

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

761

CA 16-02048

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, NEMOYER, AND CURRAN, JJ.

CHARLES F. DAMICK, JR., PLAINTIFF-APPELLANT,

V

MEMORANDUM AND ORDER

CITY OF GENEVA, DEFENDANT-RESPONDENT.

TREVETT CRISTO P.C., ROCHESTER (DAVID H. EALY OF COUNSEL), FOR
PLAINTIFF-APPELLANT.

HANCOCK ESTABROOK, LLP, SYRACUSE (JANET D. CALLAHAN OF COUNSEL), FOR
DEFENDANT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Ontario County
(Frederick G. Reed, A.J.), entered January 21, 2016. The judgment,
inter alia, dismissed the complaint.

It is hereby ORDERED that the judgment so appealed from is
unanimously affirmed without costs.

Memorandum: Plaintiff commenced this action seeking to vacate a
default judgment of foreclosure entered in an underlying in rem tax
foreclosure proceeding, and to vacate the tax foreclosure deed by
which defendant acquired title to plaintiff's property. Plaintiff
appeals from a judgment that granted defendant's motion to dismiss the
complaint for failure to state a cause of action and to vacate a lis
pendens filed by plaintiff, and that denied plaintiff's cross motion
for summary judgment.

Plaintiff contends that the default judgment was prematurely
granted inasmuch as plaintiff's time to answer or redeem his property
in the tax foreclosure proceeding was extended pursuant to 11 USC
§ 108 (c) based on plaintiff's previously pending bankruptcy
proceeding. We reject plaintiff's contention. That statute does not
extend the time in which a debtor in a bankruptcy proceeding may file
a pleading or cure a default in a separate proceeding. Rather, it
extends the time in which a litigant must act in "commencing or
continuing a civil action in a court other than a bankruptcy court on
a claim against the debtor" (§ 108 [c]; see generally *Husmann v Trans
World Airlines, Inc.*, 169 F3d 1151, 1153-1154; *Rogers v Corrosion
Prods., Inc.*, 42 F3d 292, 295-297, cert denied 515 US 1160; *Aslanidis
v United States Lines, Inc.*, 7 F3d 1067, 1072-1073).

The applicable provision here is 11 USC § 108 (b), which provides
that, "if applicable nonbankruptcy law . . . fixes a period within

which the debtor . . . may file any pleading, . . . cure a default, or perform any other similar act, . . . the trustee may only file, cure, or perform . . . before the later of- (1) the end of such period . . . ; or (2) 60 days after the order of relief" (§ 108 [b]; see *Weiner v Sprint Mtge. Bankers Corp.*, 235 AD2d 472, 473-474, citing *Eagle-Picher Indus., Inc. v United States*, 937 F2d 625, 639-640; *Matter of Flores*, 55 BR 210, 211 [Bankr D NJ]), i.e., before the later of the deadline (as temporarily automatically stayed because of the bankruptcy filing) for answering or redeeming the property in the underlying tax foreclosure proceeding, or 60 days after the onset of that automatic stay in the bankruptcy proceeding. We conclude that, pursuant to 11 USC § 108 (b), and under the particular facts of this case, plaintiff's time for filing an answer or redeeming his property expired on September 16, 2014. The bankruptcy proceeding commenced on January 13, 2014, and on that date four days remained for plaintiff to answer or redeem the property in the tax foreclosure proceeding. The bankruptcy case and the automatic stay were dismissed on September 12, 2014, and thus plaintiff's time to answer or redeem the property expired four days later. We therefore conclude that defendant did not prematurely seek a default judgment on September 18, 2014.

Entered: June 16, 2017

Frances E. Cafarell
Clerk of the Court