

Deutsche Bank Natl. Trust Co. v Durant
2022 NY Slip Op 30314(U)
February 1, 2022
Supreme Court, Queens County
Docket Number: Index No. 704245/2015
Judge: Karina E. Alomar
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

PRESENT: Honorable **KARINA E. ALOMAR**,
Justice

IAS PART 23

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR CARRINGTON MORTGAGE
LOAN TRUST, SERIES 2005 OPT2, ASSET BACKED
PASS-THROUGH CERTIFICATES

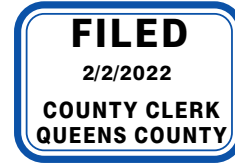
Plaintiff,

Index No.: 704245/2015

-against-

ELMA DURANT, NEW YORK CITY PARKING
VIOLATIONS BUREAU, ROBERT CLARKE

Defendants.



The following papers numbered 93 -148 read on the plaintiff's motion for an Order
a) vacating the November 18, 2016, order of dismissal and restoring the case to the
calendar, b) granting a default judgment against all defendants, c) amending the caption,
and d) appointing a referee to compute the amount due to plaintiff under the note and
mortgage pursuant to RPAPL 1231 and CPLR 4311; and on defendant Durant's cross
motion a) denying the plaintiff's motion to vacate; and b) sanctioning the plaintiff for
frivolous conduct.

Papers

Numbered

Notice of Motion-Affirmation-	
Exhibits and Memorandum of Law.....	EF No.: 93-129
Cross Motion-Affirmation-Affidavits and Exhibits.....	EF No.: 130-141
Opposition Affirmation, Affidavit	EF No.: 142-143
Reply Affirmation, Affidavit and Memorandum	EF No.: 144-148

Upon the foregoing papers, it is hereby ordered that plaintiff's motion and
defendant's cross-motion is determined as follows:

I. FACTUAL HISTORY

Plaintiff Deutsche Bank National Trust Company hereinafter "Deutsche"
commenced this action, on April 28, 2015, to foreclose a mortgage against real
property known as 193-32 Williamson Avenue; Springfield Gardens, New York

11416. The mortgage was purported given on January 28, 2005, by defendant Elma Durant hereinafter referred to as “Durant” to Option One Mortgage, and allegedly subsequently assigned to plaintiff. The mortgage was given to secure a note evidencing a loan in the initial principal amount of \$380,000.00, which plaintiff alleges defendant defaulted making payments upon as of December 1, 2013.

II. PROCEDURAL HISTORY

Defendant Durant despite being served with the Summons and Complaint never filed an answer or a notice of appearance. The parties however did appear at a foreclosure conference on August 10, 2015, which resulted in an Order. Said Order directed plaintiff to appear for a status conference on May 10, 2016, and to file an application seeking an Order of Reference by said date.

On May 10, 2016, plaintiff appeared at the status conference as directed but failed to file an application seeking an Order of Reference as directed. The Court then issued a Status Conference Order directing Plaintiff to appear at a final status conference on November 1, 2016, and to file a foreclosure affirmation/certificate of merit pursuant to Administrative Order 208/13 as well as an application for an Order of Reference by November 1, 2016.

On November 1, 2016, not only did the plaintiff fail to appear for the final conference but also failed to comply with the directives to file an affirmation/certificate of merit pursuant to Administrative Order 208/13 as well as to file for Order of Reference. Based on Plaintiff’s failure to comply with the Orders dated August 10, 2015, and May 10, 2016, the Court Referee issued a report dated November 4, 2016, recommending dismissal of the action due to abandonment as well as the cancellation and discharge of the Notice of Pendency.

On November 18, 2016, the Honorable Marguerite A. Grays confirmed the Referee's report dated November 4, 2016. Pursuant to Justice Grays' Order dated November 4, 2016, and entered on December 12, 2015, the action was dismissed, and the clerk was directed to cancel and discharge of the Notice of Pendency filed on April 28, 2015.

On June 15, 2017, plaintiff filed a motion seeking the same relief sought in the instant motion, which application was granted by the Honorable Leslie J. Purificacion on June 5, 2018, which Order was thereafter entered on June 15, 2018.

The June 5, 2018, Order was thereafter vacated by the Honorable Mojgan C. Lancman, on May 29, 2020, which Order was thereafter entered on June 2, 2020, due to plaintiff's non-service of the June 15, 2017, motion on Defendant. The June 2, 2020, Order further reinstated the dismissal issued by the Honorable Marguerite A. Grays dated November 8, 2016. Plaintiff filed a notice of appeal of the Order of May 29, 2020, but thereafter withdrew their appeal.

III. PLAINTIFF'S MOTION TO VACATE THE NOVEMBER 18, 2016, ORDER OF DISMISSAL

On March 4, 2021, Plaintiff filed the instant motion once again seeking to vacate the Order of Dismissal dated November 4, 2016. Plaintiff argues that Court erroneously dismissed the action sua sponte in non-compliance with CPLR 3216. Plaintiff's argument is misplaced. The Order of dismissal issued on November 8, 2016, was pursuant to CPLR 3215(c). CPLR 3215(c) states, in pertinent part:

If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own

initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.

“The language of CPLR 3215(c) is not, in the first instance, discretionary, but mandatory, inasmuch as courts ‘shall’ dismiss claims (CPLR 3215[c]) for which default judgments are not sought within the requisite one-year period, as those claims are then deemed abandoned”(see *Giglio v NTIMP, Inc.*, 86 AD3d 301, 307-08 [2d Dept 2011]; *HSBC Bank USA, Nat. Ass'n v Grella*, 145 AD3d 669, 671 [2d Dept 2016]; *Pipinias v J. Sackaris & Sons, Inc.*, 116 AD3d 749, 751 [2d Dept 2014]).

To avoid dismissal pursuant to CPLR 3215(c), “[i]t is not necessary for a plaintiff to actually obtain a default judgment within one year of the default in order” (*US Bank Nat. Ass'n v Dorestant*, 131 AD3d 467, 469 [2d Dept 2015]). Rather, “as long as ‘proceedings’ are being taken, and these proceedings manifest an intent not to abandon the case but to seek a judgment, the case should not be subject to dismissal” (*Brown v Rosedale Nurseries, Inc.*, 259 AD2d 256, 257 [1st Dept 1999]), even if the plaintiff’s motion is later withdrawn (*HSBC Bank USA, N.A. v Alexander*, 124 AD3d 838, 839 [2d Dept 2015]). Plaintiff herein evidenced an intent to abandon the case by their failure to apply for an Order of Reference within one year of the Defendant’s default.

The failure to timely seek a default may be excused if “sufficient cause is shown why the complaint should not be dismissed” (CPLR 3215[c]), requires the plaintiff to proffer a reasonable excuse for the delay in timely moving for a default judgment and to demonstrate that the cause of action is potentially meritorious (see *Aurora Loan Services, LLC v Hiyo*, 130 AD3d 763, 764 [2d Dept 2015]; *Pipinias v J. Sackaris & Sons, Inc.*, 116 AD3d 749, 751 [2d Dept 2014]; *Giglio v NTIMP, Inc.*, 86

AD3d 301, 308 [2d Dept 2011]). The determination of whether an excuse is reasonable is committed to the sound discretion of the motion court (see *Baruch v Nassau County*, 134 AD3d 658, 659 [2d Dept 2015]; *Pipinias v J. Sackaris & Sons, Inc.*, 116 AD3d 749, 752 [2d Dept 2014]).

Here, the plaintiff's assertions that it did not take any proceedings for entry of judgment within one year after the defendants' default due to law office failure is unavailing. A "bald and unsubstantiated claim of law office failure" is insufficient to explain a delay in meeting the one-year deadline of CPLR 3215(c) (*Staples v Jeff Hunt Developers, Inc.*, 56 AD3d 459, 460 [2d Dept 2008]; see *Opia v Chukwu*, 278 AD2d 394, 394 [2d Dept 2000]). Also unavailing is plaintiff's claim that they failed to timely seek an Order of Reference due to ongoing settlement discussions. Although "[a] defendant may waive the right to seek dismissal pursuant to CPLR 3215(c) by serving an answer or taking any other steps which may be viewed as a formal or informal appearance" a defendant's participation in a settlement conference does not constitute either a formal or informal appearance as that is not active litigation or participation in the action on the merits. (See *Private Capital Group, LLC v Hosseinipour*, 170 AD3d 909, 910 [2d Dept 2019]; see *Wells Fargo Bank, N.A. v Martinez*, 181 AD3d 470, 471 [1st Dept 2020], quoting *HSBC Bank USA, N.A. v Slone*, 174 AD3d 866, 867 [2d Dept 2019]). Moreover, the affirmation of Ivy M. Capelli, Esq., attorney for plaintiff shows the "purported settlement discussions" were not in fact settlement discussions but a one-way communication from plaintiff to defendant in the form of letters sent by plaintiff purportedly offering defendant an opportunity to settle. Plaintiff provided no evidence that prior to the Court's Order of dismissal dated November 18, 2016, and entered December 12, 2016, that the parties engaged in any settlement discussions. As

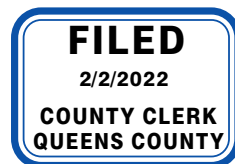
the plaintiff failed to proffer a reasonable excuse, this Court need not consider whether it had a potentially meritorious defense (see *CitiMortgage, Inc. v Goldstein*, 187 AD3d 841, 844 [2d Dept 2020]).

IV CONCLUSION:

Accordingly, for the reasons stated above the plaintiff's motion to vacate the dismissal dated November 18, 2016, and entered on December 12, 2016, and Defendant's cross-motion for sanctions are both denied.

So Ordered.

Dated: February 1, 2022




KARINA E. ALOMAR, J.S.C.