

<b>Bank of N.Y. Mellon v Walker</b>
2019 NY Slip Op 30073(U)
January 2, 2019
Supreme Court, Suffolk County
Docket Number: 018051/2009
Judge: C. Randall Hinrichs
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**SUPREME COURT - STATE OF NEW YORK**  
**IAS PART 49 - SUFFOLK COUNTY**

**PRESENT: Hon. C. RANDALL HINRICHS**  
Justice of the Supreme Court

Motion Date: 003: 11-13-2017; 004: 1-4-2018  
Adjourned Date: 003: 1-4-2018  
Motion Sequence: 003-MG; 004-MD

\_\_\_\_\_  
THE BANK OF NEW YORK MELLON F/K/A THE  
BANK OF NEW YORK, AS TRUSTEE FOR THE  
BENEFIT OF CWALT INC. ALTERNATIVE LOAN  
TRUST 2007-23CB MORTGAGE PASS-THROUGH  
CERTIFICATES SERIES 2007-23CB,

FEIN, SUCH & CRANE, LLP  
Attorneys for Plaintiff  
1400 Old Country Road  
Suite C103  
Westbury, NY 11590

Plaintiff,

-against-

RONALD D. WEISS  
Attorney for Defendant  
MORRIS E. WALKER  
734 Walt Whitman Road  
Suite 203  
Melville, NY 11747

MORRIS E. WALKER; PHEROL WALKER;  
BENEFICIAL NEW YORK INC.; "JOHN DOE #1-5"  
AND "JANE DOE #1-5" said names being fictitious, it  
being the intention of Plaintiff to designate any and all  
occupants, tenants, persons or corporations, if any, having  
or claiming an interest in or lien upon the premises being  
foreclosed herein,

Defendants.

\_\_\_\_\_  
Upon the following papers numbered 1 to 14 read on this motion for an order of reference and cross motion for reargument and dismissal; Notice of Motion and supporting papers 1 - 8 ; and Notice of Cross Motion and supporting papers 9 - 14 ; it is,

**ORDERED** that this motion (003) by the plaintiff for, inter alia, an order fixing the defaults of the non-answering defendants pursuant to CPLR 3215(f), appointing a referee to compute pursuant to RPAPL 1321 and amending the caption is granted; and it is

**ORDERED** that the caption of this action is amended by substituting IESHA GOODMAN for the fictitious "JOHN DOE #1-5" and "JANE DOE #1-5" defendants; and it is

**ORDERED** that the plaintiff shall serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court, I.A.S. Part 49; and it is

**ORDERED** that this cross motion (004) by the defendant Morris E. Walker for, inter alia, an order: (1) pursuant to CPLR 3215(c) dismissing the complaint insofar as asserted against him; or, in the alternative, (2) denying the plaintiff's motion for an order of reference; and (3) pursuant to CPLR 2004, 2005, 3012(d) and 5015 vacating his default and extending his time to interpose an answer, deemed a motion to reargue the court's prior orders denying the same relief; is denied in its entirety; and it is further

**ORDERED** that the plaintiff shall promptly serve a copy of this order pursuant to CPLR 2103(b)(1), (2), (3), (6) or (7) upon counsel for the defendant Morris E. Walker, and by first-class mail upon all other parties that have appeared herein and not waived further notice, and the plaintiff shall promptly file the affidavit(s) of service with the Clerk of the Court.

This is an action to foreclose a mortgage, given by the defendants Morris E. Walker and Pherol Walker ("the mortgagors") to the plaintiff's predecessor-in-interest, and relating to certain real property known as 23 Maylen Drive, Brentwood, New York 11717. The subject mortgage dated June 18, 2007 was executed jointly by the mortgagors; however, the note also dated June 18, 2007 was executed solely by Morris.

After the mortgagors allegedly failed to cure the default in payment, the plaintiff commenced this action by the filing of the lis pendens, summons and complaint on or about May 7, 2009. Morris was served with the summons and complaint pursuant to CPLR 308(2) by delivery of the same to his wife, Pherol, on his behalf, at the property on July 1, 2009. The affidavit of service for Morris was then filed with the Suffolk County Clerk's Office on July 6, 2009. Thus, Morris' time to answer expired on August 17, 2009, August 15, 2009 being a Saturday (see Gen Const § 25).

According to the records maintained by e-courts and/or the physical file maintained by the Suffolk County Clerk, Morris appeared in this action by, among other things, filing three notices of appearance herein, the first dated October 30, 2009, which was subsequently filed with the County Clerk on December 3, 2009; filing a motion on or about November 13, 2009 for, inter alia, leave to extend his time to answer, along with a notice of appearance and document demands; filing a subsequent motion on October 29, 2015 to reargue the court's decision denying his prior motion for an order extending his time to answer and for dismissal pursuant to CPLR 3215(c); filing the instant motion on January 2, 2018 for leave to extend his time to answer, deemed a motion to reargue the prior orders of the court, along with a notice of appearance and document demands; executing and/or consenting to the filing of a written stipulation adjourning at least one conference calendar date; and executing and/or consenting to a written stipulation adjourning the return date of Morris' first motion.

Morris' initial appearance was untimely, and, in any event, he remains in default, never having timely interposed an answer to the complaint, and his prior motions for, inter alia, leave to interpose an untimely answer having been denied. The remaining defendants have neither answered nor appeared herein.

The electronic records maintained by e-courts and/or the file maintained by the County Clerk show that the plaintiff served a Request for Judicial Intervention ("RJI") dated July 2, 2009, which was subsequently entered in the Clerk's Office on or about July 8, 2009. On June 12, 2009, the plaintiff re-filed lis pendens, alleging that service was not complete prior to the expiration of the original notice of pendency. Furthermore, on July 14, 2009, the plaintiff served notice pursuant to CPLR 3215(g)(3) on the mortgagors, and the same was filed with the County Clerk on July 22, 2009.

According to the court's records and/or the physical file maintained by the Suffolk County Clerk, the parties began a prolonged period of negotiations in an attempt to agree on a loan modification, and settlement conferences were conducted or adjourned before an assigned referee beginning on September 9, 2009 (marked "BPA"), and lasting until June 15, 2010. Thereafter, additional conferences were scheduled to be held before Foreclosure Conference Part 21 on August 24, October 19, 2010. Parenthetically, the October conference was adjourned on consent to December 21, 2010 pursuant to a written stipulation dated October 18, 2010, and made between the plaintiff's prior counsel and Morris' present counsel. The December 21, 2010 conference was adjourned to February 16, 2011 (marked "held" and "BPA"). In the interim, by consent to change filed on October 21, 2011, the firm of Fein, Such & Crane, LLP was substituted as the plaintiff's counsel for outgoing counsel, Pollack Cooperman & Fisher.

Pursuant to a Proposed Order for Conference dated March 19, 2012 (Spinner, J.), all parties or their counsel directed to appear for a status conference, unless an adequate order was received by the court on or before August 13, 2013. Thereafter, pursuant to a compliance conference order dated June 12, 2012 (Spinner, J.), served by the plaintiff on the mortgagors on July 9, 2012, the parties or their counsel were directed to appear for a status conference, and another conference was subsequently held on July 20, 2012 (marked "not settled" and "BPA").

Thereafter, a conference was held before Conference Calendar Part 21 on May 22, 2013 pursuant to another short form order dated March 13, 2013, and compliance conferences were subsequently conducted or adjourned before Compliance Conference Part 21 on September 11 and November 13, 2013 as well as on January 29 and February 26, 2014. The County Clerk's records show that the plaintiff filed a copy of the March, 2013 order along with notice of entry dated May 8, 2013 in said office on May 10, 2013. These records also show that on February 5, 2014, and again on January 23, 2017, the plaintiff subsequently filed successive notices of pendency.

By order dated April 14, 2014 (Spinner, J.), submitted by the plaintiff, the defendant's first motion (001) was denied and the plaintiff was granted permission to proceed in this action. The physical file shows that the plaintiff served said order with notice of entry dated October 28, 2014 on the mortgagors, and thereafter caused the same to be filed with the County Clerk on November 5, 2014.

After the administrative re-assignment of this action to the undersigned, one additional conference was conducted before Part 49-SC on November 6, 2017. The court's records for the November, 2017 conference were marked to indicate that the parties were again unable to modify the loan or otherwise achieve a settlement. The physical file shows that the plaintiff served "notice of status conference" pursuant to the November, 2017 order upon the mortgagors on October 26, 2017, and thereafter filed an affidavit of serving the same with the County Clerk on December 5, 2017.

