

**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

OPINION

Fifth Third Mtge. Co. v. Schiro 2022 NY Slip Op 06689

PER CURIAM.

Fifth Third Mtge. Co. v Schiro (2022 NY Slip Op 06689) Fifth Third Mtge. Co. v Schiro 2022 NY Slip Op 06689 Decided on November 23, 2022 Appellate Division, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided on November 23, 2022

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Second Judicial Department MARK C. DILLON, J.P.

CHERYL E. CHAMBERS

JOSEPH J. MALTESE

HELEN VOUTSINAS, JJ. 2020-06992

(Index No. 101379/15) [*1]Fifth Third Mortgage Company, appellant, vAnthony Schiro, respondent. Relin, Goldstein & Crane, LLP (D.J. & J.A. Cirando, PLLC, Syracuse, NY [John A. Cirando and Rebecca L. Konst], of counsel), for appellant. Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara, Wolf & Carone, LLP, Brooklyn, NY (Andrea J. Caruso of counsel), for respondent. DECISION & ORDER In an action to recover on a promissory note, the plaintiff appeals from an order of the Supreme Court, Richmond County (Desmond A. Green, J.), dated March 11, 2020. The order denied the plaintiff's motion to restore the action to the court's calendar. ORDERED that the order is reversed, on the law, with costs, and the plaintiff's motion to restore the action to the court's calendar is granted. On November 15, 2005, the defendant executed an adjustable rate note (hereinafter the note) in the sum of \$124,000 in favor of the plaintiff, which was secured by a mortgage on certain real property. The defendant allegedly defaulted on his obligations under the note. On September 22, 2015, the plaintiff commenced this action to recover on the note. The defendant interposed an answer to the complaint. Thereafter, the Supreme Court scheduled a preliminary conference for December 5, 2016, which was adjourned to December 12, 2016. In an order dated December 12, 2016, the Supreme Court indicated that counsel for the plaintiff had failed to appear for the court-ordered conferences on December 5, 2016, and December 12, 2016, marked the case off the calendar, and directed that the plaintiff "may restore [the] action to the calendar by motion." Subsequently, the

plaintiff moved to restore the action to the court's calendar in a motion that was returnable on December 4, 2019. However, the plaintiff's attorney failed to appear on that date. In January 2020, the plaintiff again moved to restore the action to the court's calendar. In an order dated March 11, 2020, the Supreme Court denied the motion, determining that it was untimely. The plaintiff appeals. 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" (Wells Fargo Bank, NA v Oziel, 196 AD3d 618, [*2]620, quoting *Andre v Bonetto Realty Corp.*, 32 AD3d 973, 975). 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" (Wells Fargo Bank, NA v Oziel, 196 AD3d at 620, quoting *Reed v Cornell Univ.*, 101 AD3d 840, 842; see *Andre v Bonetto Realty Corp.*, 32 AD3d at 975). Moreover, since this action was pre-note of issue and could not properly be marked off the calendar pursuant to CPLR 3404, the plaintiff was not required to move to restore the action to the calendar within any specified time frame (see *Wynn v Wynn-Wright*, 201 AD3d 1017, 1017; *Deutsche Bank Natl. Trust Co. v Gambino*, 181 AD3d 558, 560). Thus, contrary to the Supreme Court's determination, the plaintiff's motion was not untimely. Accordingly, the court should have granted the plaintiff's motion to restore the action to the court's calendar. The parties' remaining contentions need not be reached in light of our determination. DILLON, J.P., CHAMBERS, MALTESE and VOUTSINAS, JJ., concur. ENTER: Maria T. Fasulo Clerk of the Court