

Finkelstein v Bank of N.Y. Mellon
2022 NY Slip Op 30186(U)
January 13, 2022
Supreme Court, New York County
Docket Number: Index No. 651222/2021
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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STEPHEN FINKELSTEIN

Plaintiff,

- v -

THE BANK OF NEW YORK MELLON, AS TRUSTEE
(AND ANY PREDECESSORS OR SUCCESSORS
THERETO),

Defendant.

-----X

INDEX NO. 651222/2021

MOTION DATE _____

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

HON. MARGARET CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 28 were read on this motion to DISMISS and cross-motion to COMPEL ACCEPTANCE OF COMPLAINT

In this action arising out of defendant’s alleged breaches of its obligations as trustee under four trusts, defendant moves for an order dismissing plaintiff’s complaint as untimely under CPLR 3012 (b). Plaintiff opposes the motion and cross-moves pursuant to CPLR 3012 (d) to compel defendant to accept service of the complaint. For the reasons stated below, defendant’s motion for dismissal is denied and plaintiff’s cross-motion is granted.

Background

This action was commenced by plaintiff’s filing of a summons with notice on February 22, 2021 (NYSCEF # 1). On June 23, 2021, plaintiff filed an affidavit of service affirming that defendant had been served on June 21, 2021 with a copy of the summons with notice, just ahead of the 120-day deadline under CPLR 306-b (NYSCEF # 2). Defendant filed its notice of appearance on July 8, 2021 (NYSCEF #’s 3-5). Plaintiff filed a copy of its complaint on September 1, 2021 (NYSCEF # 6), and on the same day defendant filed a notice rejecting service of the complaint (NYSCEF # 11). On September 8, 2021, defendant filed its motion to dismiss (NYSCEF # 13). On September 17, 2021, plaintiff filed his cross-motion to compel acceptance of service of the complaint (NYSCEF # 23).

Defendant moves to dismiss on the ground that its counsel entered appearances within the deadline prescribed by CPLR 320 (a), and that plaintiff was

required to serve his complaint on defendant within twenty days of defendant's service of appearance, or by July 28, 2021, such that plaintiff's service was thirty-five days past the deadline. Defendant asserts that plaintiff cannot demonstrate a reasonable excuse for his delay in serving the complaint, and that the complaint fails to state a meritorious cause of action including because the allegations in the complaint "are merely copycats of those asserted in other, unsuccessful cases," and that the action is untimely (NYSCEF # 14-Def.'s MOL at 11-12).

Plaintiff opposes the motion and cross moves to compel defendant to accept service of the complaint. Plaintiff's reasonable excuse for failing to meet the deadline for its service was waiting in July and August for defendant's counsel to respond to a request to discuss a briefing schedule (NYSCEF # 25 at 7). Plaintiff's counsel affirms that he sent an email on June 17, 2021, to ask if defendant's counsel would accept service of the summons with notice and that, after there was no response, plaintiff had a process server effect service (NYSCEF # 24, ¶ 12). Plaintiff's counsel continued to wait for defendant's counsel to respond on the briefing schedule request even after defendant's counsel filed appearances in this action on July 8, 2021, explaining that it was "the practice of counsel in the many other actions we had litigated against [residential mortgage-backed securities] trustees" (*id.*, ¶ 13). In addition, plaintiff attributed some delay to plaintiff's counsel's departure from the law firm that filed the Summons with Notice to open his own practice (NYSCEF # 25 at 7). Plaintiff's final explanation on the delay was the complicated and time-consuming process of getting Cede & Co. authorizations from the holder of plaintiff's certificates (*id.*).

As for the merits of the case, plaintiff points to its verified complaint which alleges that defendant failed to enforce mortgage repurchase and substitution obligations, and that the complaint contains allegations demonstrating that it was timely filed. In addition, plaintiff contends that defendant has not been prejudiced by the one-month delay in filing the summons and complaint, noting that defendant made no demand for a complaint.

