

U.S. Bank N.A. v Ehrenthal

2018 NY Slip Op 30484(U)

March 22, 2018

Supreme Court, New York County

Docket Number: 850341/2014

Judge: George J. Silver

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. George J. Silver

PART 10

Justice

U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR DEUTSCHE ALT-A SECURITIES INC. MORTGAGE LOAN TRUST, MORTGAGE PASS-THROUGH CERTIFICATES SERIES 2007-2.

INDEX NO. 850341/2014

Plaintiff

MOTION DATE _____

v.

MOTION SEQ. NO. 001

SAMUEL EHRENTHAL; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; GREENPOINT MORTGAGE FUNDING, INC.; ABE SALZMAN; 325 FIFTY AVENUE CONDOMINIUM; UNITED STATES OF AMERICA INTERNAL REVENUE SERVICE, "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, person or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

MOTION CAL. NO. _____

Defendant

Cross-Motion Yes No

Plaintiff moves to amend its complaint, pursuant to CPLR § 3025(b). Defendant Samuel Ehrenthal ("defendant") opposes the motion, and cross-moves to dismiss plaintiff's complaint, pursuant to CPLR § 3215(c). For the reasons stated herein, plaintiff's motion is granted, and defendant's cross-motion is denied.

On November 10, 2014 plaintiff commenced the instant action seeking to foreclose a \$607,500.00 mortgage loan entered by borrower on February 27, 2007, and encumbering a residential property located at 325 5th Avenue, New York, New York 10016. On December 10, 2014, defendant United States of America Internal Revenue Service ("U.S.A.") filed an Answer to the Complaint. On December 11, 2014, defendant Board of Managers of 325 Fifth

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

Avenue Condominium, acting on behalf of the Unit Owners of 325 Fifth Avenue Condominium ("325 Fifth Avenue") filed an Answer with Cross-Claims. Additionally, on December 16, 2014, defendant Abe Salzman ("Salzman") filed a Notice of Appearance with claim for surplus monies. On August 15, 2017 Plaintiff filed the pending Motion to Amend, which seeks to plead allegations against defendant U.S.A. with more particularity.

This action is currently in the settlement conference phase with settlement conferences having been held on October 4, 2017, November 1, 2017, and December 6, 2017. A further settlement conference is scheduled for February 21, 2018.

Pursuant to CPLR § 3025(b), "[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."

The Court of Appeals has carried out the statute's purpose, noting that "[l]eave to amend the pleadings 'shall be freely given' absent prejudice or surprise resulting directly from the delay" (*McCaskey, Davies and Assocs., Inc. v. New York City Health & Hosps. Corp.*, 59 NY2d 755, 757 (1983); see *Boxhorn v. Alliance Imaging, Inc.*, 74 AD3d 1735 [4th Dept 2010]). Indeed, "[c]ourts are given 'considerable latitude in exercising their discretion [in entertaining motions to amend], which may be upset... only for abuse as a matter of law'" (*Kimso Apartments, LLC v. Gandhi*, 24 NY3d 403 [2014]).

Delay in seeking to amend a complaint is not fatal to a motion in which such relief is sought. In *Giambrone v. Kings Harbor Multicare Ctr.*, 104 AD3d 546 (1st Dept. 2013), the First Department granted plaintiff leave to add a derivative claim for a spouse's loss of services, even though the statute of limitations had expired on the spouse's claims. Such latitude illustrates that even belated motions to amend will not be denied in the absence of prejudice.

To establish prejudice "there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position" see, e.g., *Oil Heat Inst. of Long Island Ins. Tr. v. RMTS Assocs., LLC*, 4 AD3d 290, 294 [1st Dept. 2004]).

Defendant's primary opposition to plaintiff's motion (and support for defendant's cross-motion), is predicated upon defendant's contention that plaintiff's amended pleadings would preclude defendant's ability to defend this action and in fact dismiss it as barred by CPLR § 3215(c).

Defendant's contentions are unpersuasive. The uncontroverted allegations in the complaint in this action evidence the existence of the mortgage, the note, and the defendant borrower's payment default, which establish that plaintiff's cause of action is meritorious.

CPLR § 3215(c) states that an action may be dismissed as "abandoned" if a plaintiff fails to "take proceedings" for the entry of default judgment within one year after the default - unless "sufficient cause" is shown why the complaint should not be dismissed. New York courts have found that dismissal pursuant to CPLR § 3215(c) is improper where a plaintiff manifests its intent not to abandon the action (*LaValle v. Astoria Constr. & Paving Corp.*, 266 AD2d 28 [1st Dept. 1999]).

Evidence of plaintiff's unwillingness to abandon the instant action has been established by the record before this court, which includes plaintiff's numerous appearances at settlement conferences, and filing of the instant motion. As the action has proceeded against the answering defendants and is currently in the settlement conference phase, plaintiff has shown that it never intended to abandon the action. Further, delays imposed by the mandatory settlement conference requirement of CPLR § 3408 are not a part of the one-year time-frame for a foreclosure plaintiff to seek a default judgment. As some of the delay in this action has not been occasioned by plaintiff but rather by the inability to set an earlier mandatory settlement conference date, defendant has not been prejudiced on account of actions for which plaintiff had no control over.

Finally, as the proposed amended complaint only seeks to plead allegations against defendant U.S.A. with more particularity rather than adding a new party to the action without any prior notice, there is no prejudice to defendant.

Accordingly, it is hereby

ORDERED that plaintiff's motion for leave to amend its complaint is granted, and plaintiff's Supplemental Summons, Amended Complaint and Amended Notice of Pendency, in the proposed form annexed to the moving papers, are deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED an answer, if any, to the amended complaint or otherwise in response thereto shall be filed and served within 20 days from the date of said service; and it is further

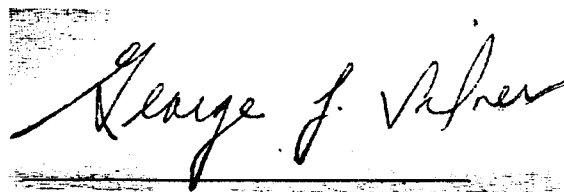
ORDERED that defendant's cross-motion for summary judgment is denied; and it is further

ORDERED that this matter is to be randomly re-assigned to another justice of the court.

This constitutes the decision and order of the court.

Dated: March 22, 2018

New York, New York



HON. GEORGE J. SILVER

- 1. Check one: Case Disposed Non-Final Disposition
- 2. Check as Appropriate: Motion is: Granted Denied Granted in Part Other