STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR RESIDENTIAL ASSET MORTGAGE PRODUCTS, INC., MORTGAGE ASSET-BACKED PASS-THROUGH CERTIFICATE SERIES 2005-EFC2,

Plaintiff,

-against-

DAWN M. LYNCH; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.; EQUIFIRST CORPORATION,

Defendants.

ORIGINAL

All Purpose Term
Hon. Henry F. Zwack, Acting Supreme Court Justice Presiding
Index No. 2015-250786

Appearances: RAS Boriskin, LLC
Attorneys for Plaintiff
Madeline Mullane, Esq., of counsel
900 Merchants Concourse
Westbury, New York 11590

Waite & Associates, P.C.
Attorneys for Defendant Dawn M. Lynch
Stephen J. Waite, Esq., of counsel
199 New Scotland Avenue
Albany, New York 12208

DECISION/ORDER

Zwack, J.:

In this residential mortgage foreclosure action, the defendant Dawn M. Lynch moves by Order to Show Cause for a stay of the foreclosure sale and for an order vacating the Judgment of Foreclosure and Sale dated January 6, 2017. The plaintiff opposes..

The foreclosure action was commenced with the filing of the Summons, Verified Complaint, and Notice of Pendency with the Rensselaer County Clerk on August 5, 2015. The stated pleadings were served on the defendant on August 15, 2015. The defendant did not Answer or appear and is in default.

A residential mortgage foreclosure settlement conference was held on May 23, 2016, the defendant did not appear and defaulted, and pursuant to the Court's Order dated May 23, 2016 the plaintiff was permitted to proceed by Order of Reference/Judgment of Foreclosure to be submitted within 90 days. By Order of Reference dated August 15, 2016 the Court granted the plaintiff a default judgment for the relief demanded in the complaint and appointed Albert P. Kolakowski as Referee. The Court granted Judgment of Foreclosure and Sale ("Judgment") on February 16, 2017.

Now, the defendant moves to vacate the Judgment, and in support offers her Affidavit and the Affidavit of her Attorney — in sum variously asserting that the prior foreclosure action under Index number 225743 ("First Action"), that she was represented by Waite & Associates, P.C. in the First Action, and interposed an answer in the First Action. She asserts that the plaintiff moved for summary judgment in the First Action — which was granted by the Court "on or around August 26, 2011." She asserts that "[s]ix years after the Judgment of Foreclosure was granted in the First Action, I received Notice of Sale in the mail in September of 2017, and states that she "assumed that the Notice of Sale I received was part of the foreclosure proceeding in the First Action. She further states "[b]ecause I believed that any papers served on me in connection with the Second Action were part and parcel of the First Action, I did not advise my counsel and offer a defense to the Second Action as I had done in the First Action...(and) my attorney was not aware of the Second Action..." The defendant argues that a "default and acceleration of the underlying Noted occurred in March of 2008. The Second Action was commenced on August 5, 2015, more than six (6) years after Plaintiff declared a default and accelerated the mortgage loan. The Second Action is barred by the appropriate Statute of Limitations." She also attaches a copy of the Answer

she would have interposed "in connection with the Second Action, had I realized a Second Action had been commenced."

In his Affidavit, the defendant's attorney states that he represented the defendant in the First Action, attended the foreclosure settlement conferences held by the Court (Ceresia, J.), that Judge Ceresia granted the plaintiff's 2011 application for summary judgment in the First Action, and that he received no "further documents, correspondence or phone calls from counsel for Plaintiff in connection with such prior proceedings." He states that in 2017 he advised the defendant to file for bankruptcy protection to forestall the foreclosure sale in the Second Action, and to determine the reason for the Second Action, as he had not been notified of a discontinuance of the First Action. He asserts that the "only indication by Plaintiff that Plaintiff was discontinuing the first foreclosure action: was the statement in the complaint (paragraph 14) in the Second Action "if any other action is pending, such action is intended to be discontinued." He argues the acceleration of the subject debt occurred in 2008, that the Second Action was commenced in 2015 and that "[i]t is inequitable that (the defendant) be denied her opportunity to defend against a second foreclosure action because Plaintiff's failed to notify me...that the first foreclosure action had been discontinued." He also argues that the

defendant's failure to answer the complaint in the Second Action is excusable, and requests that she be allowed to serve an answer.

In opposition, the plaintiff offers the Affirmation of counsel, who variously tells the Court that on February 10, 2011 the plaintiff mailed a Notice of Default to the defendant, that the plaintiff's prior counsel (McCabe, Weisberg & Conway, P.C.) mailed a 90 day notice to the defendant (that the "loan was 2,186 days in default"), and that "[0]n June 8, 2015, RAS Boriskin, LLC, as new counsel for the Plaintiff...served a Debt Validation Letter ("DVL") on the defendant, and that on August 15, 2015 the plaintiff commenced the instant foreclosure action. She notes that on August 15, 2015 the summons and complaint were personally served on the defendant, that a residential mortgage foreclosure conference was was scheduled for May 23, 2016, and that the defendant did not appear at the conference and the plaintiff was permitted to proceed with the foreclosure (with the Court on May 24, 2016 sending out confirmation of the same). Counsel further asserts that on July 23, 2016 the plaintiff moved for an Order of Reference, with a copy served on the defendant, that there was no opposition, and that the Court granted an Order of Reference on August 15, 2016; and that on January 14, 2017 the plaintiff moved for Judgment of Foreclosure, that no opposition was received, and that on February 6,

2017 the Court granted Judgment of Foreclosure. Counsel further asserts that on May 9, 2017 the plaintiff served defendant with Notice of Entry of the Judgment of Foreclosure, and argues, because the defendant "failed to appeal or move to reargue within thirty (30) days thereafter" the foreclosure action was brought to conclusion. Counsel asserts that on August 18, 2017 the plaintiff served Notice of Sale on the defendant, and that the lawfirm "received a call from Stephen J. Waite, Esq., advising he had represented (the defendant) in the prior action and requesting information regarding the sale and proceedings of the case." Counsel also notes that on September 14, 2017 the defendant filed for bankruptcy relief and that on February 19, 2019 the automatic bankruptcy stay was vacated.

Plaintiff's counsel argues the defendant "has failed to provide any reasonable excuse nor any meritorious defense to their (sic) default in the instant foreclosure action." On the issue of the defendant's claims involving possible confusion between the First Action and the Second Action — that no Answer was required in the Second Action — counsel asserts the defendant was provided with "over fifteen separate notices from Plaintiff and this Court alerting her of the imminent commencement of this new action, the pendency of this action...entered orders, and notices of sale." Counsel also asserts that the First Action "was marked off the

court's calendar in 2012." On the issue of the defendant's now claimed defense that the Second Action is barred by the Statute of Limitations, counsel argues that defense was waived in 2017, when the defendant appeared in the Second Action and without asserting the defense.

On the issues involving whether the First Action was discontinued prior the commencement of the Second Action, the plaintiff's counsel asserts that the First Action was marked off the Court's calendar prior to the commencement of the Second Action. Counsel also argues that the recitation in paragraph 14 of the complaint in the Second Action — "...or if such action is pending, a final judgment was not rendered in favor of Plaintiff and such action is intended to be discontinued" acted to sufficiently discontinue the First Action.

Plaintiff's counsel also argues the defendant's instant application is untimely, because it "was made after judgment was entered and the time to appeal had expired..."

In reply, the defendant offers her attorneys' Reply Memorandum of Law,[1] with a statement of facts reciting that "[n]either the Court nor the

[1]By letter dated July 16, 2019, the plaintiff's counsel requested the Court to reject the Reply, or grant plaintiff leave to file a Sur-Reply — in sum arguing that the Reply "improperly includes new arguments and theories in support of her motion." However viewed, and to the extent the Reply addresses/rebuts the claims made in the plaintiff's answering papers, it is considered. The Court declines the plaintiff's request to file a Sur-Reply.

Clerk of the Court in the first foreclosure action issued an order of dismissal, and Plaintiff did not serve upon attorney Waite an order of dismissal or notice of discontinuance or withdrawal." Counsel also notes that in December 2014 the plaintiff filed a Consent to Change Attorney in the First Action — and that he was never notified of the change of attorney. Counsel also argues that there is no merit to the plaintiff's claim that the matter was marked off the Court's calendar or that there was a termination, discontinuance or dismissal of the First Action prior to the commencement of the Second Action.

For the reasons that follow the Court grants the defendant's application to vacate the Judgment of Foreclosure and grants the defendant leave to file an Answer.

As an initial matter, relief from an order or judgment is generally available to a party establishing entitlement based on any of the five grounds set out in CPLR 5015(a) — thus, the defendant bears the burden of demonstrating that it was obtained by "fraud, misrepresentation, or other misconduct" (CPLR 5015[a]) — and the application addressed to the Court's sound discretion (*HSBC Bank USA v Sage,* 143 AD3d 1214, 1215 [3d Dept 2016], citations omitted). Where the grounds are fraud, mistake, misrepresentation, or inadvertence, the allegations must be supported by

the record (*Matter of McLaughlin,* 111 AD3d 1186 [3d Dept 2013]). The Court also has the inherent discretionary power to vacate the Judgment in the interests of substantial justice (*Woodson v Mendon Leasing Corp.,* 100 NY2d 62 [2003];) — and "should be resorted to only to relieve a party from judgments taken through fraud, mistake, inadvertence, surprise or excusable neglect" *HSBC Bank USA v Josephs-Byrd,* 148 AD3d 788, 790 [2d Dept 2017]).

However viewed, the plaintiff commenced the Second Action without terminating or discontinuing the First Action.

There is simply no merit to the plaintiff's claim that the First Action was marked off the Court's calendar and dismissed. To the contrary, a review of the County Clerk's files shows that on August 26, 2011 the Court (Ceresia, J.) released the First Action from the CPLR 3408 settlement part, permitted the plaintiff to proceed with the foreclosure action, and on September 7, 2011 filed with the County Clerk the plaintiff's Notice of Motion for Summary Judgment, with all supporting papers. A review of the Court's motion filings also shows that Judge Ceresia granted summary judgment on August 26, 2011. This said, the County Clerk's records establish that the plaintiff never filed and entered Judge Ceresia's August 26, 2011 Order granting summary judgment and an Order of Reference.

To be clear, there is nothing in the record to show that the plaintiff took any further proceedings in the First Action following Judge Ceresia granting summary judgment on August 26, 2011, until the Consent to Change Attorneys, dated October 2, 2014 and filed December 8, 2014, substituting McCabe, Weisberg & Conway, P.C., in place of Fein, Such & Crane, LLP. Here, the Court also notes that on August 11, 2014 McCabe, Weisberg & Conway, P.C., as attorneys for plaintiff gave the RPAPL 1304 90 Day Notice — included in the supporting papers for the plaintiff's application for an order of reference in the Second Action.

The record is also clear that the plaintiff took no steps pursuant to CPLR 3217 to voluntarily discontinue the First Action. Given that the defendant interposed an answer in the First Action, any voluntary discontinuance of the First Action required either a stipulation signed by her attorney or an order of the court (CPLR 3217 (a)(2);(b)) — which the plaintiff clearly failed to do.

Turning to the plaintiff's argument that the First Action was marked off the court's calendar, in effect a dismissal pursuant to CPLR 3404, there is nothing in the record to support the bald and self-serving claim. In any event, a CPLR 3404 dismissal is inapplicable where, as here, a Note of Issue was not filed and thus the Court could make no such determination

(*McCarthy v Jorgensen*, 290 AD2d 116, 118 [3d Dept 2002]; *Johnson v Minskoff & Sons*, 287 AD2d 233, 237 [1st Dept 2001]).

Turning to the plaintiff's argument that language contained in paragraph 14 of the Complaint in the Second Action — "That the plaintiff alleges that no other proceedings have been hade for the recovery of the mortgage indebtedness or if any such action is pending, a final judgment was not rendered and such action is intended to be discontinued." — sufficiently addressed the pre-condition requirements of RPAPL 1301(3) before commending the Second Action, the Court is not so persuaded. On this record, particularly given that the plaintiff's prior counsel, McCabe, Weisberg and Conway, P.C. in the Second Action, filed a substitution of attorney in the First Action, it simply cannot be said, as now asserted by present counsel, that the plaintiff in the Second Action was "unaware of any prior action of the mortgage debt as that term in used in the applicable statute, RPAPL 1301." Here, the Court is also mindful, as reflected in the Computation of Amounts Due in the Second Action, that the plaintiff obtained a title search prior to commencing the action — which in any event should have given the plaintiff further notice of the First Action, the Notice of Pendency filed in the First Action, and that the First Action had not been discontinued.

Under the circumstances presented, the Court credits the explanation offered by the defendant concerning her default and finds that she has demonstrated a reasonable excuse for the default, particularly considering that the plaintiff knew that she was represented by counsel in the First Action. On review of the proposed Answer provided by the defendant, including the asserted affirmative defense, it can also be said that she has demonstrated a potentially meritorious defense.

However viewed, the defendant is entitled to a vacatur of the Judgment of Foreclosure and Sale dated January 17, 2017. The plaintiff obtained the Judgment through a misrepresentation of the status of the First Action — whether on account of neglect or mistake — and absent a discontinuance of the First Action could not have maintained the present foreclosure action. This type of misrepresentation warrants vacatur (*Matter of McKenna v County of Nassau, Off. of County Attorney*, 61 NY2d 739 [1984]). On the circumstances presented, it simply cannot be said that the plaintiff took any steps towards determining the status of the First Action, despite conducting a title search prior to the commencement of the present action, and despite prior counsel in this action also appearing in the First Action. All said, the plaintiff improperly obtained the January 2017 Judgment, and is not entitled to the same.

On this record, the defendant is entitled to an order vacating the January 2017 Judgment — whether on account of having demonstrated a reasonable excuse for her default and a potentially meritorious defense, or in the interest of substantial justice — and also an order granting leave to file and serve a late Answer, and order restoring the matter to the Residential Mortgage Settlement Part (CPLR 3408). The Court also notes that the defendant has submitted a copy of a proposed Verified Answer, un-dated and not verified. The defendant may file and serve the proposed Verified Answer, or otherwise as she may determine.

Accordingly, it is

ORDERED, that the Judgment of Foreclosure and Sale dated January 17, 2017 is vacated; and it is further

ORDERED, that the defendant is granted leave to file a late Answer in the matter, to be filed and served within 20 days if the date of this Decision and Order; and it is further

ORDERED, that the plaintiff shall file and serve its Reply, if any, within 20 days of service of the defendant's Answer; and it is further

ORDERED, that the matter is returned to the Residential Mortgage Settlement Conference Part (CPLR 3408), with the Court Clerk to schedule a conference within 60 days of this Decision and Order.

This constitutes the Decision and Order of the Court. This original Decision and Order is returned to the attorneys for the defendant. All other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

Dated: September 11, 2019
Troy, New York

Henry F. Zwack
Acting Supreme Court Justice

Papers Considered:

1. Order to Show Cause dated May 21, 2019; Affidavit of Stephen J. Waite, sworn to May 15, 2019; Affidavit of Dawn M. Lynch, sworn to May 15, 2019, together with Exhibits "A" through "J";
2. Affirmation in Opposition of Madeline Mullane, Esq., dated June 28, 2019, together with Exhibits "A" through "Z";
3. Reply Memorandum of Law dated July 5, 2019.