Todd v Macko
2015 NY Slip Op 31865(U)
October 6, 2015
Supreme Court, Wyoming County
Docket Number: 47577
Judge: Michael M. Mohun

At a term of the Supreme Court held in and for the County of Wyoming, at the Courthouse in Warsaw, New York, on the 6th day of October, 2015.

PRESENT: **HONORABLE MICHAEL M. MOHUN**
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT: COUNTY OF WYOMING

NELSON E. TODD and
CATHERINE D. TODD,

Plaintiffs,

v.

DECISION AND ORDER
Index No. 47577

JOHN MACKO,

Defendant.

The defendant having moved for an order pursuant to CPLR §§3211(a)(4) and (7) dismissing the complaint 1) on the grounds that there is another action already pending between the same parties for the same cause of action and 2) on the grounds that the complaint fails to state a viable cause of action; and the plaintiffs having cross-moved for an order 1) consolidating this action with a related foreclosure action filed by the defendant under Wyoming County Index Number 25465 and 2) granting to the plaintiffs partial summary judgment to the extent of finding that the defendant is not entitled to compound interest under the Note and

Mortgage; and said motion and cross-motion having duly come on to be heard.

NOW, on reading the pleadings; and on reading and filing the notice of motion dated May 8, 2015, supported by the affidavit of Peter K. Skivington, Esq., attorney for the defendant, sworn to on May 8, 2015, together with the annexed exhibits; the notice of cross-motion dated June 16, 2015, supported by the affidavits of the plaintiffs, sworn to on June 16, 2015, and the affidavit of David M. DiMatteo, Esq., attorney for the plaintiffs, sworn to on June 16, 2015, together with the annexed exhibit; the reply affidavit of the affidavit of Peter K. Skivington, Esq., sworn to on June 22, 2015, together with the annexed exhibits and accompanying memorandum of law; the affidavit of the defendant, John Macko, sworn to on July 13, 2015; the affidavit Peter K. Skivington, Esq., sworn to on August 5, 2015, together with the annexed exhibits and accompanying memorandum of law; the memorandum of law dated August 21, 2015, submitted by David M. Roach, Esq., attorney for the plaintiffs; and the affidavit of Nelson E. Todd, plaintiff, sworn to on August 21, 2015; and after hearing Peter K. Skivington, Esq., for the defendant and David M. Roach, Esq., for the plaintiffs, due deliberation having been had, the following decision is rendered upon the motion and cross-motion.

The plaintiffs wish to convey a parcel of property on Silver

Springs Road in Silver Springs, New York. According to the purchase and sale contract attached as an exhibit to the complaint, on June 9, 2014, the Todds agreed to sell the property to Merrit and Kristy Broughton for a purchase price of $300,000.00. Effectively blocking the sale, however, is an undischarged mortgage lien. When the plaintiffs bought the property in 1983, they executed the mortgage to secure their indebtedness to the Federal Land Bank of Springfield. On November 27, 1989, the mortgage in question was assigned to a different bank. Three days later, on November 30, 1989, the second bank assigned the mortgage to the defendant. By the time that the defendant acquired the mortgage, the plaintiffs had apparently already fallen several months into arrears on their loan payments.

The plaintiffs filed for Chapter 7 bankruptcy in January of 1990, and received on May 9, 1990, a complete discharge of their listed debts – including the debt owed on the bank loan secured by the mortgage. On March 13, 1991, the defendant filed an action seeking to foreclose on the mortgage (Wyoming County Supreme Court Index Number 25465). The affidavits of service submitted by defendant's counsel state that the plaintiffs were personally served with copies of the summons and complaint during the following two days – Nelson Todd on March 14, 1991, and on Catherine Todd on March 15, 1991. In addition, defendant's counsel has submitted a copy of the plaintiff's answer in the foreclosure action. He asserts that it was

served on him on March 25, 1991. In the answer, the plaintiffs admitted that the defendant has the right to foreclose, but denied that he has the right to a deficiency judgment on the grounds that the debt was discharged in the course of the bankruptcy proceedings. The Court notes that, in affidavits, the plaintiffs now state that they "have no recollection" of being served in the foreclosure action or of "signing an answer or otherwise appearing" in the action.

The plaintiffs' complaint alleges that "[u]pon information and belief, Defendant's foreclosure action was dismissed." Based on this alleged dismissal of the foreclosure action, and based upon the defendant's failure to commence, thereafter, a timely new action to foreclose in the 24 years since, the complaint demands an order cancelling and discharging of the mortgage. Such an order would quiet title and facilitate the defendants' planned sale of the property. The plaintiffs claim that they are entitled to this relief pursuant to the equitable doctrine of laches, and pursuant to RPAPL §1501(4) and the expiration of the 6-year statute of limitations for the commencement of a timely foreclosure action (CPLR §213[4]).

