U.S. Bank N.A. v O'Neill
2018 NY Slip Op 31224(U)
June 13, 2018
Supreme Court, Suffolk County
Docket Number: 08532/2013
Judge: William G. Ford
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SHORT FORM ORDER

INDEX NO.: 08532/2013

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

COPY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motions Submit Date: 06/30/16
Mot Seq 002 MD
Mot Seq 003 Mot D; RTH

U.S. BANK NATIONAL ASSOCIATION, as Trustee relating to Chevy Chase Funding LLC Mortgage Backed Certificates Series 2007-2,

Plaintiff,

-against-

MARY KATE O'NEILL a/k/a MARY O'NEILL, "JOHN DOE", said name being fictitious, it being the intention of plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises,

Defendants.

PLAINTIFF'S COUNSEL:
Shapiro DiCaro Barak
175 Mile Crossing Boulevard
Rochester, New York 14624

DEFENDANT'S COUNSEL:
Morrison Tenenbaum PLLC
87 Walker Street, Fl 2
New York, New York 10013

On the pending motions, the Court considered the following:

1. Notice of Motion & Affirmation in Support dated April 7, 2016 and other supporting papers;
2. Notice of Cross-Motion, Affirmation in Support dated June 20, 2016 & Affidavit in Support June 22, 2016 & other supporting papers;
3. Reply Affirmation in Further Support & in Opposition to Cross-Motion dated June 27, 2016; and upon due deliberation and full consideration; it is

ORDERED that plaintiff's motion for judgment of foreclosure and sale confirming the referee's report of amounts due and owing is **denied** without prejudice with leave to renew on the submission of proper papers as discussed below; and it is further

ORDERED that plaintiff's proposed long-form proposed judgment of foreclosure and sale is hereby denied and returned as "unsigned" as consistent with this decision and order; and it is further

ORDERED that defendant's cross-motion to dismiss the complaint is **granted in part** to the extent that the matter is referred to a hearing before court appointed referee Keith O'Halloran, Esq. on a date to be noticed to defendant by counsel by certified first class mail, return receipt requested to occur no later than 21 days prior to said hearing; and the same is otherwise **denied** in all other respects; and it is further

ORDERED that defendant serve a copy of this decision and order with notice of entry by certified first class mail, return receipt requested on plaintiff's counsel forthwith; and it is further

ORDERED that counsel for the parties appear before this Court for a foreclosure status conference on September 26, 2018 at 10:00 a.m.

This is an action to foreclose a mortgage on premises more commonly known and referred to as 54 Spring Close Highway, East Hampton, New York 11937 in Suffolk County. Defendant Mary Kate O'Neill executed a consolidated promissory note dated March 15, 2007 in favor of Chevy Chase Bank, FSB in the principal amount of $ 675,000 at an adjustable annual interest rate. The note bears an undated endorsement without recourse to plaintiff U.S. Bank National Association as Trustee. It further was secured by a consolidated mortgage of the same date on the subject property which was recorded with the Suffolk County Clerk on May 29, 2007 at Liber 21542, page 214. The consolidated note and mortgage were corrected and refiled with the County Clerk on November 25, 008 at Liber 21770, page 469.

The note was subsequently transferred by assignment dated November 30, 2011 from Capital One Bank, NA as Successor in Interest to Chevy Chase Bank FSB to the Mortgage Electronic Registration Systems, Inc. (MERS), recorded by the County Clerk on February 24, 2012 at liber 22174, page 471. It was also transferred by assignment from MERS as nominee for Chevy Chase to plaintiff in an assignment dated January 4, 2012, recorded by the County Clerk on February 24, 2012 at Liber 22174, page 472.

Plaintiff previously determined its standing to litigate in this matter, having obtained default judgment and an order of reference unopposed from Supreme Court (Pines, J.) in a decision and order rendered September 25, 2015, premised upon presentation of copies of consolidation, extension, modification agreements for the consolidation note and mortgage, as well as respective assignments.

Thereafter, plaintiff moved this Court for judgment of foreclosure and sale to confirm the appointed referee's report of amounts due and owing by defendant under the note. Defendant, represented by counsel, cross-moved to dismiss the complaint making several arguments. Chiefly, defendant argues that the complaint must be dismissed for plaintiff's failure to seek entry of default within 1 year of her failure to answer or appear pursuant to CPLR 3215(c). Arguing in the alternative, defendant argues that plaintiff has failed to comply with RPAPL 1306's notice requirement, which she argues is a condition precedent to maintaining of the foreclosure action. Lastly, defendant by her affidavit and her counsel's affirmation argues that plaintiff failed to comply with CPLR 4313 and RPAPL 1321, having not noticed her of the referee's hearing or taking of evidence prior to preparing his report. Thus, defendant argues she has suffered severe and unfair prejudice having been prevented the opportunity to appear, object or otherwise contest the accuracy of the referee's computation.

Plaintiff has opposed defendant's application in whole. First, the bank argues that the matter was commenced having filed its summons and complaint and notice of pendency, as well as statutorily mandated notices on March 25, 2013. Plaintiff has previously submitted proof of service on defendant, which defendant has not disputed, indicating that defendant was served in Connecticut under CPLR 313 in a manner or method akin to substitutionary service, i.e. service on a person of suitable age and discretion under CPLR 308(2), delivering a copy of the pleadings on defendant's husband on April 6, 2013, as reflected by its affidavit of service dated April 8, 2013, filed with the County Clerk on April 18, 2013. Given substitutionary service, defendant's time to answer, appear or defend the action, would have run within 30 days of service, or sometime in late May 2013.

It contends that it did not abandon this matter as defendant urges because the matter proceeding to a mandatory CPLR 3408 foreclosure settlement conference with the Court in January 2014 after commencement and was not released to the IAS Part until April 2014. Plaintiff moreover argues that all throughout it has objectively evinced an intent, purpose or desire to continue its prosecution of the matter, having sought default judgment and an order of reference by motion in March 2015, which was not decided by the court until September 2015. Further, plaintiff notes that the time the matter was in the court's foreclosure settlement part, where defendant appeared and the parties engaged in ongoing settlement negotiations and discussions, should not be counted against plaintiff's time to move for entry of default under CPLR 3215(c).

Further, plaintiff argues that defendant's application for dismissal is inappropriate particularly where defendant is in default and has not sought to vacate her default. On this point, plaintiff specifically notes that having defaulted, defendant has waived all jurisdictional affirmative defenses such as plaintiff's alleged failure to strictly comply with RPAPL notice requirements. Furthermore, plaintiff emphasizes that defendant has made no effort of proffering any reasonable excuse for her default. Lastly, plaintiff argues that defendant suffered no prejudice, assuming she was not properly noticed prior to referee's computation. Plaintiff also argues that defendant offers no proof disputing the amounts due and owing that appear in the referee's report.

Taking these contentions in turn, the Court at the outset acknowledges the validity of plaintiff's contentions concerning defendant's waiver of affirmative defenses by her default in appearance and pleading. It is black letter law within the Second Department that "[t]he absence of a reasonable excuse renders it unnecessary to determine ... the existence of a potentially meritorious defense to the action" (***HSBC Bank USA, Nat. Ass'n v Smart***, 155 AD3d 843, 63 NYS3d 700 [2d Dept 2017]). The determination of what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court" (***One W. Bank, FSB v Valdez***, 128 AD3d 655, 655, 8 NYS3d 419, 420 [2d Dept 2015]).

Here, plaintiff is entirely correct that defendant's papers are silent on any articulation of a reasonable excuse for her prior default in appearing in this matter. More important, even if defendant were to argue that ongoing negotiations lulled her into a false sense of security, the Second Department has held that "participation in settlement conferences and loan modification negotiations" do not constitute a reasonable excuse for default (***Fed. Nat. Mortg. Ass'n v Zapata***, 143 AD3d 857, 858, 40 NYS3d 438, 440 [2d Dept 2016]). Dealing squarely with defendant's

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contentions here, the Second Department has plainly declined to dismiss foreclosure actions for failure to comply with RPAPL 1306 were defendant has defaulted, ruling that constituted waiver (***HSBC Bank USA, Nat. Ass'n v Hasis***, 154 AD3d 832, 834, 62 NYS3d 467, 470 [2d Dept 2017][holding since the defendant never moved to vacate his default in appearing or answering the complaint, he is precluded from raising the plaintiff's alleged failure to comply with RPAPL 1306]). Thus, this record makes clear to the Court that defendant has no reasonable excuse for failing to appear. Accordingly, the Court need not consider defendant's attempt at raising plaintiff's failure to comply with RPAPL 1306 as an affirmative defense warranting dismissal. Thus, that aspect of defendant's motion is **denied.**

Turning to the question of timeliness of plaintiff's application, defendant correctly states the general proposition holding that "[t]he language of CPLR 3215(c) is not, in the first instance, discretionary, but mandatory, inasmuch as courts 'shall' dismiss claims for which default judgments are not sought within the requisite one-year period, as those claims are then deemed abandoned" (***HSBC Bank USA, Nat. Ass'n v Grella***, 145 AD3d 669, 671, 44 NYS3d 56, 58 [2d Dept 2016]). However, she fails to take notice an exception which the Court finds applicable here.

> CPLR 3215(c) states, in pertinent part: "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." To avoid dismissal pursuant to CPLR 3215(c), it is not necessary for a plaintiff to actually obtain a default judgment within one year of the default. As long as "proceedings" are being taken, and those proceedings manifest an intent not to abandon the case but to seek a judgment, the case should not be dismissed. Taking the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference within one year of the defendant's default is sufficient to timely initiate proceedings for entry of judgment pursuant to CPLR 3215(c)

(***Wells Fargo Bank, N.A. v Lilley***, 154 AD3d 795, 796, 62 NYS3d 155, 157 [2d Dept 2017][finding plaintiff's application for order of reference within one year of the defendants' default indicated an intent not to abandon the foreclosure action]; *see also* ***State of New York Mortg. Agency v Linkenberg***, 150 AD3d 1035, 1037, 55 NYS3d 126, 128 [2d Dept 2017][reasoning that "[t]aking the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference within one year of the defendant's default is sufficient to timely initiate proceedings for entry of judgment pursuant to CPLR 3215(c)]).

Even where a bank is not exactly timely in moving for default judgment within the 1 year timeframe, our courts have exercised leniency permitting such a movant to "to establish 'sufficient cause' why the complaint should not be dismissed" premised on a showing that it had a reasonable excuse for the delay in taking proceedings for the entry of a default judgment, and that it has a potentially meritorious cause of action (***Wells Fargo Bank, N.A. v Bonanno***, 146 AD3d 844, 845–46, 45 NYS3d 173, 174 [2d Dept 2017]; *see also* ***Aurora Loan Services, LLC v Hiyo***, 130 AD3d 763, 764, 13 NYS3d 554, 555–56 [2d Dept 2015]; *accord* ***Bank of New York Mellon v Adago***, 155 AD3d 594, 595, 63 NYS3d 495, 497 [2d Dept 2017][one exception to the

otherwise mandatory language of CPLR 3215(c) is that the failure to timely seek a default on an unanswered complaint ... may be excused if 'sufficient cause is shown why the complaint should not be dismissed']; ***HSBC Bank USA, Nat. Ass'n v Traore***, 139 AD3d 1009, 1010, 32 NYS3d 283, 284 [2d Dept 2016][[i]t is not necessary for a plaintiff to actually obtain a default judgment within one year of the default in order to avoid dismissal pursuant to CPLR 3215(c), but rather, it suffices that the plaintiff timely takes "the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference" to establish that it "initiated proceedings for entry of a judgment within one year of the default" for the purposes of satisfying CPLR 3215(c)]).

Here, given that the court has previously determined plaintiff's foreclosure action meritorious finding plaintiff has standing to litigate and has awarded default judgment and an order of reference, albeit not exactly to the letter of the timeframe set out in CPLR 3215(c), this Court will not dismiss plaintiff's complaint in the manner suggested by defendant. While not precisely timely, it remains clear that certain delays were due to ongoing settlement discussions in the foreclosure settlement conference part prior to the commencement of dispositive motion practice before IAS. This is all the more the case where the law unmistakably states that "defendant may waive the right to seek a dismissal pursuant to CPLR 3215(c) by serving an answer **or taking "any other steps which may be viewed as a formal or informal appearance"** (***HSBC Bank USA, Nat. Ass'n v Grella***, 145 AD3d 669, 670-71, 44 NYS3d 56, 58 [2d Dept 2016]). Here, a simple search of the court file indicates that defendant appeared before the foreclosure settlement conference part on at least one occasion, on January 31, 2014. So, even despite her default, she has participated and thus has provided additional and ample grounds for this Court to determine she has waived the right to seek dismissal under CPLR 3215(c). Therefore, that branch of defendant's motion is **denied**.

Despite all of this, plaintiff still is not successful in its efforts to secure judgment of foreclosure today. Defendant is also correct that entry of judgment of foreclosure of sale and confirmation of the referee's report of amounts due and owing where borrower was not noticed of the hearing and was not afforded an opportunity to be heard, participate ore object is clear error. Second Department precedent clearly so holds. The prevailing law in the Second Department is that it is reversible error for the *nisi prius* court to confirm a referee's repot absent the holding of a hearing where it is requested (***Aurora Loan Services, LLC v Taylor***, 114 AD3d 627, 629, 980 NYS2d 475, 477 [2d Dept 2014], *aff'd*,25 NY3d 355 [2015][Supreme Court erred in confirming the referee's report computing the amount due to the plaintiff without holding a hearing on notice]; ***Citimortg., Inc. v Kidd***, 148 AD3d 767, 768, 49 NYS3d 482, 484 [2d Dept 2017][Supreme Court erred in confirming the referee's report ... it should be confirmed whenever the findings are substantially supported by the record]; *see also* 2-20 Bergman on New York Mortgage Foreclosures § 20.06 [2017][[a]lthough a defaulting defendant is not entitled to notice of a referee's hearing, nonetheless, a defaulting defendant does have the right to have its claim considered—for example, a credit on a mortgage—to the extent that it relates to the sum due on the mortgage]).

It is settled that Supreme Court is the ultimate arbiter of the dispute and possesses the power to reject the Referee's report, make new or independent findings, to consider the parties' evidence anew. However, defendant is not necessarily guaranteed a hearing and such a request for the same may be denied where defendant is not otherwise prejudiced by the inability to submit evidence directly to the Referee (***Adelman v Fremd***, 234 AD2d 488, 489, 651 NYS2d

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604, 605 [2d Dept 1996][applying CPLR 4403]). Stated differently, motion courts are affirmed where defendants have had full, fair and ample opportunity to raise objection and submit countervailing proof on any and all the issues before the referee on computation, prior to confirmation of the report and recommendation. Thus, under those circumstances, defendant-borrower's request for a hearing may be denied as unnecessary (***Deutsche Bank Nat. Tr. Co. v Zlotoff***, 77 AD3d 702, 908 NYS2d 612 [2d Dept 2010]).

Under the presently presented circumstances in this matter, this Court finds no compelling reasons to deviate from precedent: applied here, the motion record indicates defendant has in the most general terms denied by affidavit having been noticed for the referee's hearing. In response, plaintiff does not address this denial, arguing that it caused defendant no prejudice. However, on this point, a triable question of fact arises where defendant by sworn testimony specifically claims she has been prejudiced insofar as the referee has calculated an amount due and owing by defendant which she disputes. While it is true that defendant's objection is unspecific, plaintiff has not persuaded this Court that the referee went forward with carrying out his duty on notice to the defendant. Thus, this Court will not confirm said report, unless and until, it is on actual notice to the defendant, reasonably calculated to apprise her of the pendency of such a hearing, and affording an opportunity to appear to object or dispute said computation.

The foregoing constitutes the decision and order of this Court.

Dated: June 13, 2018
Riverhead, New York

WILLIAM G. FORD, J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**