

**U.S. Bank N.A. v Rosenberg**

2022 NY Slip Op 34721(U)

May 23, 2024

Supreme Court, Kings County

Docket Number: Index No. 14895/2008

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 8th day of September, 2022.

**PRESENT:** HON. CENCERIA P. EDWARDS, CPA

Justice.

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR  
CSAB MORTGAGE-BACKED PASS-THROUGH CERTIFICATES,  
SERIES 2006-3,

Plaintiff(s),

-against-

ELIYAHU ROSENBERG; YOSI SHEM-TOV;, et al.

Defendant(s).

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The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Notice of Motion/Affidavits (Affirmations) and Exhibits \_\_\_\_\_  
Opposing Affidavits (Affirmations) and Exhibits \_\_\_\_\_  
Reply Affidavits (Affirmations) and Exhibits \_\_\_\_\_

2-31 \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

This is an action to foreclose on a mortgage encumbering the residential real property located at 391 Van Sicten Avenue, Brooklyn, New York, owned by defendant-mortgagors Yosi Shem-Tov and Eliyahu Rosenberg.<sup>1</sup> In 2014, the action was dismissed pursuant to CPLR § 3215 (c). Plaintiff now moves to vacate the dismissal and restore the case to active status. This motion is unopposed, although Plaintiff purportedly served all defendants, including both mortgagors.

**The Instant 2008 Action**

Plaintiff commenced this action by filing the summons and complaint on May 21, 2008, alleging that defendant-mortgagor Yosi Shem-Tov (hereinafter “Defendant”), the sole obligor on the underlying debt, failed to pay the monthly installment payments due after October 2007 and

<sup>1</sup> By deed executed February 11, 2009 (recorded September 29, 2009), co-owners Eliyahu Rosenberg and Yosi Shem-Tov conveyed the subject premises solely to the latter (*see* NYSCEF Doc. #7 [Exhibit D to the motion].)

represents that the affidavits of service on all defendants were filed by June 4, 2008. On January 26, 2009, Plaintiff filed a Request for Judicial Intervention (“RJI”) and an *ex parte* motion for a Default Judgment and an Order of Reference. By order dated May 24, 2010, the Court (Leon Ruchelsman, J.) granted withdrawal of the Default Judgment motion submitted by Plaintiff’s former attorneys (*see* NYSCEF Doc. # 15 [Exhibit L]).

Except for Plaintiff’s January 11, 2012, filing of a consent to change attorneys, there was no additional activity in this case until a Status Conference was held on January 14, 2014, after which the Court (Lawrence Knipel, J.) issued an order of dismissal as abandoned (entered on May 12, 2014) for Plaintiff’s failure to proceed to entry of judgment within one year of default (*see* NYSCEF Doc. # 17 [Exhibit N]). Plaintiff subsequently filed a motion to discontinue the action on June 26, 2014, but withdrew the motion on September 16, 2014.<sup>2</sup>

### **The 2018 Quiet Title and Foreclosure Actions**

On April 17, 2018, Defendant Yosi Shem-Tov commenced his own action against Plaintiff under Index No. 507720/2018, seeking to quiet title pursuant to RPAPL § 1501 (4) (*see* NYSCEF Doc. # 22 [Exhibit S]). By order entered February 27, 2019, the Court (Noach Dear, J.) denied Shem-Tov’s motion for summary judgment on his complaint but granted Plaintiff’s cross-motion for summary judgment dismissing the complaint, holding that “the quiet title claim fails” because “the dismissal of the [2008 foreclosure] action lacks finality” (NYSCEF Doc. # 24 [Exhibit U]).

On June 27, 2018, Plaintiff commenced a second action against defendant-mortgagors Yosi Shem-Tov and Eliyahu Rosenberg, under Index No. 513226/2018, to foreclose on the same mortgage encumbering the subject premises (*see* NYSCEF Doc. # 25 [Exhibit V]). Defendant Shem-Tov appeared and answered the 2018 foreclosure complaint, asserting several defenses and counterclaims, to which Plaintiff responded (*see* NYSCEF Doc. #s 26-27 [Exhibits W and X]). By order entered September 20, 2019, the Court (Dear, J.) denied Shem-Tov’s motion to dismiss the 2018 foreclosure action, finding that the February 27, 2019, order dismissing the quiet title action “recognized that issues of fact remain as to whether the loan was properly de-accelerated”

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<sup>2</sup> Curiously, on March 30, 2017, the law firm of Anderson Bowman & Bowman, PLLC, purporting to represent a “John Doe” defendant in this action, served Notice of Entry of the 2014 dismissal order and filed proof of same on April 4, 2017 (*see* NYSCEF Doc. #19 [Exhibit P]).

(NYSCEF Doc. # 28 [Exhibit Y]). Plaintiff further advises that on May 6, 2020, Shem-Tov's new counsel filed a note of issue in the 2018 foreclosure action (*see* NYSCEF Doc. # 29 [Exhibit Z]).

