

JPMorgan Chase Bank, N.A. v Gluck

2022 NY Slip Op 30349(U)

February 1, 2022

Supreme Court, Kings County

Docket Number: Index No. 15501/13

Judge: Lawrence S. Knipel

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, FRP 3 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 1st day of February, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

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JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,

Plaintiff,

-against-

MAYER GLUCK;
NEW YORK CITY PARKING VIOLATIONS BUREAU;
NEW YORK CITY TRANSIT ADJUDICATION BUREAU;
BANK OF AMERICA, N.A.;
NEW YORK CITY DEPARTMENT OF FINANCE;
NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE;
EZIEL STRULOVIC;
UNITED STATES OF AMERICA – INTERNAL REVENUE SERVICE;
BOARD OF MANAGERS OF 57-59 LORIMER CONDOMINIUM;
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD;
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.
as Nominee for GREENPOINT MORTGAGE FUNDING, INC.;
MAZEL ESTATES INC.;
“JOHN DOES” AND “JANE DOES,” said names being fictitious,
parties intended being possible tenants or occupants of
premises, and corporations, other entities or persons
who claim, or may claim, a lien against the premises,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc No.:

Notice of Motion, Affirmation, and Exhibits Annexed _____	10-20	_____
_____ Opposing Affirmation and Exhibits Annexed _____	21-42	_____
_____ Affirmation in Reply and Exhibits Annexed _____	45-48	_____
_____		_____

In this action to foreclose a mortgage on residential real property, defendant Mayer Gluck (“Mayer”), together with defendant Rachel Gluck, sued herein as a “Jane Doe” (“Rachel” and

collectively with Mayer, the “defendants”¹), move for an order: (1) pursuant to CPLR 3215 (c), dismissing the action as against each of them; or, in the alternative (2) tolling interest on the principal balance of the note to the extent such interest accrued from April 5, 2016 to September 11, 2019 and further to the extent it additionally accrued from September 12, 2019 to October 5, 2021. The entity known as “1900 Capital Trust III, by U.S. Bank Trust National Association, Not In Its Individual Capacity But Solely as Certificate Trustee,” as the current assignee of plaintiff JPMorgan Chase Bank, National Association (collectively with its current assignee, the “plaintiff”), objects.

Background

On June 9, 2005, Mayer executed and delivered a consolidated note and mortgage (the “note” and “mortgage,” respectively) secured by his title in unit #3A in the condominium building located at 57 Lorimer Street in Brooklyn, New York (the “property”). Rachel, though an occupant of the property with her husband, Mayer, was neither the property owner, nor executed the note and mortgage secured by the property.

Before the inception of this action, the note and mortgage were assigned to the plaintiff, as successor by merger to Chase Home Finance, LLC. On August 23, 2013, the plaintiff commenced this action against, among others, Mayer. Although Rachel was not explicitly named as a defendant, she was personally served with process as “Rachel Gluck Sued Herein as [a] Jane Doe.” Neither Mayer nor Rachel interposed an answer.

On December 9, 2013, and again on January 15, 2014, the action was scheduled for a conference in the foreclosure-settlement part. On May 7, 2014, Mayer, represented by The Law Offices of Joshua R. Bronstein & Associates, PLLC (“Attorney Bronstein”), appeared for

¹ Because Rachel shares the last name with her husband, the Court refers to these parties by their first names.

a conference in the foreclosure-settlement part. On the same day, Attorney Bronstein, acting as Mayer's counsel, executed a Notice of Appearance (NYSCEF Doc No. 34). The following day (May 8, 2014), Attorney Bronstein had his Notice of Appearance filed with the Kings County Clerk's Office.

On November 12, 2014, Attorney Bronstein inadvertently missed the calendar call in this action. Because of Attorney Bronstein's nonappearance when called, this action was released from the foreclosure-settlement part (*see* Ecourts Docket, November 12, 2014 entry [NYSCEF Doc No. 40]).

By notice of motion, dated March 25, 2015, Attorney Bronstein, then explicitly representing both defendants (*i.e.*, Mayer and Rachel) moved to restore this action to the active calendar (Seq. No. 1) (the "motion to restore"). The defendants' motion to restore was supported by, among other documents: (1) Attorney Bronstein's affirmation explaining the reasons behind his inadvertent failure to answer the calendar call at the November 12th conference; and (2) Mayer's personal affidavit attesting to the merits of his defenses (*see* Attorney Bronstein's Affirmation and Mayer's Affidavit, both dated March 25, 2015 [NYSCEF Doc No. 48]).

By decision and order, dated April 5, 2016, Justice Noach Dear denied the defendants' motion to restore, finding no grounds for "any reasonable likelihood of [success in the] renewed in-court negotiations" (NYSCEF Doc No. 48).

On July 13, 2017, Justice Dear held a status conference in this action. The plaintiff's counsel appeared at the conference. After noting "a significant period of inactivity in prosecuting this action," Justice Dear, by decision and order, dated July 19, 2017, directed that the plaintiff resume prosecution of this action within 90 days of the date of his decision and order (NYSCEF Doc No. 16).

On July 9, 2019, Justice Dear held another status conference in this action, with the plaintiff's counsel again appearing at the conference. Upon finding that the plaintiff failed to offer a reasonable excuse for its delay in prosecuting this action, Justice Dear, by decision and order, dated July 19, 2019, directed that "interest [be] tolled from April 11, 2016 . . . to the date [on which] Plaintiff files its next motion" (NYSCEF Doc No. 17) (the "interest-tolling order").

On September 11, 2019, the plaintiff moved for summary judgment, a default judgment, and an order of reference (Seq. No. 2) (the "summary judgment motion"). On February 21, 2020, defendants cross-moved to dismiss this action for lack of prosecution or, in the alternative, to toll interest in accordance with the interest-tolling order (Seq. No. 3) (the "prior dismissal motion").

By notice, dated October 5, 2021, the plaintiff's current counsel withdrew, without prejudice, its summary judgment motion, as well as, without opposition from the defendants, their prior dismissal motion (NYSCEF Doc No. 7-8).

On November 2, 2021, the defendants served the instant motion. On November 30, 2021, the Court reserved decision on the instant motion.

Discussion

I. Relief as to Mayer

A. Failure to Prosecute

The starting point in the discussion is the language of CPLR 3215 (c). The statute provides, in relevant part, that:

"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, . . . on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision [*i.e.*, a defendant's motion to dismiss the action as abandoned] does not constitute an appearance in the action."

Nonetheless, “[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*” (*Bank of Am., N.A. v Rice*, 155 AD3d 593, 594 [2d Dept 2017] [internal quotation marks omitted; emphasis added]).

Here, although the plaintiff failed to move for leave to enter a default judgment as against Mayer within one year of his default in answering the complaint, under the circumstances of this case, the subsequent filing of a notice of appearance on Mayer’s behalf by Attorney Bronstein in May 2014, as well as the latter’s service of a motion to restore in March 2015, constituted a waiver of Mayer’s right to seek dismissal of the complaint as against him under CPLR 3215 (c) (*see OneWest Bank, FSB v Lara*, 192 AD3d 695, 697 [2d Dept 2021]).

Mayer’s reliance on *Wells Fargo Bank, N.A. v Martinez* (181 AD3d 470 [1st Dept 2020]), followed in *US Bank N.A. v Kail* (189 AD3d 1652 [2d Dept 2020]), is misplaced. Unlike the defendants-borrowers in *Martinez* and *Kail*, Mayer here actively litigated before Justice Dear by moving (together with Rachel) to restore this action, and, furthermore, had his motion denied, after oral argument, by the aforementioned decision and order, dated April 5, 2016.

B. Interest Tolling

“[A] foreclosure action is equitable in nature and triggers the equitable powers of the court” (*Rajic v Faust*, 165 AD3d 716, 717 [2d Dept 2018] [internal quotation marks omitted]). “In an action of an equitable nature, the recovery of interest is within the court’s discretion. The exercise of that discretion will be governed by the particular facts in each case, including any wrongful conduct by either party” (*BAC Home Loans Serv., L.P. v Jackson*, 159 AD3d 861, 862 [2d Dept 2018] [internal quotation marks omitted]).

Justice Dear's interest-tolling order (which, by now, is law of the case) requires that interest on the principal balance of the note be tolled from April 11, 2016 to the date on which the plaintiff filed its "next motion." Inasmuch as the plaintiff filed its "next motion" (within the meaning of the interest-tolling order) on September 11, 2019, there was a gap of exactly 41 months between the interest-tolling date of April 11, 2016 and the motion-filing date of September 11, 2019. This 41-month gap was obviously excessive, thus warranting that interest on the principal balance of the note be tolled during that period (*i.e.*, from April 11, 2016 to September 11, 2019) (*see Deutsche Bank Natl. Tr. Co. v Ould-Khatti*, ___ AD3d ___, 2022 NY Slip Op 00167 [2d Dept 2022]).

On the other hand, the additional tolling of interest from September 12, 2019 to October 5, 2021 is unwarranted under the circumstances of this case. The plaintiff's conduct (or, more precisely, the alleged lack of diligence) during that period was not so egregious (particularly, in light of the interim statutory and administrative stays) as to merit the imposition of sanctions against the plaintiff, in the form of tolling (or otherwise limiting) the interest to be awarded to it for that period (*see Prompt Mtge. Providers of N. Am., LLC v Zarour*, 155 AD3d 912, 915 [2d Dept 2017], *lv denied* 33 NY3d 907 [2019]).

Contrary to the plaintiff's contention, a belated filing by the defendants' current counsel (which took over from Attorney Bronstein) of a consent to change attorneys is a technical, non-prejudicial defect (*see Sperry Assoc. Fed. Credit Union v John*, 160 AD3d 1007, 1009 [2d Dept 2018]).

II. Relief as to Rachel

A. Failure to Prosecute

Dismissal of this action as against Rachel for failure to prosecute is inappropriate. As an occupant of the property with her husband, Mayer, she was personally served with process at the inception of this action. In addition, Attorney Bronstein, while representing *both* her and Mayer, moved to restore the action as to both of them (which motion, as noted, was subsequently denied by Justice Dear). Attorney Bronstein’s *joint* representation of Rachel and Mayer, at least in the context of their *joint* motion to restore, operated as a waiver of her rights under CPLR 3215 (c).

B. Interest Tolling

The alternative branch of the defendants’ motion which is for interest tolling is inapplicable to Rachel who (unlike Mayer) is not an obligor on the note/mortgage.

Conclusion

Accordingly, it is

ORDERED that the defendants’ motion in Seq. No. 4 is *granted to the extent* that interest on the principal balance of the note is tolled as against Mayer from April 11, 2016 to September 11, 2019; and their motion is otherwise denied; and it is further

ORDERED that the caption of this action is amended to reflect Rachel Gluck as a named defendant, to read as follows:

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JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,

Plaintiff,

-against-

Index No. 15501/13

MAYER GLUCK; RACHEL GLUCK;
NEW YORK CITY PARKING VIOLATIONS BUREAU;
NEW YORK CITY TRANSIT ADJUDICATION BUREAU;
BANK OF AMERICA, N.A.;
NEW YORK CITY DEPARTMENT OF FINANCE;
NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE;
EZIEL STRULOVIC;
UNITED STATES OF AMERICA – INTERNAL REVENUE SERVICE;
BOARD OF MANAGERS OF 57-59 LORIMER CONDOMINIUM;
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD;
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.

as Nominee for GREENPOINT MORTGAGE FUNDING, INC.; MAZEL ESTATES INC.; "JOHN DOES" AND "JANE DOES," said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises,

Defendants.

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The plaintiff's counsel is directed to electronically serve a copy of this decision and order with notice of entry and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision and order of the Court.

ENTER,



J. S. C.

**HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE**