To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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BANK OF AMERICA, N.A.,

Plaintiff,

DECISION & ORDER

Index No.:59860/2013
Sequence No. 2

-against-

MICHAEL REILLY A/K/A MICHAELC. REILLY, ROBIN REILLY, CAPITALONE BANK, N.A., AMERICAN EXPRESSCENTURION BANK, COMMISSIONEROF TAXATION AND FINANCE, WOODS III IN WESTCHESTER HOMEOWNERS ASSOCIATION, INC. AND THE UNITED STATES OF AMERICA INTERNAL REVENUE SERVICE, PEOPLE OF THE STATE OF NEW YORK, MIDLAND FUNDING LLC,

Defendants.

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WOOD, J.

The following papers were read in connection with moving defendant Woods III In Westchester Homeowners Association, Inc. ("Association") motion which is opposed by plaintiff, Bank of America, N.A. ("the Bank")

Defendant's Notice of Motion, Sullivan's Affidavit, Exhibits, Memorandum of Law.
Association's Counsel's Affirmation in Opposition, Exhibits.

This is an action to foreclose a mortgage made by Michael Reilly and Robin Reilly, as borrowers to purchase a residential property in Peekskill. Borrowers defaulted on their payment obligations, based upon the Note dated November 13, 2008, and have failed to cure their default. The Bank commenced this action on June 28, 2013, by filing the summons, verified complaint and notice of pendency. None of the defendants have appeared by an answer with defenses to this action. The Association filed a notice of appearance waiving service of all papers and certain notices. On March 31, 2015, the Bank was awarded an order of reference, and holding the non-appearing parties in default, and Liam McLaughlin, Esq. was appointed as referee to compute the sums owed.

According to the Bank, on June 4, 2015, it forwarded to the Referee the Oath and Report for the Referee to review and if acceptable execute. On or about July 2, 2015, the Referee contacted the Bank's counsel and advised that he needed a new Affidavit of Merit and Amount due in order to execute the Oath and Report. On July 6, 2015, the Bank's counsel, was advised that the loan and file were being transferred to a new servicer on July 15, 2015, and that the outgoing servicer was not going to provide a new Affidavit of Merit and Amount due. On October 16, 2015, the new servicer provided the Bank's counsel judgment figures and those figures were incorporated in the new Affidavit of Merit and Amount due and sent to the new servicer for review, signature and notarization. On November 3, 2015, the Bank's counsel received the executed said new Affidavit of Merit and Amount due and subsequently the Oath and Report were mailed out to the Referee for execution. Since the sending of the Oath and Report, the Bank's counsel claims that numerous telephone calls and contact to the Referee have been unreturned.

On December 30, 2015, the Bank received the Association's Demand for Resumption of Prosecution and for filing of a Note of Issue.

The Association now brings the instant motion to dismiss seeking an order: to dismiss the action pursuant to CPLR 3215 and 3216; to dismiss the action for failure to abide by the court's order directing the bank to proceed with the filing of an application for Judgment of Foreclosure and Sale within six months of the Order of Reference; and for the appointment of a temporary receiver to collect rents and income for the benefit of the Association; and for such other and further relief as the court deems just and proper.

Based upon the foregoing, the motion is decided as follows:

It is well-settled that "a court's power to dismiss a complaint, sua sponte, is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal" (HSBC Bank USA, N.A. v Alexander, 124 AD3d 838, 839, [2d Dept 2015]). If a plaintiff takes the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference (see RPAPL §1321 [1]), within one year of defendant's default, it is deemed to have initiated proceedings for entry of the default judgment, and, thus, does not abandon an action (HSBC Bank USA, N.A. v Alexander, 124 AD3d 838, 839 [2d Dept 2015]). Addressing the Association's motion under CPLR 3215(c), it argues that the complaint should be dismissed with prejudice, due to the Bank's failure to prosecute its mortgage foreclosure case promptly; the non-payment of assessments by the borrowers to the Association has presented and continues to present a significant financial burden to it; and as of April 28, 2016, the amount past due to the Association exceeds $27,189.25.

CPLR 3215(c) provides that:"[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed."

Here, the record shows that the Association was served with the summons and complaint in July 2013, it filed a request for judicial intervention requesting the required settlement conferences pursuant to CPLR 3408, just a little more than a month after the action had been commenced. On August 4, 2014, the Bank advised its counsel that the foreclosure was on hold/stayed for review of a modification application pursuant to the Consumer Finance Protection Board ("CFPB") rules and the Bank was directed not to proceed with filing of the application for Order of Reference until advised that the stay was lifted. On August 13, 2014, the Bank's counsel received the executed affidavit of merit in support of an application for order of reference but was still stayed pursuant to the CFPB rules. After this matter was no longer stayed, the Bank moved for an Order of Reference and Default Judgment dated November 5, 2014, and entered on February 18, 2015.

Under these circumstances, the Bank has demonstrated, in its opposing papers, that sufficient cause exists for the delay within the contemplation of CPLR 3215(c) due to its participation in litigation activities, and stays imposed on the litigation, all indicate that the Bank did not abandon the action. Moreover, the record reflects a meritorious action, as the Bank had sustained its burden without opposition of demonstrating its entitlement to judgment as a matter of law by tendering proof of the existence of the note, mortgage, and the borrowers' default in payment (Mahopac Natl. Bank v Baisley, 244 AD2d 466, 467 [1997]).

Addressing the Association motion to dismiss pursuant to CPLR 3216, there is a strong public policy in favor of resolving cases on their merits whenever possible (Espinal v New York City Health & Hospitals Corp., 115 AD3d 641[2d Dept 2014]). However, "[l]itigation cannot be conducted efficiently if deadlines are not taken seriously [and] that disregard of deadlines should not and will not be tolerated" (Andrea v Arnone, Hedin, Casker, Kennedy & Drake, Architects and Landscape Architects, P.C., 5 NY3d 514, 521 [2005].)

CPLR 3216 is "an extremely forgiving statute which never requires, but merely authorizes the Supreme Court to dismiss a plaintiff's action based on the plaintiff's unreasonable neglect to proceed" (Lauri v Freeport Union Free School Dist., 78 AD3d 1130 [2d Dept 2010]). The statute provides that once the 90–day notice is received, plaintiff is required to file a note of issue in compliance with the notice or move, before the default date, either to vacate the notice or to extend the 90–day period (Chaudhry v Ziomek, 21 AD3d 922, 924 [2d Dept 2005]). However, pursuant to CPLR 2004, "(e)xcept where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed." It is within the discretion of the Supreme Court whether to grant such an extension of time (Oliver v Town of Hempstead, 68 AD3d 1079, 1080 [2d Dept 2009]). Thus, in opposition to the motion to dismiss for want of prosecution, a plaintiff is required to provide a justifiable excuse for her delay and to demonstrate a meritorious cause of action (*see* CPLR 3216[e]; Sharpe v Osorio, 21 AD3d 467[2d Dept 2005]). However, "such a dual showing is not strictly necessary in order for the plaintiff to escape such a dismissal" (Ferrera v Esposit, 66 AD3d 637, 638 [2d Dept 2009]). A court may retain some "residual

discretion" to deny a motion to dismiss, "even when a plaintiff fails to comply with the 90–day requirement and additionally fails to proffer an adequate excuse for the delay or a potentially meritorious cause of action" (Ramon v Zangari, 116 AD3d 753 [2d Dept 2014]).

Procedurally, the timing of a motion to dismiss becomes crucial. A court cannot dismiss an action for neglect to prosecute unless: at least one year has elapsed since joinder of issue; defendant has served on plaintiff a written demand to serve and file a note of issue within 90 days; and plaintiff has failed to serve and file a note of issue within the 90–day period (CPLR 3216[b]) (Baczkowski v D.A. Collins Const. Co., Inc., 89 NY2d 499, 503 [1997]).

By the Order of Reference, which required the Bank to make application for Judgment of Foreclosure and Sale within 6 months of the Order of Reference, unless extension is granted by the Court for good cause shown. Notably, the Bank failed to seek leave of the court for an extension. The Bank claims that it was not unreasonably neglecting to proceed as it could not proceed without an executed oath and report. Moreover, the Bank asserts that it experienced delays due to the referee requiring a new Affidavit of Merit and Amount Due; the service transfer of the file which delayed obtaining said new affidavit; and the referee's alleged failure to return the oath and report sent to the referee or respond to the Bank's numerous contacts.

Therefore, in light of the foregoing, and the fact that issue had not been joined in this action as no defendant (including the Association) had served answers in the action (U.S. Bank Nat. Ass'n v Bassett, 137 AD3d 1109, 1110 [2d Dept 2016]), the Bank has demonstrated good cause for not filing the proposed Judgment of Foreclosure and Sale before the expiration of the six month deadline set forth by this court. Importantly, in the context of foreclosure actions, "the

stability of contract obligations must not be undermined by judicial sympathy" (Wells Fargo Bank, N.A. v Meyers, 108 AD3d 9, 21, 22 [2d Dept 2013]).

Further, regarding the Association's application for a temporary receiver, a party moving for the appointment of a temporary receiver must submit "clear and convincing evidence of irreparable loss or waste to the subject property and that a temporary receiver is needed to protect their interests" (Bd. of Managers of Nob Hill Condo. Section II v. Bd. of Managers of Nob Hill Condo. Section I, 100 AD3d 673 [2d Dept 2012]).

Notably, the Association filed a lien with the Westchester County Clerk on October 9, 2012 for unpaid assessments with respect to the subject premises. The Association also filed Lien II. The Association argues that the inability of the Association to collect assessments during the pendency of this proceeding mandates the appointment of a receiver to rent out the subject unit thereby placing tenants in occupancy to halt the deterioration and decline in value of the unit.

Under the circumstances of this case, there has been no demonstration of actual and imminent risk to the premises, or that the temporary receiver is necessary in this case.

NOW, THEREFORE, based upon the stated reasons, it is hereby:

ORDERED, that the Association's alternate relief that the Court compel the Bank to expeditiously and diligently resume prosecution of this matter is granted, so that the Bank must submit to the court on notice to defendants an application for Judgment of Foreclosure and Sale in this matter within 90 days of this order, or if it does not possess the necessary documents to do so, submit within such time, a motion for a substitute referee, and the reasons for such motion, and the Association's motion is denied in all other respects; and it is further

ORDERED, that the appointment of a temporary receiver is denied; and it is further

ORDERED, that the Bank is directed to serve a copy of this order with Notice of Entry upon the parties to this action, within five days of entry of this Decision and Order, in accordance with NYSCEF protocols.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

Dated: White Plains, New York
September 21, 2016

HON. CHARLES D. WOOD, J.S.C

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