

US Bank N.A. v 104 Hall St., LLC
2016 NY Slip Op 32726(U)
July 8, 2016
Supreme Court, Kings County
Docket Number: 507240/15
Judge: Mark I. Partnow
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At an IAS Term, FRP 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 30th day of June, 2016.

P R E S E N T:

HON. MARK I. PARTNOW,

Justice.

-----X

US BANK, N.A., as Trustee for GREENPOINT MORTGAGE FUNDING TRUST MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-AR6,

Plaintiff,

- against -

104 HALL STREET, LLC;
UNITED STATES OF AMERICA INTERNAL REVENUE SERVICE;
DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT;
THE BROOKLYN UNION GAS COMPANY;
TONI SCOTT, Executor of the Estate of TANYA BLACKWOOD;
NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE;
THE PEOPLE OF THE STATE OF NEW YORK;

“JOHN DOE #1” through “JOHN DOE #12,”
the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint,

Defendants.

-----X

The following e-filed papers read herein:

Notice of Motion, Affidavit, Affirmation, Memorandum of Law, and Exhibits Annexed _____	<u>36-46</u>
Affirmation in Opposition and Exhibits Annexed _____	<u>51-61</u>
Reply Affidavit, Affirmation, Memorandum of Law and Exhibits Annexed _____	<u>63-68</u>

DECISION AND ORDER

Index No. 507240/15

Mot. Seq. No. 1

104 Hall Street
Brooklyn, NY 11205

Block 1890, Lot 64

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NYSCEF No.

In this action to foreclose on a mortgage, the defendants 104 Hall Street LLC (hereafter, the LLC) and Toni Scott Smith, incorrectly sued herein as Toni Scott, as executor

of the estate of Tanya Blackwood (hereafter, Smith and, collectively with the LLC, the defendants), jointly move in Seq. No. 1 for an order: (1) pursuant to CPLR 3012 (d), 317, and 2004, extending the time for the defendants to serve and file their answer, as well as compelling the plaintiff US Bank, N.A., as Trustee for Greenpoint Mortgage Funding Trust Mortgage Pass-Through Certificates, Series 2006-AR6 (hereafter, the plaintiff), to accept service of the defendants' proposed answer; (2) pursuant to CPLR 3211 (a) (5), dismissing this action and canceling the notice of pendency on the underlying property, in each instance, on the grounds that the applicable statute of limitations has expired; and (3) pursuant to Real Property Law § 282, awarding the defendants costs, expenses, and disbursements, including attorneys' fees, incurred in the defense of this action. The plaintiff opposes.

Analysis

CPLR 3012 (d) provides that “[u]pon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.” CPLR 317 provides, in part, that “[a] person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318 . . . who does not appear may be allowed to defend the action . . . upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense.” CPLR 2004 provides that “[e]xcept where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed.”

The Court will apply these rules, first, to the defendant LLC and, then, to the defendant Smith. Concurrently, the Court will address the branch of the defendants' motion for dismissal of the complaint as time-barred as to each defendant, coupled with their request for cancellation of the notice of pendency on the underlying property. Finally and separately, the Court will address the remaining branch of the defendants' motion which is for an award of expenses and attorneys' fees under Real Property Law § 282.

The Defendant LLC

The record reflects that personal jurisdiction was obtained over the LLC by personal delivery of the summons and complaint to the Secretary of State (*see* Limited Liability Company Law § 303). The LLC has failed to establish a reasonable excuse for its delay in appearing in the action, as the mere denial by its member/owner Smith¹ of receipt of the summons and complaint is insufficient to rebut the presumption of proper service on the Secretary of State raised by the affidavit of service (*see Ultimate One Distrib. Corp. v 2900 Stillwell Ave., LLC*, 2016 NY Slip Op 04931 [2d Dept 2016]). If the LLC failed to actually receive a copy of the summons and complaint from the Secretary of State because of a change of address, that was due to its own fault as it failed to keep the Secretary of State apprised of its current address for forwarding process (*see Town House St., LLC v New Fellowship Full Gospel Baptist Church, Inc.*, 29 AD3d 893, 894 [2d Dept 2006]). Smith's affidavit, which was submitted on behalf of, inter alia, the LLC, amounted to nothing more

¹ In addition to being the executor of Tanya Blackwood's estate, Smith is also the sole member/owner of the LLC.

than a denial of receipt of the summons and complaint by the LLC because of an outdated address on file with the Secretary of State.² Her affidavit is insufficient to establish lack of actual notice of the action by the LLC in time for it to defend, in accordance with CPLR 317 (*see Xiao Lou Li v China Cheung Gee Realty, LLC*, 139 AD3d 724 [2d Dept 2016]). Accordingly, the Court, in the exercise of its discretion under CPLR 2004, denies the branch of the defendants' motion which is pursuant to CPLR 3012 (d) and 317 to extend the time for the LLC to appear in this action. Since the branch of the defendants' motion to dismiss the complaint as against the LLC was made after the time for it to appear or answer has expired, the Court denies as untimely that branch of the defendants' motion which is to dismiss the complaint as against the LLC as barred by the statute of limitations (*see* CPLR 3211 [e]; *see also Ultimate One Distrib. Corp.*, 2016 NY Slip Op 04931).

It follows that the notice of pendency must remain in effect. The branch of the defendants' motion for cancellation of the notice of pendency on the underlying property is denied.

The Defendant Smith

The record reflects that Smith was served with process "other than by personal delivery" (CPLR 317), and that, therefore, she is entitled to seek relief under CPLR 317 (*see* CPLR 308 [2]; *cf.* CPLR 308 [1]), as well as under CPLR 3012 (d). Considering the lack of any demonstrated prejudice to the plaintiff as a result of Smith's relatively short delay in

² *See* Tony Scott Smith Opening Affidavit, dated Dec. 22, 2015, n 1 ("the forwarding address for the LLC on file with the Secretary of State is . . . an outdated address").

-serving a proposed answer, the existence of a potentially meritorious defense,³ and the public policy favoring the resolution of cases on the merits, the Court excuses Smith's delay in answering the complaint (*see Rozz v Law Offices of Saul Kobrick, P.C.*, 134 AD3d 920, 921 [2d Dept 2015]). Accordingly, the branch of the defendants' motion which is to extend the time for the defendant Smith to serve her answer is granted, as more fully set forth in the decretal paragraphs below.

In addition, the defendants move to dismiss the complaint as against Smith under CPLR 3211 (a) (5) as time-barred. To understand this challenge fully, some background information is necessary.

The mortgage which forms the basis of this foreclosure action was accelerated on April 30, 2008 when the prior foreclosure action under Index No. 13180/08 (hereafter, the prior action) was commenced against Tanya Blackwood (hereafter, Blackwood), the then-owner of the underlying property. The prior action was discontinued on July 1, 2011 when the stipulation of discontinuance was so ordered by the court. Following the discontinuance of the prior action, the mortgage was not reinstated and remained in default. On June 15, 2012, Blackwood conveyed the underlying property to the LLC in which she was then the sole member. On March 15, 2013, Blackwood died.

This action, which was not commenced until June 11, 2015, or approximately 7 years and 1 month after the mortgage was accelerated, would normally have been time-barred as

³ For purposes of CPLR 3012 (d) and 317, the defense need not be meritorious but only "potentially" meritorious. That the defense ultimately may lack merit does not factor in the threshold analysis of whether an excuse for a late answer has been proffered.

against Smith under the six-year statute of limitations of CPLR 213 (4). However, CPLR 210 (b) provides for an 18-month period after the death of the person against whom a cause of action exists, during which period the time for commencing an action against his or her executor is tolled. CPLR 210 (b) serves to add 18 months to the otherwise applicable statute of limitations (*see Perez v Natl. Westminster Bank, USA*, 158 AD2d 361, 362 [1st Dept 1990]). Here, this additional toll renders this litigation timely as against Smith in her capacity as the executor of Blackwood's estate. Accordingly, the branch of the defendants' motion for dismissal of the complaint as against Smith under CPLR 3211 (a) (5) as time-barred is denied.⁴

Both Defendants

The defendants also seek an award of expenses and attorneys' fees under Real Property Law § 282. That statute, which became effective December 19, 2010 (*see* L. 2010, ch. 550, § 2), provides, in part, that "[w]henever a covenant contained in a mortgage on residential real property shall provide that . . . the mortgagee may recover attorneys' fees and/or expenses incurred as the result of the failure of the mortgagor to perform any covenant or agreement contained in such mortgage . . . there shall be implied in such mortgage a covenant by the mortgagee to pay to the mortgagor the reasonable attorneys' fees and/or expenses incurred by the mortgagor . . . in the *successful defense* of any action or proceeding

⁴ Defendants' additional request for dismissal of the complaint as against Smith for lack of personal jurisdiction cannot be considered because they made that request for the first time in their reply memorandum of law (more specifically, in Point II.C thereof).

commenced by the mortgagee against the mortgagor arising out of the contract” (emphasis added). Here, the mortgage at issue permits the plaintiff to recover attorneys’ fees “for services performed in connection with [the borrower’s] default for the purpose of protecting [its] interest in the [underlying property] and rights under the [mortgage] (§ 14), and thus the threshold requirement of the statute is satisfied. The other requirement of the statute is that the borrower must obtain the “successful defense.” The issue, therefore, is whether the defendants, either jointly or separately, have obtained the “successful defense” at this stage of litigation.

As the Second Department explained in construing the statute:

“Ordinarily, only a prevailing party is entitled to attorney’s fees. To be considered a prevailing party, a party must be successful with respect to the central relief sought. Such a determination requires an initial consideration of the true scope of the dispute litigated, followed by a comparison of what was achieved within that scope.”

(*DKR Mtge. Asset Trust I v Rivera*, 130 AD3d 774, 775-776 [2d Dept 2015] [internal quotation marks, citations, and alteration omitted]).

Applying the foregoing principles, the Court finds that neither defendant, at this stage of litigation, has obtained the “successful defense.” As noted, the defendant LLC has lost its bid to interpose a late answer and to dismiss the complaint as against it, whereas the defendant Smith, although permitted to put in a late answer, lost her bid to dismiss the complaint as against her as time-barred. Accordingly, the remaining branch of the defendants’ motion which is for an award of costs and attorneys’ fees under Real Property Law § 282 is denied.

Conclusion

Accordingly, it is

ORDERED that the branch of the defendants' motion, pursuant to CPLR 3012 (d), 317, and 2004, extending the time for the defendant 104 Hall Street LLC to serve and file its answer, as well as to dismiss the complaint as against it as time-barred under CPLR 3211 (a) (5) is denied; and it is further

ORDERED that the branch of the defendants' motion, pursuant to CPLR 3012 (d), 317, and 2004, extending the time for the defendant Toni Scott Smith (incorrectly sued herein as Toni Scott), in her capacity as the executor of Tanya Blackwood's estate, to serve and file her answer is granted, and Ms. Smith shall have twenty days from the date of service of this decision and order on defendants' counsel with notice of entry to interpose her answer; said answer must be made solely in Ms. Smith's capacity as the executor of Tanya Blackwood's estate (rather than as also the member/owner of 104 Hall Street LLC); and it is further

ORDERED that the branch of the defendants' motion to dismiss the complaint as against Ms. Smith as time-barred under CPLR 3211 (a) (5) is denied; and it is further

ORDERED that the branch of the defendants' motion for cancellation of the notice of pendency against the underlying property is denied; and it is further

ORDERED that the remaining branch of defendants' motion for an award of costs and attorneys' fees under Real Property Law § 282 is denied; and it is further

ORDERED that the plaintiff's counsel is directed to serve a copy of this decision and order with notice of entry on the defendants' counsel and to electronically file an affidavit of service thereof with the Kings County Clerk; and it is further

ORDERED that the caption is amended to reflect the correct name of the defendant Smith as "Tony Scott Smith, as Executor of the Estate of Tanya Blackwood"; and it is further

ORDERED that the parties are directed to appear for a preliminary conference in the PC Part in Room 282 on September 13, 2016 at 9:30 a.m.

This constitutes the Decision and Order of the Court.

ENTER,



J. S. C.

**HON. MARK I PARTNOW
SUPREME COURT JUSTICE**

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2016 JUL -8 AM 8:05

