

U.S. Bank, N.A. v Kahan

2025 NY Slip Op 34126(U)

October 22, 2025

Supreme Court, Kings County

Docket Number: Index No. 27503/2008

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 22nd day of October, 2025.

P R E S E N T:

HON. CENCERIA P. EDWARDS, CPA,

Justice.

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U.S. BANK, N.A. AS TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST,

Plaintiff(s),

-against-

ISRAEL KAHAN, et al.,

Defendant(s).
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ORDER

Motion Calendar: 5/26/2022
Motion Cal. #(s): 44 and 45

Index #: 27503/2008
Mot. Seq. #(s): 6 and 7

The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Notice of Motion, Affidavits (Affirmations) and Exhibits _____	_____ 3-9 _____
Notice of Cross-Motion, Affidavits (Affirmations) and Exhibits _____	_____ 12-27 _____
Reply Affidavits (Affirmations) and Exhibits _____	_____ 28-30 _____

In this action to foreclose on a mortgage encumbering the residential real property known as 1275 East 34th Street, Brooklyn, NY 11210, defendant ISRAEL KAHAN (“Defendant”) now moves, in motion sequence (“mot. seq.”) #6, pursuant to CPLR 3216, to dismiss this action for failure to prosecute. Plaintiff opposes and cross-moves, in mot. seq. #7, pursuant to, inter alia, CPLR §§ 306-b, 3025 (b), and 3217, to, in effect, discontinue the action as against Defendant and strike his answer, amend the pleadings to add WTC DIME LLC (“WTC”), the new owner of the subject premises, as a defendant, and for an extension of time to serve and file a supplemental summons, and an amended complaint and notice of pendency.

Relevant Procedural History

On October 3, 2008, COUNTRYWIDE HOME LOANS, INC. (“Countrywide”), Plaintiff’s predecessor, commenced this action against, inter alia, Defendant as the borrower/mortgagor and owner of the subject premises. Countrywide filed an ex parte application for an order of

reference (“ORef”) on April 21, 2009, but withdrew it on January 10, 2011 (*see* NYSCEF Doc. #17). By order dated February 11, 2014, the Court (Gloria Dabiri, J.) declared that Countrywide had “unreasonably neglected to prosecute this action” and ordered the action “dismissed pursuant to CPLR 3216 ... unless plaintiff files a note of issue or otherwise proceeds by motion for entry of judgment within 90 days from the date hereof” (NYSCEF Doc. #18). On June 5, 2014, the case was administratively dismissed in accordance with that conditional order. On August 17, 2016, Countrywide moved to vacate the dismissal and restore the case to active status, which was granted by order dated February 2, 2017 (*see* NYSCEF Doc. #19).

In June 2017, Plaintiff moved again for an ORef, which was granted on August 7, 2017, and in October 2017, Plaintiff moved for a judgement of foreclosure and sale (“JFS”), which was granted on March 19, 2018 (*see* NYSCEF Doc. #s 21-22).¹ After successfully moving to vacate his default in appearing, Defendant filed an answer on July 9, 2019 (*see* NYSCEF Doc. #6). The record shows the following occurred thereafter: Plaintiff filed another notice of pendency on November 5, 2020; on April 1, 2021, Defendant served a CPLR 3216 (b)(3) demand for Plaintiff to resume prosecution within 90 days; Plaintiff received it on April 5, 2021, as per the certified mailing return receipt; and Plaintiff filed an application to convert the case to e-filing on or about April 13, 2021 (*see* NYSCEF Doc. #1, pp. 734-737; NYSCEF Doc. #s 8-9). Defendant filed the instant motion on July 8, 2021, Plaintiff filed the cross-motion on January 24, 2022.

