

JP Morgan Chase Bank, N.A., v Cantwell

2024 NY Slip Op 34679(U)

May 24, 2024

Supreme Court, Nassau County

Docket Number: Index No. 011968/2008

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

JP MORGAN CHASE BANK, N.A.,

Decision and Order

MOTION SEQ.: 03, 04

INDEX NO.: 011968/2008

Plaintiff,

-against-

**ALEXANDER CANTWELL; SCORY LLC DBA
INTELLIGENT OFFICE; EDWARD A. DRESKIN;**

**“JOHN DOES” and “JANE DOES”, said names being
fictitious, parties intended being possible tenants or
occupants of premises, and corporations, other entities
or persons who claim, or may claim, a lien against the
premises,**

Defendants.

**The following papers and the attachments and exhibits thereto have been read on this
motion:**

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Plaintiff JP Morgan Chase Bank, NA (“Plaintiff”) moves by Notice of Motion seeking an order: “(1) Restoring this matter to the court’s active calendar; (2) Granting summary judgment pursuant to CPLR § 3212; (3) Dismissing defenses and counterclaims asserted in the answer filed by Defendant Richard Cella pursuant to CPLR § 3211(b); (4) permitting the answer to be treated as a limited notice of appearance requiring Plaintiff to serve the answering Defendant, without prior notice, a copy of the entered Judgment of Foreclosure and Sale, notice of sale, notice of discontinuance, and notice of surplus money proceedings pursuant to CPLR § 320; (5) Appointing a referee to compute the amount due to plaintiff and to examine and report whether the mortgaged premises can be sold in parcels pursuant to RPAPL § 1321; (6) Amending the caption to substitute Ticor Title Insurance Company and Richard Cella, as party Defendants in place of “John Does” and “Jane Does” pursuant to RPAPL § 1311; (7) Granting a default judgment against all non-appearing and non-answering defendants the defaults be fixed and determined pursuant to CPLR § 3215; that the counterclaims of the Defendant Richard Cella, be denied in their entirety; (8) Amending the caption to reflect the plaintiff as U.S. Bank National Association, not in its individual capacity but solely as trustee for RMAC Trust, Series 2016-CTT; and for such other and further relief as to the Court may deem just and proper.”

Richard Cella moves by Cross-Motion seeking an order: “(1) pursuant to CPLR § 3211 and CPLR § 3212 granting summary judgment dismissing the complaint; (2) pursuant to CPLR §3211 and CPLR §3212, summary judgment with regard to the counterclaims; (3) pursuant to RPAPL § 1501(4), discharging Plaintiff’s encumbrance and notice of pendency on the premises located at 2240 Walsall Street Seaford, New York 11783, interest be waived in totality from the date of the filing of the complaint; (4) an Order, directing that the notice of pendency be vacated; interest be waived in totality from the date of the filing of the complaint, as and for the plaintiff’s failure to provide discovery and for the failure to engage in good faith negotiations pursuant to CPLR 3408; (5) an Order, directing discovery in this matter; (6) an Order, directing that a hearing be held in this matter, and directing that the matter be returned to the settlement part; (7) denying the entirety of the plaintiff’s motion, vacating and discharging all of the loan documents as the exhibits attached are reduced to such a fine print that they cannot be read and violate banking regulations; (8) dismissing and vacating the loan in its entirety as it violates New York State Banking Law Section 6-1(2)(m); (9) imposing sanctions upon Plaintiff and its counsel for failing to make application to restore the matter to the calendar some 11 years later, to place its name on the litigation backer, to use a

fraudulent mortgage as the basis for the instant action, in failing to serve a consent to change attorney; (10) an Order forwarding this action to the US attorney and the NCDA; (11) an Order granting Defendant leave of court amending the answer to impose a constructive trust for the repairs and improvements, taxes paid on the property; (12) an Order awarding defendant reasonable attorneys fees incurred in the defense of the instant motion, together with the costs and disbursements of this motion; and (13) together with such other and further relief as this court deems just and proper.”

Background

This is an action to foreclose a mortgage encumbering a property located at 2240 Walsall Street, Seaford, New York 11783.

Defendant Andrew Cantwell (“Cantwell”) executed and delivered a Note on December 27, 2007, in the principal amount of \$337,500, which was secured by a mortgage (“Cantwell Mortgage”) delivered to JP Morgan Chase Bank, N.A., encumbering the property located at 2240 Walsall Street, Seaford, New York 11783 (“Property”).

Plaintiff commenced the instant action by filing a Summons and Complaint and Notice of Pendency on June 30, 2008, following Cantwell’s alleged default on the Cantwell Mortgage on or about March 1, 2008.

Foreclosure settlement conferences took place on October 18, 2010, April 1, 2011 and May 5, 2011. On April 1, 2011, the Plaintiff withdrew its motion seeking an Order of Reference and related relief. On May 5, 2011, the matter was released from the settlement conference part for continued litigation. However, no further conferences were held and no other motions were filed. As a result, on March 27, 2015, the matter was administratively “marked off” the calendar, with no future date.

Subsequently, the mortgage was assigned from JP Morgan Chase Bank N.A., to U.S. Bank National Association, not in its individual capacity but solely as trustee for the RMAC Trust, Series 2016-CTT, pursuant to an Assignment of Mortgage executed on June 6, 2017, and recorded in the Office of the Nassau County Clerk on September 8, 2017. Plaintiff annexes, *inter alia*, a copy of the recorded Assignment, Affidavit of Note Possession from JP Morgan Chase Custody Services Inc. and JPMorgan Chase Bank, N.A. Plaintiff also includes an Affidavit from Antony Younger, Assistant Secretary of Rushmore Loan Management Services LLC, Appointed Attorney In fact for U.S. Bank National Association, not in its individual capacity but solely as trustee for the RMAC Trust, Series 2016-CTT. Younger attests in part that U.S. Bank National Association, not in its individual capacity but solely as trustee for the RMAC Trust, Series 2016-CTT, had possession of the original Promissory Note on July 1, 2017.

Plaintiff substituted counsel by Consent to Change Attorney on August 1, 2017. Approximately two months later, on October 11, 2017, incoming counsel served and filed a Notice of Pendency; counsel also conducted a new title search on the property, and as a result of which, allegedly discovered that ownership of the Property was re-conveyed to Cella via quitclaim deed recorded in or about June of 2016. The transfer back to Cella is alleged to have been pursuant to the settlement of a separate action commenced by Cella in 2008, at approximately the same time that the instant action was commenced (“the Cella action” *infra*). Consequently, Richard Cella and Regina Cella were served with the Summons and Complaint, on October 15, 2018, and October 17, 2018, respectively, pursuant to RPAPL 1311.

Plaintiff annexes, as Exhibit “L,” a copy of a document entitled “Verified Answer, Affirmative Defenses and Counterclaims” which was signed on February 3, 2019, by Cella’s attorney Genevieve Lane Lopresti, Esq. Although the document is labeled “Verified Answer, Affirmative Defenses and Counterclaims” there is no verification attached to the document. Further, the Court minutes do not reflect that a Verified Answer and Counterclaim has been filed.¹ Plaintiff filed a Verified Reply to Cella’s Counterclaims on February 26, 2019, and Cella filed a Notice of Rejection on March 7, 2019.

In the “Verified Answer, Affirmative Defenses and Counterclaims,” Defendant alleges that Cella has lived at the residence for 20 years, paid taxes for approximately 16 years, owns the residence and has a superior interest therein, including the equity of redemption. Cella further claims, *inter alia*, that: Plaintiff lacks standing to commence the action because the Cantwell Mortgage has been discharged in bankruptcy; Plaintiff is bound by the contract between Cella and Cantwell dated November 15, 2007, which Cella describes as being a straw-buying scam; Plaintiff is barred by the doctrine of laches from continuing the action; Plaintiff failed to comply with CPLR 306-a as it “is using an old Index number previously used in 2008 that has expired” and 306-b, “as it failed to service the summons and complaint within 120 days of the original issuance of 2018”; the complaint fails to state a cause of action and is barred by the doctrine of unclean hands, by documentary evidence and unjust enrichment. Defendant also asserts several counterclaims.

On March 21, 2019, Cella moved, *inter alia*, to dismiss the complaint pursuant to CPLR 3216, as asserted against him for failure to prosecute, and pursuant to CPLR 3211(a)(7), to dismiss the complaint asserted against him for failure to state a cause of action. In an Order dated May 14, 2019, the Court (Adams, J.) denied the motion, noting that “[t]here is no merit to the defendant’s claims” which included failure to state of cause of action and want of prosecution. Specifically, the Court found that Plaintiff’s complaint stated a cause of action, Plaintiff’s security interest in the subject property survived the Defendant’s discharge in bankruptcy, and that “there is no proof that the plaintiff has been served with a written demand to serve and file a note of issue within 90 days”

¹ Plaintiff notes in its Affirmation that it “relied upon the service of this answer and this holding by the Court despite the Clerk Minutes not reflecting an answer has been filed or served” and requests in a footnote that the Court grant default judgment against Cella if the Court determines an answer was not served.

and therefore, Cella's claim that the complaint should be dismissed for want of prosecution fails. Cella appealed the decision ("2019 Cella Appeal") and the Order was affirmed by the Appellate Division, Second Department pursuant to a Decision & Order dated January 18, 2023. Defendant's motion for leave to reargue the appeal, or in the alternative, for leave to appeal to the Court of Appeals from the Decision & Order of the Appellate Division, Second Department, was denied with \$100 costs on November 1, 2023.

