

Morgan Stanley v Dejesus
2022 NY Slip Op 31643(U)
March 16, 2022
Supreme Court, Kings County
Docket Number: Index No. 506414/2017
Judge: Cenceria P. Edwards
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At an IAS Term; Part FRPM-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 16th day of March 2022

P R E S E N T:

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

-----X
MORGAN STANLEY,
Plaintiff,

-against-

JUAN DEJESUS, et al,
Defendants.
-----X

DECISION AND ORDER

Index No: 506414/2017

MS #3 (MS#1 and #2)

Papers

Numbered

Notice of Motion and Affidavit and Memorandum in Support.....	___ 1-2 ___
Order to Show Cause, Affidavits Annexed, and Memorandum of Law	_____
Answering Affidavits and Memorandum of Law.....	_____
Replying Affidavits	_____
Exhibits	_____
Other	_____

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

Plaintiff moves pursuant to CPLR §2221(e) for leave to renew Plaintiff's Motion dated June 27, 2019 and Defendant's Notice of Cross-Motion dated August 3, 2019 and upon renewal, vacating the Order dated January 13, 2020; and modifying the same to the extent that the Plaintiff's motion for summary judgment is granted and denying the Defendant's motion to dismiss. Defendant did not oppose this instant motion.

Plaintiff filed a summons and complaint seeking foreclosure on or about May 31, 2017. Defendant answered the complaint and sought various defenses, including an affirmative defense

based upon the statute of limitations. Plaintiff subsequently moved for summary judgment. Defendant thereafter filed a cross motion to dismiss the action based on the expiration of the statute of limitations and failure to hold a CPLR §3408 conference. Defendant argued that there was a prior matter that was filed in 2010 and discontinued in 2013. The instant action (2017) was filed more than six (6) years from the filing of the 2010 action. Defendant argued that this instant action is barred by the statute of limitations. The Court at the time determined that the discontinuance of the prior 2010 action did not equate to a de-acceleration sufficient to make the current action timely and the case was dismissed.

A motion for leave to renew pursuant to CPLR §2221(e), is based on new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and shall contain reasonable justification for the failure to present such facts on the prior motion. Additionally, Plaintiff filed and perfected an appeal of the Order and as such, Plaintiff's rights to renew have not lapsed. The Court has held that intervening case law which would change the result and arises prior to the time that a party's Appellate rights have lapsed is a sufficient reason to seek renewal. *Daniels v. Miller Elevator Industries, Inc.*, 44 A.D.3d 895 (2d Dep't 2007). In this case, Plaintiff met the burden for this Court to consider the motion to renew.

At the time this case was decided by the Court, the Second Department held that a voluntary discontinuance did not equate to a revocation of acceleration. However, The Court of Appeals has reversed the Second Department decision and has held that a discontinuance filed within six (6) years of the filing of the complaint does constitute deceleration. See *Freedom Mortgage Corporation v. Engel*, 37 N.Y.3d 1. As such, this court can not dismiss this matter based on statute of limitations.

As it pertains to Plaintiff's motion for summary judgment, the Court denies Plaintiff's motion without prejudice. Plaintiff argues that Defendant did not assert any other defenses with specificity and that Defendant's arguments regarding CPLR §3408 were only argued in a cursory manner and therefore without merit. The Court disagrees.

Pursuant to CPLR §3408 (a)(1), "Except as provided in paragraph two of this subdivision, in any residential foreclosure action involving a home loan as such term is defined in section thirteen hundred four of the real property actions and proceedings law, in which the defendant is a resident of the property subject to foreclosure, plaintiff shall file proof of service within twenty days of such service, however service is made, and the court shall hold a mandatory conference within sixty days after the date when proof of service upon such defendant is filed with the county clerk, or on such adjourned date as has been agreed to by the parties, for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to: (i) determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to, including, but not limited to, a loan modification, short sale, deed in lieu of foreclosure, or any other loss mitigation option; or (ii) whatever other purposes the court deems appropriate." This is a statutory requirement.

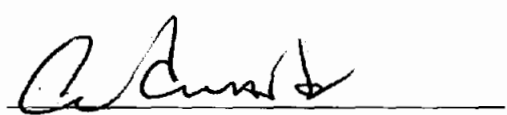
Plaintiff filed the summons and complaint on March 31, 2017. However, Plaintiff did not file a certificate of merit stating that it was not required because the subject loan is not a home loan as defined in RPAPL §1304 (E-filed Documents #3). Had the certificate of merit been filed, this matter would have been placed on the mandatory conference calendar. Defendant filed an answer on May 5, 2017 and stated as his tenth affirmative defense that Plaintiff failed to file a certificate

of merit pursuant to CPLR §3012-b. On June 27, 2019, over two (2) years later, Plaintiff files the Request for Judicial Intervention (RJI) with a Notice of Motion and the Foreclosure Addendum (E-Filed Documents #46) stating that the property was in fact a 1-4 family owner occupied residential property. This would have required a certificate of merit.

As stated above, Plaintiff's motion to renew (MS#3) is GRANTED only to the extent that the Court is vacating the Order dated January 13, 2020. Plaintiff's motion for summary judgment (MS#1) is DENIED without prejudice. Defendant's cross-motion to dismiss (MS#2) is DENIED. This matter shall be set down on the FSCA calendar for a mandatory conference on June 14, 2022.

The foregoing constitutes the Decision and Order of this Court.

Date: March 16, 2022



Hon. Cenceria P. Edwards

KINGS COUNTY CLERK
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