

IndyMac v Vargas

2024 NY Slip Op 34604(U)

July 3, 2024

Supreme Court, Kings County

Docket Number: Index No. 18794/08

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 3rd day of July 2024.

P R E S E N T:

HON. *Larry D. Martin*
J.S.C.

Index No.: 18794/08

✓ _____ x
INDYMAC,

Plaintiff,

DECISION AND ORDER

-against-

✓ _____ x
JUAN VARGAS et al,
Defendant,

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

Papers ✓	Numbered
Motion (MS 4) ✓	<u>1</u>
Opp/Cross (MS 5) ✓	<u>2</u>
Reply/Opp to Cross	<u>3</u>
Cross-Reply	<u>4</u>

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

The instant action was commenced on June 27, 2008 and Defendant Vargas was allegedly personally served on July 1, 2008 but failed to timely answer or appear in the action. On November 18, 2009, Plaintiff filed a motion for an order of reference which was subsequently withdrawn.¹ A pre-settlement conference was scheduled for September 27, 2010 and the matter was released upon Defendant's non-appearance. Seemingly unbeknownst to Plaintiff and the Court, Defendant died on November 24, 2010.

¹ Pursuant to the Rohe-Kipp Affirmation (submitted in support of Plaintiff's first motion to vacate), the October 2010 withdrawal was (pursuant to the affiant's personal knowledge) "due to the implementation of the Affirmation requirement imposed by the Office of Court Administration."

Following several years of inactivity, the matter was dismissed pursuant to CPLR 3215[c] on January 9, 2014 following a purge conference. Nearly a year later, Plaintiff filed a motion seeking to vacate the dismissal. Therein, its counsel addressed only the delay following the withdrawal of the (untimely) motion for an order of reference. On February 5, 2015, the motion to vacate was denied upon all parties' failure to appear. Seven months later, Plaintiff filed another motion for the same relief.² The appearance notes proffered by Plaintiff reflect that its attorney and an attorney representing Defendant's estate³ appeared on the return date and the matter was marked stayed in light of Defendant's death. Following several further adjournments, Plaintiff withdrew its second motion to restore.

A probate petition was filed in November 2014. Following the appointment of a guardian ad litem and the issuance of her recommendations, the Queens County Public Administrator was appointed in June 2016. Pursuant to her counsel, she has attempted to sell the property for the benefit of the heirs but has been thwarted by, among other things, Plaintiff's unwillingness to negotiate a reduction in the amount of interest arrears sought. The Public Administrator also started proceedings to have the instant lien held unenforceable due to the lapse of the statute of limitations.

On June 12, 2023, Plaintiff filed the instant motion seeking to vacate the dismissal, restore the action, substitute the Public Administrator in place of the decedent, add the known heirs, serve the unknown heirs by publication, and substitute the current holder of the loan as plaintiff. Following several conferences between Plaintiff, Josefa Vargas Jones (Defendant's daughter), and the Court and upon receipt of a letter from the Public Administrator's counsel suggesting that Plaintiff's motion was deficient, a virtual conference with the aforementioned individuals and the Public Administrator's counsel was held and a schedule for further briefing entered into.

On February 12, 2024, the Public Administrator filed opposition and a cross-motion, arguing that the case should either remain dismissed pursuant to CPLR 3215[c] or dismissed

² As the papers do not appear to have been scanned, the Court is unable to discern what arguments were raised therein.

³ It is clear from the record that counsel was actually representing Navezda Giraldo whose claim to the estate was subsequently rejected by the Queens County Surrogate's Court.

pursuant to CPLR 1021 based upon Plaintiff's protracted delay in seeking to substitute it into this action in place of the decedent. Plaintiff opposed and the Public Administrator replied.

Defendant died prior to the dismissal and, as such, the case was automatically stayed⁴ and that order a nullity. Nonetheless, the Court must consider whether the dismissal itself was proper as, if it were, this Court could and would re-dismiss upon the same ground as suggested by the Public Administrator.

In seeking to vacate the dismissal, Plaintiff argues that the initial motion for an order of reference was timely filed within one year of Defendant's default. As noted by the Public Administrator, that is factually incorrect. Consequently, in reply, Plaintiff advances a different set of arguments – that Plaintiff was shut down by the Office of Thrift Supervision in July 2008⁵, that the parties⁶ entered into a six month forbearance agreement in August 2009 which prevented Plaintiff from timely proceeding, and that the right to seek dismissal pursuant to CPLR 3215[c] was waived upon “the estate's” prior appearance in this action.⁷ As Plaintiff has demonstrated sufficient justification for the short delay in initially seeking to fix Defendant's default, the Court will not re-dismiss this action pursuant to CPLR 3215[c].

The Public Administrator argues that this action should be dismissed as Plaintiff unreasonably delayed seeking to substitute it in place of Defendant. Pursuant to CPLR 1021, “[a] motion for substitution may be made by the successors or representatives of a party or by any party.... [but i]f the event requiring substitution occurs before final judgment and substitution is not made within a reasonable time, the action may be dismissed as to the party for whom substitution should have been made.” “In determining reasonableness, a court should consider the plaintiff's diligence in seeking substitution, prejudice to the other parties, and whether the action is shown to have potential merit” (*Navas v NY Hosp Med Ctr of Qns*, 180 AD3d, 796, 797

⁴ The Public Administrator argues that the action need not have been stayed as Defendant was not necessary to the action in light of the waiver of rights within the forbearance agreement. The Court disagrees. Plaintiff was still seeking a potential deficiency judgment against him and the Defendant (arguably) still had the right to raise certain defenses and to challenge a subsequent referee's report. Indeed, when the Court learned of Defendant's death, the action appears to have been marked stayed.

⁵ The FDIC was appointed Conservator at that time and the assets were sold to Onewest Bank in March 2019.

⁶ Defendant and Onewest.

⁷ The Public Administrator is correct that the appearance by counsel for Giraldo – who was never appointed to represent the estate – does not waive the estate's right to seek dismissal pursuant to CPLR 3215[c]. The Court further notes that the informal appearance was while the action was already dismissed pursuant to CPLR 3215[c] and appears to have been intended solely to apprise the Court of Defendant's death.

[2d Dept 2020]). Herein, Plaintiff learned of Defendant's death no later than 2015 and the Public Administrator was appointed in 2016. Substitution was not sought until the filing of the instant motion in 2023. In the absence of any meaningful explanation, that is evidence of a marked lack of diligence (see, for example, *Hemmings v Rolling Frito-Lay Sales*, 220 AD3d 754 [2d Dept 2023]). Nonetheless, "the court may still grant the motion for substitution if there is no showing of prejudice and there is potential merit to the action, in light of the strong public policy in favor of disposing of matters on the merits" (*Navas*, 180 AD3d at 797-798; see also, *Hemmings*, 220 AD3d at 757). As Defendant entered into an agreement agreeing that Plaintiff's claims are meritorious and as the alleged prejudice to the estate and heirs – the increased amount due – can be cured by interest tolling, this Court grants substitution of the Public Administrator and heirs in place of the decedent and will not dismiss this action pursuant to CPLR 1021.

"In an action of an equitable nature, the recovery of interest is within the court's discretion. The exercise of that discretion will be governed by the particular facts in each case, including any wrongful conduct by either party" (*Dayan v York*, 51 AD3d 964, 965 [2d Dept 2008]). "[T]olling and cancellation of interest may also be warranted where there is an unexplained delay in prosecution of a mortgage foreclosure action" (*People's United Bank v Patio Gardens III, LLC*, 189 AD3d 1622, 1623 [2d Dept 2020]; see, similarly, *Greenpoint Mtge. Corp. v Lamberti*, 155 AD3d 1004 [2d Dept 2017]; *Citicorp Trust Bank, FSB v Vidaurre*, 155 AD3d 934 [2d Dept 2017]). Herein, the matter was released from conference on September 27, 2010. The next action taken by Plaintiff was the filing of a motion to vacate the dismissal on December 30, 2014. While the Court recognizes that Defendant was deceased for virtually the entire period, Plaintiff either was unaware and still did not act or was aware and failed to seek substitution. As such, tolling for that time is warranted. Additionally, after Plaintiff's motion was marked off on February 5, 2015, it took no further action until September 1, 2015 when it again sought the same relief. As such, interest is also tolled from February 5th through September 1st of 2015. Thereafter, Plaintiff was informed of Defendant's death and the case was stayed. The Public Administrator was appointed to represent the estate on June 7, 2016 but Plaintiff did not seek substitution until June 12, 2023. Tolling for that period is also appropriate.

As the guardian ad litem appointed by the Surrogate's Court appears to have done a thorough job in seeking the heirs and as Defendant's daughter confirmed the accuracy and completeness of her conclusions, the portion of Plaintiff's motion seeking to substitute the Public

Administrator and known heirs in place of the decedent is granted but an order of publication as to “unknown heirs” is denied.

In light of the foregoing, it is

ORDERED that Plaintiff’s motion is granted to the extent the Order of Dismissal dated January 9, 2014, is hereby vacated; and it is further

ORDERED that the case is restored to the Court's active calendar; and it is further

ORDERED that Plaintiff is granted leave to file, and serve where necessary, the annexed Supplemental Summons, Amended Complaint, 1303 Notices and Amended Notice of Pendency of Action; and it is further

ORDERED that the time to complete service of the Supplemental Summons and Amended Complaint is extended to 120 days from entry of this order; and it is further

ORDERED that Juan Vargas as Heir and Distributee of the Estate of Juan Vargas, Pedro Vargas as Heir and Distributee of the Estate of Juan Vargas, Josefa Vargas-Jones as Heir and Distributee of the Estate of Juan Vargas, Charmaine Campbell S/H/A John Doe #1, Crystal Edwards S/H/A John Doe #2, Kenneth Edwards S/H/A John Doe #3, Susanne Korte S/H/A John Doe #4, Tafiyah Morgan S/H/A John Doe #5, and Michael Morgan S/H/A John Doe #6 be added to the caption without prejudice to all the proceedings heretofore had herein; and it is further

ORDERED that the caption be amended as follows:

_____ C

VRTMTG ASSET TRUST

Plaintiff,

vs.

PUBLIC ADMINISTRATOR OF QUEENS COUNTY AS
ADMINISTRATOR OF THE ESTATE OF JUAN
VARGAS; JUAN VARGAS AS HEIR AND
DISTRIBUTE OF THE ESTATE OF JUAN VARGAS;
PEDRO VARGAS AS HEIR AND DISTRIBUTE OF

THE ESTATE OF JUAN VARGAS; JOSEFA VARGAS-JONES AS HEIR AND DISTRIBUTE OF THE ESTATE OF JUAN VARGAS; CHARMAINE CAMPBELL S/H/A JOHN DOE #1; CRYSTAL EDWARDS S/H/A JOHN DOE #2; KENNETH EDWARDS S/H/A JOHN DOE #3; SUSANNE KORTE S/H/A JOHN DOE #4; TAFIYAH MORGAN S/H/A JOHN DOE #5; MICHAEL MORGAN S/H/A JOHN DOE #6; CAPITAL ONE BANK; FINANCIAL CREDIT CORP. A/A/O BALLY'S; KINGS SUPREME COURT; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR BNC MORTGAGE INC.; NEW YORK CITY CRIMINAL COURT; NEW YORK CITY DEPARTMENT OF FINANCE; 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; UNITED STATES OF AMERICA ACTING THROUGH THE IRS; JOHN DOE (Said name being fictitious, it being the intention of Plaintiff to designate any and 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.)

Defendants.

_____x

and it is further

ORDERED that the Public Administrator's cross-motion is granted to the extent that interest is tolled from September 27, 2010 through December 30, 2014, February 5, 2015 through September 1, 2015, and June 7, 2016 through June 12, 2023.

ORDERED that Plaintiff shall serve a copy of this Order with Notice of Entry upon the owner of the equity of redemption, any tenants named in this action, and any other parties or persons entitled to service.

This constitutes the decision and order of the Court.

ENTER:



Hon. Larry D. JSC
Martin

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT