

US Bank N.A. v John
2015 NY Slip Op 31604(U)
April 2, 2015
Supreme Court, Suffolk County
Docket Number: 15156/2012
Judge: Thomas F. Whelan
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COPY

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

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 9/18/14
SUBMIT DATE: 3/20/15
Mot. Seq. # 001 - MG
CDISP: No

-----X

US BANK NATIONAL ASSOCIATION, AS :
 TRUSTEE RELATING TO CHEVY CHASE :
 FUNDING LLC, MORTGAGE BACKED :
 CERTIFICATES SERIES 2006-3, :
 :
 Plaintiff, :
 :
 -against- :
 :
 THERESA JOHN, ANTHONY PETERS, :
 CLIMBERS TREE CARE SPECIALIST, INC., :
 JENNAK ENTERPRISES, INC., d/b/a :
 AMAGANSET SUPPLY YARD, KMT GROUP, :
 LLC, NYS DEPARTMENT OF TAXATION & :
 FINANCE, SOUTH FORK ANIMAL HOSPITAL, :
 TEACHERS FEDERAL CREDIT UNION, :
 CAPITAL ONE BANK and "JOHN DOES" :
 AND "JANE DOES", said names being fictitious :
 parties intended being possible tenants or occupants :
 of premises and corporations, other entities or :
 persons who claim, or may claim, a lien against :
 the premises, :
 :
 Defendants. :
 -----X

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Upon the following papers numbered 1 to 8 read on this motion by the plaintiff for an order of reference on default and other incidental relief, Notice of motion and supporting papers 1 - 4; Notice of Cross Motion & Supporting papers _____; Opposing papers; 5-6; Reply papers 7-8; Other ___; it is,

ORDERED this motion(#001) by the plaintiff for an order fixing the defaults in answering of all defendants served with process, the deletion of the unknown party defendants from the caption and an order appointing a referee to compute is considered under CPLR 3215 and RPAPL § 1321 and is granted.

In May of 2012, the plaintiff commenced this action to foreclose the lien of a June 30, 2006 mortgage given by defendants, Theresa John and Anthony Peters, to secure a mortgage note of the same date given by defendant John in the principal amount of \$605,000.00. None of the defendants served with the summons and complaint appeared in this action by service of an answer. Following the initialization of the action, it was assigned to the specialized mortgage foreclosure part in accordance with the rules in effect in this court. In June of 2013, the matter released from the specialized mortgage foreclosure part and was assigned to the case inventory of the Honorable Elizabeth H. Emerson, J.S.C., where it remained until September 18, 2014, which was the return date of this motion by the plaintiff for an order of reference on default. On that date, the motion was referred to the foreclosure part and thereafter adjourned upon stipulation of counsel. On January 2, 2015, the action was re-assigned to the case inventory of this court after which the instant motion was retrieved and re-calendared for March 20, 2015.

In its moving papers, the plaintiff seeks an order of reference on default pursuant to CPLR 3215 and RPAPL § 1321 and the deletion of the unknown defendants listed in the caption together with an amendment thereof to reflect such deletion. The motion was interposed in August of 2014 some two months after the action was released from the specialized mortgage foreclosure conference part and it is opposed by mortgagor defendant Peters in an affirmation of his counsel. Therein, a dismissal of the complaint as abandoned pursuant to CPLR 3215(c) is demanded as is a request to appear and defend on the merits. The plaintiff opposes both of these demands for relief in its reply papers.

First considered are the merits of the contentions asserted in the opposing papers of defendant Peters, as determination thereof may render the plaintiff's motion academic.

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]).

The Appellate Division, Second Department has instructed that in cases where no motion was 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 providing 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]).

In the mortgage foreclosure arena, delays in the prosecution of cases may fairly be attributable to various legislative enactments and administratively rules which are aimed at resolving foreclosure actions in a manner favorable to mortgagors. These legislative enactments and rules have dramatically slowed the pace of residential mortgage foreclosure actions pending at the time of such enactments or rule were adopted and have caused serious delays in the institution of new actions (*see* Laws of 2008, Ch. 472 § 3–a as amended by the Laws of 2009 Ch. 507 § 10; CPLR 3408; 22 NYCRR 202.12-a). The seemingly endless imposition of new procedural mandates include the scheduling of a mandatory settlement conference pursuant to CPLR 3408, which was extended by administrative rule to include multiple conferences (*see* 22 NYCRR 202.12-a[c][6], the holding of all motions “in abeyance” during the conference process; 22 NYCRR 202-12-a[7], the merit based vouching requirements that were imposed upon counsel for a foreclosing plaintiff in all pending cases by court administrators) (*see* A.O. 548/10, amended by A.O. 431/11; and A.O. 208/13), which are now the subject of CPLR 3012-a for cases commenced after August 30, 2013.

In addition, many servicers and/or lenders are subject to a host of federal regulations adopted on a temporary basis in 2013 and formally thereafter in January of 2014 which prohibit the commencement and/or continued prosecution of claims for foreclosure and sale in cases wherein the borrower may be eligible for a loan modifications of other loss mitigation alternatives under federal programs (*see* CFPB Regulations X @ 12 C.F.R. Part 1024, Chapter X, Subpart C, §§ 1024.39;-1024.41). Other stays on prosecution of foreclosure actions subject to federal jurisdiction were put in place by FEMA in 2011 and 2012 due to the effects of hurricanes Irene and Sandy.

As a consequence of these statutory and regulatory frameworks, motions for orders of reference are often first made after the one year time limitation period imposed by CPLR 3215(c), the purpose of which, is to prevent the prosecution of stale claims (*see Giglio v NTIMP, Inc.*, 86 AD3d 301, *supra*). Sufficient cause to justify a belated motion for a default judgment has thus been held to have been demonstrated where such delays were engendered by the action remaining in the specialized mortgage foreclosure conference part for multiple conferences over many months, during which time, motions are held in “abeyance” until the action was released from the conference part (*see* 22 NYCRR 202.12-a[c][6]; 202-12-a[7]; *Countrywide Home Loans Serv., LP v Meri Crespo, Greis Lopez, Country Wide Bank, FSB, et al.*, Index No. 09-15340, 2015 WL 1036390 [Sup Ct. Suffolk County 2015, *delays attributable to federally imposed stays and regulations and state conference procedures*]; *see also Aurora Loan Serv., LLC v Brescia, Cach, LLC*, 2013 WL 5823057, *2 [Sup Ct., Suffolk County, 2013]; *Onewest Bank, FSB v Navarro*, 41 Misc3d 1238[A], 2013 WL 6500194 [Sup. Ct., Suffolk County, 2013]; *BAC Home Loans Serv., L.P. v Bordes*, 36 Misc3d 1203[A], 957 NYS2d 263 [Sup. Ct., Queens County, 2012]; *BAC Home Loans Serv., L.P. v Maurer*, 36 Misc3d 1210[A], 957 NYS2d 263

[Sup. Ct., Suffolk County, 2012]; *see also Wells Fargo Bank, N.A v Pasciuta*, [Sup Ct. Suffolk County Index No 22235/12; *delay engendered by inability to comply with vouching requirements*]). These holdings find support from appellate case authorities issued in other contexts where the delay is attributable to the parties' engagement in litigation communications, discovery matters and/or settlement talks which negates any intention to abandon and is 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 court finds that the plaintiff has advanced sufficient evidence of a meritorious cause of action for foreclosure and sale. In addition, the court finds that the plaintiff demonstrated a reasonable excuse for the delay in moving for the fixation of the defendants' defaults, federally imposed stays upon the prosecution of foreclosure actions following Hurricane Sandy and the parties' engagement in loan modification discussions. Moreover, the absence of prejudice to defendant Peters tips the balance in favor of the plaintiff. The record reflects that such defendant has enjoyed use of the mortgaged premises since February 1, 2011 when the default, in payment occurred, without making any payments of amounts due for insurance, taxes or other municipal assessments as required under the terms of the mortgage indenture. These circumstances warrant a finding of the absence of any intent to abandon this action. The defendant's demands for dismissal of the complaint pursuant to CPLR 3015(c) are thus denied.

Also denied is the nuanced and conclusory demand by defendant Peters' counsel for, in effect, a vacatur of such defendant's default in answering and leave to serve a late answer. Where a default in answering has occurred, but no judgment or other adjudication of the default has been fixed by the court, a party in default may oppose a motion for a default judgment and seek dismissal on jurisdictional grounds or under CPLR 3215(c), or may seek to vacate the default and appear in the action pursuant to CPLR 3012(d) (*see HSBC Bank USA, Natl. Ass'n v Rotimi*, 121 AD3d 855, 995 NYS2d 82 [2d Dept 2014]; *Karalis v New Dimensions HR, Inc.*, 105 AD3d 707, 962 NYS2d 647 [2d Dept 2013]; *Wassertheil v Elburg, LLC*, 94 AD3d 753, 753, 941 NYS2d 679 [2d Dept 2012]; *Swedbank, AB v Hale Ave. Borrower, LLC*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]). Notably, recent appellate case authorities have instructed that a party in default who opposes a motion for a default judgment may have the default vacated and obtain leave to serve and file a late answer pursuant to CPLR 3012(d) without benefit of the service of a notice of cross motion seeking leave to extend the time to answer, *provided*, the opposing papers establish the requisite reasonable excuse for the delay and a meritorious defense and a copy of the proposed answer is attached to the moving papers (*see Fried v Jacob Holding, Inc.*, 110 AD3d 56, 970 NYS2d 260 [2d Dept 2013]; *see also Schwartz v Reisman*, 112 AD3d 909 976 NYS2d 883 [2d Dept 2013]; *Blake v U. S.*, 109 AD3d 504, 970 NYS2d 465 [2d Dept 2013]).

Here, defendant Peters defaulted in answering the complaint and none of the requisite elements necessary to vacate such default is advanced in or discernable from the opposing papers and none was previously granted under any prior order of the court. All affirmative demands for relief set forth in the opposing papers of defendant Peters are denied.

Left for consideration is the plaintiff's motion for an order of reference on default and for an order deleting as party defendants, the unknown defendants listed in the caption. For the reasons stated below the motion is granted.

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. Ass'n v Poku*, 118 AD3d 980, 989 NYS2d 75 [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 Citimortgage, Inc. v Chow Ming Tung*, ___ AD3d ___, 2015 WL 1213591 [2d Dept 2015]; *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 [2d Dept 2015], *supra*; *One West Bank, FSB v DiPilato*, 124 AD3d 735, *supra*; *U.S. Bank Natl. Assn. v Razon*, 115 AD3d 739, *supra*; *Green Tree Serv., LLC v Cary*, 106 AD3d 691, *supra*).

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

Dated: March 2, 2015


THOMAS F. WHELAN, J.S.C.