SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III **PART** IAS MOTION 32

Acting Justice

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GREENPOINT MORTGAGE FUNDING, INC.,

Plaintiff,

- v -

SAMUEL EHRENTHAL a/k/a SAMUAL EHRENTHAL, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as nominee for GREENPOINT MORTGAGE FUNDING, INC., ABE SALZMAN, NYC ENVIRONMENTAL CONTROL BOARD, BOARD OF MANAGERS OF 325 FIFTH AVENUE CONDOMINIUM and ASMITA PATEL,

Defendants.

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INDEX NO. 115170/2008

MOTION DATE

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following papers, numbered 1 to 8, were read on this application to/for Restore/Sell/Refer

Notice of Motion/ Affidavits – Exhibits/Prop order	No(s)	1 – 4
Answering Affidavits - Exhibits	No(s)	5 - 6
Replying	No(s)	7 - 8

Upon the foregoing documents, the motion is decided as follows:

In this action to foreclose on a mortgage encumbering real property located at 325 Fifth Avenue, Unit G11, New York, New York, Plaintiff moves to restore this matter to active status, for an extension of time sell the property and to appoint a substitute referee. Defendant Samuel Ehrenthal ("Ehrenthal") opposes the motion.

All Defendants, including Ehrenthal, failed to answer[1] or oppose Plaintiff's motions for an order of reference and judgment of foreclosure and sale. The judgment of foreclosure and sale was granted on October 8, 2009, but not entered with the County Clerk until May 18, 2010. As part of that judgment, the Court ordered "that the reasonableness of the amount of attorney's fees and additional expenses for preservation of property are severed for inquest and assessment upon service of the trial support office of a conformed copy of this Judgment." Plaintiff filed a Note of Issue and an inquest occurred on June 28, 2011.

On November 10, 2014, Plaintiff, for reasons not made clear in the moving papers, commenced a second action to foreclose on the subject property. In the complaint, it claimed "[t]hat the Plaintiff alleges that no other proceedings have been had for the recovery of the mortgage indebtedness or if any

[1] Defendant Board of Managers of 325 Fifth Avenue Condominium served a notice of appearance and waiver in this matter.

such action is pending, a final judgment was not rendered in favor of Plaintiff and such action is intended to be discontinued." Defendant Samuel Ehrenthal a/k/a Samual Ehrenthal ("Ehrenthal") answered therein. Plaintiff moved for summary judgment and Ehrenthal opposed and cross-moved to dismiss the action based upon expiration of the statute of limitations. By order dated August 13, 2019, Justice Arlene Bluth denied Plaintiff's motion for summary judgment and granted Ehrenthal's cross-motion to dismiss. The within motion and opposition ensued.

A judgment of foreclosure and sale is an *in rem* judgment against real property, not a money judgment against the mortgagor (*Citibank, N.A. v Cambel*, 119 AD2d 720 [2d Dept 1986]). As such, unlike the limitations periods imposed on enforcement of a money judgment (*see* CPLR §§211[b], 5014), a judgment of foreclosure and sale has no fixed expiration date (*see Equicredit Corporation of NY v Registe*, 59 Misc 3d 1209[A], at *2 [Sup Ct Kings Cty, 2018], *citing Wing v De La Rionda*, 125 NY 678, 680 [1890]; *The Consequences of Sitting on a Foreclosure Judgment*, Bruce J. Bergman, NYLJ, May 13, 2015; *Nationstar Mtge LLC v Russo*, ____Misc3d____, 2018 NY Slip Op 30275[U], at *5 [Sup Ct Suffolk Cty, 2018]). Further, marking an action disposed in the Court's records is generally meaningless and, in this instance, undoubtably the result of entry of the judgment of foreclosure and sale (*see Dabrowski v ABAX Inc.*, 199 AD3d 409 [1st Dept 2021]). Therefore, there is no discernable bar at law to extending Plaintiff's time to conduct a foreclosure sale.

Ehrenthal opposes the motion positing a sale is barred by laches, judicial and equitable estoppel and CPLR §3404. Initially, Ehrenthal does not address the viability of the judgment of foreclosure and sale entered against him in this matter or explain his default in this action. "[A] Judgment of Foreclosure and Sale entered against a Defendant is final as to all questions at issue between the parties, and all matters of defense which were or which might have been litigated in the foreclosure action are concluded" (*see Vanderbilt Mortgage and Finance, Inc. v Palmore-Archer*, 177 AD3d 1020, 1021 [2d Dept 2019]). While this case may have been marked disposed following the inquest, this does not alter the *res judicata* effect of the judgment entered (*see generally Ryan v New York Telephone Co.*, 62 NY2d 494, 500 [1984]). Moreover, since Defendant never moved to vacate his default in appearing or answering the complaint, he cannot be heard on any defense to the issuance of the judgment (*cf. US Bank, N.A. v Oliver*, 180 AD3d 843, 844 [2d Dept 2020]; *HSBC Bank USA, N.A. v Hasis*, 154 AD3d 832, 834 [2d Dept 2017]; *see also Wells Fargo Bank, N.A., v Vazquez*, 57 Misc3d 941, 946 [Sup Ct. Suffolk County, 2017]).

However, there is authority supporting that a court may consider defenses to execution of the judgment based upon facts occurring after issuance of the judgment (*see Griffo v Swartz*, 61 Misc2d 504 [Sup Ct Monroe Cty, 1969]). To invoke the doctrine of laches, Ehrenthal was required to demonstrate "'(1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant in asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that relief is accorded the complainant'" (*Stein v Doukas*, 98 AD3d 1026, 1028 [2d Dept 2012], *quoting Cohen v Krantz*, 227 AD2d 581, 582 [2d Dept 1996]). Here, Defendant cannot claim ignorance of the judgment of foreclosure and sale nor could there have been a reasonable belief that Plaintiff abandoned its claims thereunder. Defendant also failed to demonstrate the existence of any prejudice "by a showing of injury, change of position, loss of evidence, or some other disadvantage resulting from the delay" (*In re Linker*, 23 AD3d 186, 189 [1st Dept 2005]). While Defendant points to the cost of defending the 2014 foreclosure action, it is undisputed Defendant has not made a mortgage payment since 2008. The cases relied on by Defendant are unavailing.

Defendant Ehrenthal established neither judicial estoppel nor equitable estoppel are applicable. "The doctrine of judicial estoppel precludes a party from taking a position in one legal proceeding which is contrary to that which he or she took in a prior proceeding, simply because his or her interests have changed" (*In re New Creek Bluebelt, Phase 4. City of New York*, 79 AD3d 888, 890 [2d Dept 2010]). However, this doctrine only applies where, as a result of the earlier asserted position, the party secured a judgment or some other favorable judicial action (*see Ferreira v Wyckoff Hgts. Med. Ctr.*, 81 AD3d 587, 588 [2d Dept 2011]; *Angel v Bank of Tokyo–Mitsubishi, Ltd.*, 39 AD3d 368, 371 [1st Dept.2007]; *Bono v Cucinella*, 298 AD2d 483, 484 [2d Dept 2002]). Defendant is correct Plaintiff asserted in the 2014 foreclosure action that no other proceeding to recover on the mortgage indebtedness "or if any such action is pending, a final judgment was not rendered in favor of Plaintiff and such action is intended to be discontinued." Nevertheless, since that action terminated in Defendant's favor, Plaintiff neither secured a judgment nor favorable judicial action based upon that inconsistent position (*see Deutsche Bank National Trust Company v Gambino*, 181 AD3d 558, 560 [2d Dept 2020]).

"A mortgage lender may, under certain circumstances, be estopped from asserting its rights under a mortgage bond" (*Carver Fed. Sav. & Loan Ass'n v Glanzer*, 186 AD2d 706, 708 [2d Dept 1992]). Equitable estoppel requires clear and convincing proof of the following: "with respect to the party estopped, '(1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts. The party asserting estoppel must show with respect to himself: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position'" (*First Union Nat'l Bank v. Tecklenburg*, 2 AD3d 575, 757 [2d Dept 2003], *quoting Airco Alloys Div., Airco, Inc. v. Niagara Mohawk Power Corp.*, 76 AD2d 68, 81 [4th Dept 1980]; *see also 3rd Ave. Assoc., LLC v Patel*, 117 AD3d 451, 453 [1st Dept 2014]; *Central Federal Sav. F.S.B. v Laurels Sullivan County Estates Corp.*, 145 AD2d 1, 6 [3d Dept 1989]). "[T]he doctrine of equitable estoppel is to be invoked sparingly and only under exceptional circumstances" (*Badgett v New York City Health & Hosps. Corp.*, 227 AD2d 127 [1st Dept 1996]).

Ehrenthal insists that he was induced to spend significant time, effort, and money to defend the 2014 foreclosure action wherein Plaintiff represented no judgment was obtained in this matter and it intended to discontinue this action. This argument is flawed as Ehrenthal acknowledges he was aware of the judgment, but simply was mistaken as to its viability. This does not constitute concealment of facts as Defendant "possessed knowledge sufficient to place him under a duty to make inquiry and ascertain all the relevant facts" (*see Picard v Fish*, 139 AD3d 1331, 1333 [3d Dept 2016] [internal quotation marks and punctuation omitted]). Moreover, Ehrenthal's knowledge of the true state of this action demonstrates there was no justifiable reliance on those statements nor impairment of Defendant's ability to defend this action (*see Bank of Am., N.A. v Ali*, ____AD3d____, 2022 NY Slip Op 00838 [2d Dept 2022]). Defendant defaulted herein and made no effort to vacate the judgment herein during the five years between issuance of the judgment and commencement of the later action.

