

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. MOJGAN C. LANCMAN

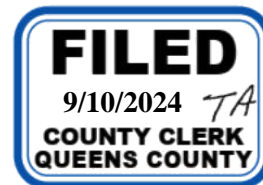
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RAYWATTIE RAMKUMAR,

Plaintiff,

-against-

U.S. BANK TRUST NATIONAL ASSOCIATION, NOT
IN ITS INDIVIDUAL CAPACITY BUT SOLELY
AS TRUSTEE FOR MEB LOAN TRUST II,

Defendant.
-----x



IAS PART 20

Index No.: 703512/2024

Motion Seq. No.: 1

Motion Date: 7.31.2024

Motion Cal. No.: 42

The papers bearing NYSCEF Doc. Nos. 12-30, 32-41 and 43-50 were read on: (1) the motion filed by the plaintiff, Raywattie Ramkumar (the “Plaintiff” or “Ramkumar”), for, *inter alia*, a default judgment; and (2) the cross-motion filed by the defendant, U.S. Bank Trust National Association, not in its individual capacity but solely as Trustee for MEB Loan Trust II (the “Defendant”), to, *inter alia*, dismiss this cause pursuant to CPLR §§ 3211 [a] [1] and [a] [7].

This is the third litigation relating to a mortgage (the “Mortgage”) on the real property located at 191-06 Nero Avenue, Holliswood, New York 11423 (the “Property”). As explained below, two prior actions, which were commenced by Bank of America, N.A. (“BoA”) in 2015 and 2017, respectively, to foreclose upon the Mortgage were previously dismissed. The Plaintiff commenced this cause seeking to cancel and discharge the Mortgage and for an award of attorneys’ fees incurred in this action and the two prior actions.

Presently before the Court are two motions. The Plaintiff moves for a default judgment against the Defendant; the cancellation and discharge of the Mortgage; and an award of reasonable attorneys’ fees pursuant to RPAPL § 282. The Defendant cross-moves to dismiss this cause pursuant to CPLR §§ 3211 [a] [1] and [a] [7], and, in the alternative, for leave to file a late answer. For the following reasons: (1) the Plaintiff’s motion is granted in part and denied in part; and (2) the Defendant’s cross-motion is denied.

I. The Plaintiff’s Motion

CPLR § 3215 [a] provides that: “[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him [or her].”

“On a motion for leave to enter a default judgment under CPLR § 3215, a plaintiff must submit proof of service of the summons and the complaint, the facts constituting the causes of

action, and the defendant's default [citations omitted]" (*Rattner v Fessler*, 202 AD3d 1011, 1014 [2d Dept 2022]). "A plaintiff must allege enough facts to enable the court to determine that a viable cause of action exists" (*Roy v 81E98th KH Gym, LLC*, 142 AD3d 985, 985 [2d Dept 2016]).

"To defeat a facially sufficient CPLR § 3215 motion, a defendant must show either that there was no default, or that it had a reasonable excuse for its delay and a potentially meritorious defense" (*Liberty County Mut. v Avenue I Med., P.C.*, 129 AD3d 783, 785 [2d Dept 2015]).

An affidavit of service establishes that the Defendant was served with the summons and complaint on February 21, 2024 when same were personally delivered upon Elvis Wood, a managing clerk, who indicated that he was authorized to accept service on the Defendant's behalf. The Defendant does not contest that service of process was proper.

The Plaintiff alleges enough facts to establish the cause of action that the Mortgage should be cancelled and discharged through her affidavit, the verified complaint and the documentary evidence submitted on the motion. These submissions establish that the statute of limitations on the Mortgage has expired. Here, the Mortgage was accelerated when BoA commenced a foreclosure action on March 23, 2015 under index number: 702731/2015 (the "First Action"); that the First Action was dismissed on September 19, 2016; that BoA's motion to, in effect, vacate the dismissal thereof was denied pursuant to an Order dated March 6, 2017; that BoA's second action to foreclose upon the Mortgage was commenced on October 12, 2017 under index number: 714155/2017 (the "Second Action"); that the Second Action was dismissed on May 31, 2023; that this cause was commenced on February 14, 2024; that the Mortgage was accelerated on March 23, 2015 when the First Action was commenced, over nine years ago; and that the Plaintiff owns the Property, which is her primary residence.

The Plaintiff also establishes the Defendant's default in answering the complaint. Here, the Defendant did not interpose an answer by the deadline to do so, March 13, 2024. The Defendant's cross-motion for, *inter alia*, leave to serve a late answer was not filed until July 24, 2024, over four months later.

On this record, the Plaintiff meets all the requirements for a default judgment against the Defendant on the first cause of action asserted in the complaint (*see 53 PL Realty, LLC v U.S. Bank Nat. Ass'n*, 153 AD3d 894 [2d Dept 2017]).

As noted, to defeat this motion, the Defendant must demonstrate "either that there was no default, or that it had a reasonable excuse for its delay and a potentially meritorious defense" (*Liberty County Mut. v Avenue I Med., P.C.*, 129 AD3d 783, 785). Since the Defendant does not contest that it is in default, the inquiry becomes, in the first instance, whether there is a reasonable excuse for the delay. Here, the Defendant relies upon the affidavit of Christopher Antonellis ("Antonellis"), who is employed by Newrez LLC ("Newrez"), which services the Mortgage on the Defendant's behalf. Antonellis acknowledges that Newrez received the complaint on February 26, 2024, five days after the Defendant was served. According to Antonellis, "... the complaint was not routed to the legal department [of Newrez] or referred to outside counsel upon receipt. The failure to respond to the Complaint was an error and inadvertent. It was not done willfully or deliberately."

Antonellis avers as follows with respect to the Plaintiff's present motion for a default judgment: that the Defendant received a copy thereof on May 3, 2024; that Antonellis received same on May 8, 2024, which he transmitted to Newrez's legal department; and that this cause was referred to outside counsel on May 17, 2024.

The determination of whether an excuse for a delay is reasonable lies within the sound discretion of the trial court (*see U.S. Bank National Association v Pierre*, 210 AD3d 929 [2d Dept 2022]). The purported excuse that the complaint was received by Newrez, but not routed to its legal department or to outside counsel, "is akin to an excuse of law office failure. While a court has the discretion to accept law office failure as a reasonable excuse, such excuse must be supported by detailed allegations of fact explaining the law office failure" (*Board of Managers of Harborview Condominium v Goodman*, 189 AD3d 1529, 1531 [2d Dept 2020] [internal quotation marks and citations omitted]). "Other than conclusorily asserting that [the complaint was not routed to Newrez's legal department or to outside counsel] ... no detailed allegations of fact to substantiate [t]his claim [are presented]" (*see id.*; citations omitted). Thus, the Defendant fails to present a reasonable excuse for the default in answering the complaint (*see id.*).

Since a reasonable excuse for the delay is not presented, it is unnecessary to consider whether the Defendant has presented a potentially meritorious defense to this cause (*see U.S. Bank National Association v Morino*, 207 AD3d 776 [2d Dept 2022]). However, in the interests of thoroughness, the Court notes that the Defendant's contention that the statute of limitations has not run on the Mortgage because of the savings clause of CPLR § 205-a is without merit. Here, BoA was the original plaintiff in the First Action and the Second Action, and there is no evidence in admissible form that the Defendant is acting on behalf of BoA in this cause. The Defendant is therefore not entitled to the benefit of the savings clause of CPLR § 205-a (*see B and H Florida Notes LLC v Ashkenazi*, 221 AD3d 480 [1st Dept 2023]).

The Plaintiff is therefore granted a default judgment against the Defendant on the first cause of action asserted in the complaint, and the Mortgage is thus cancelled and discharged.

The Plaintiff also seeks a default judgment on the second cause of action asserted in the complaint, which seeks, pursuant to RPL § 282, an award of attorneys' fees and expenses with respect to the First Action, the Second Action and this action.

The Plaintiff fails to establish entitlement to a default judgment pursuant to RPL § 282 with respect to the First Action because there is no evidence that she incurred attorneys' fees and expenses in same. Here, the Court's file with respect to the First Action, judicial notice of which is taken, reveals that Ramkumar took no action to defend herself in same. Here, among other things, she did not file an answer or a notice of appearance.

The Plaintiff also fails to establish entitlement to a default judgment pursuant to RPL § 282 with respect to the Second Action. The Second Action was dismissed because RPAPL § 1304 was not complied with. Dismissal of an action on this ground does not establish that the borrower is a prevailing party within the meaning of RPL § 282 (*see Johnson v Cascade Funding Mortgage Trust 2017-1*, 220 AD3d 929 [2d Dept 2023]; *U.S. Bank, N.A. v Krakoff*, 199 AD3d 299 [2d Dept 2021]).

The Plaintiff is, however, entitled to recover the attorneys' fees and expenses incurred in the prosecution of this cause. Here, the Plaintiff is the prevailing party within the meaning of RPL § 282 since her submissions establish that the statute of limitations to commence an action to foreclose upon the Mortgage has expired, and that the Mortgage should thus be cancelled and extinguished (*see generally 21st Mtge. Corp. v Nweke*, 165 AD3d 616 [2d Dept 2018]).

An inquest on the issue of the reasonable attorneys' fees and expenses the Plaintiff incurred in this cause is required for three reasons. First, the law is settled that while a defaulting defendant admits all traversable allegations contained in the complaint, it does not admit to the damages claimed by a plaintiff (*see Rokina Opt. Co. v Camera King, Inc.*, 63 NY2d 728 [1984]). Second, the claimed attorneys' fees and expenses do not represent a sum certain (*see id.*). Third, there are issues as to whether the hourly rates claimed by the Plaintiff's counsel, \$750.00 for partners and \$550.00 for senior associates, and the time devoted to work performed, *e.g.*, a total of 10.40 hours for drafting a complaint that consists of four pages, are reasonable.

The Plaintiff is thus directed to file a Notice of Inquest on the issue of attorneys' fees and expenses incurred in this cause (*see generally Neeman v Smith*, 227 AD3d 818 [2d Dept 2024]).

II. The Defendant's Cross-Motion

In the first instance, the Defendant cross-moves to dismiss this cause pursuant to CPLR §§ 3211 [a] [1] and [a] [7]. This application is denied for two reasons. First, a party that is in default may not seek affirmative relief of a non-judicial nature without first vacating its default (*see Holubar v Holubar*, 89 AD3d 802 [2d Dept 2011]). The Court, in granting the Plaintiff's motion for a default judgment and, as explained below, in denying the Defendant's application for leave to serve a late answer, declines to vacate the Defendant's default in answering (*see id.*; *McGee v Dunn*, 75 AD3d 624 [2d Dept 2010]). Second, the application for relief pursuant to CPLR § 3211 is untimely because it was made after the deadline to file a responsive pleading passed and while the Defendant was in default of answering (*see CPLR § 3211[e]*; *21st Mtge. Corp. v Raghu*, 197 AD3d 1212 [2d Dept 2021]; *U.S. Bank N.A. v Gilchrist*, 172 AD3d 1425 [2d Dept 2019]).

The Defendant's request for alternative relief, leave to file a late answer, is also denied. "CPLR 3012 [d], which governs motions for leave to serve a late pleading and excuse a delay in answering and appearing, provides that upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default. A defendant seeking to vacate a default in answering a complaint and to compel the plaintiff to accept an untimely answer pursuant to CPLR 3012 [d] must provide a reasonable excuse for the default and demonstrate a potentially meritorious defense. A motion to vacate a default is addressed to the sound discretion of the court. Where the defendant fails to demonstrate a reasonable excuse for the default, the court need not consider whether a potentially meritorious defense was offered" (*Windward Bora, LLC v Lodico*, 206 AD3d 1038, 1039 [2d Dept 2022] [internal quotation marks, brackets and citations omitted]).

As explained, the Defendant fails to demonstrate a reasonable excuse for its default in answering the complaint. Leave to file a late answer is thus denied on this ground, making it

unnecessary to consider whether the Defendant has a potentially meritorious defense to this cause (*see id.*; *Hersko v Hersko*, 224 AD3d 810 [2d Dept 2024]).

III. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that the Plaintiff's motion is granted in part and denied in part; and it is further,

ORDERED, that the Plaintiff is granted a default judgment against the Defendant with respect to the first cause of action asserted in the complaint; and it is further,

ORDERED, that the mortgage dated July 14, 2004, and recorded in the Office of the City Register of the City of New York on September 23, 2004, under CRFN 2004000595781 against the Property (Block 10516, Lot 137) is cancelled and discharged; and it is further,

ORDERED, that upon presentation of a certified copy of this Order and the payment of fees, if any, the Office of the City Register of the City of New York is directed to cancel and discharge the mortgage dated July 14, 2004 and recorded on September 23, 2004 under CRFN 2004000595781 against the Property (Block 10516, Lot 137); and it is further,

ORDERED, that the Plaintiff is granted a default judgment against the Defendant on the second cause of action asserted in the complaint solely to the extent that the Defendant is liable for the reasonable attorneys' fees and expenses incurred by the Plaintiff in the prosecution of this cause; and that the application for a default judgment for attorneys' fees and expenses incurred in the First Action and the Second Action is denied; and it is further,

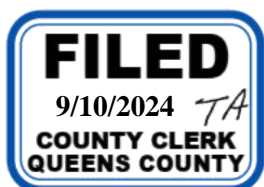
ORDERED, that the Plaintiff shall serve and file a Notice of Inquest by October 31, 2024 for the purpose of an inquest to determine the reasonable attorneys' fees and expenses she incurred in this cause; and it is further,

ORDERED, that the Defendant's cross-motion is denied; and it is further,

ORDERED, that the Plaintiff shall serve a copy of this Order with Notice of Entry upon the Defendant via NYSCEF by October 31, 2024.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
September 5, 2024



A handwritten signature in black ink, consisting of a large, stylized loop followed by a vertical line and a horizontal stroke.

MOJGAN C. LANCMAN, J.S.C.