

Bank of N.Y. Mellon v Rootz & Tingz Inc.
2022 NY Slip Op 32437(U)
July 7, 2022
Supreme Court, Kings County
Docket Number: Index No. 516682/2019
Judge: Carl J. Landicino
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At an IAS Term, Part 81 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 7th day of July 2022.

PRESENT:
HON. CARL J. LANDICINO,

Justice.

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THE BANK OF NEW YORK MELLON f/k/a THE BANK OF NEW YORK, as Trustee for the Certificate holders of CWALT, INC., Alternative Loan Trust 2006-OC3, Mortgage Pass-Through Certificates, Series 2006-OC3,
Plaintiffs,

Index No.: 516682/2019

DECISION AND ORDER
(On Default)

-against-

Motion Sequence # 2

ROOTZ & TINGZ INC., GEORGE CAMPBELL, VERONA HENNINGHAM, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, WORKERS COMPENSATION BOARD OF NEW YORK, CRIMINAL COURT OF THE CITY OF NEW YORK, MRC RECEIVABLES CORP., JACKELINE I. MELBOURNE, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY DEPARTMENT OF FINANCE, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., SHOLOM HOROWITZ, MENDEL ROCHLITZ, CITY REGISTER OF THE CITY OF NEW YORK,

Defendants,

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

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed 68-88.
Opposing Affidavits (Affirmations)..... 37¹

After a review of the papers and without opposition, the Court finds as follows:

This action has been commenced by the Plaintiff The Bank of New York Mellon f/k/a The Bank of New York, as Trustee for The Certificateholders of SWALT, Inc., Alternative Loan Trust

¹ The Court acknowledges that Defendant George Campbell filed (NYSCEF Doc. 37) a document that purports to be, among other things, "submitted as the answer to the alleged Complaint/Summons."

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2006-OC3, Mortgage Pass-Through Certificates, Series 2006-OC3 (hereinafter the "Plaintiff") and now moves (motion sequence #2) for 1) for summary judgment in equity and pursuant to Article 15 of the Real Property Actions and Proceedings Law to discharge from the record an alleged forged Discharge of Mortgage against Defendant George Campbell; 2) reinstating the purportedly satisfied mortgage; 3) striking the Writ in the Nature of Discovery Conditional Acceptance & Notice of Counterclaim and Notice of Rejection UCC Summons Plaintiff's Attorney; and 4) granting a default against the remaining Defendants.

The Plaintiff argues that Defendants George Campbell and Defendant Verona Henningham (hereinafter collectively the "Defendant Mortgagors") acquired the real property known as 1714 Albany Avenue, Brooklyn, New York 11210 (hereinafter the "Premises") by a Quitclaim Deed dated October 17, 2005 and recorded November 14, 2005 in CRFN 2005000630582 (the "Deed"). The Plaintiff contends that on or about January 18, 2006, the Defendant Mortgagors made, executed, and delivered a note in the principal sum of \$332,500.00, with interest, to American Brokers Conduit (the "Note") and a mortgage to Mortgage Electronic Registration Systems, Inc. (hereinafter "MERS"), as nominee for American Brokers Conduit (the "Mortgage"), which Mortgage was recorded in the Office of the City Register of the City of New York on February 7, 2006 in CRFN 2006000072732. On June 23, 2009, the Mortgage was apparently assigned to the Plaintiff. On July 1, 2009, the Plaintiff commenced a foreclosure proceeding relating to the Mortgage by the filing of a Summons and Complaint and also filed a Notice of Pendency in Supreme Court, Kings County under Index No. 16443/2009 (hereinafter the "Foreclosure Action"). On September 25, 2012, an alleged forged discharge was purportedly made by MERS "in presence of MorFunding Network Authorized Representative for MERS by A. RajahEl, as Vice President/Authorized Representative" (hereinafter the "Discharge" or "Satisfaction"). The

Discharge was recorded on October 31, 2012. On July 26, 2017, a Judgement of Foreclosure and Sale was entered in the Foreclosure Action. Subsequently, the foreclosure sale was held and the third-party purchaser raised the Discharge as an encumbrance and cloud on title. Plaintiff commenced this action with the filing of a Summons and Complaint and Notice of Pendency on July 30, 2019. Defendants Sholom Horowitz, George Campbell, and Verona Henningham were served on or about August 8, 2019. Defendant Mendel Rochlitz was served on or about August 14, 2019. The remaining Defendants were also served on or around the same date. Defendant Workers Compensation Board of New York State filed a Notice of Appearance and Waiver dated August 14, 2019. Defendant George Campbell's authorized representative filed a Writ in the Nature of Discovery, Conditional Acceptance and Notice of Counter Claim (the "Writ") on or about August 21, 2019. Plaintiff filed a Notice of Rejection of the Writ on or about September 4, 2019. Defendant George Campbell filed a "Notice of Rejection, UCC Summons Plaintiff's Attorney" to Plaintiff's Notice of Rejection. Plaintiff then filed a Notice of Rejection to this Notice of Rejection.

No other Defendant answered, appeared, or moved within the required period. Although Defendants Horowitz and Rochlitz have moved (motion sequence #3) to dismiss the action for failure to enter default within one year and dismiss this motion for default judgment, these Defendants did not directly oppose the instant motion and no interim relief has been sought in that their application was brought by notice of motion not order to show cause. In addition, motion sequence #3 has not been scheduled for oral argument pursuant to Part 81 Rules and is subject to being marked off the calendar in the event it is not timely scheduled pursuant to Part 81 rules. Moreover, the motion was not made within the time to answer (CPLR 320(a)). *See Deutsche Bank Nat'l Tr. Co. v. Hall*, 185 A.D.3d 1006, 1007, 129 N.Y.S.3d 146 [2d Dept 2020].

As an initial matter, the Court finds that the Plaintiff's application for default as against the Defendants, other than Defendant George Campbell, is granted as timely and without opposition.

CPLR 3215(c) provides in pertinent 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, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed."

However, it is not necessary to actually obtain a default judgment within one year if the Plaintiff has shown an intent not to abandon the case. *See US Bank Nat. Ass'n v. Dorestant*, 131 A.D.3d 467, 469, 15 N.Y.S.3d 142, 143-44 [2d Dept 2015]. The instant proceeding was commenced with the filing of a Summons and Complaint and Notice of Pendency on July 30, 2019. The Defendants were purportedly served between August 7, 2019 and August 14, 2019. That means that the Defendants had defaulted in appearance by failing to answer the complaint on or about September 15, 2019. The Plaintiff points to AO/78/20 issued on March 22, 2020 that barred Plaintiff from filing any non-essential court documents until further order of the Court. "Governor Cuomo later issued a series of nine subsequent executive orders that extended the suspension or tolling period, eventually through November 3, 2020." *Brash v. Richards*, 195 AD3d 582, 583, 149 N.Y.S.3d 560, 562 [2d Dept 2021]. This provides sufficient good cause as to why the initial motion was not filed until October 19, 2020. Given the tolls and filing delays related to the COVID-19 pandemic, the filing of the initial motion (motion sequence #1) was sufficient to show that the instant motion was timely. Moreover, the instant motion was brought within one year of the prior motion being marked off. The Court finds that the instant motion served, in effect, as a motion to restore the application that had been marked off. The restoration of a "marked off" motion is granted without need of excuse or meritorious claim shown if made within one year of the date the matter had been marked off. *See One W. Bank, FSB v. Rosenberg*, 189 AD3d 1600, 1601, 140 N.Y.S.3d 86 [2d

Dept 2020]. Although the prior motion was thereafter marked off the calendar pursuant to Part 81 rules on May 12, 2021, the instant motion, which seeks the same relief, was made on October 13, 2021. The Plaintiff did not abandon the proceeding. *See HSBC Bank USA, Nat. Ass'n v. Traore*, 139 AD3d 1009, 1010, 32 N.Y.S.3d 283, 284 [2d Dept 2016]. Accordingly, the Plaintiff's application for a default judgment as against the Defendants is timely and the Plaintiff's default application is granted as against the Defendants (not including Defendant George Campbell) that failed to timely answer.²

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it "should only be employed when there is no doubt as to the absence of triable issues of material fact." *Kolivas v. Kirchoff*, 14 AD3d 493, 787 N.Y.S.2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341 [1974]. The proponent for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98, 100 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]. "In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party." *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 AD3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

² The Court also notes that the Plaintiff filed notice of entry and proof of service (NYSCEF Doc. 98-99) regarding service of the scheduling order for motion sequence #2 on the Defendants.

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v. Oppenheimer*, 148 AD2d 493, 538 N.Y.S.2d 837 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; see *Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

As stated, the Court finds that Defendant George Campbell has answered and as a result is not in default. However, Defendant Campbell has failed to oppose the Plaintiff’s summary judgment application. In general, “[a] mortgage may have an erroneous discharge of mortgage, without concomitant satisfaction of the underlying mortgage debt, set aside, and have the mortgage reinstated where there has not been detrimental reliance on the erroneous recording” *N.Y. Cmty. Bank v. Vermonty*, 68 AD3d 1074, 1076, 892 N.Y.S.2d 137, 139 [2d Dept 2009]. In support of their application, the Plaintiff provides an Affidavit by Rebecca Huskey, a Senior Foreclosure Manager with Shellpoint Mortgage Servicing, a purported servicer for Plaintiff. (See NYSCEF Document 72). In her affidavit, Ms. Huskey states (paragraph 12) that the Discharge of Mortgage that was recorded with the Office of the City Register on October 31, 2012 was fraudulent and a forgery. Ms. Huskey also states (paragraph 11) that a review of the business records shows that “the Note and the Mortgage have not been paid in full and remain outstanding. Mortgagor’s last payment on the Note and the Mortgage was received on or about February 24, 2009 and applied to the payments due November 1, 2008 and December 1, 2008.” Ms. Huskey states that there is a balance of \$332,500.00 due and owing. She further states that the Plaintiff has not issued a

discharge or a satisfaction and has not authorized one to be recorded. No opposition has been submitted to the instant motion for summary judgment by Defendant George Campbell. Accordingly, summary judgment is granted as against Defendant Campbell, on default.

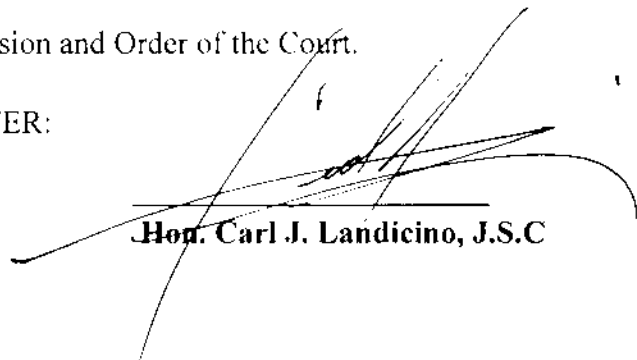
Based upon the foregoing, it is hereby Ordered that:

The Plaintiffs' motion (motion sequence #2) a) for a default judgment is granted as against all Defendants, except Defendant George Campbell and b) for summary judgment is granted as against Defendant George Campbell on default.

Plaintiff to settle an order and judgment on notice to all parties within sixty days of the entry of this decision.

The foregoing constitutes the Decision and Order of the Court.

ENTER:



Hon. Carl J. Landicino, J.S.C

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