966 N.Y.S.2d 65 [2d Dept 2013]; *Laourdakis v. Torres*, 98 AD3d 892, 950 N.Y.S.2d 703 [1st Dept.2012]; *LaValle v. Astoria Const. & Paving Corp.*, 266 A.D.2d 28, 697 N.Y.S.2d 605 [1st Dept 1999]; *Hinds v. 2461 Realty Corp.*, 169 A.D.2d 629, 632, 564 N.Y.S.2d 763 [1st Dept 1991]).

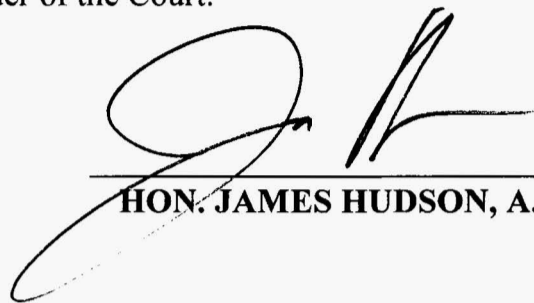
Defendants argue that Plaintiff has failed to show “...any legitimate reason why it did not move to enforce the default of Defendant Rueb for more than two years after their defaults.” (Counsel’s affirmation dated February 26, 2015, para 13). We disagree. Plaintiff has detailed that since the Rueb Defendants were served June 30 2011, it has been far from inactive. Pursuant to CPLR § 3408, settlement conferences were conducted between January 18, 2012 and June 26, 2012. Settlement negotiations have been held to be sufficient evidence to defeat a claim of abandonment (*Iorizzo v. Mattikow*, 25 A.D.3d 762, 807 N.Y.S.2d 663 [2nd Dept.2006]).

Under the circumstances presented, we find that Plaintiff has met its burden of demonstrating a reasonable excuse for its delay in proceeding in this case as well as a meritorious claim. Accordingly, Defendants Jeffrey and Maria Rueb's motion to Dismiss will be denied and Plaintiff's motion for Summary Judgment will be granted.

Simultaneously with the issuance of this decision, the Court is issuing an Order of Reference incorporating the relief granted herein.

The foregoing constitutes the order of the Court.

DATED: MAY 19, 2015
RIVERHEAD, NY



HON. JAMES HUDSON, A.J.S.C.