

U.S. Bank N.A. v Sergeant

2022 NY Slip Op 34720(U)

May 23, 2024

Supreme Court, Kings County

Docket Number: Index No. 13839/2008

Judge: Cenceria P. Edwards

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At an IAS Term, Part FRP1 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 August, 2022.

P R E S E N T:

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

Justice.

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR LEHMAN
BROTHERS-STRUCTURED ASSET SECURITIES CORPORATION
SASCO 2007-BNC1,

Plaintiff(s),

-against-

SECEAL SERGEANT, et. al.,

Defendant(s).
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ORDER

Mot. Calendar #: 51

Index No.: 13839/2008

Motion Seq. #: 1

The following papers read herein:

Notice of Motion, Affidavits (Affirmations) and Exhibits _____	_____ 5-19 _____
Opposing Affidavits (Affirmations) and Exhibits _____	_____ 21 _____
Reply Affidavits (Affirmations) and Exhibits _____	_____ 24-26 _____

On May 8, 2008, Plaintiff commenced this action against, *inter alia*, the defendant-borrower Seceal Sergeant (“Defendant”) to foreclose on the mortgage encumbering the residential real property known as 4025 Hubbard Place, Brooklyn, New York, alleging that he breached his agreement to pay the monthly installment payments pursuant to the terms of the mortgage loan. On or about October 24, 2008, Plaintiff filed a Request for Judicial Intervention (“RJI”), specifying that the nature of intervention sought was an *ex parte*, application for an Order of Reference. The case was released from the Foreclosure Settlement Conference Part on March 10, 2009, and the Court issued an Order of Reference in favor of Plaintiff on or about November 5, 2009. There is no indication that any additional activity occurred in this case until a Status Conference was held on July 23, 2013, after which the Court (Lawrence Knipel, J.)

issued an order of dismissal, which was entered on August 27, 2013. In said order, the Court found that Plaintiff had failed to proceed to entry of judgment within one year of default, excluding the time spent prior to discharge from the mandatory settlement conference part. The Court, thus, ordered this action dismissed as abandoned, pursuant to CPLR § 3215(c), and directed the County Clerk to vacate the notice of pendency filed against the subject property.

Plaintiff now moves to vacate the dismissal of this action and restore the case to the active calendar, arguing that the Court incorrectly found that that it had abandoned this action. Defendant opposes the motion. CPLR § 3215 (c) provides, in pertinent part, that “[i]f 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.” “It is not necessary for a plaintiff to actually obtain a default judgment within one year of the default in order to avoid dismissal...” (*US Bank N.A. v Dorestant*, 131 AD3d 467, 469 [2d Dept 2015]). “Rather, as long as proceedings are being taken, and these proceedings manifest an intent not to abandon the case but to seek a judgment, the case should not be subject to dismissal pursuant to CPLR 3215 (c)” (*U.S. Bank, N.A. v Duran*, 174 AD3d 768, 770 [2d Dept 2019] [internal quotation marks and alterations omitted]).

In residential mortgage foreclosure actions, moving (or applying *ex parte*) for an order of reference is the preliminary step toward obtaining a default judgment of foreclosure and sale, and, thus, constitutes the initiating of proceedings for the entry of judgment within the meaning of CPLR § 3215 (c) (*see Deutsche Bank Natl. Trust Co. v Khalil*, 208 AD3d 555, 557-558 [2d Dept 2022]; *HSBC Mtge. Corp. v Hasan*, 186 AD3d 1495, 1497 [2d Dept 2020]).¹ Plaintiff filed the *ex parte* RJI seeking an order of reference on October 24, 2008, and an order was issued on November 5, 2009. As the RJI was filed less than six months after this action was commenced, this was necessarily within a year of any defendant’s default. Accordingly, Plaintiff has demonstrated that this action was not subject to dismissal pursuant to CPLR § 3215 (c), and the July 23, 2013 *sua sponte* order dismissing the action was, therefore, improper.

Although Plaintiff has shown that the dismissal based on CPLR § 3215 (c) was improper, the record evinces what appears to be an extended delay in the prosecution of this action. Since

¹Defendant’s focus in his opposing papers on the fact that Plaintiff had not made a formal motion for a default judgment within a year of his default in answering the complaint is, thus, misplaced.

“[a] foreclosure action is equitable in nature and triggers the equitable powers of the court” (*Deutsche Bank Natl. Trust Co. v Ould-Khatti*, 201 AD3d 701, 703 [2d Dept 2022]), “the recovery of interest is within the court’s discretion,” the exercise of which “will be governed by the particular facts in each case, including any wrongful conduct by either party” (see *Onewest Bank, FSB v Kaur*, 172 AD3d 1392, 1393-1394 [2d Dept 2019]; CPLR § 5001). The Second Department has repeatedly approved of the tolling of interest and fees that have accrued during periods of unexplained delays in prosecuting a foreclosure action (see e.g. *Deutsche Bank Natl. Trust Co. v Ould-Khatti*, 201 AD3d 701, 703-704 [2d Dept 2022] [three separate periods totaling 28 months]; *BAC Home Loans Servicing, L.P. v Jackson*, 159 AD3d 861, 863 [2d Dept 2018] [nearly 4-year delay]; *Greenpoint Mtge. Corp. v Lamberti*, 155 AD3d 1004, 1005-1006 [2d Dept 2017] [roughly 3-year delay]). In the case at bar, the record does not indicate, nor do the moving papers suggest, that Plaintiff did anything to prosecute this action during the nearly 4-year period between the Court’s November 5, 2009 issuance of the order of reference and the August 27 2013 entry of the order of dismissal, following the status conference held the previous month. Nor does it appear that Plaintiff did anything during the more than 9-year period that followed, until the making of the instant motion on December 22, 2022.

For the foregoing reasons, although the instant motion to vacate the 2013 dismissal order and restore this action is granted to the extent indicated below, any future applications by Plaintiff **shall** be accompanied by an affidavit presenting good cause for the periods of inactivity discussed above, which total more than 13 years. The failure to make a sufficient showing shall result in the tolling of interest and fees for these and any other unexplained periods of delay which may arise, or have already arisen, in the prosecution of this matter.

Accordingly, the above-referenced motion is **GRANTED to the extent** that it is:

ORDERED that this action is **conditionally restored**, provided that neither Plaintiff nor its privies has brought another action against the borrower-defendant Seceal Sergeant and/or his privies or successors-in-interest to recover any part of the underlying mortgage debt; and it is further

ORDERED that within 30 days of entry of this Order, **Plaintiff shall file an affidavit averring** that it is in compliance with RPAPL 1301(3), **specifically stating** that no other action

or proceeding, in any court or tribunal, has been commenced or maintained to recover any part of the same debt secured by the subject mortgage, or, alternatively, if other actions to recover any part of the subject mortgage debt were brought, Plaintiff shall state in the affidavit all of the parties to those other action(s), the date of the respective commencement(s) of those actions, the outcome of the action(s), including whether any part of the debt has been collected, and Plaintiff shall also provide information sufficient to identify said action(s) within the relevant court or other public records; and it is further

ORDERED that upon filing the above-referenced affidavit, Plaintiff shall email a copy of same to this Court in accordance with the published Part Rules; and it is further

ORDERED that within 30 days of entry of this Order, Plaintiff shall serve this Order with Notice of Entry by overnight mail upon the following persons/entities:

- to the borrower-defendant Seceal Sergeant to his last known residence;
- to defendant Seceal Sergeant's attorney-of-record, Glenroy M. George; and
- to all others entitled to notice of proceedings in this action, including the present owners of the subject mortgaged premises, if applicable (and to the extent that they are not among those ordinarily deemed to be entitled to notice of proceedings in this action); and it is further


ORDERED that within 10 days after service of Notice of Entry of this Order, Plaintiff shall file proof of same and email a copy to this Court in accordance with the published Part Rules; and it is further

ORDERED that this matter shall be fully restored to the calendar upon Plaintiff's **submission of adequate proof of strict compliance** with all conditions set forth above.

The foregoing constitutes the Decision and Order of this Court.

ENTER,

Dated: May 23, 2024



Hon. Cenceria P. Edwards, JSC, CPA