In the instant motion to dismiss, the defendant contends that the complaint in this action must be dismissed because the foreclosure action has not, in fact, been dismissed. Generally, on a motion to dismiss pursuant to CPLR 3211(a) (7) for failure to state a cause of action, "the court must

accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Caliguri v. JPMorgan Chase Bank, N.A., 121 A.D.3d 1030, 1030-1031 [2nd Dept., 2014], leave to appeal denied by 25 N.Y.3d 911 [2015]). When evidentiary material is submitted and considered upon such a motion, however, the Court may look beyond the bare allegations of the complaint. "[T]he question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one" (id., 1031). Thus, where "it has been shown that a material fact claimed by the plaintiff to be one is not a fact at all," and where "it can be said that no significant dispute exists regarding it," the Court may grant dismissal upon the finding that the plaintiff, in fact, has no cause of action (id.).

Looking, then, at the record before the Court to determine whether it has been shown that the plaintiffs clearly lack a cause of action, the Court observes, initially, that there appears to be no dispute that the foreclosure action was timely when it was filed. Therefore, unless that action was actually dismissed, there can be no claim that the statute of limitations has expired. But the court file in the foreclosure action, examined by counsel for both parties, contains no dismissal order. And notwithstanding the allegation in the complaint that "[u]pon information and belief,

Defendant's foreclosure action was dismissed," the plaintiffs do not actually assert that an order dismissing the action exists. Rather, their claim is that the action was subject to an automatic dismissal by virtue of the defendant's delay in obtaining a judgment of foreclosure. Plaintiffs' counsel explained this contention in his June 16 affidavit in the following terms: The Court may conclude that the foreclosure action was dismissed "because Plaintiffs never appeared in the action and therefore defaulted, and CPLR § 3215(c) provides that '[i]f a plaintiff fails to take proceedings for the entry of judgment within one year after [the defendant's] default, the court shall not enter judgment but shall dismiss the complaint as abandoned . . .'" Dismissals under CPLR §3215(c) do not occur automatically, however (compare CPLR §3404). Moreover, while the subsection allows for dismissal by the Court "upon it's own initiative," as well as upon motion, the power of the Court to dismiss sua sponte "is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal" (U.S. Bank v. Emmanuel, 83 A.D.3d 1047, 1048 [2nd Dept., 2011]). No dismissal occurs under the subsection without a court order.

In view of the undisputed absence of a dismissal order in the foreclosure case, it is evident that no dismissal occurred. Thus, the "fact" of the dismissal, asserted in the complaint, has been shown to be "no fact at all." With it falls both of the plaintiffs' causes of action, since both of them

rest upon it. There is no statute of limitations cause of action because the otherwise timely foreclosure action remains pending and is not barred by the statute of limitations. In addition, laches does not apply because "if brought within the limitations period for the commencement of suit, the doctrine of laches is no defense to a foreclosure action" (First Federal Savings and Loan Association of Rochester v. Capalongo, 152 A.D.2d 833, 834 [3rd Dept., 1989], leave to appeal denied by 74 N.Y.2d 945 [1989]; Schmidt's Wholesale, Inc. v. Miller & Lehman Const., Inc., 173 A.D.2d 1004 [3rd Dept., 1991]; New York State Mortgage Loan Enforcement and Adminstration Corp., 191 A.D.2d 151 [1st Dept., 1993]). Accordingly, the Court shall order the dismissal of the plaintiffs' complaint pursuant to CPLR 3211(a) (7).

Alternatively, the Court finds that the complaint should be dismissed pursuant to CPLR §3211(a)(4). The complaint seeks an order cancelling and discharging the mortgage. As noted, the plaintiffs' base their claim for this relief on the allegation that the defendant's foreclosure action "was dismissed" as abandoned due to their default in answering and the defendant's subsequent failure to obtain a default judgment within one year. Although it is now evident that the foreclosure was not, in fact, dismissed, the plaintiffs question the authenticity of answer produced by the defendant and it appears that they may still wish to pursue the claim that the foreclosure action should be dismissed as abandoned. This claim, however,

is best litigated within the foreclosure action where the same relief is available. The Court notes that CPLR §3215(c) permits a motion to dismiss for failure to obtain judgment within one year of a default to be brought without such a motion "constitut[ing] an appearance in the action."

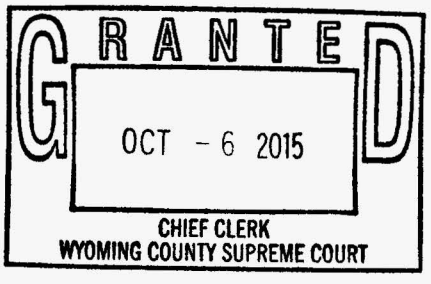
Having found that the plaintiffs' action must be dismissed, the Court will deny the plaintiffs' cross-motion to consolidate the action with the foreclosure action. Since it is not properly before the Court, the Court will not examine the question of the defendant's entitlement to compound interest.

NOW, THEREFORE, it is hereby

ORDERED that the defendant's motion is granted and the complaint is dismissed; and it is further

ORDERED that the plaintiffs' cross-motion is denied.

DATED: October 6, 2015
Warsaw, New York



HON. MICHAEL M. MOHUN
Acting Justice of the Supreme Court