Defendant's reliance on CPLR §3404 is inapposite. That statute provides that a "case in the supreme court . . . marked 'off' or struck from the calendar . . . and not restored within one year thereafter, shall be deemed abandoned and shall be dismissed without costs for neglect to prosecute." This action was never marked "off" or struck from the trial calendar. Indeed, issue was never joined in this matter was only marked disposed after completion of the inquest for attorney's fees and additional expenses. "Where a case is not marked off or stricken from the trial calendar, but is removed from the calendar for another reason, CPLR §3404 does not apply" (*Berde v North Shore-Long Island Jewish*

Health System, Inc., 98 AD3d 932 [2d Dept 2012]; *see also Santana v Vargas*, 77 AD3d 648 [2d Dept 2010]).

Accordingly, Plaintiff was not required to demonstrate the existence of a reasonable excuse and meritorious claim and the matter should be permitted to proceed to a foreclosure sale (*see Deutsche Bank National Trust Company v Gambino*, 181 AD3d 558, 560 [2d Dept 2020]).

Nevertheless, equity will not permit Plaintiff to profit from its inordinate postponement in prosecuting this action to completion via a foreclosure sale. The delays in obtaining a resolution of its claim for attorney's fees herein and conducting a public sale lay with Plaintiff alone. Defendant was forced to incur significant expenses defending the 2014 action. "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 particular facts in each case,' including wrongful conduct by either party" (*U.S. Bank N.A. v Beymer*, 190 AD3d 445 [1st Dept 2021], *citing South Shore Fed. Sav. & Loan Assn. v Shore Club Holding Corp.*, 54 AD2d 978, [2d Dept 1976]).

Resultantly, Plaintiff shall only recover the amount found due and owing under the mortgage note in the judgment dated October 8, 2009, to wit $634,142.42. Plaintiff is not entitled to recover any expense, cost, late charges, legal fees or interest accrued thereafter (*see* CPLR §5001 [a]; *US Bank, N.A. v Spence*, 175 AD3d 1346, 1348 [2d Dept 2019]). Moreover, Plaintiff's conduct in commencing and prosecuting the second foreclosure action as well as making the instant motion while that action was pending demonstrates Plaintiff acted with "disinterested malevolence" entitling Defendant to recover all reasonable attorney's fees, costs and expenses associated defending the 2014 foreclosure action (*see Reif v Nagy*, 175 AD3d 107, 131 [1st Dept 2019]). Further, Plaintiff is precluded from conducting the sale until those fees, costs and expenses are paid in full. Should this Court be forced to issue a decision setting the amount of same, Defendant, but not Plaintiff, shall be entitled to recover all expenses associated therewith.

Accordingly, it is

ORDERED that Plaintiff's time to conduct the foreclosure is extended 180 days from the date of efiling of this order, and it is

ORDERED that the judgment of foreclosure and sale is amended, and Plaintiff is permitted to recover only $634,142.42 from the sale, and it is

ORDERED that the judgment of foreclosure and sale is amended, and that publication of the sale shall be made in the **Irish Echo**, rather than the New York Law Journal, and it is

ORDERED that the judgment of foreclosure and sale is amended, and the Referee may utilize any FDIC insured bank for the within sale and deposit of sale proceeds, and it is

ORDERED that **PRIOR** to scheduling publication, Plaintiff shall efile proof that all reasonable attorney's fees, costs and expenses incurred by Defendant Samuel Ehrenthal defending the 2014 foreclosure action was paid, and it is

ORDERED that **PRIOR** to scheduling publication, Plaintiff shall contact the auction part clerk at **sfc-foreclosures@nycourts.gov** and obtain consent to place the matter on the auction calendar and,

thereafter, Plaintiff shall upload the notice of sale to NYSCEF at least 21 days before the sale and the Referee. IF THE AUCTION IS NOT ON THE CALENDAR, then *the auction will not go forward*; and it is further

ORDERED that the sale shall be conducted according to the NY County Auction Part Rules for Outdoor Auctions (http://ww2.nycourts.gov/courts/1jd/supctmanh/foreclosures.shtml).

3/22/2022
DATE

FRANCIS A. KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III J.S.C.

CHECK ONE:	X	CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	☐ DENIED	☐	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐	REFERENCE