

Nationstar Mtge. LLC v DiStefano
2022 NY Slip Op 30966(U)
March 21, 2022
Supreme Court, Albany County
Docket Number: Index No. 900134/2016
Judge: Margaret Walsh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

NATIONSTAR MORTGAGE LLC D/B/A
CHAMPION MORTGAGE COMPANY,

Plaintiff,

DECISION and ORDER

-against-

Index No. 900134/2016

STANLEY L. DISTEFANO, JR., BOARD OF
DIRECTORS OF SAGE ESTATE
HOMEOWNERS ASSOCIATION INC.,
ENDURANCE AMERICAN INSURANCE
COMPANY, SOUTHWORTH MILTON INC.,
UNITED STATES OF AMERICA ACTING
THROUGH THE SECRETARY OF HOUSING
AND URBAN DEVELOPMENT, BREAKELL
LAW FIRM P.C.,

Property:
10 Sage Estate
Albany, New York 12204

JOHN DOE (being fictitious, the names
unknown to Plaintiff intended to be tenants,
occupants, persons or corporations having or
claiming an interest in or lien upon the property
described in the complaint or their heirs at law,
distributes, executors, administrators, trustees,
guardians, assignees, creditors or successors.)

Defendants.

(Supreme Court, Albany County, Motion Term)

(Margaret Walsh, Supreme Court Justice, Presiding)

Appearances:

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Attorneys for the Plaintiff
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Williamsville, New York 14221

Sandra S. Poland Demars, Esq.
Attorney for the Defendant Stanley L. DiStefano, Jr.
817 Madison Avenue
Albany, New York 12208

WALSH, J.:

This is an action commenced by the Plaintiff via the New York State Courts Electronic Filing System (“NYSCEF”) on January 27, 2016 to foreclose a mortgage on real property located in the City of Albany known as 10 Sage Estate in the City of Albany, New York. Before the Court is the Plaintiff’s motion pursuant to CPLR 306-b for an extension of time to serve pleadings. The Defendant opposes. The Court determines the motion as follows.

The motion record discloses the following. After commencing the action, on April 21, 2016 the Plaintiff filed a supplemental summons and amended complaint. The Defendant, however, had filed a chapter 7 bankruptcy on April 20, 2016 resulting in an automatic stay of this matter. On June 3, 2019, the Bankruptcy court lifted the stay to allow the foreclosure action to proceed. Thereafter, a January 14, 2020 order¹ was entered granting the Plaintiff leave to file and serve a supplemental summons and amended complaint. The January 2020 order also extended, pursuant to CPLR 306-b, the time to serve the required papers upon all Defendants by one hundred and twenty (120) days from the date of the order, that is, until May 13, 2020. On February 28, 2020 the Plaintiff filed its supplemental summons and amended pleadings. According to the attorney affirmation in support, service of same could not be completed because the foreclosure action was suspended as a result of a moratorium on pending mortgage foreclosures implemented on March 18, 2020 due to the Covid-19 pandemic (*Fay Aff.*, ¶ 9-10). The moratorium expired on July 31, 2021 (*id.*, ¶ 9). The Plaintiff thereafter initially requested on December 15, 2021 an additional extension of time via a motion to “resettle” the January 2020 order, but the Court held that

¹ This order was made by the Hon. Thomas A. Breslin, JSC, the justice to whom this action was previously assigned.

resettlement was not the proper basis for the relief sought (*id.*, 10-11). This motion by Plaintiff ensued.

“Where service is not timely made, the court may, within its discretion, extend the time for service upon either good cause or in the interest of justice” (Wells Fargo Bank, N.A. v. McCarthy, 195 AD3d 983, 985 [2d Dept. 2021], citing CPLR 306-b; *Leader v. Maroney, Ponzini & Spencer*, 97 NY2d 95, 101). As the court previously granted an extension of time to serve, the focus of the inquiry at bar concerns the time period from January 14, 2020 forward. Although there is no proof in the motion record demonstrating any reasonable diligence in attempting service upon the Defendant, the Court nevertheless finds that an extension of time for service of the supplemental summons and amended complaint to be in the interests of justice (*see State of New York Mtge. Agency v. Braun*, 182 AD3d 63, 66 [2d Dept. 2020][noting that the statutory interests of justice standard is broader than that of good cause shown], citing *Bumpus v. New York City Tr. Auth.*, 66 AD3d 26, 32 [2d Dept. 2009]). “In considering the interest of justice standard, ‘the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the statute[] of limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff’s request for the extension of time, and prejudice to defendant” (*id.*, 66-67, quoting *Leader v. Maroney, Ponzini & Spencer*, *supra* at 105-106).

The Plaintiff appears to have timely commenced the action and has timely filed its supplemental summons and amended complaint as required by the January 2020 order. Soon thereafter, former Governor Andrew Cuomo declared a disaster when New York State became the epicenter of the COVID-19 pandemic. The Governor’s Executive Orders tolled or suspended the time in the January 2020 order during which the Plaintiff could serve the Defendant to November

3, 2020 (*see Brash v. Richards*, 195 AD3d 582 [3d Dept. 2021], citing 9 NYCRR 8.202.8, 8.202.14, 8.202.28, 8.202.38, 8.202.48, 8.202.55, 8.202.55.1, 8.202.60, 8.202.67, 8.202.72; *see Lau v. Wang*, 2021 N.Y. Misc. LEXIS 2273 [Supreme Ct, Queens Cty 2021][unpublished]), the Coronavirus Aid, Relief and Economic Security Act (“CARES” Act) resulted in a moratorium on foreclosures of Federally-backed mortgages commencing on March 18, 2020, and this moratorium was thereafter extended by the U.S. Housing and Urban Development Agency (“HUD”) through July 31, 2021.² This moratorium also specifically applied to FHA reverse mortgage programs (*see* fn. 1), which is the alleged mortgage here.

Counsel for the Plaintiff asserts that it promptly brought the initial motion to resettle the order in December 2021 once the foreclosure moratorium and holds on the matter expired. The Plaintiff quickly followed with the instant motion. The Court does not find in these circumstances that the Plaintiff engaged in dilatory conduct (*compare JP Morgan Chase Bank N.A. v. Kelleher*, 188 AD3d 1484, 1486 [3d Dept. 2020][denial of request for extension to serve affirmed, where plaintiff waited for more than two years to file motion]). Moreover, the Plaintiff asserts a potentially meritorious cause of action in its amended complaint, i.e., that the Defendant defaulted when he allegedly failed to comply with the terms of the reverse mortgage by failing to pay insurance and property taxes on the subject property. The statute of limitations may have expired at this time. Further, there is “no demonstrable prejudice to the defendant[] as a consequence of the delay in service” (*Wells Fargo Bank, N.A. v. McCarthy*, 195 AD3d at 985). The Defendant has actual notice of the controversy and has actively opposed both of Plaintiff’s motions. The Defendant will have the opportunity to dispute the allegations made by the Plaintiff (*see State of*

² See 2020 and 2021 Mortgagee Letters 2020-4, 2020-13, 2020-19, 2020-27, 2020-43, 2021-03, 2021-15 and 2021-15 (2020 Mortgagee Letters | HUD.gov / U.S. Department of Housing and Urban Development (HUD)).

New York Mtge. Agency v. Braun, 182 AD3d 63, 67 [2d Dept. 2020]). Based upon a careful analysis of the relevant factors delineated herein, the Court grants the Plaintiff's motion for an extension of time to serve the Defendant in the interests of justice (*see also Wachovia Bank, N.A. v. Greenberg*, 190 AD3d 1007, 1009 [2d Dept. 2021]; *U.S. Bank N.A. v. Viera*, 187 AD3d 818, 819-820 [2d Dept. 2020]).

Those arguments not specifically addressed herein are found to be unpersuasive or were otherwise rendered academic.

Therefore, it is hereby


ORDERED, that the Plaintiff's motion for an extension of time to serve the Defendant is **GRANTED**; and it is therefore

ORDERED, that the Plaintiff shall have 120 days from the date of entry of this decision and order to effect service upon the Defendant. Upon completion of service the Plaintiff shall upload an affidavit of service to the case file maintained on NYSCEF.

This constitutes the *Decision and Order* of the court. The Court has uploaded the original *Decision and Order* to the case record in this matter maintained on the NYSCEF website whereupon it is to be entered and filed by the Office of the Albany County Clerk. Counsel for the **Plaintiff** is not relieved from the applicable provisions of CPLR 2220 and 202.5b(h)(2) of the Uniform Rules of Supreme and County Courts insofar as they relate to service and notice of entry of the filed document upon all other parties to the proceeding, whether accomplished by mailing or electronic means, whichever may be appropriate dependent upon the filing status of the party. (Please note that section 202.5b(b)(2)(I) of the Uniform Rules of Supreme and County Courts directs that service upon non-participating parties must be made in hard copy.)

It is So Ordered.

Dated: March 21, 2022
Albany, New York



Margaret Walsh
Supreme Court Justice

Enter:



03/21/2022

Papers considered:

NYSCEF Doc. Nos. 33 through 45.