In opposition to the cross motion and in further support of its motion, defendant contends that plaintiff's explanations for its late service of the complaint are unreasonable and vague. Defendant notes that plaintiff failed to explain how plaintiff's counsel's transition to his new firm prevented the timely service of the complaint or how obtaining the Cede & Co. authorizations affected plaintiff's ability to timely serve the complaint, particularly where such authorizations were obtained in mid-July (NYSCEF # 25 at 3). Defendant also argues that the verified complaint and affirmation of merit, both signed by plaintiff's counsel, are insufficient to demonstrate the merits of the complaint as plaintiff's counsel does not have personal knowledge of any of its factual predicates and that plaintiff's claims are untimely.

Discussion

When the summons is served without a complaint, and the defendant has demanded the complaint or made an appearance, the plaintiff must serve the complaint within twenty days or face dismissal of the action (CPLR 3012 (b)). To prevail on a motion to compel acceptance of a complaint untimely served under CPLR 3012 (d), the plaintiff must demonstrate a reasonable excuse for the default and a meritorious claim (*see e.g. Fawn Second Ave. LLC v First Am. Title Ins. Co.*, 192 AD3d 478 [1st Dept 2021]). Other relevant factors considered by the court are the length of the delay, the presence of prejudice to the defendant, and the strong public policy in favor of resolving cases on the merits (*Wimbledon Fin. Master Fund, Ltd. v Weston Cap. Mgmt. LLC*, 150 AD3d 427, 428 [1st Dept 2017]). “The determination of what constitutes a reasonable excuse for the delay lies within the sound discretion of the motion court” (*Amodeo v Gellert & Quartararo, P.C.*, 26 AD3d 705, 706 [3d Dept 2006]).

Here, the delay is excusable due to the confluence of plaintiff’s situation, including law office failure and the complicated issues involved in preparing the forty-nine page complaint (*see e.g. Wimbledon Fin. Master Fund, Ltd.*, 150 AD3d at 428 [holding that complexity of case among factors demonstrating reasonable excuse]; *Hernandez v Chaparro*, 95 AD3d 745 [1st Dept 2012] [finding reasonable excuse on the basis of the complexity of the guardianship and estate proceedings preceding service of the complaint]; *Amodeo*, 26 AD3d at 706 [upholding reasonable excuse for 35-day delay “attributable to law office failure, confusion regarding [defendant’s] representation and plaintiffs’ delay in approving the proposed complaint”). Notable is the brevity of plaintiff’s delay, being only thirty-five days long (*see e.g. Wimbledon Fin. Master Fund, Ltd.*, 150 AD3d at 428 [reasonable excuse supported by relatively brief 27-day delay]), and the absence of any pattern of default (*see e.g. Gazes v Bennett*, 70 AD3d 579, 579–80 [1st Dept 2010]). Furthermore, plaintiff has not evinced any intent to abandon his claim, since he ultimately filed the complaint prior to, and promptly responded after, defendant’s motion to dismiss, and defendant has not shown any prejudice resulting from the delay (*see Rose v Our Lady of Mercy Med. Ctr.*, 268 AD2d 225, 226 [1st Dept 2000] [finding that excusing plaintiff’s default was supported by lack of intention to abandon claim and lack of prejudice to defendant]; *see also Brown v Hannaford Bros. Co.*, 27 AD3d 815, 816, [3d Dept 2006] [“given the lack of demonstrated prejudice to defendant, Supreme Court properly exercised its discretion in accepting plaintiff’s excuse that the delay had resulted from law office failure”).

Plaintiff has also set forth a potentially meritorious action (*see e.g. W. & S. Life Ins. Co. v U.S. Bank Nat’l Ass’n*, 69 Misc 3d 1213(A) at *5 [Sup Ct, NY County 2020] [holding that “alleged failure to enforce repurchase obligations present additional fact issues further precluding dismissal at this stage”]; *see also Royal*

Park Invs. SA/NV v Deutsche Bank Nat'l Tr. Co., No. 14-CV-4394 (AJN), 2016 WL 439020, at *4 [US Dist Ct, SD NY 2016] [finding that trustee upon discovering that mortgage loans did not conform with representations and warranties of the party that had sold such loans to the trustee “had an obligation to require [such seller] to substitute or repurchase [the] defective loans”). The evidence supporting plaintiff’s case is particularly sufficient at this stage in the litigation given the nature of the case (see *MLRN LLC v U.S. Bank Nat. Ass’n*, No. 652712/2018, 2019 WL 5963202, at *2 [Sup Ct, NY County, 2019], affd 190 AD3d 426 [1st Dept 2021] [“with respect to RMBS cases [plaintiff’s pleading burden] has been described as a low bar” that may be satisfied “with allegations that simply raise a reasonable expectation that discovery will reveal evidence proving the plaintiff’s claim”] [internal citations and quotations omitted]).

Defendant’s argument that plaintiff’s counsel’s affirmation of merit and verification of plaintiff’s complaint are insufficient to demonstrate the merits of plaintiff’s case because they are not verified by plaintiff himself is unavailing because plaintiff’s counsel has personal knowledge (NYSCEF # 24, ¶’s 6-9) of investigations into the relevant claims (see *Wimbledon Fin. Master Fund, Ltd.*, 150 AD3d at 428 [finding that plaintiff “adequately demonstrated the potential merits of its claims ... through the affirmation of counsel, who, based on her personal involvement in the investigation and review of files, detailed the factual basis for the fraud claims”). Furthermore, the question of trustee liability involves complex legal principles that may lie outside the knowledge of plaintiff (see e.g. *Santana v Prospect Hosp.*, 84 AD2d 714 [1st Dept 1981] [finding that “Plaintiff herself, administratrix of the deceased, could hardly be expected to have personal knowledge of facts needed to demonstrate the meritoriousness of the action.... Such facts could be offered in this case by plaintiff’s attorney, based upon examination of the pertinent hospital records”]; compare *Brice v Westchester Cmty. Health Plan*, 143 AD2d 170, 170 [2d Dept 1988] [noting that where medical malpractice “claim is based upon matters not within the ordinary experience and knowledge of lay persons ... expert medical opinion evidence is required to demonstrate merit”]).

Plaintiff has also sufficiently demonstrated, at this early stage, the possibility that, given plaintiff’s un rebutted claim that the trusts involved in this litigation were subject to class actions, its claims are timely (see *W. & S. Life Ins. Co. v U.S. Bank Nat'l Ass’n*, 69 Misc 3d 1213(A) at *5 [Sup Ct, NY County 2020] [holding that the “question whether ... claims accrued when [trustee] first allegedly discovered a breach ... or when [trustee] allegedly permitted its repurchase rights ... to ‘lapse’ eight years after the breach ..., or sometime in between, is not one that can be decided on the pleadings”]; see also *IKB Intern., S.A. v LaSalle Bank N.A.*, No. 654436/2015, 2021 WL 358318, at *25 [Sup Ct, NY County 2021] [respecting the statute of limitations for various claims involving potential estoppel and tolling via class actions of claims against trustee of mortgage loans, finding the existence of “issues

of fact and law [that] are not addressed, or properly determined, on the record of these motions to dismiss”).

In view of the foregoing and that public policy favors the resolution of cases on their merits (*Amodeo*, 26 AD3d at 706), defendant’s motion to dismiss is denied and plaintiff’s cross-motion to compel defendant to accept service of its complaint is granted.

Conclusion

In view of the above, it is

ORDERED that defendant’s motion to dismiss is denied and plaintiff’s cross-motion is granted; and it is further

ORDERED that defendant shall answer or otherwise respond to the complaint within 20 days of the e filing of this order; and it is further

ORDERED that a preliminary conference by Microsoft Teams (invite to be provided by the court) will be held on March 2, 2022 at 2:15pm.

This constitutes the Decision and Order of the court.

01/13/2022
DATE


MARGARET CHAN, J.S.C.
MARGARET CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED
 SETTLE ORDER

DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART
 SUBMIT ORDER

OTHER

APPLICATION: