

HSBC v Haylett

2024 NY Slip Op 32326(U)

February 16, 2024

Supreme Court, Kings County

Docket Number: Index No. 15573/06

Judge: Lawrence Knipel

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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 16th day of February 2024.

PRESENT:

HON. LARRY D. MARTIN
Justice Lawrence Knipel
J.S.C.

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_____ X

HSBC,

Plaintiff,

DECISION AND ORDER

-against-

ELLY HAYLETT et al,

Defendant,

_____ X

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

Papers	Numbered
Motion (MS 10)	<u>1</u>
Opp/Cross (MS 11)	<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:

Plaintiff moves for judgment of foreclosure and sale. Defendant opposes and cross-moves for the tolling of interest based upon Plaintiff's alleged delay in prosecuting this action. Plaintiff opposes.

The instant action was commenced on May 22, 2006 and Defendant defaulted in answering. Shortly thereafter, Plaintiff successfully moved for default judgment and an order of reference. Motions for judgment of foreclosure and sale were filed on June 5 and October 5, 2007. Both were denied in January 2008 – the first as abandoned and the second for failure to submit sufficient supporting documentation. On April 16, 2009, Plaintiff moved for an extension

of time nunc pro tunc to serve notice of entry of the order of reference and for execution of the proposed judgment of foreclosure and sale. While in the settlement conference part, that motion was withdrawn on January 27, 2011. The matter was released on November 15, 2011. In January 2014, Defendant filed a motion seeking discharge of the mortgage. The following month, Plaintiff moved for vacatur of the order of reference and to resettle a new order of reference. Defendant's motion was granted on default by order dated April 24, 2014 and Plaintiff's motion was denied as abandoned on September 10, 2014. Shortly thereafter, Defendant filed a motion seeking to quiet title which appears to have been marked off in January 2015. The action appears to have been inactive thereafter until September 19, 2018 when Plaintiff moved for vacatur of the discharge order and restoration of the action. By order dated December 5, 2018, the motion was denied as untimely. Plaintiff appealed and, by order dated January 20, 2021, the Appellate Division reversed and vacated the contested 2014 order. Plaintiff then successfully moved for the appointment of a substitute referee. The instant motions followed.

Defendant argues that interest should be tolled from January 28, 2008 when Plaintiff's initial motion for judgment of foreclosure and sale was deemed abandoned until February 4, 2014 when it moved to resettle the judgment of foreclosure and sale and from April 24, 2014 when the mortgage was discharged until September 19, 2018 when the motion to vacate was filed. Plaintiff does not really address the specific time periods raised by Defendant, merely offering general arguments against the whole idea of tolling interest.

"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]). Tolling, albeit for a shorter period than sought, is appropriate here. While the Court finds that the case was substantially active from commencement until the release from settlement conferences (November 15, 2011), no excuse has been offered for the failure to proceed

thereafter until Plaintiff sought to resettle the order of reference in February 2014.¹ Interest is, thus, tolled from November 15, 2011 until February 4, 2014. Further, the Court agrees with Defendant that interest should be tolled from the grant of his motion to discharge until Plaintiff sought vacatur of that order – April 24, 2014 until September 19, 2018.

Turning to the referee's report, the Court – like Defendant – presumes that the referee relied upon the McKernan Affidavit in rendering her report.² As noted by Defendant, both the affidavit and report state that interest was calculated from March 6, 2021 through July 5, 2021. That appears to be a scrivener's error. The Court having run the numbers from the alleged default in 2006 until July 5, 2021³, it is clear that the interest reflected in the report is for that – the correct (pre-toll) – period.

Plaintiff claims that it is owed \$116,929.61 in escrow advances. However, its supporting list of tax and insurance disbursements reflects an Escrow Advance Balance of \$77,651.32.⁴ It is only that amount that is awarded.

In light of the foregoing, it is

ORDERED that Defendant's cross-motion is granted to the extent that interest is tolled from November 15, 2011 until February 4, 2014 and from April 24, 2014 until September 19, 2018; and it is further

ORDERED that Plaintiff's motion for judgment of foreclosure and sale is granted

¹ Though Defendant filed a motion the prior month, it is unclear when Plaintiff filed opposition thereto. The Court, thus, uses the earliest confirmed action by Plaintiff.

² Most of the referenced "schedules" are not appended to the copy of the report uploaded with Plaintiff's papers. However, her findings – including the scrivener's error as to the dates for which interest was calculated – matches that of the affiant.

³ Using the undisputed UPB and interest rate.

⁴ The Court is aware that the top of that same page states "Current Escrow Balance \$ (116,929.61)" but the actual running tally ends at \$77,651.32.

subject to the Court's modifications to the amount due⁵ (see accompanying modified JFS order).

This constitutes the decision and order of the Court.

ENTER:

[Handwritten signature]

[Handwritten initials]

Hon. ~~Larry D Martin~~ JSC

**HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE**

KINGS COUNTY CLERK
FILED
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⁵

UPB	636,800.00
Interest	381,644.13
Escrows	77,651.32
Inspections	1,220.00
TOTAL	1,097,315.45