

Wells Fargo v Cox

2022 NY Slip Op 32632(U)

July 18, 2022

Supreme Court, Kings County

Docket Number: Index No. 512105/19

Judge: Larry D. Martin

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FSMP, 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 24th day of June 2022.

P R E S E N T:

HON. LARRY D MARTIN,
J.S.C.

Index No.: 512105/19

_____ x

WELLS FARGO,

Plaintiff,

DECISION AND ORDER

-against-

HEIDI COX et al,

Defendant,

_____ x

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

Papers	Numbered
Motion (MS 1)	<u>1</u>
Opposition	<u>2</u>
Reply	<u>3</u>
Cross-Motion (MS 2)	<u>5</u>
Cross-Motion (MS 3)/Opp to MS 2	<u>6</u>
Reply to Opp to MS 2	<u>7</u>
Opp to MS 3	<u>8</u>

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

Defendant moves for summary judgment dismissing Plaintiff's claims, discharging the mortgage pursuant to her quiet title counterclaim, and awarding attorney fees to her. Plaintiff cross-moves for summary judgment in its favor and an order of reference. Defendant cross-moves for leave to amend her answer to assert counterclaims pursuant to ECOA and Banking Law 6-1 (if her motion for summary judgment is denied).

I. Defendant's Motion for Summary Judgment

Plaintiff agrees that, due to a prior foreclosure action accelerating the debt, the instant action would only be timely were it entitled to a six-month extension pursuant to CPLR 205[a]. Defendant argues that 205[a] is inapplicable as the prior action was dismissed for neglect to prosecute and, even were that not so, Plaintiff failed to complete service within six months of the dismissal of the 2012 action. Plaintiff disagrees as to both points.

The prior action was dismissed pursuant to CPLR 3215[c] by order dated December 3, 2018. A dismissal pursuant to 3215[c] is not inherently for neglect to prosecute and, as such, a court must assess whether the dismissal order “include[d] any findings of specific conduct demonstrating ‘a general pattern of delay in proceeding with the litigation’” (*Wells Fargo Bank NA v Eitani*, 148 AD3d 193, 198-199 [2d Dept 2017]). The Honorable Noach Dear found, in essence, that Plaintiff failed to timely file an RJL, failed to move for default judgment within one year, and offered insufficient explanation for its failure to timely proceed – but did not substantiate a general pattern of delay as that phrase appears to be interpreted by the Appellate Divisions¹ (see, *Wells Fargo v Kehres*, 199 AD3d 869 [2d Dept 2021]; *US Bank v Jalas*, 195 AD3d 1122, 1124 [3d Dept 2021]; *Deutsche Bank v Gouin*, 194 AD3d 479, 480 [1st Dept 2021]; *HSBC v Janvier*, 187 AD3d 999, 1001 [2d Dept 2020]). As such, 205[a] is applicable.

It is undisputed that Defendant was served via substitute service on June 1, 2019, that the mailing was completed three days later, and that the affidavit of service was filed on June 7, 2019. The order dismissing the 2012 action was entered on December 10, 2018 and notice of entry was filed three days later. Plaintiff is correct that the six month extension of CPLR 205[a] did not begin until its time to appeal as of right had run – which did not occur until 30 days later² (*Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, PC*, 5 NY3d 514, 519-20 [2005]; *Specialized Loan Servicing Inc v Nimec*, 183 AD3d 962, 965 [3d Dept 2020]). As such, service occurred during the extension (as required) and the instant action is timely.

¹ In fact, this Court has not found a single case where the Appellate Division has actually found a 3215[c] dismissal order to be a dismissal for “neglect to prosecute.”

² The Court need not reach the parties’ dispute whether service needs to be effected or completed (here, ten days later) during the six months which would only be relevant without the additional thirty days.

In light of the foregoing, the portions of Defendant's motion seeking summary judgment on its counterclaims – which were premised on this Court finding the action to be untimely – also are unavailing.

II. Defendant's Motion to Amend

Defendant seeks to amend her answer to drop several affirmative defenses and assert defenses that Plaintiff violated the Equal Credit Opportunity Act and Banking Law 6-l. Plaintiff opposes the additive portions of the amendment, primarily arguing that the proposed amendment is patently devoid of merit. As to ECOA, Plaintiff notes that the claim would be untimely, does not constitute a defense to foreclosure, and is rebutted by the (proffered) disclosures that she signed. Noting that the loan herein is not a "home loan" and exceeded the qualifying amount, Plaintiff posits that 6-l is inapplicable. Defendant elected not to file a reply to Plaintiff's opposition.

Having reviewed the parties' submissions, the Court agrees with Plaintiff that the proposed additional affirmative defenses are patently devoid of merit. Those defenses that Defendant elected to drop (the seventh through twelfth) are stricken without opposition.

III. Plaintiff's Motion for Summary Judgment

It is well established that "[i]n a mortgage foreclosure action, a plaintiff establishes its prima facie entitlement to judgment as a matter of law by producing the mortgage and the unpaid note, and evidence of the default" (*Loancare v. Firshing*, 130 A.D.3d 787 [2d Dept 2015]). Plaintiff has done so.

In opposition, Defendant argues that the instant action is untimely, that Plaintiff failed to demonstrate compliance with RPAPL 1304, and that Plaintiff failed to demonstrate that it sent the default notice required by the mortgage. Those arguments are unavailing. The instant action is timely (see Section I). It is clear from the record (and Defendant does not contest) that this suit concerns an investment property and not a "home loan." As such, RPAPL 1304 notices were unnecessary. Plaintiff has demonstrated the first class mailing of default notices by Litton Servicing via the Flanagan Affidavit.

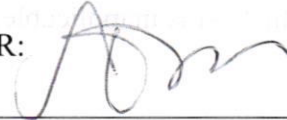
Defendant has abandoned her remaining affirmative defenses by failing to address them in opposition to Plaintiff's motion (*114 Woodbury Realty, LLC v. 10 Bethpage Rd., LLC*, 178 AD3d 757, 761 [2d Dept 2019]). As such, Defendant has not raised an issue of fact in opposition to Plaintiff's motion.

IV. Conclusions

Defendant's motion for summary judgment is denied. Plaintiff's cross-motion for summary judgment is granted (see accompanying order of reference). Defendant's motion to amend her answer is denied.

This constitutes the decision and order of the Court.

ENTER:



Hon. Larry D Martin JSC

07/18/2022

**HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT**