

21st Mtge. Corp. v Rodriguez-Cardona
2015 NY Slip Op 30423(U)
March 13, 2015
Supreme Court, Kings County
Docket Number: 504178-2014
Judge: Loren Baily-Schiffman
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At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 13th day of March, 2015.

PRESENT: HON. LOREN BAILY-SCHIFFMAN
JUSTICE

21ST MORTGAGE CORPORATION,
Plaintiff(s),
 - against -
 JOSE LUIS RODRIGUEZ-CARDONA, CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD NEW YORK CITY TRANSIT ADJUDICATION BUREAU, JOHN DOE #1 TO JOHN DOE # 10,
Defendant(s).

Index No.: **504178-2014**
 Motion Seq. # **1**
 ORDER and DECISION

As required by CPLR 2219(a), the following papers were considered in the review of this motion.

The following papers numbered 1 to 6 read on this motion

	<u>PAPERS NUMBERED</u>
Notice of Motion - Order to Show Cause - Affidavit(s)1-2.....
Affirmation(s), Petition, and Exhibits Annexed3-4.....
Answering Affidavit(s) and Affirmation(s)5-6.....
Reply Affidavit(s) and Affirmation(s)
Other Papers

Upon the foregoing papers Defendant, Jose Luis Rodriguez-Cardona (hereinafter referred to as "Cardona") moves this Court for an order dismissing Plaintiff's complaint herein pursuant to **CPLR §3211(a)(5)**. Plaintiff, 21st Mortgage Corporation (hereinafter referred to as "21st Mortgage") commenced this foreclosure action on or about May 20, 2014. Issue was joined when Cardona interposed an answer on or about June 30, 2014. The answer included as a first affirmative defense that the within action is barred by the Statute of Limitations. This foreclosure action arises from Defendant, Cardona's default on the note and mortgage executed on August

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4, 2006 to Option One Mortgage Corporation (hereinafter referred to as "Option One"). Option One commenced a prior action based upon the identical facts as those presented herein on or about June 20, 2007 (Index # 22749/07). There is no dispute that the 2007 action was timely commenced. On September 27, 2007 Option One made an application for an Order of Reference in the 2007 action. Thereafter, that action remained dormant for more than three and one-half years and by Order dated October 22, 2013 Hon. Lawrence Knipel dismissed the case "as abandoned pursuant to **CPLR 3215(c)**".

Plaintiff 21st Mortgage contends that the instant action (Index # 504178/14) is timely because the tolling provisions of **CPLR §205 (a)** are applicable herein. **CPLR §205 (a)** tolls the Statute of Limitations and permits commencement of a second action within six months of a terminated action. However, the tolling provision will not be applicable in cases dismissed for "...neglect to prosecute the action pursuant to **CPLR §3216** or otherwise...". This includes any dismissal, even those that are not made pursuant to **CPLR § 3216**, if it is based upon any conduct constituting a neglect to prosecute..". A dismissal pursuant to **CPLR 3215 (c)** constitutes a dismissal for neglect to prosecute and will, therefore, preclude the application of **CPLR §205 (a)**'s tolling provision. **EMC v Smith, 18 AD3d 602 (2nd Dept., 2005); Shepard v St. Agnes Hosp., 86 AD2d 628,630 (2nd Dept., 1982)**. As the Court of Appeals stated: "[T]he plain purpose of excluding actions dismissed for neglect to prosecute from those that can be, in substance, revived by a new filing under CPLR 205 (a) was to assure that a neglect to prosecute would be a serious sanction, not just a bump in the road" **Andrea v Arnone 5 NY3d 514, 521 (2005), citing, Carven Assoc. v American Home Assur. Corp., 84 NY2d 927 (1994), Laffey v City of New York, 52 NY2d 796 (1980), Keel v**

Parke Davis & Co., 50 NY2d 833(1980), Flans v Federal Ins. Co. 43 NY2d 881 (1978).

