

U.S. Bank, N.A. v Kim
2019 NY Slip Op 33417(U)
November 15, 2019
Supreme Court, New York County
Docket Number: 850238/2018
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

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U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, NATIONAL ASSOCIATION AS SUCCESSOR BY MERGER TO LASALLE BANK NA AS TRUSTEE FOR WASHINGTON MUTUAL MORTGAGE PASS-THROUGH CERTIFICATES WAMU SERIES 2007-OA4 TRUST,

Plaintiff,

- v -

SHERRY KIM, THOMAS KIM, ROBERT L. GORDONS LLC, NATIONAL CITY BANK, BOARD OF MANAGERS OF THE DOWNTOWN CLUB CONDOMINIUM, COLLINS FINANCIAL SERVICES INC., NEW YORK CITY TRANSIT ADJUDICATION BUREAU, NEW YORK CITY PARKING VIOLATIONS BUREAU, JOHN DOES AND JANE DOES

Defendant.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 97, 109, 110, 111, 112, 113, 114, 115, 116

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 117

were read on this motion to/for

JUDGMENT - SUMMARY

Motion Sequence Numbers 001 and 002 are consolidated for disposition. The motion (MS001) by plaintiff for summary judgment and to appoint a referee is denied. The motion by defendant Robert L. Gordons LLC ("Gordons LLC") for summary judgment dismissing this case is granted.

Background

In this foreclosure action, plaintiff moves for summary judgment and to appoint a referee to compute the amount it is due. Gordons LLC moves for summary judgment dismissing this case based on the statute of limitations.

It is undisputed that plaintiff brought a previous foreclosure action on May 21, 2010 against *inter alia* defendants Sherry and Thomas Kim (the borrowers). In that action, plaintiff did not file an RJI until December 2013 and failed to move for a default judgment until June 2014. While plaintiff failed to move its case, the condo successfully prosecuted its own foreclosure action against the borrowers and sold the property at a foreclosure auction to Gordons LLC. When plaintiff finally moved for a judgment of foreclosure and sale, Gordons LLC cross-moved to dismiss on the ground that plaintiff failed to timely move for a default judgment pursuant to CPLR 3215(c). The judge assigned to the case agreed with Gordons LLC and dismissed the case on March 27, 2018 (NYSCEF Doc. No. 91). Plaintiff then commenced this action on August 20, 2018.

Discussion

The central issue on this motion is whether plaintiff may utilize CPLR 205(a) to commence the instant action despite the fact that it began more than six years after the statute of limitations began to run in May 2010 (when plaintiff brought the first foreclosure action).

CPLR 205(a) provides that:

“If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that

service upon defendant is effected within such six-month period. Where a dismissal is one for neglect to prosecute the action made pursuant to rule thirty-two hundred sixteen of this chapter or otherwise, the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation.”

The purpose of CPLR 205(a) “is to provide a second opportunity to the claimant who has failed the first time around because of some error pertaining neither to the claimant's willingness to prosecute in a timely fashion nor to the merits of the underlying claim” (*George v Mt. Sinai Hospital*, 47 NY2d 170, 178-9, 417 NYS2d 231 [1979]). “Indeed, the statute will normally involve situations in which a suit has been started but, due to an excusable mistake or a procedural defect or ineptitude of counsel or inability to obtain needed evidence, or some other cause that should not be fatal to the claim, the start has been a false one” (*id.* at 179 [internal quotations and citation omitted]).

The Court grants the motion by Gordons LLC to dismiss this case. The fact is that the previous action was dismissed because plaintiff failed to prosecute its case; plaintiff waited more than four years to bring a motion for a default judgment. This is not a case where the previous action was dismissed because plaintiff was unable to obtain necessary evidence or some other excusable mistake. In fact, there is no dispute that the borrowers failed to make their mortgage payments and, for some reason, plaintiff did not seek to recoup its loan by obtaining a judgment and selling the property. Instead, plaintiff let the case linger.

The Court rejects Plaintiff's characterization of the dismissal of the 2010 foreclosure action as a “procedural defect.” Rather, plaintiff's handling of that case was a complete and utter abandonment of its rights. It could be that plaintiff was not paying attention or that plaintiff was hoping it could recover a substantial amount of interest while the foreclosure case remained

pending for nearly a decade. Either circumstance does not support the application of CPLR 205(a).

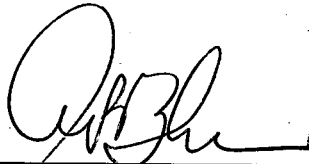
If CPLR 205(a) were found to be applicable in the instant situation, it would completely eviscerate the statute of limitations. It would allow plaintiff to pursue a case more than eight years after the limitations period began to run and it would render CPLR 3215(c) meaningless. A lender who fails to timely seek a default judgment and has its case dismissed could simply bring a new case and cite CPLR 205(a), thereby avoiding both CPLR 3215(c) and the limitations period. This Court cannot sanction this type of "end-run" around the statute of limitations.

Accordingly, it is hereby

ORDERED that the motion by plaintiff (MS001) for summary judgment is denied; and it is further

ORDERED that the motion by defendant Robert L. Gordons LLC for summary judgment dismissing this action is granted, with costs, and the Clerk is directed to enter judgment accordingly and to cancel the Notice of Pendency filed in relation to the subject premises in this matter (NYSCEF Doc. No. 8).

11/15/19
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT

APPLICATION: DENIED

CHECK IF APPROPRIATE: OTHER

REFERENCE