

Maspeth Fed. Sav. & Loan Assn. v Rothstein

2025 NY Slip Op 32852(U)

July 21, 2025

Supreme Court, Kings County

Docket Number: Index No. 16584/13

Judge: Cenceria P. Edwards

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This opinion is uncorrected and not selected for official publication.

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 July, 2025.

P R E S E N T:

HON. CENCERIA P EDWARDS,
Justice.

-----X

MASPETH FEDERAL SAVINGS AND
LOAN ASSOCIATION,

Plaintiff,

-against-

Index No.: 16584/13
MS 2&3

DAVID ROTHSTEIN et al,

Defendant,

-----X

The following e-filed papers read herein:

NYSEF Nos.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and Affidavits (Affirmations)
Annexed¹ _____

4-17

Opposing Affidavits (Affirmations) _____

18-29

Affidavits/ Affirmations in Reply _____

30

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property located at 1290 East 22nd Street in Brooklyn (Block 7639, Lot 60), Plaintiff moves for summary judgment and an order of reference. Defendants David Rothstein and Reize Rothstein oppose and cross-move for dismissal pursuant to CPLR 3215[c] as to Reize or, in the alternative, for tolling of the interest that accrued between October 2, 2014 and October 11,

¹ Plaintiff's moving papers were not e-filed.

2019. Plaintiff opposes the requested relief but concedes that it failed to comply with RPAPL 1304, CPLR 3211[g], and CPLR 3012-b.

Background Facts and Procedural History

Plaintiff commenced the instant foreclosure action on September 16, 2013. While all defendants were allegedly served with the summons and complaint, only David Rothstein timely answered. Following release from the Foreclosure Settlement Conference Part on October 2, 2014, the parties stipulated to allow Plaintiff to file a late answer to David's counterclaims.

On May 24, 2017, the matter was marked disposed. Plaintiff immediately filed a motion to restore, counsel averring that he was unaware of the building-wide purge of inactive cases held by the Honorable Lawrence Knipel earlier that month and, thus, failed to appear for it. He further asserted that Plaintiff intended to proceed with this matter and provided an affidavit of merit from his client. The motion was granted without opposition and the matter restored on September 15, 2017.

Nearly two years later, the Honorable Noach Dear held a status conference and propounded an order (on July 19, 2019) finding that there had been a significant period of inactivity in prosecuting this action, directing Plaintiff to resume prosecution within ninety days, and threatening to toll interest.

Plaintiff filed the instant motion for summary judgment and an order of reference on October 11, 2019. Defendants cross-moved for dismissal and tolling nearly two years later, arguing that Plaintiff failed to seek a default judgment against Reize within one year of the expiration of her time to answer (in 2014). They further argue that Plaintiff's motion should be denied as it failed to send the additional notices required by CPLR 3211[g][1] and [g][3] and failed to comply with the certificate of merit requirement of CPLR 3012-b. Defendants also allege that Plaintiff failed to demonstrate compliance with RPAPL 1304, both neglecting to attach proof of mailing and impermissibly addressing the notices to both Defendants.² Further, Defendants argue that Plaintiff did not demonstrate their default on the loan, its affiant failing to

² Counsel notes that the record is insufficiently clear whether the notices were jointly mailed to both borrowers contrary to the Second Department's interpretation of the statute.

produce the records upon which she relied. Finally, Defendants suggest that Plaintiff's delay in proceeding between the release of the action from settlement conferences and the making of the instant motion remains unexplained and, if the action is not dismissed, interest should be tolled.

In response, Plaintiff concedes non-compliance with CPLR 3211[g] and 3012-b due to counsel's misapprehension of the law. It further admits that the notices were jointly mailed to both Defendants and explicitly agrees that Plaintiff's motion should be denied and the action dismissed without prejudice based upon its non-compliance with RPAPL 1304. Plaintiff, however, argues that dismissal pursuant to CPLR 3215[c] is unwarranted as it filed an RJI seeking settlement conferences within one year of Reize's default, thereby taking action to advance the litigation. In the alternative, it suggests that it has a meritorious cause of action and was justified in delaying making a motion for default judgment as it was waiting until it was prepared to seek summary judgment against the answering defendant.

Defendants disagree with Plaintiff's assertion that the filing of an RJI is sufficient to stave off dismissal pursuant to CPLR 3215[c]. They further argue that Plaintiff' excuse for its delay in moving – its desire to seek default as part of a motion for summary judgment – is legally insufficient and unsupported by any explanation why it took so long to seek summary judgment. In the alternative, Defendants agree that the case should be dismissed for failure to comply with RPAPL 1304. Finally, they note that Plaintiff did not address the portion of their motion seeking the tolling of interest.

Analysis

“If 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 ... upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.” (CPLR 3215[c]). “It is not necessary for a plaintiff to actually obtain a judgment within one year after the default to avoid a CPLR 3215(c) dismissal, so long as proceedings were undertaken to do so during the initial year after the defendant's default” (*Citibank v Kerszko*, 203 AD3d 42, 51 [2d Dept 2022]). “Where, as here, a settlement conference is a necessary prerequisite to obtaining a default judgment (see CPLR 3408[a], [m]), a formal judicial request for such a conference in connection with an ongoing demand for the ultimate relief sought in the complaint constitutes ‘proceedings for entry of judgment’ within the meaning

of CPLR 3215(c)” (*US Bank v Jerriho-Cadogan*, 224 AD3d 788, 790 [2d Dept 2024]., quoting *Citimortgage v Zaibak*, 188 AD3d 982, 983 [2d Dept 2020]). Here, Plaintiff timely filed an RJI seeking settlement conferences and, as such, took proceedings towards a judgment. Dismissal pursuant to CPLR 3215[c] is, thus, unwarranted.

The parties agree that Plaintiff’s motion should be denied and this action dismissed for failure to comply with RPAPL 1304 in light of *Wells Fargo v Yapkowitz*, 199 AD3d 126 [2d Dept 2021] and its progeny. To the extent that Defendants’ tolling arguments were an alternative relief if the case were to not be dismissed, this Court will not address that relief but expressly reserves that issue for Plaintiff’s next suit (if any) to foreclosure on its lien.

Conclusion

Accordingly, it is

ORDERED that Plaintiff’s motion for summary judgment and an order of reference is denied; and it is further

ORDERED that Defendants cross-motion is granted to the extent that this action is dismissed based upon Plaintiff’s failure to strictly comply with RPAPL 1304.

This constitutes the decision and order of the Court.

July 21, 2025

ENTER:



Hon. Cenceria P Edwards, J.S.C., CPA