The plaintiff now moves for, inter alia, an order fixing the defaults of the non-answering defendants, appointing a referee to compute, amending the caption, awarding it certain declaratory relief and money damages related to said monetary relief. In response, Morris opposes the plaintiff's motion and cross moves for, inter alia, an order: (1) pursuant to CPLR 3215(c) dismissing the complaint insofar as asserted against him; or, in the alternative, (2) denying the plaintiff's motion for an order of reference; and (3) pursuant to CPLR 2004, 2005, 3012(d) and 5015 vacating his default and extending his time to interpose an answer. The plaintiff has not filed opposition in response to the cross motion. By written stipulation dated November 8, 2017, the moving parties had agreed to adjourn the plaintiff's motion on consent of both sides to January 4, 2018, the same return date as the cross motion, subject to the approval of this court.

The branch of Morris' cross motion for an order dismissing the complaint is denied because he waived his right to move for dismissal of the complaint pursuant to CPLR 3215(c), by serving several notices of appearance, by serving and filing several motions for an order extending his time to answer, by his appearance and participation in the court conferences, either personally or by counsel, and by execution of the stipulation to adjourn the plaintiff's motion, all of which constituted a formal appearance in this action (*see* CPLR 320[a]; *US Bank N.A. v Gustavia Home, LLC*, 156 AD3d 843, 67 NYS3d 242 [2d Dept 2017]; *Bank of Am., N.A. v Rice*, 155 AD3d 593, 63 NYS3d 486 [2d Dept 2017]; *HSBC Bank USA v Lugo*, 127 AD3d 502, 9 NYS3d 6 [1st Dept 2015]; *Meyers v Slutsky*, 139 AD2d 709, 527 NYS2d 464 [2d Dept 1988]; *see also American Home Mtge. Servicing, Inc. v Arklis*, 150 AD3d 1180, 56 NYS3d 332, 334 [2d Dept 2017] [personal jurisdiction defense waived where there is an appearance without a jurisdictional defense or pre-answer motion to dismiss pursuant to CPLR 3211[a][8]; *Wells Fargo Bank N.A. v Vaca*, 60 Misc3d 1217 [A], 2018 NY Slip Op 51155 [U][Sup Ct, Suffolk County 2018] [rejecting argument that notice of appearance is limited where it is not accompanied by a motion pursuant to CPLR 3211[a][8]; *cf. HSBC Bank USA N.A. v Grella*, 145 AD3d 669, 44 NYS3d 56 [2d Dept 2016]).

Even if there were no waiver, under the circumstances presented herein, the court finds no entitlement to dismissal of the complaint pursuant to CPLR 3215(c) (*see HSBC Bank USA, N.A. v Clayton*, 146 AD3d 942, 45 NYS3d 543 [2d Dept 2017]; *BAC Home Loans Servicing, LP v Reardon*, 132 AD3d 790, 18 NYS3d 664 [2d Dept 2015]; *Iorizzo v Mattikow*, 25 AD3d 762, 807 NYS2d 663 [2d Dept 2006]). In this case, the delay was partly attributable to Morris by his participation in numerous settlement and other conferences and/or by requesting or consenting to continuances of the conferences, by his repeated motion practice, and by not submitting an order in response to the disposition of his first motion, necessitating the plaintiff to do so (*see Iorizzo v Mattikow*, 25 AD3d 762). Furthermore, the plaintiff demonstrated that it did not abandon this action by, inter alia, serving the RJI, by submitting the proposed order disposing of Morris' first motion, by then serving and filing said order with notice of entry, and by serving and filing two other orders with notice of entry (*see Aurora Loan Servs., LLC v Gross*, 139 AD3d 772, 32 NYS3d 249 [2d Dept 2016]). Moreover, the plaintiff's instant motion for an order of reference preceded Morris' instant third motion (*see US Bank N.A. v Dorestant*, 131 AD3d 467, 15 NYS3d 142 [2d Dept 2015]).

Additionally, it appears from the moving papers that the plaintiff has a meritorious claim for the foreclosure and sale of the subject property which is uncontested by Morris (*see Rivera v Schlagbaum*, 204 AD2d 524, 612 NYS2d 68 [2d Dept 1994]; *cf. Richards v Lewis*, 243 AD2d 615, 663 NYS2d 233 [2d Dept 1997]). The court finds that all of these factors, when considered together with the meritorious nature of the complaint, constitute sufficient cause as to why the complaint should not be dismissed.

In any event, Morris neither demonstrated nor alleged that he sustained any prejudice herein (*see LNV Corp. v Forbes*, 122 AD3d 805, 996 NYS2d 696 [2d Dept 2014]). To the contrary, any delay has worked to Morris' advantage because he has been living in the property, without making any payments, since the date of the lengthy default in payment. Accordingly, the branch of the cross motion for an order pursuant to CPLR 3215(c) dismissing the complaint as abandoned is denied.

The branches of Morris' cross motion for leave to vacate his default and extend his time to answer are denied because the court's prior determinations are law of the case (*see Aguilar v Feygin*, 151 AD3d 798, 56 NYS3d 536 [2d Dept 2017]; *Posin v Russo*, 294 AD2d 344, 741 NYS2d 893 [2d Dept 2002]). To the extent that Morris moves for reargument of his two prior motions, he has failed to demonstrate that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law in reaching its prior determinations (*see Saccomagno v City of New York*, 29 AD3d 979, 814 NYS2d 880 [2d Dept 2006]; *McGill v Goldman*, 261 AD2d 593, 691 NYS2d 75 [2d Dept 1999]). The remainder of the relief sought by Morris in the cross motion was waived by his failure to answer (*see* CPLR 3211[e]; *HSBC Bank USA v Philistin*, 99 AD3d 667, 952 NYS2d 83 [2d Dept 2012]), and, in any event, is found to be entirely without merit (*see Aurora Loan Servs., LLC v Chirinkin*, 135 AD3d 676, 22 NYS3d 876 [2d Dept 2016] [nothing in record to support the claim that the plaintiff engaged in conduct that improperly hindered the settlement process or needlessly prevented the parties from reaching a mutually agreeable resolution]; *JPMorgan Chase Bank, N.A v Mantle*, 134 AD3d 903, 23 NYS3d 258 [2d Dept 2015] [no genuine interest in negotiating a loan modification]).

The court next turns to the motion-in-chief. The plaintiff has submitted sufficient evidence entitling it to the relief requested (*see HSBC Bank USA, N.A. v Alexander*, 124 AD3d 838, 4 NYS3d 47 [2d Dept 2015]; *Wells Fargo Bank, NA v Ambrosov*, 120 AD3d 1225, 993 NYS2d 322 [2d Dept 2014]). This proof consists of, inter alia, the mortgage, the note, the default thereunder, an affidavit of the facts constituting the claim pursuant to CPLR 3215(f), a and affidavits of service. Thus, the plaintiff demonstrated its prima facie burden.

"[S]uccessful opposition to a CPLR 3215 motion for leave to enter a default judgment requires the same showing as an affirmative motion for leave to extend the time to answer," including, inter alia, demonstrating the existence of a reasonable excuse for the default (*Fried v Jacob Holding, Inc.*, 110 AD3d 56, 66, 970 NYS2d 260 [2d Dept 2013]; *see Weinstein v Schacht*, 98 AD3d 1106, 950 NYS2d 711 [2d Dept 2012]). Additionally, defaulting defendants are "deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71, 760 NYS2d 727 [2003] [internal quotation marks and citations omitted]).

Morris failed to demonstrate that he had a reasonable excuse for his default (*see Deutsche Bank Natl. Trust Co. v Kuldip*, 136 AD3d 969, 25 NYS3d 653 [2d Dept 2016]). Because Morris failed to answer the complaint and did not make a timely motion to dismiss, he also waived the purported defenses he now attempts to raise (*see CPLR 3211[a][e]*).

Because the plaintiff has established the default in answering by all of the defendants in this action, it is entitled to an order appointing a referee to compute amounts due under the subject note and mortgage (*see RPAPL 1321; Green Tree Servicing, LLC v Cary*, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]).

The branch of the plaintiff's motion for an order amending the caption, by substituting IESHA GOODMAN for the fictitious "JOHN DOE #1-5" and "JANE DOE #1-5" defendants, is granted (*see Citibank, N.A. v Van Brunt Props., LLC*, 95 AD3d 1158, 945 NYS2d 330 [2d Dept 2012]). By its submissions, the plaintiff established the basis for the above-noted relief. All future proceedings shall be captioned accordingly.

Accordingly, the plaintiff's motion is granted, and the cross motion is denied in its entirety. The proposed order of reference, as modified by the court, has been signed with this decision.

Dated: Jan. 2, 2019

  
HON. C. RANDALL HINRICHS, J.S.C.

\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION