

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

ANTHONY DIDATO,

Plaintiff,

-against-

WILMINGTON SAVINGS FUND SOCIETY, FSB, D/B/A CHRISTIANA TRUST, NOT INDIVIDUALLY BUT AS TRUSTEE FOR HILLDALE TRUST; and "JOHN DOE" 1-5 and "JANE DOE" 1-5, the last ten names being fictitious, said parties intended being undisclosed, unnamed and unknown investors, participants, corporate or other entities, conduits, trustees, servicers, custodians and others, if any, having or claiming an interest in, or lien upon the premises described in the complaint,

Defendants.

Index No. 2018-50215

NOTICE OF ENTRY

SIRS/MESDAMES:

PLEASE TAKE NOTICE that annexed hereto is a true copy of the **DECISION AND ORDER** of the Honorable Maria G. Rosa, J.S.C., dated November 29, 2018 and entered in the Office of the County Clerk, Dutchess County on December 3, 2018.

Dated: New York, New York
December 4, 2018

ADAM LEITMAN BAILEY, P.C.

Counsel for Defendant Wilmington Savings Fund Society, FSB, d/b/a Christiana Trust, Not Individually But As Trustee for Hilldale Trust

Jackie Halpern Weinstein

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TO: (Service by NYSCEF)

Brian McCaffrey, Esq.
Brian McCaffrey Attorney at Law, P.C.
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

Present:

Hon. Maria G. Rosa

Justice

ANTHONY DIDATO,

DECISION AND ORDER

Plaintiff,

Index No. 50215/18

-against-

WILMINGTON SAVINGS FUND SOCIETY, FSB, dba CHRISTIANA TRUST, Not Individually but as Trustee for HILLDALE TRUST; and "JOHN DOE" # 1-5 and "JANE DOE" # 1-5, the last ten names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporation, if any, having or claiming an interest in or lien upon the premises, described in the complaint.

Defendants

The following papers were read on plaintiff's motion for a default judgment and defendant's cross-motion:

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
EXHIBITS A - B

NOTICE OF CROSS-MOTION
AFFIRMATION IN SUPPORT
AFFIDAVIT IN SUPPORT
AFFIDAVIT IN SUPPORT
EXHIBITS 1 - 9

AFFIRMATION IN OPPOSITION AND FURTHER SUPPORT
EXHIBITS A - I

REPLY AFFIRMATION
EXHIBITS 10 - 14

Plaintiff commenced this action seeking to discharge a mortgage on real property located at

1030 Dutchess Tpke, Poughkeepsie, New York alleging defendant was barred from foreclosing on the mortgage because the statute of limitations on any such action has expired. Plaintiff now moves for a default judgment. Defendant cross-moves for leave pursuant to CPLR §§2004 and 3012(d) for an extension of time to answer and to serve a pre-answer motion to dismiss pursuant to CPLR §3211.

Plaintiff commenced this action on January 29, 2018. An affidavit of service states that service was made on the defendant on February 12, 2018 by serving a receptionist at defendant's Wilmington, Delaware office. Plaintiff seeks a default judgment pursuant to CPLR §3215 based upon defendant's failure to timely appear.

CPLR 3012(d) provides that a court may extend the time to appear or plead, or compel the acceptance of an untimely pleading, "upon such terms as may be just and upon a showing of reasonable excuse for delay or default." CPLR 3012(d); Stephan B. Gleich & Assoc. v. Gritsipis, 87 AD3d 216, 226 (2nd Dept 2011). To obtain such relief a defendant is required to provide a reasonable excuse for the delay and demonstrate a potentially meritorious defense to the action. Deutsche Bank Nat. Tr. Co.v. Kuldip, 136 AD2d 969 (2nd Dept 2016). The determination of what constitutes a reasonable excuse lies within the sound discretion of this court. Citimortgage, Inc. v. Kowalski, 130 AD3d 558 (2nd Dept 2015). In exercising this discretion the court should consider the length of the delay, the excuse offered, the absence or presence of willfulness and the possibility of prejudice. See Guzetti v. City of New York, 32 AD3d 234, 238 (1st Dept 2006).

Defendant asserts that it failed to timely appear due to a clerical error in forwarding the summons and complaint to counsel. In support of this claim it has submitted an affidavit of the receptionist allegedly served stating that she had no recollection of receiving service of process but that her normal practice upon receiving such papers would be to make a record of such documents and follow detailed instructions about forwarding the documents to the appropriate department. She further states that defendant has no record of receiving such papers and thus either the documents were not served on her or she erroneously misplaced them. Defendant has also submitted an affidavit of a paralegal responsible for processing legal documents. The paralegal states that it is the defendant's regular business practice to make records pertaining to receipt of legal process and that there are no records documenting service of the summons and complaint in this action. The court finds the foregoing, in conjunction with the defendant's effort to remedy the default within one year, the apparent lack of wilfulness and the lack of prejudice to the plaintiff sufficient to constitute a reasonable excuse. See generally Kim v. Strippoli, 144 AD3d 982 (2nd Dept 2016).

Defendant has also demonstrated a meritorious defense to the action. Plaintiff seeks to quiet title and discharge the mortgage lien based upon the alleged expiration of the six year statute of limitations set forth in CPLR §213(4). In 2011 JP Morgan Chase Bank, N.A. commenced an action to foreclosure on the same mortgage underlying this action. While that action was pending it assigned the note and mortgage to Ventures Trust 2013-I-H-R by MCM Capital Partners, LLC ("Ventures Trust"). JP Morgan Chase Bank then moved for summary judgment on the complaint and for an order substituting Ventures Trust as the plaintiff. The court denied the motion and subsequently granted plaintiff's motion to dismiss based on a claim that Ventures Trust was not

authorized to do business in New York State. Ventures Trust appealed the order of dismissal dated August 15, 2016 to the Appellate Division, Second Department and that appeal is still pending.

Based on the foregoing, defendant correctly asserts that it is entitled to the tolling benefits of CPLR 205(a). That statute allows a plaintiff whose action was timely commenced but terminated in any manner other than certain enumerated exceptions not applicable here to commence a new action upon the same transaction or occurrence even though the statute of limitations has expired. CPLR 205(a); Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C., 5 NY3d 514, 515 (2005). Although generally only the plaintiff in the original action is entitled to the benefits of CPLR 205(a), an exception to this rule exists under circumstances where the plaintiff in a new action is seeking to enforce the same rights as the plaintiff in the original action. Reliance Ins Co. v. PolyVision Corp., 9 NY3d 52, 57 (2007). In accordance with this exception, the Appellate Division, Second Department has held that “a plaintiff in a mortgage foreclosure action which meets all of the other requirements of the statute is entitled to the benefit of CPLR 205(a) where...it is the successor in interest as the current holder of the note.” Wells Fargo, N.A. v. Eitani, 148 AD3d 193, 195 (2nd Dept 2017). Here, defendant is the assignee and subsequent holder of the note and mortgage underlying both the dismissed 2011 foreclosure action and upon which it presently seeks to foreclose. Accordingly, it is entitled to the benefit of the tolling provisions of CPLR 205(a). U.S. Bank Nat'l Ass'n v. Gordon, 158 AD3d 832, 838 (2nd Dept 2018). Moreover, the 2011 foreclosure action dismissed for lack of capacity has not yet terminated within the meaning of CPLR 205(a). For purposes of that statute, “termination of the prior action occurs when appeals as of right are exhausted.” Andrea v. Arnone, Hedin, Casker, Kennedy & Drake, Architects & Landscape Architects, P.C., 5 NY3d at 519. The prior action was timely filed, has not yet terminated and defendant is entitled to the benefits of the tolling provisions of CPLR 205(a). Thus, even if the dismissal of that action is upheld on appeal, defendant may foreclose on the mortgage based upon the tolling provisions of CPLR 205(a). Wherefore, defendant has demonstrated as a matter of law that plaintiff may not prevail on his claim to discharge the mortgage based upon an expiration of the statute of limitations. It is

ORDERED that plaintiff's motion for a default judgment is denied. It is further

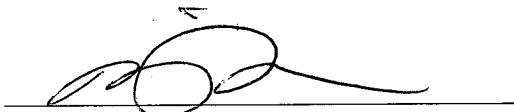
ORDERED that defendant's cross-motion to extend the time to appear and to serve a pre-answer motion to dismiss pursuant to CPLR 3211 is granted. It is further

ORDERED that defendant's motion to dismiss pursuant to CPLR 3211(a)(1) is granted. The unrefuted documentary evidence before the court is that plaintiff is not entitled to discharge of the mortgage. While not germane to this decision, the court rejects defendant's claim that it also has a meritorious defense based upon an inability to accelerate the maturity of the debt pursuant to the terms of the subject mortgage. Defendant's predecessor in interest clearly elected to declare the balance of the principal indebtedness immediately due and payable in connection with the 2011 foreclosure action. The mere fact that prior to accelerating all amounts due the lender was required to give notice and a right to cure does not preclude it from demanding immediate payment in full of the loan. See Persaud v. U.S. Bank Nat'l, 2018 WL 5117212 (NY Sup. Ct. Oct. 19, 2018).

The foregoing constitutes the decision and order of the Court.

Dated: November 27, 2018
Poughkeepsie, New York

ENTER:



MARIA G. ROSA, J.S.C.

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

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2018-50215

Anthony Didato - v. - WILMINGTON SAVINGS FUND SOCIETY, FSB, D/B/A CHRISTIANA TRUST, NOT INDIVIDUALLY BUT AS TRUSTEE FOR HILLDALE TRUST et al

Assigned Judge: Maria G Rosa

Documents Received on 12/04/2018 04:33 PM

Doc #	Document Type	Motion #
67	NOTICE OF ENTRY Does not contain an SSN or CPI as defined in 202.5(e) or 206.5(e)	2

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