On July 25, 2023, Plaintiff made the instant application, seeking, *inter alia*, summary judgment insofar as asserted against Cella, appointing a Referee to compute the amount due to Plaintiff, and for leave to enter a default judgment against all non-appearing and non-answering Defendants. In its application, Plaintiff cites to related cases filed over the course of the last 16 years in addition to the 2019 Cella Appeal (*supra*) and the COVID-19 Executive Orders suspending foreclosure proceedings, as and for sufficient cause for delay and proof that the action has not been abandoned:

The Cella Action

In 2008, Richard Cella commenced an action to recover damages for, *inter alia*, fraud and misrepresentation against Plaintiff, Cantwell, and others in Supreme Court, Nassau County ("the Cella action" bearing Index No.: 010785/2008). Cella subsequently commenced another action (Index No.: 23356/2010) which was later consolidated with the Cella action pursuant to an Order dated June 26, 2012 (Jaeger, J.). Cella asserted causes of action for criminal enterprise, fraud, rescission, breach of contract, unjust enrichment and negligence seeking monetary damages and equitable relief.

The Cella action arose from the transaction that took place on December 27, 2007, when Cantwell purchased the subject Property and signed the Note that is at issue in the instant action. Cella, the original owner of the Property by quitclaim deed dated September 8, 2004, conveyed the premises to Cantwell. Among other allegations, Cella asserts that Cantwell was actually a "straw buyer" during a "sham" closing that occurred at the Law Offices of Constantine Giannakos, as agent of Chase. Cella claims that he did not receive any consideration for the transfer of the Property "in furtherance of the criminal enterprise conducted by the various defendants."

JPMorgan Chase moved for summary judgment to dismiss the complaint insofar as asserted as against it. On February 9, 2016, by short form order, the motion was granted.

On June 6, 2016, the Cella action was purportedly resolved with Cantwell re-conveying the premises to Cella by quitclaim deed.

Plaintiff claims that it did not proceed with this action during the pendency of the Cella action because "[t]he litigation in the 08-10785 case concerned title to the mortgaged property and thus, wholly effected this matter."

The 2009 Cantwell Bankruptcy

On or about November 30, 2009, Cantwell filed a voluntary petition under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court, Eastern District of New York, which stayed the instant action. On March 9, 2010, Cantwell's was granted a discharge under Section 727 of Title 11, United States Code and the bankruptcy stay was lifted.

Plaintiff partially attributes the delay in prosecution of the instant action to the bankruptcy stay.

Discussion

Plaintiff's motion

Plaintiff moves for an order to, *inter alia*, restore the matter to the court's active calendar, granting summary judgment against Cella, appointing a referee to compute the amount due to Plaintiff, and amend the caption to replace "John Doe" with Cella. In support of its motion, Plaintiff submits, *inter alia*, a copy of the Note; a copy of the Cantwell Mortgage; and, the affidavit of Antony Younger ("Younger"), Assistant Secretary of Rushmore Loan Management Services LLC, servicer for Plaintiff, which was annexed thereto as evidence of Cantwell's default.

"To establish a *prima facie* entitlement to judgment as a matter of law in a foreclosure action, a plaintiff must produce the mortgage, the unpaid note, and evidence of the default" (*see Bank of N.Y. Mellon v Pigott*, 200 AD3d 633 [2d Dept 2021]). Once the movant has demonstrated a *prima facie* showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v New York*, 49 NY2d 557 [1980]). "Only the existence of a bona fide issue of fact and not one based on conclusory or irrelevant allegations will suffice to defeat a summary judgment motion" (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]).

The branch of Plaintiff's motion seeking to restore the matter to the Court's active calendar is granted (*see Andre v Bonetto Realty Corp.*, 32 AD3d 973 [2d Dept 2006]). Contrary to Defendant's assertions, the matter was never dismissed and Plaintiff was not required to purchase a new index number. In addition, Plaintiff established that the mortgage was validly assigned to a third party subsequent to the commencement of the foreclosure action and therefore, may amend the caption to reflect the Plaintiff as "U.S. Bank National Association, not in its individual capacity but solely as trustee for RMAC Trust, Series 2016-CTT" (*see Brighton BK, LLC v Kurbatsky*, 131 Ad3d 1000 [2d Dept 2015]). Further, Plaintiff has met its *prima facie* burden warranting judgment as a matter of law. Plaintiff has produced a copy of the mortgage, a copy of the note, and evidence of Cantwell's default (*see Bank of New York Mellon v Swift*, 213 AD3d 624 [2d Dept 2023]). In opposition, Cella has failed to raise a triable issue of fact. Accordingly, Plaintiff's motion is granted.

Cella's Cross-Motion

On October 30, 2023, Cella filed a cross-motion for, among other things, summary judgment dismissing Plaintiff's complaint insofar as asserted against him on the grounds that, *inter alia*, Plaintiff has abandoned the instant action by failing to proceed in 11 years, and failed to serve Cella with the consent to change attorney.

More specifically, Cella contends that: Plaintiff has abandoned the instant action by failing to seek restoration within one year of the proceeding being marked disposed; Plaintiff failed to comply with CPLR 306-b and did not timely serve Cella with the summons and complaint; Plaintiff failed to serve Cella with a consent to change attorney required by CPLR 321; and, Plaintiff's action is barred by the doctrine of laches. Moreover, Cella contends that due to the fraud and misrepresentation of Plaintiff as a participant in the illegal transfer of the premises to Cantwell in 2007, Plaintiff's action is barred and should be dismissed.

Cella has failed to meet his *prima facie* burden warranting dismissal of Plaintiff's complaint. Contrary to Cella's contentions, because the instant matter is "pre-note of issue" and was not disposed of by the court (*see Andre v Bonetto Realty Corp.*, 32 AD3d 973 [2d Dept 2006]), Cella has failed to demonstrate that a 90-day demand was served upon Plaintiff (*see* CPLR 3216) and has failed to demonstrate that he has suffered any prejudice, warranting a dismissal pursuant to the doctrine of laches (*see Hudson City Sav. Bank v. Hossain*, 181 AD3d 572 [2d Dept 2020]). Similarly, Cella's contentions regarding Plaintiff's non-compliance with CPLR 306-b and CPLR 321 are without merit. Cella was not a named party when Plaintiff filed the consent to change attorney and CPLR 306-b does not apply as Cella waived objection to lack of personal jurisdiction by failing to seek dismissal based on untimely service (*see Berti v Berti*, 150 AD2d 320 [2d Dept 1989]).

Moreover, Cella's papers appear to be a cloaked effort to relitigate the issue of fraud. Cella's contention as to Plaintiff's alleged fraud and misrepresentation in the 2007 conveyance of the deed to Cantwell is barred by *res judicata* (*see Montoute v Wells Fargo Bank, N.A.*, 208 Ad3d 474 [2d Dept 2022]). The issue of whether Plaintiff committed fraud or misrepresentation against Cella was adjudicated by the Court's order dated February 5, 2016, which dismissed the Cella action against Plaintiff. Based on the foregoing, the Court need not address Plaintiff's opposition papers in this regard (*see Winegrad at* 64 NY2d 851).

Regarding the branch of Cella's motion requesting a waiver of interest, the Court finds that a tolling of interest is warranted. Plaintiff has failed to provide a valid explanation as to why it failed to prosecute this matter from April 1, 2011, the date Plaintiff withdrew its motion for summary judgment to October 15, 2018, the date Plaintiff served Cella with the summons and complaint, and from May 14, 2019, the date Cella's motion to dismiss was denied, to March 7, 2020, the start of the COVID-19 Pandemic, and from February 28, 2021, the date a stay on foreclosure actions in New York was lifted, to July 25, 2023, the date that Plaintiff filed the instant motion (*see Deutsche Bank National Trust Company v Armstrong*, 218 AD3d 738 [2d Dept 2023]). Accordingly, Cella's motion is granted in part and denied in part. In calculating the amount of the judgment, a tolling of interest is granted from April 1, 2011 to October 15, 2018; May 14, 2019 to March 7, 2020; and, February 28, 2021 to July 25, 2023.

Accordingly, it is hereby

ORDERED, that Plaintiff's motion is hereby **GRANTED** in its entirety. The proposed Order is executed simultaneously herewith; and it is further

ORDERED, that the Cella's motion is hereby **GRANTED** to the extent interest is tolled from April 1, 2011, to October 15, 2018; May 14, 2019 to March 7, 2020; and, February 28, 2021 to July 25, 2023; and it is further

ORDERED, that the remainder of Cella's motion is hereby **DENIED**; and it is further

ORDERED, that all requests for relief not specifically addressed herein are **DENIED**.

This shall constitute the Decision and Order of the Court.

Dated: May 24, 2024



Hon. Vito M. DeStefano, J.S.C.

ENTERED

Jun 04 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE