

<b>Nationstar v Gayle</b>
2022 NY Slip Op 31026(U)
March 22, 2022
Supreme Court, Kings County
Docket Number: Index No. 505483/14
Judge: Cenceria P. Edwards
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At an IAS Term, Part FRP-1, 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 22<sup>nd</sup> day of March 2022.

P R E S E N T:

HON. CENCERIA P. EDWARDS,  
A.J.S.C.

Index No.: 505483/14

*MS # 5 + 6*

\_\_\_\_\_  
NATIONSTAR,

Plaintiff,

**DECISION AND ORDER**

*-against-*

BYRON GAYLE et al,

Defendant,  
\_\_\_\_\_ x

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion:

<b>Papers</b>	<b>Numbered</b>
Motion (MS 5)	<u>1</u>
Motion (MS 6)	<u>2</u>
Opposition	<u>3</u>
Reply	<u>4</u>

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Plaintiff commenced the instant action on June 16, 2014. All defendants defaulted in answering Plaintiff's Complaint. On September 19, 2014, Plaintiff filed an ex parte application for default judgment and an order of reference which was granted by order dated September 23, 2016. After receiving the executed oath and report, Plaintiff filed a motion for judgment of foreclosure and sale which was granted on July 17, 2017. Defendant Gayle, however, had filed a motion to dismiss on jurisdictional grounds on May 24, 2017. The following year, Judge Dear granted the requested relief solely to the extent that the order of reference and JFS were vacated

and Defendant allowed to file an answer. Defendant did so in September 2018, that month also filing an appeal of Judge Dear's decision. Plaintiff filed a motion for summary judgment on October 30, 2018. Judge Dear denied that motion on May 13, 2019. Plaintiff appealed. In accordance with that order, Plaintiff filed a request for a preliminary conference and a PC order was issued. Upon Plaintiff's counsel's failure to timely appear at an ADR conference, the matter was administratively dismissed without order. Plaintiff moved the following month to vacate that dismissal (MS 5). Upon Defendant's failure to oppose that motion and Plaintiff's demonstration of a reasonable excuse for its default and potentially meritorious case, MS 5 is granted (see accompanying order).

On February 24, 2021, the Appellate Division issued orders on the parties' respective appeals, affirming Judge Dear's finding that the case should not be dismissed on jurisdictional grounds and reversing his determination that Plaintiff had failed to prove its prima facie case. In light of the appellate opinions, Plaintiff settled an order on notice granting summary judgment in its favor and an order of reference. As that order does not appear to have been signed, this Court does so now (see accompanying order).

On March 22, 2021, Defendant filed a motion (MS 6) to toll interest. He argues that Plaintiff unreasonably delayed in filing this action, that he should not be required to pay interest for the time between commencement and vacatur of his default, and that Plaintiff has been intentionally delaying ever since. Defendant further suggests that equity requires the Court to strike all interest that occurred during the Covid pandemic. Finally, he argues that Plaintiff failed to negotiate in good faith. Plaintiff disagrees on both legal and factual grounds.

Delay prior to the commencement of this action within the applicable statute of limitations cannot be the basis for interest tolling (*Nationstar Mtge., LLC v Dunn*, 186 A.D.3d

836 [2d Dept 2020]; see, also, *NY State Mortg. Loan Enforcement & Admin. Corp. v N. Town Phase II Houses, Inc.*, 191 AD2d 151 [1st Dept 1993]; *First Fed. Savs. & Loan Ass'n of Rochester v Capalongo*, 152 AD2d 833 [3d Dept 1989]; *OneWest Bank, N.A. v Melina*, 2015 WL 5098635 [EDNY 2015]; *FDIC v Kisosoh Realty Corp.*, 1994 WL 702026 [SDNY 1994]).

"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" (*Dayan v York*, 51 AD3d 964, 965 [2d Dept 2008]; see, similarly, *Greenpoint Mtge. Corp. v Lamberti*, 155 AD3d 1004 [2d Dept 2017]; *Citicorp Trust Bank, FSB v Vidaurre*, 155 AD3d 934 [2d Dept 2017]).

Plaintiff's initial (non-) service of the summons and complaint upon Defendant was facially valid and there is no assertion that it knew that there were potential issues therewith until Defendant filed his motion to dismiss. Plaintiff had timely sought an order of reference and JFS prior to that time. The action was being prosecuted in good faith and there is no reason to toll interest for that period.

Following Judge Dear's vacatur of the prior orders, Plaintiff timely moved for summary judgment and, after that was denied, proceeded to a preliminary conference as required. MS 5, filed during discovery and decided *supra*, was pending at the time of the Covid shutdown. The Court thus finds that Plaintiff's conduct was not "wrongful" such to warrant tolling.

Defendant provides no legal basis for his assertion that he should not have to pay interest accrued during the COVID shutdown. However, he was in default and not paying at the time. Per the mortgage, interest continued to accrue. Even the legislation designed to protect


homeowners who defaulted due to Covid-related hardships – CARES and 9-x – do not provide for the tolling of interest.

Defendant's bad faith allegations are also unavailing. He complains about alleged conduct that occurred long after the case left the Foreclosure Settlement Conference Part and, thus, is outside the ambit of CPLR 3408. Plaintiff also accurately notes that Defendant is not the owner of the property, even if he controls the corporation that does, and that most loss mitigation options are thus unavailable. While Defendant complains about the short amount of time for which the reinstatement letter was valid, it should have given him an approximation of the amount he needed to gather and he could have requested an updated letter when he was ready to pay. Though Defendant claims that he attempted short sales and modification, the record contains no supporting evidence. Defendant's emails substantiating his short payoff offer are largely illegible (especially the dates) and the offer does not appear to include proof of funds. While Plaintiff likely should have responded quicker, the Court does not find that Plaintiff acted in bad faith.

Plaintiff's motion to restore (MS 5) granted (see accompanying order). Defendant's motion for tolling (MS 6) denied.

This constitutes the decision and order of the Court.

ENTER:

  
Hon. Cenceria P. Edwards, A.J.S.C.

A.S.C.J. Cenceria P. Edwards