

Deutsche Bank v Glover

2024 NY Slip Op 34377(U)

May 21, 2024

Supreme Court, Kings County

Docket Number: Index No. 6326/08

Judge: Larry D. Martin

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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 21st day of May 2024.

P R E S E N T:

HON. LARRY D MARTIN,

J.S.C.

Index No.: 6326/08

DEUTSCHE BANK,

Plaintiff,

DECISION AND ORDER

-against-

AKIE GLOVER et al,

Defendant,

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

Motion:

Papers
Motion (MS 6)
Opposition
Reply

Numbered
1
2
3

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

The instant action was commenced on February 27, 2008. Defendants, including the borrower/deedholder Trevor Williams, defaulted. Several months later,¹ Plaintiff filed a motion for an order of reference which was denied the following year by the Honorable Robert J Miller. On April 10, 2014 following several years of inactivity, the Honorable Lawrence Knipel dismissed this action pursuant to CPLR 3215[c] following conference. Two weeks later, Plaintiff filed a motion seeking vacatur of the dismissal. By order dated April 17, 2015, the Honorable Debra Silber denied Plaintiff’s motion – noting that its arguments were substantially directed to CPLR 3216 rather than 3215[c], that its papers did not include a copy of the dismissal

¹ On June 13, 2008, well within one year of the defendants’ default in answering.

order,² and that Plaintiff offered “a completely inadequate explanation for the delay” in obtaining an order of reference. Plaintiff then filed another motion for the same relief or, in the alternative, to renew its prior motion upon additional evidence that it had not previously proffered. By order dated January 7, 2016, Judge Silber denied the requested relief finding that “[a] rejected motion doesn’t bar abandonment indefinitely. Here nothing took place between 3/7/09 and 4/10/14. This is clearly an abandonment of the action.” Plaintiff then appealed from the April 2015 denial of vacatur. During the appeal, counsel for Williams’ heirs raised – seemingly for the first time – that Williams died on July 6, 2014.³ Consequently, by order dated May 12, 2021, the Appellate Division dismissed the appeal as having been filed in violation of the statutory stay and vacated the April 17, 2015 order – also issued following his death – as a nullity.

On April 22, 2022, Plaintiff filed a motion seeking vacatur of the 2014 dismissal, restoration of the action to the active calendar, substitution of Akie Glover (the administrator of Williams’ estate) in place of the decedent, amendment of the caption, and other ancillary relief. Plaintiff argued that the dismissal was erroneous in light of the timely motion for an order of reference and that the denials of vacatur were nullities in light of Williams’ death.⁴ Glover, through the counsel who had been representing Williams, opposed arguing that Plaintiff’s prior motions to vacate the dismissal were denied and law of the case barred revisiting the issue. In reply, Plaintiff again asserted that the dismissal was legally erroneous and the denial orders void. By order dated August 11, 2022, the Honorable Cenceria P Edwards granted Plaintiff’s motion.

In November 2022, Glover’s counsel filed an order to show cause seeking vacatur of the restoration order on the grounds that the Court allegedly did not consider his opposition. In support, counsel noted that scrawled across the top of the order is the word “Unopposed” and that there is no indication as to which papers were considered in rendering the decision. He also explained that he was led to understand that the motion would be on submission without appearance and, as such, did not appear on the return date despite having filed opposition. Judge Edwards declined to sign the OSC, writing “DENIED MOVANT TO MOVE THE COURT BY NOTICE OF MOTION.” Glover did not do so.

² A copy of the dismissal order was scanned with the decision so it appears that Judge Silber did have a copy at the time she rendered her decision.

³ After the dismissal but before Judge Silber denied vacatur.

⁴ Indeed, the Appellate Division explicitly vacated the initial denial order due to Williams’ death.

On February 2, 2023, Plaintiff moved for default judgment and an order of reference. Though the motion was adjourned twice to allow Glover to file opposition, he – now with new counsel – did not do so. On July 13, 2023, neither Glover nor his counsel appeared and this Court granted the requested relief on default and without opposition.

On February 2, 2024, Glover – having again changed counsel – filed the instant motion to vacate his default in opposing the motion for an order of reference and to dismiss this action pursuant to CPLR 3211[a][4], 3211[a][5], and 3215[c]. Therein, he argues that Judge Edwards should not have vacated the 2014 dismissal and that the record reflects that his opposition to that motion was not considered though it should have been. Glover also posits that the Appellate Division only vacated the 2015 denial of vacatur but not the 2016 decision and, thus, res judicata, issue preclusion, and/or law of the case barred restoration. Additionally, noting that Plaintiff only discontinued its prior action after Judge Miller raised its existence in his 2009 order denying an order of reference, Glover suggests that the instant action should have been dismissed due the co-pendency of the cases. Further, Glover argues that the instant action is untimely – while his argument is not clear, this Court interprets it as being that Plaintiff impermissibly waited more than six years before successfully seeking to restore the instant action. Turning to the order of reference, Glover argues that he had a reasonable excuse for defaulting as his then-counsel filed an affirmation of actual engagement. Plaintiff opposed Glover's motion and he replied.

While it is unclear what documents were considered by Judge Edwards, Plaintiff is correct that her order should not be vacated. It is undisputed that Plaintiff timely moved for an order of reference. As such, the dismissal was erroneous as a matter of law. As noted by the Appellate Division, the initial denial of vacatur was a nullity as this case was stayed by Williams' death. That is also true of the second denial order which, accordingly, has no preclusive effect. As such, even if Judge Edwards did not consider Glover's opposition, the omission was not prejudicial as no arguments raised therein could reasonably have led to a different result.

Glover – like Williams before him – remains in default in this action. As such, he cannot raise non-jurisdictional defenses like the statute of limitations and that there were multiple actions pending. Plaintiff is also correct that there is no basis to dismiss the instant action as

untimely – it was filed within six years of both the loan and the prior action. That it was restored following a protracted period of dismissal is of no moment.

Vacatur of the order of reference would also be inappropriate. Defendant was given several adjournments and had about five months to file opposition to Plaintiff's motion. Despite his incoming counsel⁵ being cautioned that she was being given one last chance to do so and that the matter was marked final, nothing was filed. Additionally, the affirmation of actual engagement referenced in Glover's papers was e-filed at 12:43 AM on the appearance date and counsel did not reach out to the Court or opposing counsel to seek an adjournment. Finally, Plaintiff is correct that Glover asserts no potentially meritorious grounds to oppose the grant of the order of reference, challenging neither jurisdiction nor that Plaintiff proved its prima facie case.

Motion denied.

This constitutes the decision and order of the Court.

ENTER:



Hon. Larry D Martin JSC

**HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT**

⁵ Though counsel only filed a notice of appearance on July 13th, the CTCA is dated May 22nd and the referee's notes reflect that she "appeared" on June 5th when a new briefing schedule was provided upon her application for additional time.