

Deutsche Bank Natl. Trust Co. v Pascarella
2018 NY Slip Op 32870(U)
November 13, 2018
Supreme Court, Suffolk County
Docket Number: 11575/2008
Judge: Howard H. Heckman
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SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

PRESENT:**HON. HOWARD H. HECKMAN JR., J.S.C.**

INDEX NO.: 11575/2008

MOTION DATE: 10/16/2018

MOTION SEQ. NO.: #006 MD

#007 MG

CASE DISP

-----X
DEUTSCHE BANK NATIONAL TRUST
COMPANY,

Plaintiff,

-against-

ANTHONY PASCARELLA, et al.,

Defendants.
-----X**PLAINTIFF'S ATTORNEY:**

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Upon the following papers numbered 1 to 45 read on this motion : Notice of Motion/ Order to Show Cause and supporting papers 1-14 (#006) 15-20 (#007) ; Notice of Cross Motion and supporting papers____ ; Answering Affidavits and supporting papers 21-29, 30-40 ; Replying Affidavits and supporting papers 41-43, 44-45 ; Other____ ; it is,

ORDERED that this motion by defendant Thomas Pascarella for an order pursuant to CPLR 3216 & 6514: 1) vacating the Order (Tanenbaum, J.) dated February 17, 2009 granting a default judgment in favor of the plaintiff; 2) dismissing plaintiff's complaint for failure to prosecute; and 3) cancelling the notice of pendency filed by the plaintiff is denied; and it is further

ORDERED that the motion by plaintiff Deutsche Bank National Trust Co. for an order confirming the referee's report of sale dated September 27, 2017 and for a judgment of foreclosure and sale is granted to the following extent:

This foreclosure action has had a long procedural history which needs to be detailed for purposes of addressing the issues raised by the defendant.

Plaintiff's action seeks to foreclose a mortgage in the original sum of \$220,500.00 executed by defendants Anthony Pascarella and Thomas Pascarella on September 30, 2005 in favor of Argent Mortgage Company, LLC. On the same date defendant Anthony Pascarella executed a promissory note promising to repay the entire amount of monies borrowed to the mortgage lender. The note and mortgage were subsequently assigned to the plaintiff by assignment dated October 15, 2008. The Pascarella defendants defaulted in making payments since November 1, 2007 and the default has

continued to date. Plaintiff commenced this action by filing a notice of pendency, summons and complaint in the Suffolk County Clerk's Office on March 24, 2008. Defendants Anthony Pascarella and Thomas Pascarella served a timely answer which was withdrawn by stipulation dated October 6, 2008. By Order (Tanenbaum, J.) dated February 17, 2009 plaintiff's unopposed motion for an order granting a default judgment and for the appointment of a referee was granted.

Court records indicate that a total of five justices were previously assigned to this action and that twenty-six court conferences were scheduled and held prior to reassignment of this action to this Part. The parties also engaged in extensive motion practice which included the following motions which were decided subsequent to Justice Tanenbaum's February 17, 2009 Order granting a default judgment::

- a) Motion Sequence #2- Plaintiff submitted a motion on August 31, 2009 seeking a judgment of foreclosure and sale with an original return date of January 25, 2010. By short form Orders (Tanenbaum, J.) dated November 1, 2010 and October 19, 2011, the motion was adjourned pending plaintiff's submission of additional affidavits or attorney affirmations certifying compliance with court rules. Upon Justice Tanenbaum's retirement on December 31, 2011, this action was assigned to Justice Hector D. LaSalle. By short form Order dated January 10, 2012, plaintiff's motion was denied;
- b) Motion Sequence #3- Plaintiff submitted an unopposed motion on January 28, 2014 seeking a judgment of foreclosure and sale with an original return date of February 24, 2014. By Order (Tarantino, J.) dated May 19, 2014 plaintiff's motion was denied without prejudice to renewal to submission of a renewal motion within one hundred twenty days;
- c) Motion Sequence #4- Defendant Thomas Pascarella submitted a motion on March 4, 2015 seeking an order dismissing plaintiff's complaint for failure to prosecute with an original return date of March 31, 2015. By Order (Tarantino, J.) dated August 12, 2015 defendant's motion was denied;
- d) Motion Sequence #5- Plaintiff submitted a motion on March 27, 2015 seeking a judgment of foreclosure and sale with an original return date of March 31, 2015. This motion was marked submitted on April 21, 2015. By Order (Tarantino, J.) dated September 15, 2016 plaintiff's motion was denied without prejudice.

Sometime in 2012 this action was assigned to Supreme Court Justice Jerry Garguilo. Beginning June 12, 2012 and extending until January 7, 2014 a total of seven foreclosure conferences were held in Justice Garguilo's part. The action was thereafter reassigned to Acting Supreme Court Justice Andrew G. Tarantino, Jr. Beginning January 28, 2014 and continuing until November 30, 2016 a total of thirteen foreclosure conferences were held in Acting Justice Tarantino's part. The action was thereafter assigned to Acting Supreme Court Justice Martha Luft. Beginning January 11, 2017 and continuing until September 19, 2017 a total of six conferences were held in Acting Justice Luft's part. The action was thereafter reassigned to this part by Administrative Order (Hinrichs, J.) dated June 27, 2018.

Before this court are two motions: the first, defendant Pascarella's motion seeking an order

dismissing plaintiff's complaint for failure to prosecute and cancelling the notice of pendency; and the second, plaintiff's motion seeking an order confirming the referee's most recent report and for a judgment of foreclosure and sale. Defendant's motion was originally served on September 14, 2017 with an original return date of September 19, 2017. The motion was thereafter marked submitted on Acting Justice Luft's motion calendar on October 17, 2017 where it remained sub judice until reassignment to this part where it was re-calendared and submitted on October 16, 2018. Plaintiff's motion was originally served on October 20, 2017 with an original return date of November 14, 2017. The motion was thereafter marked submitted on Acting Justice Luft's motion calendar on December 19, 2017 where it remained sub judice until reassignment to this part where it was re-calendared and submitted on October 16, 2018.

Defendant's motion seeks an order dismissing the complaint for failure to prosecute. Defendant claims that plaintiff was served with a CPLR 3216 90 day notice by certified mail on May 26, 2017 and upon plaintiff's failure to comply with the demand defendant claims the complaint must be dismissed for failure to prosecute. Defendant Pascarella claims that plaintiff's failure to timely prosecute this action for the past nine (9) years has caused him substantial prejudice and prevented him from "moving on with his life." Defendant also argues that even if the court were to grant plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale, the amount of interest to be awarded to the mortgage lender should be limited based upon plaintiff's significant delay in prosecuting this action.

The legal grounds for dismissing a pre-note of issue action are dictated by the requirements of CPLR 3216. The statute does not permit dismissal unless issue has been joined (CPLR 3216(b)(1)). In this case, although the Pascarella defendants initially appeared in this action by serving an answer, the answer was subsequently withdrawn by stipulation signed by the mortgagors on October 6, 2008. Based upon this record a condition precedent to dismissal pursuant to CPLR 3216 is absent since issue was not joined as a result of the defendants' withdrawal of the answer and therefore the court is without authority to dismiss this foreclosure action pursuant to CPLR 3216 (*see Wells Fargo Bank, N.A. v. Pinargote*, 150 AD3d 1311, 52 NYS3d 907 (2017); *Deutsche Bank National Trust Company v. Hall*, 149 AD3d 803, 49 NYS3d 910 (2017); *Downey Savings & Loan Association, F.A. v. Aribisala*, 147 AD3d 911, 47 NYS3d 413 (2017); *U.S. Bank, N.A. v. Bassett*, 137 AD3d 1109, 28 NYS3d 109 (2016))*1.

With respect to defendants' claims concerning the substantive issues surrounding the referee's report and computations, no legal basis exists to deny confirmation of the referee's report. Plaintiff's submissions establish its entitlement to a judgment of foreclosure and sale based upon the referee's report and findings (*see U.S. Bank, N.A. v. Saraceno*, 147 AD3d 1005, 48 NYS3d 163 (2nd Dept., 2017); *HISBC Bank USA, N.A. v. Simmons*, 125 AD3d 930, 5 NYS3d 175 (2nd Dept., 2015)). Whereas the court is not bound by the referee's report of the damages due the plaintiff, the report of a referee should be confirmed in circumstances where the findings are substantially supported by the evidence in the record (*CitiMortgage, Inc. v. Kidd*, 148 AD3d 767, 49 NYS3d 482 (2nd Dept., 2017); *Matter of Cincotta*, 139 AD3d 1058, 32 NYS3d 610 (2nd Dept., 2016)). In this case, the referee submitted sufficient evidence in the form of an affidavit from a representative of the mortgage servicer (Ocwen Loan Servicing, LLC), together with sufficient documentary proof, to establish the accuracy of the referee's computations and to confirm the finding that the mortgaged premises should be sold in one parcel (*CitiMortgage, Inc. v. Kidd, supra.*; *Hudson v. Smith*, 127 AD3d 816, 4 NYS3d 894 (2nd Dept., 2015)).

*1- The court notes that defendant's motion was the second such motion defendant has submitted citing CPLR 3216 as grounds for dismissal. Defendant's initial CPLR 3216 motion was denied by Order (Tarantino, J.) dated August 12, 2015. A fair reading of that prior order reveals that the denial was premised upon the motion having been submitted as an application pursuant to CPLR 3126 and not pursuant to CPLR 3216.

With respect to the issue of interest to be awarded, in an action of an equitable nature, such as this proceeding, the recovery of interest is within the court's discretion and the exercise of such discretion should be governed by the particular facts of the case including "wrongful" conduct on the part of either party (see *BAC Home Loans Servicing, LP v. Jackson*, 159 AD3d 861, 74 NYS3d 59 (2nd Dept., 2018); *Greenport Mortgage Corp. v. Lamberti*, 155 AD3d 1004, 66 NYS3d 32 (2nd Dept., 2017); *Citicorp Trust Bank v. Vidaurre*, 155 AD3d 934, 65 NYS3d 237 (2nd Dept., 2017)). An unexplained and prolonged delay which results in unusual circumstances substantially prejudicing a party could result in forfeiture of interest during the unexplained period of delay (*BAC Home Loans Servicing, LP v. Jackson, supra.*).

The history of this action reveals that, although there has been an extensive period of time between the original order granting a default judgment and an award granting a judgment of foreclosure and sale, there exists no legal or equitable grounds to either grant defendant's dismissal motion (thereby rewarding the defaulting mortgagor a windfall— a defendant who has not made a mortgage payment during the past eleven (11) years) nor to deny plaintiff's motion. The record shows that the prolonged delay in awarding a final judgment of foreclosure and sale was due to a number of reasons including: the imposition of administrative attorney certification requirements during the immediate period after the award of a default judgment; the period beginning June 12, 2012 through November 30, 2016 during which a total of twenty foreclosure conferences were scheduled; additional lengthy and prolonged delays which were the result of the assigned motion court's failure to render decisions on submitted motions; and a period of unexplained delay on the part of counsel then representing plaintiff during the period between September 16, 2014 and March 23, 2015.

Defendant claims that Acting Justice Tarantino's August 12, 2015 Order indicated that plaintiff's award of interest should be tolled for periods including: 1) the time between September, 16, 2014 and March 23, 2015 (the period beginning on the date plaintiff was required to serve a renewal motion and the date the renewal motion was actually made); 2) the time between November 1, 2010 and January 12, 2012 (the period between plaintiff's first motion seeking a judgment of foreclosure and sale and the order denying that motion); and 3) the time between February, 2014 and March 24, 2015 (representing the period between the final settlement conference and plaintiff's filing of its second motion seeking a judgment of foreclosure and sale). However a fair reading of Acting Justice Tarantino's Order reveals that there was no such legal determination— merely a directive that a hearing was required to determine these issues. Court records indicate that no hearing was ever conducted and that by Order (Tarantino, J.) dated September 15, 2016 plaintiff's motion was denied without prejudice to renewal.

Plaintiff's submission of this third motions seeking a judgment of foreclosure and sale again raises the issue of whether there exists any admissible proof sufficient to deny, or toll, the interest to

be awarded to the mortgage lender. Based upon this record this Court finds that there is an unexplained and prolonged period of delay which, in fairness and equity, requires a tolling of interest to be awarded to the mortgage lender between the period beginning September 16, 2014 and ending March 23, 2015— that period represents the actual date when plaintiff was required by Acting Justice Tarantino's May 19, 2014 Order to serve its renewal motion, and ending when plaintiff did in fact serve its renewal motion seeking a judgment of foreclosure and sale. Plaintiff has submitted no reasonable explanation for plaintiff's prior counsel's failure to serve a timely motion in compliance with that order. Accordingly, interest on the outstanding mortgage debt shall be tolled for this period which amounts to a reduction in interest in the sum of \$7,921.13 (189 days x \$41.91076600 per diem interest), so that the total amount to be awarded the plaintiff as of August 31, 2017, shall be the sum of \$428,128.52.

The remaining periods of time which resulted in a delay of prosecution of this action are either not attributable solely to the inaction of the plaintiff's counsel; are periods during which conferences were continually being scheduled and held; or are periods during which motions had been submitted and were sub judice awaiting the court's determination. The initial period of delay beginning with plaintiff's service of its initial motion seeking a judgment of foreclosure and sale was during a time when plaintiff's counsel in all pending foreclosure actions were required to comply with administrative orders which became effective October 10, 2010, resulting in nearly universal delays in prosecution of these cases. There is no relevant, admissible evidence submitted to attribute "wrongful conduct" to the plaintiff during this period and all remaining periods of time recited in Acting Justice Tarantino's Order between February, 2014 and March 24, 2015, and periods since that time. Court records indicate that court conferences were continuously being held during these periods which included a total of twelve (12) conferences before Acting Justice Tarantino and six (6) conferences before Acting Justice Luft. And, although Acting Justice Tarantino's September 15, 2016 Order refers to a "tortuous history of missing documents and delays", the court never issued an order citing such conduct as warranting some form of sanction and, in fact, reflected that plaintiff was still involved in attempting to reach a "cash for keys" settlement agreement while conducting such conferences. Based upon this record there is insufficient proof submitted to deny plaintiff's motion with the exception that the interest to be awarded in the judgment shall be limited to the extent indicated hereinabove. Defendant's remaining contentions are without merit.

Accordingly, defendant's motion is denied in its entirety, and plaintiff's motion is granted to the extent indicated. The proposed, modified judgment of foreclosure and sale has been signed simultaneously with execution of this order.

Dated: November 13, 2018

HON. HOWARD H. HECKMAN, JR.

J.S.C.