Citimortgage, Inc. v Moran
2020 NY Slip Op 30723(U)
March 6, 2020
Supreme Court, New York County
Docket Number: 850110/2019
Judge: Arlene P. Bluth

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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CITIMORTGAGE, INC.,

Plaintiff,

- v -

TREVOR MORAN, BOARD OF MANAGERS W/ THE HERITAGE AT TRUMP PLACE, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, JOHN DOE, IF ANY, HAVING OR CLAIMING AN INTEREST IN OR LIEN UPON THE PREMISES DESCRIBED IN THE COMPLAINT,

Defendant.

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INDEX NO. 850110/2019

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 37, 38, 39, 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, 68, 71, 72, (the Court did not consider the sur-reply)

were read on this motion to/for JUDGMENT - SUMMARY.

The motion by plaintiff for summary judgment is denied.

Background

This foreclosure action asks this Court to consider the reach of the savings statute—CPLR 205(a)—and whether it should apply where a lender failed to satisfy a condition precedent that compelled dismissal of an earlier case.

Plaintiff commenced a prior foreclosure action arising out of the subject premises in October 2011. A review of that docket reveals that a request for judicial intervention ("RJI") was not filed until August 2014 and that the case was released from the settlement part on March 9, 2015 after Mr. Moran failed to appear for two conferences. For some reason, plaintiff did not make a motion for summary judgment until January 2016 despite the fact that the order releasing

the case from the CPLR 3408 settlement part noted that plaintiff had 90 days to file its motion for an order of reference.

Plaintiff's motion was eventually sent to the special referee's part for a traverse hearing regarding whether the RPAPL 1304 notice was sent. The referee assigned found plaintiff failed to satisfy this obligation. However, the judge then-assigned to the case disagreed and rejected the referee's report. The Appellate Division, First Department reversed in December 2018 and concluded that "Plaintiff failed to establish a presumption that it properly served defendant with [an] RPAPL 1304 notice through proof either of actual mailing or of a standard office practice or procedure for proper addressing and mailing" (*CitiMortgage, Inc. v Moran*, 167 AD3d 461, 461, 90 NYS3d 29 [1st Dept 2018]). After the dismissal by the First Department, plaintiff commenced this action in May 2019.

Defendant Moran argues that this case is time-barred[1] and that plaintiff lacks standing to prosecute this action. In reply, plaintiff argues that it had until June 11, 2019 to recommence this action pursuant to CPLR 205(a) and, therefore, this case is timely given that the complaint was filed in May 2019.

Discussion

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

[1] Bizarrely, Moran did not cross-move to dismiss based on his statute of limitations argument.

specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation."

When discussing New York's saving statute, Judge Cardozo noted that it was "designed to insure to the diligent suitor the right to a hearing in court till he reaches a judgment on the merits. Its broad and liberal purpose is not to be frittered away by any narrow construction. The important consideration is that, by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts" (*Gaines v City of New York*, 215 NY 533, 539, 109 NE 594 [1915] [discussing CPLR 205(a)'s predecessor statute]). CPLR 205(a) "shares with its venerable predecessor provisions the "broad and liberal purpose" of remedying what might otherwise be the harsh consequence of applying a limitations period where the defending party has had timely notice of the action" (*Goldstein v New York State Urban Dev. Corp.*, 13 NY3d 511, 521, 893 NYS2d 472 [2009]).

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).

Here, the plaintiff was anything but a diligent litigant and its mistake (failing to send the RPAPL 1304 notice) was not excusable or a procedural defect. The fact that the statue of limitations is an issue is entirely due to plaintiff's apparent lack of interest in the 2011 foreclosure case. As noted above, plaintiff waited for nearly three years to file an RJI in the

2011 case. That failure has numerous consequences for a foreclosure action. Not filing an RJI means the case was not assigned to a judge nor was a CPLR 3408 conference promptly scheduled. The Court has no idea why plaintiff waited so long to file an RJI— a document that takes only a few minutes to complete.

But plaintiff's utter disregard for timely prosecution did not stop with the RJI. Once plaintiff finally got around to filing the RJI and the case was released from the CPLR 3408 settlement part, plaintiff was ordered by the Court to file a motion for an order of reference within 90 days of March 9, 2015. Plaintiff did not do that; instead, plaintiff waited until January 2016 to make its motion. Flat out disregard of a court order does not evidence a diligent plaintiff.

Then, when the judge assigned to the case ordered a traverse hearing about the RPAPL 1304 issue in July 2016, plaintiff had a choice. It could have discontinued the case and started a new case to avoid the possibility that the Court would find that RPAPL 1304 was not satisfied and dismiss the case for failure to comply with this condition precedent. But plaintiff decided to pursue the 2011 case and take the risk that the case would be dismissed—which is exactly what happened.

CPLR 205(a) is supposed to give a second chance to a plaintiff that has made a technical defect or oversight. As one Supreme Court case noted "Reduced to its common denominator, the intent of CPLR 205(a) is to afford a claimant the fair opportunity to have 'one full bite of the apple', no more but no less" (*Goldberg v Nathan Littauer Hosp. Assn.*, 160 Misc2d 571, 574, n 2 610 NYS2d 446 [Sup Ct, Albany County 1994]). There is no doubt that plaintiff had a fair opportunity to foreclose on its note and mortgage. Plaintiff blew that opportunity by not serving the RPAPL 1304 notice and by its dilatory tactics in prosecuting the 2011 case. It may be that

plaintiff intentionally delayed the first case in order to rack up interest (interest it was likely to recover given that the case involved real estate in Manhattan) or that plaintiff simply was too disorganized or incompetent to prosecute its case.

But that does not justify the application of CPLR 205(a)—this statute is not meant to provide a "do over" every time a previous case is dismissed particularly where the case is dismissed because plaintiff failed to comply with a basic requirement for a foreclosure case. The logical consequence of permitting the use of the savings statute in this case is obvious—it would eviscerate the purpose of RPAPL 1304. It would condone plaintiff's failure to satisfy its obligation to give a defaulting borrower 90 days notice, plaintiff's inexcusable delay in moving its case and its outright refusal to follow a Court order directing the filing of a motion. In other words, plaintiff cannot create its own statute of limitations problem and then cite CPLR 205(a) and ask the Court to ignore its years of questionable conduct.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is denied.

Next Conference: July 14, 2020 at 2:15 p.m.

3/6/2020
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
APPLICATION:		GRANTED	X	DENIED		GRANTED IN PART	OTHER
		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE