

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

.....
RICHARD BENITEZ,

Plaintiff,

- against -

U.S. BANK, NATIONAL ASSOCIATION,
AS TRUSTEE FOR MASTR ASSET BACKED
SECURITIES TRUST 2006-WMC3, MORTGAGE
PASS-THROUGH CERTIFICATES,
SERIES 2006-WMC3,

Defendant.

TRIAL/IAS PART 30
NASSAU COUNTY

Index No.: 601476/2023
Motion Seq. Nos.: 01, 02
Motion Dates: 05/23/2023
07/18/2023

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The following papers have been read on these motions:

| | Papers Numbered |
|---|-----------------|
| <u>Notice of Motion (Seq. No. 01), Affirmation and Exhibits, Affidavit</u> | <u>1</u> |
| <u>Notice of Cross-Motion (Seq. No. 02), Affirmation and Exhibits, Affidavit and Exhibits, Memorandum of Law</u> | <u>2</u> |
| <u>Affirmation in Opposition to Cross-Motion (Seq. No. 02) and in Reply to Motion (Seq. No. 01) and Exhibits, Memorandum of Law</u> | <u>3</u> |

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Plaintiff moves (Seq. No. 01), pursuant to CPLR § 3215(a), for an order directing an entry of a default judgment against defendant.

Defendant opposes the motion (Seq. No. 01) and cross-moves (Seq. No. 02), for an order vacating its default and permitting it to answer plaintiff's Verified Complaint. Plaintiff opposes the cross-motion (Seq. No. 02).

At the outset, the Court notes that, on August 18, 2023, the Honorable David P. Sullivan, J.S.C. issued a Decision and Order in the matter of *U.S. Bank National Association, as Trustee for Mastr Asset Backed Securities Trust 2006-WMC3 Mortgage Pass-Through Certificates, Series 2006-WMC3 v. Richard Benitez, et al.*, Index Number 608132/2023.

In Justice Sullivan's August 18, 2023 Decision and Order, he found that,

"Defendant Richard Benitez (hereinafter 'Defendant') has moved by notice of motion for an order pursuant to CPLR 3211(a)(5) dismissing the action as time-barred.

Plaintiff opposed, Defendants replied and the motion was deemed submitted July 20, 2023.

On May 17, 2006, Defendant executed a certain Note and Mortgage in favor of Plaintiff's predecessor-in-interest which was secured by the property located at 178 Drexel Avenue, Westbury, NY 11590. The Loan was ultimately assigned to Plaintiff, who is the current mortgagee of record. Defendant defaulted on the Loan by failing to make the payment due on April 1, 2008 and the payments thereafter.

Plaintiff filed the first foreclosure action against under Index #533/2014 on January 17, 2014 (the '2014 Action'). There is no dispute that the 2014 Foreclosure Action was dismissed by Decision & Order of the Second Department on December 7, 2022, pursuant to CPLR 3215(c) (*U.S. Bank N.A. v Benitez*, 211 AD3d 765 [2d Dept 2022]).

On May 19, 2023, Plaintiff commenced the instant foreclosure action which seeks foreclosure with respect to the same debt instruments on the same property.

Defendant now moves to dismiss the action as time-barred based upon the enactment [of] the Foreclosure Abuse Prevention Act (“FAPA”) on December 30, 2022 which, *inter alia*, added CPLR §205-a which altered the ‘savings provision’ of CPLR 205 as it applies to real property actions including foreclosure matters. CPLR 205-a states, in relevant part:

(a) If an action upon an instrument described under [CPLR 213] is timely commenced and is terminated in any manner other than a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, *a dismissal of the complaint for any form of neglect*, including, but not limited to those specified in subdivision three of section thirty-one hundred twenty-six, *section thirty-two hundred fifteen*, rule thirty-two hundred sixteen and rule thirty-four hundred four of this chapter . . . the original plaintiff, or, if the original plaintiff dies and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months following the termination, provided that the new action would have been timely commenced within the applicable limitations period prescribed by law at the time of the commencement of the prior action and that service upon the original defendant is completed within such six-month period (emphasis added).

FAPA (§10) states that ‘This act shall take effect immediately and shall apply to all actions commenced on an instrument described under subdivision four of section two hundred thirteen of the civil practice law and rules in which a final judgment of foreclosure and sale has not been enforced’.

Plaintiff argues that FAPA does not apply retroactively to impair ‘vested property rights’ and further contends that the retroactive application would render FAPA unconstitutional.

Plaintiff argues that FAPA cannot be applied retroactively in the instant matter, however this claim is belied by the express language of the statute. (See, *Deutsche Bank National Trust Company as Trustee for Registered Holders of Morgan Stanley ABS Capital I Inc. Trust 2006-HE5 v. Dagrín*, 2023 N.Y. Slip Op. 23103 [Sup Ct, Queens County 2023]).

As it pertains to Plaintiff's claims that FAPA cannot be applied to impair a 'vested' property right, Plaintiff's arguments are misplaced as no judgment was entered in Plaintiff's favor with respect to the subject loan and therefore no right 'vested' (see, *Gilman v Tucker*, 13 L.R.A. 304 [1891]).

Plaintiff's remaining contentions are wholly without merit (see, e.g. *Id.*; *HSBC Bank USA, N.A. as Trustee of Ace Securities Corp. Home Equity Loan Trust v. IPA Asset Management, LLC*, 190 N.Y.S.3d 622 [Suffolk Cty. Sup. Ct. 2023]; *Deutsche Bank National Trust Company as Trustee for Registered Holders of Morgan Stanley ABS Capital I Inc. Trust 2006-HE5 v. Dagrín*, 190 N.Y.S.3d 582 [Queens Cty. Sup. Ct. 2023]).

Accordingly, the action must be dismissed as time-barred and the notice of pendency must be vacated (CPLR 6514).

In light of the foregoing, it is hereby: ORDERED, that the Defendant's motion is hereby granted in its entirety and the complaint filed under Index #608132/2023 is hereby dismissed. The Clerk of the County of Nassau, upon the payment of any applicable fees, is hereby directed to file/record this order cancelling the Notice of Pendency filed against the property known as 178 Drexel Avenue, Westbury, NY 11590, having Section/Block/Lot designation 10/191/832 & 833 under the Nassau County Tax Assessment Map." See NYSCEF Document No. 38.

Based upon Justice Sullivan's August 18, 2023 Decision and Order, and the applicable law detailed therein, plaintiff's instant motion (Seq. No. 01), pursuant to CPLR § 3215(a), for an order directing an entry of a default judgment against defendant, is hereby **GRANTED**.

Plaintiff is directed to submit judgment.

Defendant's cross-moves (Seq. No. 02), for an order vacating its default and permitting it to answer plaintiff's Verified Complaint, is hereby **DENIED**.

This constitutes the Decision and Order of this Court.

ENTER:


DENISE L. SHER, A.J.S.C.
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Dated: Mineola, New York
January 11, 2024

ENTERED

Jan 24 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE