

US Bank N.A. v Davis
2015 NY Slip Op 32070(U)
October 28, 2015
Supreme Court, New York County
Docket Number: 107002/2008
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

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11/2/15
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PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 107002/2008
WELLS FARGO BANK
vs.
DAVIS, JULIE
SEQUENCE NUMBER : 006
JUDGMENT FORECLOSURE & SALE

FILED

NOV 02 2015

COUNTY CLERK'S OFFICE
NEW YORK

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

RECEIVED
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NYS SUPREME COURT - CIVIL
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COUNTY CLERK'S OFFICE
NEW YORK _____, J.S.C.

Dated: 10/28/15
OCT 28 2015

HON. EILEEN A. RAKOWER

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER

Justice

PART 15

FILED

NOV 02 2015

US BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR CITIGROUP MORTGAGE LOAN
TRUST 2007-WFHE3, ASSET BACKED
PASS-THROUGH CERTIFICATES, SERIES
2007-WFHE3,

INDEX NO. 107902719
MOTION DATE
MOTION SEC. NO. 6
MOTION CAL. NO.

Plaintiff,

- v -

JULIE DAVIS, BOARD OF MANAGERS OF THE
305 WEST 52 CONDOMINIUM, GEORGE
POLIZOIS, NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, NEW YORK CITY PARKING
VIOLATIONS BUREAU, NEW YORK CITY
TRANSIT ADJUDICATION BUREAU,
JOHN DOE,

Defendants.

FILED

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COUNTY CLERK'S OFFICE
NEW YORK

This is an action to foreclose a mortgage. The mortgaged premises is commonly known as 305 West 52nd Street, New York, NY 10019 (“the Premises”). Plaintiff, U.S. Bank National Association (“Plaintiff”), brings this action to foreclose loans which were made to defendant Julie Davis (“Defendant”).

Plaintiff now moves an Order, pursuant to Real Property Actions and Proceeding Law § 1351, granting a judgment of foreclosure and sale. Melissa Davis, as power of attorney to act on behalf of Defendant, opposes and cross-moves to dismiss the action as abandoned pursuant to CPLR § 3215(c), or in the alternative, to remand this matter to the Settlement Conference Part for further loss mitigation review. Plaintiff opposes the cross motion.

Plaintiff submits the attorney affirmation of Amanda Rudroff-Lavis (“Rudroff-Lavis”). Attached to Rudroff-Lavis’ affirmation are the following exhibits: a Supplemental Affirmation pursuant to Administrative Order 433/11; Consolidated Note in the amount of \$215,000.00; Note in the amount of \$64,435.84; Note in the amount of \$151,000.00; Consolidation, Extension and Modification Agreement; Mortgage; Assignment of Mortgage to U.S. Bank;

Merger Documentation; Demand Letter; Non-Military Affidavit with Department of Defense Search results; Summons and Complaint; Notice of Pendency; Service of Process Affidavits; Affidavit of Service by Mail pursuant to CPLR § 3215(g)(3)(iii); Notices of Appearance; Notice of Claim to Surplus Monies; Melissa Davis' Power of Attorney; Consent to Change Attorneys; Affirmation of Rudroff-Lavis stating that a settlement conference was held by the Court; Affidavit of Heather D. Hill ("Hill"), the Vice President Loan Documentation of Wells Fargo; Affirmation of Regularity; Preliminary Conference Order; Decision and Order granting Order of Reference; Notice of Entry of the Decision and Order granting Order of Reference; Referee's Oath and Report of Amount Due; Attorney Fee Affirmation; Costs and Disbursements of Plaintiff with Supporting Invoices; and Proposed Judgment of Foreclosure and Sale.

Defendant submits the affidavit of Melissa Davis.

On September 22, 2006, Defendant executed and delivered an adjustable rate note whereby Defendant promised to pay the sum of \$151,000 plus interest at a yearly rate of 7.950% to Wells Fargo Bank, N.A. ("Wells Fargo"). On March 21, 2007, Defendant executed a fixed rate note whereby Defendant promised to pay the sum of \$64,435.84 plus interest at a yearly rate of 7.750% to Wells Fargo. The mortgage was consolidated to form a single lien in the amount of \$215,000 plus interest at a yearly rate of 7.750%. (See Consolidation, Extension, and Modification Agreement).

Wells Fargo commenced this action on May 20, 2008. All defendants were served and an additional copy of the summons was mailed to Defendants in compliance with CPLR § 3215. Defendants did not answer the complaint.

On December 16, 2008, Wells Fargo applied for an Order of Reference. On February 26, 2009, a Short Form Order was issued referring the case to the settlement conference part. On December 1, 2009, settlement conferences commenced. Wells Fargo withdrew its application for Order of Reference on November 15, 2010. The parties did not reach a settlement, and the case was released from the conference part on September 7, 2011. On November 1, 2011, Wells Fargo assigned the Mortgage to Plaintiff.

Plaintiff moved for an Order of Reference on August 21, 2012, which was denied by decision and order dated September 14, 2012. On March 19, 2013, a compliance conference was held wherein Plaintiff was directed to resubmit their motion for Order of Reference. On October 4, 2013, Plaintiff moved for Order of

Reference, which Plaintiff subsequently withdrew. In November 2013, Plaintiff again moved for an Order of Reference. Davis, on Defendant's behalf and with the assistance of The New York Legal Assistance Group, opposed Plaintiff's motion. On December 17, 2013, Plaintiff withdrew its Order of Reference.

Plaintiff made another application for Order of Reference on or about February 12, 2014. On March 14, 2014, Defendant moved for an Order for leave to file a late answer. On April 1, 2014, Plaintiff's February 12, 2014 application for Order of Reference was returned to Plaintiff due to a notary error in the affidavit of service by mail. On April 11, 2014, Plaintiff again moved for Order of Reference. On September 12, 2014, the Court granted Plaintiff's motion for Order of Reference and denied Defendant's motion. The Court's decision stated, "Defendant fails to demonstrate a reasonable excuse for failing to interpose an answer during the five years after receipt of the summons and complaint. Nor has Defendant demonstrated a potentially meritorious defense. Furthermore, having failed to succeed on her application pursuant to CPLR § 3012(d) to file a late answer, Defendant has waived the defense of standing."

"A plaintiff may establish a prima facie right to foreclosure by producing the mortgage documents underlying the transaction and undisputed evidence of nonpayment." *Red Tulip, LLC v. Neiva*, 44 A.D.3d 204, 209 [1st Dep't 2007] (citation omitted). In the present case, Plaintiff established a prima facie right to foreclosure. The burden then shifts to Defendant to raise a triable issue of fact in opposition to foreclosure. (See *LPP Mortgage, Ltd. v. Card Corp.*, 17 A.D.3d 103, 104 [1st Dep't 2005]).

Plaintiff produces mortgage documents underlying the transaction. Plaintiff provides the Consolidated Note and Consolidated Mortgage whereby Davis promised to pay Wells Fargo \$215,000 plus interests at a yearly rate of 7.750% upon the Property. Plaintiff also provides Corporate Assignment of Mortgage dated November 1, 2011, whereby Wells Fargo, as Assignor, assigned Davis' Consolidated Mortgage to Plaintiff, the Assignee. Plaintiff also provides evidence of nonpayment. In Report of Referee, the amount due to Plaintiff on the note and mortgage, as of December 25, 2013 is \$326,592.12. Defendant does not dispute her failure to pay. Accordingly, Defendant fails to raise a triable issue.

Turning to Defendant's cross motion, Defendant cross moves to dismiss Plaintiff's action as abandoned under CPLR § 3215(c). Plaintiff opposes Defendant's cross motion on the grounds that it is untimely, among other grounds. Plaintiff contends that Defendant's opposition/cross motion to Plaintiff's motion

was due on or before May 8, 2015, and that they were not received until May 14, 2015, the day before the scheduled argument, and thus were five days late.

Assuming arguendo that Defendant's papers are deemed timely, CPLR § 3215(c) provides:

(c) 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.

CPLR § 3215.

In a foreclosure action, “[w]hen the plaintiff took the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference (see RPAPL 1321[1]), he initiated proceedings for entry of the default judgment of foreclosure and sale within one year of the defendant's default and, thus, did not abandon the action.” (*Klein v St. Cyprian Props., Inc.*, 100 A.D.3d 711, 712 [2d Dep't 2012]). See also *HSBC Bank USA, N.A., v. Alexander*, 124 A.D. 3d 838 [2nd Dept 2015](holding that Plaintiff did not abandon the action because it took the preliminary step in obtaining the judgment of foreclosure within one year by filing a motion for Order of Reference even though Plaintiff subsequently withdrew its motion for Order of Reference).

“The one exception to the otherwise mandatory language of CPLR 3215(c) is that the failure to timely seek a default on an unanswered complaint or counterclaim may be excused if ‘sufficient cause is shown why the complaint should not be dismissed.’” (*Giglio v. NTIMP Inc.*, 86 A.D.3d 301, 308 [2d Dep't 2011] [citing CPLR §3215(c)]. “This Court has interpreted this language as requiring both a reasonable excuse for the delay in timely moving for a default judgment, plus a demonstration that the cause of action is potentially meritorious.” (*Id.*) (citation omitted).

Here, Plaintiff commenced this action on May 20, 2008. Upon expiration of Defendant's time to answer, Plaintiff made an application for Order of Reference on or about December 16, 2008, less than one year after the action as commenced. As such, Plaintiff took the preliminary step toward obtaining a default judgment of

foreclosure and sale by moving for an Order of Reference within a year, and as such, Plaintiff did not abandon the case. While Plaintiff subsequently withdrew that 2008 application and did not re-file an application until a few years thereafter, Plaintiff states that the delay in re-filing its Order of Reference was due to “the extensive amount of time the case spent in the Court’s settlement conference part during which time the parties worked toward the possibility of a settlement.” Plaintiff also states that the delay was due to the issuance of Administrative Order 548/10, amended by Administrative Order 431/11, which imposed a new requirement on Plaintiff’s counsel to review its entire file and documents submitted to court and confirm the accuracy of every document with its client. The record shows that although this action has had significant delays, Plaintiff did not abandon the case and sufficient cause has been demonstrated to preclude dismissal of the action pursuant to CPLR § 3215[c].

The Court has reviewed Defendant’s additional arguments, including Defendant’s request for additional settlement conferences, and has found these arguments to be unavailing.

Wherefore, it is hereby

ORDERED that Plaintiff’s motion for a Judgment of Foreclosure and Sale, is granted to the extent provided in the annexed Judgment of Foreclosure and Sale; and it is further

ORDERED that Defendant’s cross motion is denied.

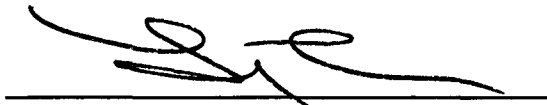
This constitutes the decision and order of the court. All other relief requested is denied.

DATED: 10/28/15

OCT 28 2015

FILED

HON. EILEEN A. RAKOWER J.S.C.



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