FLA v Lawson
2024 NY Slip Op 34369(U)
May 7, 2024
Supreme Court, King County
Docket Number: Index No. 513942/15
Judge: Larry D. Martin
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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 7th day of May 2024.

P R E S E N T:

HON. LARRY D MARTIN,
J.S.C.

Index No.: 513942/15

x

FLA,

Plaintiff,

DECISION AND ORDER

-against-

KEISHA WILLIAMS LAWSON 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 4)	1
Opposition	2
Reply	3

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

The instant action was commenced on November 13, 2015. Only Defendant Williams Lawson timely answered. Pre-settlement conferences were scheduled and the matter was released on April 20, 2016. On April 26, 2017, Plaintiff filed its initial motion for summary judgment against Williams Lawson, default judgment against the remaining defendants, and an order of reference. It appears that the motion was returned for correction but, as it was never corrected, did not get calendared. Following purge conferences in 2017 and 2018, Plaintiff again sought judgment and an order of reference in January 2019. After Defendant opposed, the motion was denied based upon Plaintiff's failure to demonstrate compliance with the notice requirements of RPAPL 1304 and the mortgage. The following year, Plaintiff moved to discontinue the action against Defendant, for default judgment against the remaining defendants

including Harbor Drive which owned the property, and for an order of reference. That motion was granted without opposition by order uploaded in July 2022. On September 14, 2023, Plaintiff moved for judgment of foreclosure and sale. The matter was calendared for October 19, 2023 and, on that date, counsel for Harbor Drive requested and was granted an adjournment – its opposition and/or cross-motion was to be filed no later than November 9th, Plaintiff was to respond by November 24th, Harbor Drive's cross-reply was due December 7th, and the parties were to appear on December 11th. On the adjourn date, Plaintiff's motion was marked submitted without opposition.[1] An order granting JFS was prepared the same day but not signed and uploaded until February 2024.

On December 29, 2023, Harbor Drive filed the instant motion seeking dismissal of the action – based upon CPLR 3215[c], Kings County UCTR Rule F7, and for failure to comply with the terms of the order of reference – and/or tolling of interest. Plaintiff opposed.[2]

It is undisputed that Plaintiff failed to timely move for a default – filing its initial motion one year and six days following release from settlement conferences. It argues, however, that its filing of an RJI was sufficient to defeat the instant motion. Plaintiff is correct that the filing of the specialized RJI requesting settlement conferences is "taking procedures for the entry of Judgment" (*US Bank v Jerriho-Cadogan*, 224 AD3d 788, 790 [2d Dept 2024]; *Citimortgage v Zaibak*, 188 AD3d 982, 983 [2d Dept 2020]).[3]

Harbor Drive argues that the action should be dismissed pursuant to UCTR F,7[4] which states that "[w]ithin one year after the signing and entry of an Order of Reference, an application for a Judgment of Foreclosure and Sale must be made … [and f]ailure to comply will result in an automatic dismissal of the action." The Appellate Division has treated the dismissal provision of F,8 as being similar to that of CPLR 3215[c] (see, for example, *OneWest Bank, FSB v.*

[1] From the calendar, it appears that counsel was present on that date and did not seek a further adjournment.
[2] The Court recognizes that Plaintiff may well be correct that Harbor Drive's decision not to oppose the motion for judgment of foreclosure and sale is fatal to the instant motion but elects to consider the arguments on the merits.
[3] The Court is aware that Zaibak was recognized as an outlier and contrary to the weight of the precedents (see, *Citibank v Kerszko*, 203 AD3d 42, 72 fn 4 [2d Dept 2022][Barros, dissenting]; see also, *Wells Fargo v Jackson*, 208 AD3d 613 [2d Dept 2022][reiterating – post Zaibak --that "the one-year deadline of CPLR 3215(c) was tolled by the mandatory settlement conferences" rather than the filing of the RJI barring 3215[c]]; *Deutsche Bank v Lewin*, 205 AD3d 677 [2d Dept 2022][same]). Nonetheless, the Court cannot ignore the Appellate Division's explicit and unqualified application of *Zaibak* recently in *Jerriho-Cadogan*.

[4] Formerly, F,8.

Rodriguez, 171 AD3d 772, 773 [2d Dept 2019][using 3215[c] case law to address F,8]; *Deutsche Bank v Bakarey*, 198 AD3d 718, 721 [2d Dept 2021][using F,8 case law in the context of 3215[c]]). To that end, a Court has discretion to not dismiss if it finds that the Plaintiff has a reasonable excuse for not timely filing a motion for judgment of foreclosure and sale (*Rodriguez*, 171 AD3d at 773) and "the determination of whether the excuse is reasonable is committed to the sound discretion of the motion court" (*US Bank v Cabrera*, 192 AD3d 1176, 1176 [2d Dept 2021]). Here, Plaintiff has proffered sufficient excuse for the sight tardiness. It has demonstrated that it was actively working to compile documentation and figures to present to the referee. Further judgment of foreclosure and sale is final as to all issues between the parties and, thus, non-compliance with UCTR Part F, Rule 8 may not be raised thereafter (*Retained Realty, Inc. v Koenig*, 166 AD3d 691, 692 [2d Dept 2018]).[5] In light of the foregoing, the Court finds that dismissal pursuant to UCTR Rule F,7 would be inappropriate.[6]

Tolling, albeit to a lesser degree that requested by Harbor Drive is warranted. Tolling for prelitigation delay is generally inappropriate (*Nationstar Mtge., LLC v Dunn*, 186 A.D.3d 836 [2d Dept 2020]; see, also, *NY State Mortg. Loan Enforcement & Admin. Corp. v N. Town Phase II Houses, Inc.*, 191 AD2d 151 [1st Dept 1993]; *First Fed. Savs. & Loan Ass'n of Rochester v Capalongo*, 152 AD2d 833 [3d Dept 1989]; *OneWest Bank, N.A. v Melina*, 2015 WL 5098635 [EDNY 2015]; *FDIC v Kisosoh Realty Corp.*, 1994 WL 702026 [SDNY 1994]). While the Appellate Division recently did so, therein the panel noted that it was the unexplained delay in prosecuting the prior action that led to the sanction (see, *Deutsche Bank v Armstrong*, 218 AD3d 738 [2d Dept 2023]). Tolling is appropriate, however, from April 26, 2017 when Plaintiff filed its initial motion – which it failed to correct – until it filed a calendarable motion on January 25, 2019. Thereafter, the Court sees no unreasonable delay.

Motion granted solely to the extent that interest is tolled from April 26, 2017 until January 25, 2019. The judgment of foreclosure and sale is amended to reflect a total of

[5] The Court recognizes that Harbor Drive's motion was filed prior to the entry of judgment. However, it elected not to raise the argument in opposition thereto.
[6] The same logic militates against dismissal for failing to secure the referee's report within 60 days of the order of reference – despite the order itself providing for that.

$2,025,533.67 due as of May 31, 2023.[7]

This constitutes the decision and order of the Court.

ENTER:

Hon. Larry D Martin JSC

HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT

[7] By this Court's calculation, the amount of interest tolled is $75,902.80.