Wilmington v Sulton
2019 NY Slip Op 34031(U)
June 27, 2019
Supureme Court, Kings County
Docket Number: 503546/17
Judge: Noach Dear

At an IAS Term, Part FRP-1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 27th day of June 2019.

P R E S E N T:

HON. NOACH DEAR,
J.S.C.

Index No.: 503546/17

_____ x

MS #1

WILMINGTON,

Plaintiff,

DECISION AND ORDER

-against-

ANDRE SULTON et al,

Defendant,

_____ x

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

Papers	**Numbered**
Motion (MS 1)	1
Opposition	2
Reply	3

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Defendant moves for summary judgment in his favor on Plaintiff's claims and the counterclaim. Plaintiff opposes.

"The law is well settled that with respect to a mortgage payable in installments, there are 'separate causes of action for each installment accrued, and the Statute of Limitations [begins] to run, on the date each installment [becomes] due unless the mortgage debt is accelerated. Once the mortgage debt is accelerated, the entire amount is due and the Statute of Limitations begins to run on the entire mortgage debt" (*Loiacono v. Goldberg*, 240 A.D.2d 476, 477 [2d Dept. 1997]). The prior action was commenced on 7/7/10, accelerating the lien. The instant action was not filed until 2/22/17, more than six years later. As such, Defendant met his initial burden of showing that the instant action is untimely. The burden then shifted to Plaintiff to demonstrate that the prior action was not an

acceleration or any other basis for the instant action to be timely (*U.S. Bank Nat. Ass'n v. Martin*, 144 A.D.3d 891 [2d Dept 2016]).

The Court of Appeals has held that "termination of the prior action occurs when appeals as of right are exhausted or, when discretionary appellate review is granted, upon final determination of the discretionary appeal" (*Malay v. City of Syracuse*, 25 N.Y.3d 323, 328 [2015][internal cites and quotation marks omitted]; see also, *Caffrey v. North Arrow Abstract & Settlement Services, Inc.*, 160 AD3d 121, 130 [2d Dept 2018]; *Fischer v New York*, 147 A.D.3d 1030, 1031 [2d Dept 2017]). Here, a motion to vacate Judge Knipel's (seemingly erroneous[1]) dismissal is pending before him and, were he to deny it, Plaintiff would have the right to seek appellate redress (as it is already seeking to do on a discretionary basis). As such, the prior action has not yet been finally determined and, were 205[a] applicable (an insufficiently briefed, fact-based[2] issue on which the Court need not take a position at this juncture), the instant action would be timely (see, similarly, *Bank of N.Y. Mellon v Slavin*, 156 AD3d 1073, 1074-1075 [3d Dept 2017]).

Motion denied.

ENTER:

Hon. Noach Dear, J.S.C.

KINGS COUNTY CLERK
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[1] Issue was joined in the 2010 action upon Defendant's answer.

[2] The majority in *Eitani* implies that, were the 3215[c] dismissal opinion therein to have included findings of specific conduct demonstrating a general pattern of delay in proceeding with the litigation, 205[a] would not have been applicable. This is consistent with the Court of Appeals' holding in *Andrea v. Arnone, Hedin, Casker, Kennedy and Drake, Architects and Landscape Architects, P.C.*, 5 NY3d 514, 520 [2005] that "the 'neglect to prosecute' exception in CPLR 205(a) applies not only where the dismissal of the prior action is for want of prosecution pursuant to CPLR 3216, but whenever neglect to prosecute is in fact the basis for dismissal."

While it appears the order in the 2010 action is the same as that in *Eitani*, the record does not reflect the basis, if any, stated by Judge Knipel in issuing the dismissal order at the 2013 conference.