However, Plaintiff further argues that an amendment to ***CPLR §205 (a)***, effective July 7, 2008, expanded the use of the tolling provision thereby making the preclusionary language of the statute inapplicable herein. The amendment provided in relevant part: “[W]here a dismissal is one for neglect to prosecute.... the judge shall set forth on the record the specific conduct constituting the neglect, which conduct shall demonstrate a general pattern of delay in proceeding with the litigation”. It is undisputed that no such record was made on October 22, 2013 as required by the aforementioned amendment to ***CPLR §205 (a)***. Specifically, failure to make the requisite record, i.e., setting forth the specific conduct that demonstrated “a general pattern of delay”, allows a plaintiff to re-commence the action utilizing ***CPLR §205 (a)***'s tolling provision even if the prior dismissal was based upon neglect to prosecute. ***Webb v Greater NY Automobile Dealers Assn., 123 AD3d 1111(2nd Dept., 2014); Marrero v Crystal Nails, 114 AD3d 101 (2nd Dept., 2013); Zulic v Persich, 106 AD3d 904 (2nd Dept., 2013).***

Alternatively, 21st Mortgage argues that in foreclosure cases, a plaintiff's application for an Order of Reference constitutes initiating proceedings for the entry of judgment. The Second Department has consistently held that if a foreclosing plaintiff has moved for an Order of Reference a dismissal made pursuant to ***CPLR 3215 (c)*** is inappropriate. ***HSBC Bank USA, NA v Alexander, 124 AD3d 838 (2nd Dept., 2015); U. S. Bank National Assn. v Poku, 118 AD3d 980,981 (2nd Dept., 2014), citing, MERS v Smith, 111 AD3d 804, (2nd Dept., 2013), Jones v Fuentes, 103 AD3d 853, (2nd Dept., 2013), Nowickiv Sports World Promotions, 48 AD3d 435, 436 (2nd Dept., 2008), Brown v Rosedale Nurseries, 259 AD2d 256, 257 (1st Dept.,1999); see***

also, Klein v St. Cyprian Properties, 100 AD3d 711, 712 (2nd Dept., 2012); HSBC v Hamid, 2014 NY Slip Op. 31731.

Therefore, the tolling provision of *CPLR §205 (a)* is applicable herein. However, the statute provides that the second action must be commenced within six months of dismissal of the prior action. Plaintiff argues that the six-month period in which to commence the instant action did not begin to run until the dismissal order was filed on January 29, 2015. Defendant argues that the six months should be calculated from the date that the prior action was dismissed, October 22, 2013. Contrary to Plaintiff's contention the six-month period is calculated from the date of dismissal. *Pi Ju Tang v St. Francis Hospital, 37 AD3d 690, 691 (2nd Dept., 2007), citing, Burns v Pace Univ., 25 AD3d 334, 335 (1st Dept., 2006), leave to app. denied 7 NY3d 705 (2006); Kaps-All Packaging Systems, Inc. v Cohen, 60 AD3d 738 (2nd Dept., 2009); Ross Jamaica Hospital Center, 122 AD3d 607, 608 (2nd Dept., 2014).* Moreover, *CPLR §205 (a)* requires not only that the action be commenced within six months but also that service upon defendant be effectuated within that time period as well. *Quinones v Neighborhood Youth and Family Services, Inc., 71 AD3d 1106 (2nd Dept., 2010); Kaps-All Packaging Systems, supra at 738; First Central Savings Bank v Meridian Residential Capital, 35 Misc.3d 1206(A) (S. Ct., Nassau Co, 2012).* Service herein was effectuated on Defendant Cardona pursuant to *CPLR § 308 (2)*, "by delivering the summons to a person of suitable age and discretion" and mailing to Defendant's last known residence on May 13 and 20, 2014, respectively. Contrary to Plaintiff's contention the instant action was not commenced on May 9, 2014 but, rather, on June 3, 2014, the date that the affidavits of service were filed.

Additionally, *CPLR §308 (2)* specifically provides that service is not complete until ten days after the last affidavit of service is filed. The affidavits of service herein were filed on June 3, 2014 thus service was complete on June 13, 2014, nearly two months after the statute of limitations had expired. Therefore, the statute of limitations had expired by the time Cardona was served with process herein and this Court need not address any other issues raised by either of the parties. Accordingly, Defendant, Cardona's motion to dismiss Plaintiff, 21st Mortgage's complaint herein as time barred is granted in its entirety, and it is;

ORDERED, that Plaintiff's complaint is hereby dismissed.

ENTER



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