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

OneWest Bank, FSB v. Segal

2023 NY Slip Op 06146 (App. Div. 2023) · No. 2020-05186 · Decided November 29, 2023

SUMMARY

The Appellate Division, Second Department, reversed an order denying OneWest Bank's motion to restore a mortgage foreclosure action to the active calendar and extend the time to file a note of issue. The court held that the June 26, 2018 order was not a valid 90-day demand under CPLR 3216 because it provided insufficient time and lacked the required warning language. It further held that the action had been ministerially dismissed without a motion, notice, or formal dismissal order, requiring restoration without consideration of the plaintiff's excuse for delay.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Betsy Barros, J.P.; Linda Christopher, J.; Barry E. Warhit, J.; Janice A. Taylor, J.
JURISDICTION	New York
DECIDED	November 29, 2023
DOCKET	2020-05186
DISPOSITION	reversed
PROCEDURAL POSTURE	The plaintiff appealed from an order denying its motion to restore a mortgage-foreclosure action to the active calendar and to extend the time to file a note of issue.
STANDARD OF REVIEW	The court reviewed the order for errors of law and addressed unpreserved legal issues apparent on the face of the record.
PRECEDENTIAL VALUE	Published New York Appellate Division opinion
PARTIES	OneWest Bank, FSB v. Lilly Segal

TOPICS

foreclosure · civil procedure · appellate procedure · motions to dismiss · final judgment rule

PRACTICE AREAS

New York civil procedure | mortgage foreclosure | appellate procedure

QUESTIONS PRESENTED

1. Whether the June 26, 2018 order constituted a valid ninety-day demand under CPLR 3216.
2. Whether the action could properly be dismissed or marked disposed ministerially for failure to file a note of issue without a motion, notice, or formal order of dismissal.
3. Whether the action should be restored to the active calendar without requiring the plaintiff to establish a reasonable excuse for its delay.

HOLDINGS

1. The June 26, 2018 order was not a valid ninety-day demand under CPLR 3216 because it gave the plaintiff less than ninety days to comply and did not contain the required warning that noncompliance could serve as the basis for a dismissal motion.
2. The action was improperly marked disposed because the record showed a ministerial dismissal without a motion or notice to the parties and without entry of a formal order directing dismissal.
3. The action should have been restored to the active calendar without consideration of whether the plaintiff had a reasonable excuse for its delay in complying with the June 26, 2018 order.

KEY QUOTATIONS

> *"Thus, the order dated June 26, 2018, did not constitute a valid 90-day demand pursuant to CPLR 3216"* ([*2])

> *"Under these circumstances, the action should have been restored to the active calendar without considering whether the plaintiff had a reasonable excuse for its delay in complying with the order dated June 26, 2018"* ([*2])

FACTUAL BACKGROUND

OneWest Bank brought an action to foreclose a mortgage on residential property in Brooklyn. The Supreme Court directed the bank to file a note of issue by June 29, 2018, but the bank served the note of issue without filing it with the Kings County Clerk. The action was subsequently marked disposed for failure to file the note of issue, although no motion, notice, or formal dismissal order was issued. The bank later moved to restore the action, asserting law-office failure and a meritorious cause of action.

PROCEDURAL HISTORY

OneWest Bank commenced a mortgage-foreclosure action in 2011. After prior summary judgment proceedings and discovery disputes, the Supreme Court directed the plaintiff to file a note of issue by June 29, 2018. The plaintiff served but did not file the note of issue, and the action was marked disposed without a motion, notice, or formal dismissal order. The Supreme Court denied the plaintiff's later motion to restore the action, and the Appellate Division reversed and granted that motion.

DISPOSITION

reversed

REMAND INSTRUCTIONS

The Supreme Court's order was reversed, and the plaintiff's motion to restore the action to the active calendar and extend the time to file a note of issue was granted.

CASES CITED

- Deutsche Bank Natl. Trust Co. v Bastelli, 164 AD3d 748, 749
- HSBC Bank USA, N.A. v Garnes, 186 AD3d 1620, 1620
- Cadichon v Facelle, 18 NY3d 230, 235-236
- Nationwide Capital Group, Inc. v Weiss, 170 AD3d 870, 871-872
- Christiano v Heatherwood House at Holbrook II, LLC, 185 AD3d 778, 779
- Wollman v Berliner, 29 AD3d 786, 786
- Byers v Winthrop Univ. Hosp., 100 AD3d 817, 818
- Rosenfeld v Schneider Mitola LLP, 175 AD3d 1576, 1577
- U.S. Bank N.A. v Spence, 175 AD3d 1346, 1348
- Onewest Bank, FSB v N & R Family Trust, 200 AD3d 900, 902
- Wells Fargo, N.A. v Parker, 210 AD3d 1128, 1129-1130
- Bayview Loan Servicing, LLC v Mosbacher, 191 AD3d 936, 936-937
- Wells Fargo Bank, N.A. v Drago, 170 AD3d 1083, 1084
- Deutsche Bank Natl. Trust Co. v Musheyev, 203 AD3d 1027, 1028-1029

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