Analysis

CPLR 3216 (a) provides, in pertinent part, that “[w]here a party unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof against any party who may be liable to a separate judgment, or unreasonably fails to serve and file a note of issue, the court, on its own initiative or upon motion, with notice to the parties, may dismiss the party’s pleading on terms.” Dismissal is authorized only if the conditions set forth in CPLR 3216 (b) are met; “[t]hose statutory preconditions include the following: ‘at least one year has elapsed since joinder of issue; defendant has served on plaintiff a written demand to serve and file a note of issue within 90 days; and plaintiff has failed to serve and file a note of issue within the 90-day period’” (*Holness v Gigglesworld Corp.*, 233 AD3d 661, 662 [2d Dept 2024], quoting

¹ Plaintiff succeeded Countrywide in April of 2017, and the ORef amended the caption to that effect (*see* NYSCEF Doc. # 1, p. 280; NYSCEF Doc. #21).

Baczowski v D.A. Collins Constr. Co., 89 NY2d 499, 503 [1997]). “Where [] the plaintiff is served with a 90-day demand pursuant to CPLR 3216, the plaintiff is required to timely file a note of issue or move, before the default date, either to vacate the demand or for an extension of the 90-day period” (*Pavilion Park Slope Cinemas 9, LLC v Pro Century Corp.*, 186 AD3d 1389, 1390 [2d Dept 2020]). The parties do not seriously dispute that the statutory preconditions have been met, as the record shows that issue was joined on July 9, 2019, Defendant served the 90-day demand on April 1, 2021, and Plaintiff received the demand on April 5, 2021, but did not move against it or file a note of issue within 90 days thereafter.

The Court, thus, moves on to the next step of the analysis. A plaintiff opposing a CPLR 3216 motion to dismiss is required to demonstrate a justifiable excuse and proof of a potentially meritorious cause of action (*see Holness*, 233 AD3d at 662; *Turner v Fuchs, Cooperstein & Greengold, LLC*, 216 AD3d 1037 [2d Dept 2023]). As an excuse, Plaintiff notes that by deed dated December 7, 2020 and recorded January 13, 2021, Defendant transferred ownership of the subject premises to nonparty WTC (*see* NYSCEF Doc. #25), and the COVID-19 Emergency Eviction and Foreclosure Prevention Act then in effect permitted mortgagors or owners to submit a hardship declaration which would have stayed this action until January 15, 2022. Plaintiff argues that had it complied with the 90-day demand and resumed prosecution during the spring of 2021, this would have prejudiced WTC. (*See* NYSCEF Doc. # 13, ¶30.) Notwithstanding the lack of any evidence that WTC ever tried to submit a hardship declaration in connection with this case to which it is not yet even a formal party, Plaintiff proffers no authority for the proposition that it can invoke this statutory protection on behalf of another person or entity. As noted by Defendant, if WTA’s potential hardship was a genuine concern, Plaintiff could have moved to stay or vacate the 90-day demand, but it did not do so and proffers no explanation. The Court cannot accept speculation as to what WTA might have done as justification for Plaintiff’s failure to act in response to the 90-day demand. To the contrary, the Court agrees with Defendant that this post hoc excuse is belied by the long history of Plaintiff’s inaction in this case.

Plaintiff also cross-moves to, in effect, discontinue this action as against Defendant, arguing that once it waives a deficiency judgment against him (as proposed in its cross-moving papers), Defendant will cease to be a necessary party because he no longer owns the subject

premises.² Defendant counters that irrespective of Plaintiff's subsequent actions taken to render him an unnecessary party, when he served the 90-day demand and made the instant motion to dismiss, he was, and still is, a named defendant against whom a cause of action has been asserted and, therefore he had standing to utilize CPLR 3216.

The Court finds that dismissal, not discontinuance, is more appropriate. "A motion to discontinue should not be granted where discontinuance is being sought in an apparent attempt to avoid the consequences of a potentially adverse determination" (*Matter of Yonkers Firefighters v City of Yonkers*, 165 AD3d 816, 817 [2d Dept 2018]; *see also Marinelli v Wimmer*, 139 AD3d 914, 915 [2d Dept 2016]). Since Plaintiff does not offer a justifiable excuse for its failure to resume prosecution after being served with the 90-day demand, its opposition to Defendant's motion to dismiss is insufficient as a matter of law (*see Umeze v Fidelis Care NY*, 17 NY3d 751, 751 [2011]; *Turner*, 216 AD3d at 1038). An adverse determination is, thus, all but certain, especially since, as recounted above, the record evinces "persistent neglect" for many years (*see Baczkowski*, 89 NY2d at 503 [dismissal was proper due to "persistent neglect despite repeated opportunities to resume prosecution of the action and the absence of any timely proffered reasonable excuse for the extensive delay"]; *Deutsche Bank Natl. Trust Co. v Pulver*, 211 AD3d 1600, 1602 [4th Dept 2022]).

It is also noted that Plaintiff sued Defendant in his capacities as the sole borrower, mortgagor, and owner of the subject premises, and he answered in those same capacities. It is only by happenstance that, more than 12 years after commencement and a year-and-a-half after issue was joined, nonparty WTC succeeded Defendant in his capacity as owner. Moreover, simultaneous with the discontinuance, Plaintiff also asks the Court to strike Defendant's answer, candidly admitting that this will mean that issue is no longer joined, thereby eliminating one of the statutory requirements for dismissal under CPLR 3216 (*see* NYSCEF Doc. #13, ¶31). The inescapable conclusion to draw from this is that Plaintiff seeks to use the discontinuance to avoid the consequences of its persistent neglect to prosecute this case, which culminated in its failure to comply with the 90-day demand. Such an improper purpose warrants denial of the cross-motion (*see Marinelli*, 139 AD3d at 915). In any event, in his reply papers Defendant still insists on

² Although Plaintiff asks to "dismiss" Defendant from this action, the proper relief is discontinuance against him, as indicated by the authority cited (*see* NYSCEF Doc. #13, p. 4, citing *DLJ Mtge. Capital, Inc. v 44 Brushy Neck, Ltd.*, 51 AD3d 857, 859 [2d Dept 2008]).

dismissal, and CPLR 1018 provides that a party who has transferred its interest may continue to prosecute or defend an action without formal substitution (*see Wells Fargo Bank, NA v McKenzie*, 183 AD3d 574, 575 [2d Dept 2020]; *Wells Fargo Bank, N.A. v Hudson*, 98 AD3d 576, 577-578 [2d Dept 2012]; *Equicredit Corp. of Am. v Campbell*, 73 AD3d 1119, 1120 [2d Dept 2010]; *Buywise Holding, LLC v Harris*, 31 AD3d 681, 683 [2d Dept 2006]), thus, rendering Plaintiff's preferred strategy largely academic.

Plaintiff also moves for leave to file and serve amended pleadings listing WTC as an additional party-defendant, contending that WTC's status as the current owner of the subject premises makes it a necessary party to this foreclosure action. However, the deed conveying the premises from Defendant to WTC was recorded on January 13, 2021, more than two months after Plaintiff filed a new notice of pendency. "Therefore, [WTC] had constructive notice of this action, [i]s bound by all proceedings taken herein as if it were a party, and [i]s not a necessary party" (*Bank of Am., N.A. v Burton*, 233 AD3d 644, 645 [2d Dept 2024], citing, inter alia, CPLR 6501 and *Wells Fargo Bank, N.A. v Lance*, 196 AD3d 535, 536 [2d Dept 2021]; *see also Neighborhood Hous. Servs. of NY City, Inc. v Meltzer*, 67 AD3d 872, 874 [2d Dept 2009]).

Accordingly, the above-referenced motion by defendant ISRAEL KAHAN (mot. seq. #6) is **GRANTED to the extent** indicated below, the cross-motion by Plaintiff (mot. seq. #7) is **DENIED** in its entirety, and it is hereby

ORDERED that this action is dismissed as against defendant ISRAEL KAHAN.

The foregoing constitutes the Decision and Order of this Court.

E N T E R,

Dated: October 22, 2025



Hon. Cenceria P. Edwards, JSC, CPA