### **CPLR § 3215 (c) Dismissal**

Plaintiff argues that the dismissal order should be vacated, and this case restored to active status, because the Court incorrectly found that it had abandoned this action. 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]). Plaintiff filed its RJI and *ex parte* application for a Default Judgment and an Order of Reference on January 26, 2009. As this occurred less than a year after the June 4, 2008, filing of all of the affidavits of service, 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) (*see Wells Fargo Bank, N.A. v Mayen*, 155 AD3d 811, 812-813 [2d Dept 2017] [case not subject to dismissal if application for order of reference was timely made, even if later withdrawn]).

Nonetheless, it does not necessarily follow, based on the unique procedural history recounted above, that Plaintiff is entitled to revive this case and resume its prosecution. In a somewhat analogous scenario, the Appellate Division, Second Department, rejected a plaintiff's attempt to restore an action which had been improperly dismissed as abandoned pursuant to CPLR § 3215 (c), holding that dismissal was still appropriate for another reason (*see Wells Fargo Bank,*

*N.A. v McClintock* (174 AD3d 950, 951-952 [2d Dept 2019]). Like *McClintock*, the instant case involves an improper CPLR § 3215 (c) dismissal and, as discussed below, it also presents a separate legal reason, appearing on the face of the record presented in Plaintiff's own moving papers, requiring that this case remain disposed.

### **Violation of RPAPL § 1301 (3)**

As discussed above, more than four years after the instant foreclosure action was dismissed pursuant to CPLR § 3215 (c), Plaintiff commenced a second action against the same mortgagors to foreclose on the same mortgage encumbering the same subject premises ("the 2018 foreclosure action"). However, RPAPL § 1301 (3) provides, in pertinent part:

"While the action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, including an action to foreclose the mortgage, without leave of the court in which the former action was brought. The procurement of such leave shall be a condition precedent to the commencement of such other action and the failure to procure such leave shall be a defense to such other action."

"The object of the statute is to shield the mortgagor from the expense and annoyance of two independent actions at the same time with reference to the same debt" (*Bayview Loan Servicing v Starr-Klein*, 193 AD3d 807, 808 [2d Dept 2021] [internal quotation marks omitted]). In other words, the statute's core purpose is "to avoid inappropriate duplicative and vexatious litigation by the same party" (*Central Trust Co. v Dann*, 85 NY2d 767, 772 [1995]).

The record does not indicate, and Plaintiff does not contend, that it obtained leave of Court in this action before commencing the 2018 foreclosure action. Rather, the instant motion made on August 2, 2021, is the first activity of substance undertaken by Plaintiff in this case since filing the RJI and *ex parte* order of reference in January 2009, and withdrawing the application in May of 2010. Nor can it be said that prior to making the instant motion Plaintiff treated this action as pending "in name only," as the Court (Dear, J.) granted Plaintiff's cross-motion for summary judgment dismissing the complaint in Defendant Shem-Tov's quiet title action on the ground that the *sua sponte* dismissal of the instant foreclosure action lacked finality (*see* NYSCEF Doc. # 24 [Exhibit U]). Moreover, in contrast to the instant action, Shem-Tov appeared in and actively defended against the 2018 foreclosure action, including the filing of a note of issue on May 6, 2020, after his dispositive motion for summary judgment was denied. Hence, not only is the 2018

foreclosure action still pending, but it also appears to be ready for trial. In contrast, the instant action, if restored, would still be in a pre-note of issue status since a default judgment and order of reference was never issued. Thus, Plaintiff's own moving papers demonstrate that by commencing and prosecuting the 2018 foreclosure action without first obtaining leave of Court in the instant action, Plaintiff engaged in the duplicative litigation that RPAPL § 1301 (3) is meant to prevent.

Although RPAPL § 1301 (3) has always prohibited the commencement and maintenance of multiple simultaneously pending actions to collect on a mortgage debt, it was amended by the Foreclosure Abuse Prevention Act ("FAPA"), enacted on December 30, 2022, to expressly prescribe remedies for the violation of its command. Now, when an action to collect on a mortgage debt has been commenced without leave of the court in which the former action was brought, "the former action **shall be deemed discontinued** upon the commencement of the other action, unless prior to the entry of a final judgment in such other action, a defendant raises the failure to comply with this condition precedent therein, or seeks dismissal thereof based upon a ground set forth in [CPLR § 3211 (a)(4)]" (RPAPL § 1301 [3] [emphasis added]). As discussed, Plaintiff submitted with this motion a copy of Defendant Shem-Tov's Answer from the 2018 foreclosure action, which plainly does not include a defense based on RPAPL § 1301 (3) and/or CPLR § 3211 (a)(4), nor is there any indication that Shem-Tov sought dismissal of the action on that ground. As the governing law now makes clear that Plaintiff's unauthorized commencement of the second foreclosure action discontinued the instant action as a matter of law, Plaintiff's request to vacate the dismissal order and restore the instant action must be denied, regardless of the improper ground upon which the action was dismissed.

Accordingly, the above-referenced motion by Plaintiff to vacate the order of dismissal dated January 14, 2014, and entered May 12, 2014, and to restore this action to active status, is **DENIED in its entirety.**

The foregoing constitutes the Decision and Order of this Court.

**E N T E R,**

**Dated:** May 23, 2024



**Hon. Cenceria P. Edwards, JSC, CPA**