

HSBC v Weisz

2023 NY Slip Op 31991(U)

May 1, 2023

Supreme Court, Kings County

Docket Number: Index No. 29749/2008

Judge: Larry D. Martin

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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 1st day of May 2023.

P R E S E N T:

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

Index No.: 29749/2008

_____ x

HSBC,

Plaintiff,

DECISION AND ORDER

-against-

ROBERT WEISZ et al,

Defendant,

_____ x

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

Papers	Numbered
Motion (MS 2)	<u>1</u>
Opposition	<u>2</u>
Reply	<u>3</u>
Supplemental Opp ¹	<u>4</u>
Supplemental Reply	<u>5</u>

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

The instant action was filed on October 30, 2008 and Defendants Robert and Ester Weisz answered through counsel. The following year, Plaintiff moved for summary judgment and an order of reference. Settlement conferences were then held – and the motion repeatedly adjourned – until mid-2012, at which point the matter was released and the motion was withdrawn. On November 18, 2013, a “purge conference” was held and the Honorable Noach Dear ordered Plaintiff to file a motion for summary judgment within 120 days or to provide a written explanation to the Court why it could not do so. No motion having been filed and the

¹ Leave to file supplemental opposition and reply was granted in light of the passage of FAPA.

Court apparently not having heard from Plaintiff's counsel, the action was dismissed without prejudice by order dated March 26, 2014. No further action was taken until the filing of the instant motion in May 2022.

Plaintiff now moves to vacate the dismissal order and, upon vacatur, to substitute the alleged new holder of the note as the plaintiff in this action. In support, it argues that the Court should not have sua sponte dismissed the action in the absence of extraordinary circumstances and that there was no statutory basis for doing so. In opposition, Defendants suggest that Plaintiff failed to establish that it has a meritorious claim and offers no explanation for its lengthy default in seeking to restore this matter. Plaintiff counters that it provided an affidavit from its client attesting to the default and appending a copy of the note and mortgage, thereby demonstrating that it has a potentially meritorious cause of action. It further suggests that its motion is timely in the absence of a notice of entry of the dismissal order.

Following the enactment of FAPA, Defendants suggest that this action cannot be resurrected. It is undisputed that a new action to foreclose on the same lien was started in 2018 and dismissed in January 2019. Defendants suggest that RPAPL 1301[3], as amended², would require the instant action to be deemed discontinued as a second action was filed without leave of the Court. Defendants also suggest that the Court's finding that the 2018 action was barred by the statute of limitations renders the instant action untimely under new RPAPL 1301[4]³. Plaintiff responds that Defendant is now attempting to raise defenses waived upon their failure to timely assert them, that Defendants are misapplying FAPA, and that it would be unconstitutional to apply FAPA retroactively.

This Court agrees with Plaintiff that the dismissal order should be vacated. No basis for the dismissal – other than general inactivity – was given. Absent compliance with the strictures

² In relevant 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. For purposes of this subdivision, in the event such other action is commenced without leave of the court, 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 paragraph four of subdivision (a) of rule thirty-two hundred eleven of the civil practice law and rules."

³ "If an action to foreclose a mortgage or recover any part of the mortgage debt is adjudicated to be barred by the applicable statute of limitations, any other action seeking to foreclose the mortgage or recover any part of the same mortgage debt shall also be barred by the statute of limitations."

of CPLR 3216, that is not a sufficient basis to dismiss an action (see, for example, *Chase v Scavuzzo*, 87 NY2d 228, 233 [1995])[“courts do not possess the power to dismiss an action for general delay where plaintiff has not been served with a 90–day demand to serve and file a note of issue pursuant to CPLR 3216(b)”].

That the dismissal order dates back nearly a decade does not prevent Plaintiff from seeking its vacatur. Plaintiff’s motion, though citing to CPLR 5015, is in essence seeking vacatur of the prior order pursuant to CPLR 2221[a] and “[u]nlike a motion to reargue pursuant to CPLR 2221(d), a motion pursuant to CPLR 2221(a) to vacate an order is not subject to any specific time limitation” (*US Bank v Thompson*, 189 AD3d 1643, 1644 [2d Dept 2020]).

While unnecessary, Plaintiff demonstrated that it has a potentially meritorious claim through its client affidavit and appended exhibits.

This action was dismissed at the time the 2018 action was commenced. Leave of the Court was, thus, not necessary, RPAPL 1301[3] is inapplicable, and this case is not “deemed discontinued.”

Defendants’ answer does not plead that the instant action was filed beyond the applicable statute of limitations⁴. Such defense is, thus, waived (*Green Tree v Weiss*, 180 AD3d 654, 655 [2d Dept 2020])⁵ and Defendants’ 1301[4] arguments are unavailing – even were the Court inclined to adopt Defendants’ reading of that section.

Plaintiff’s motion to restore and to amend the caption to substitute Plaintiff’s successor in interest in its stead is granted. The caption shall now read:

-----X
 PALM AVENUE HIALEAH TRUST, A
 DELAWARE STATUTORY TRUST, FOR
 AND ON BEHALF AND SOLELY WITH
 RESPECT TO PALM AVENUE HIALEAH
 TRUST, SERIES 2014-1
 Plaintiff,
 vs
 ROBERT WEISZ, ESTER WEISZ, CAPITAL
 ONE BANK, JAY RUBIN DMD PLLC, JP

⁴ Indeed, it is undisputed that the instant action was timely when it was filed. The parties dispute whether it has been retroactively rendered untimely.

⁵ Were the Court to interpret Defendants’ argument as invoking a form of res judicata, that defense was also not pled in their answer and was waived (*Onate v Fernandez*, 184 AD3d 725, 727 [2d Dept 2020]).

MORGAN CHASE BANK, N.A., NATIONAL CITY BANK, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, THE BOARD OF MANAGERS OF THE 1217 42ND STREET CONDOMINIUM, UNITED STATES OF AMERICA ACTING THROUGH THE IRS

JOHN DOE (Said name being fictitious, it being the intention of Plaintiff to designate and any all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises.)

Defendant(s).

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However, to allow Plaintiff to collect interest for the period of inactivity would be inequitable. As such, interest is tolled from March 26, 2014 (when the action was dismissed for inactivity) until May 2, 2022 (when the instant motion was filed).

This constitutes the decision and order of the Court.

ENTER: 

Hon. Larry D Martin JSC

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

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