SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

Fifth Third Mortgage Company v. Anthony Schiro

2022 NY Slip Op 06689 (N.Y. Ct. App. 2022) · No. 2020-06992 · Decided November 23, 2022

SUMMARY

The Appellate Division, Second Department, reversed an order denying Fifth Third Mortgage Company's motion to restore a pre-note-of-issue action to the court's calendar. The court held that restoration was automatic because the case had been marked inactive without a CPLR 3216 notice or an order directing dismissal, and that the motion was not subject to a specified time limit.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Per Curiam; Mark C. Dillon, J.P.; Cheryl E. Chambers, J.; Joseph J. Maltese, J.; Helen Voutsinas, J.
JURISDICTION	New York
DECIDED	November 23, 2022
DOCKET	2020-06992
DISPOSITION	reversed
PROCEDURAL POSTURE	Plaintiff appealed from an order denying its motion to restore a pre-note-of-issue mortgage action to the court's calendar.
STANDARD OF REVIEW	The Appellate Division reviewed the legal propriety of the order denying restoration of the action to the calendar.
PRECEDENTIAL VALUE	Published appellate decision
PARTIES	Fifth Third Mortgage Company v. Anthony Schiro

TOPICS

civil procedure · appellate procedure · contracts · mortgages

PRACTICE AREAS

civil procedure · mortgage foreclosure and enforcement · appellate procedure

QUESTIONS PRESENTED

1. Whether restoration of a pre-note-of-issue action marked inactive before a note of issue was filed is automatic when there was no CPLR 3216 90-day notice and no dismissal order under 22 NYCRR 202.27.
2. Whether the plaintiff's motion to restore was untimely because it was brought more than a specified period after the action was marked off the calendar.
3. Whether the plaintiff was required to establish a reasonable excuse for delay or lack of dilatory conduct in seeking restoration.

HOLDINGS

1. When a case is marked inactive before a note of issue is filed, without a CPLR 3216 90-day notice and without an order dismissing the complaint under 22 NYCRR 202.27, restoration to the calendar is automatic.
2. The court need not consider whether the plaintiff had a reasonable excuse for delay or engaged in dilatory conduct when restoring a case marked inactive under these circumstances.
3. The motion to restore was not untimely because the action was pre-note of issue and could not properly be marked off the calendar pursuant to CPLR 3404; therefore, no specified time limit required the motion to be brought.

KEY QUOTATIONS

> “*Where, as here, the case was marked "inactive" before a note of issue had been filed, there was no 90-day notice pursuant to CPLR 3216, and there was no order directing dismissal of the complaint pursuant to 22 NYCRR 202.27 for failure to appear at a compliance conference, "'restoring a case marked \"inactive\" is automatic'"*” (*1)

> “*Under these circumstances, a motion to restore the action to the calendar should be granted "'without considering whether the plaintiff had a reasonable excuse for the delay or whether [it] engaged in dilatory conduct'"*” (*1)

FACTUAL BACKGROUND

Anthony Schiro executed a $124,000 adjustable-rate promissory note in favor of Fifth Third Mortgage Company, secured by a mortgage on real property. After Schiro allegedly defaulted, Fifth Third commenced an action to recover on the note. Before a note of issue was filed, the Supreme Court marked the case off the calendar after plaintiff's counsel failed to appear at two court-ordered conferences; plaintiff later sought restoration.

PROCEDURAL HISTORY

Fifth Third commenced an action to recover on a promissory note after Schiro allegedly defaulted. The Supreme Court marked the case off the calendar after plaintiff's counsel failed to appear at scheduled preliminary conferences and later denied plaintiff's motion to restore the action as untimely. The Appellate Division reversed and granted the motion to restore.

DISPOSITION

reversed

REMAND INSTRUCTIONS

The plaintiff's motion to restore the action to the court's calendar is granted.

CASES CITED

- Wells Fargo Bank, NA v. Oziel, 196 AD3d 618, 620
- Andre v. Bonetto Realty Corp., 32 AD3d 973, 975
- Reed v. Cornell Univ., 101 AD3d 840, 842
- Wynn v. Wynn-Wright, 201 AD3d 1017, 1017
- Deutsche Bank Natl. Trust Co. v. Gambino, 181 AD3d 558, 560

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