

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

U.S. Bank N.A. v. Sanchez

2022 NY Slip Op 06155 (N.Y. Ct. App. 2022) · No. 2020-02636; 2020-02643 · Decided November 2, 2022

SUMMARY

The Appellate Division, Second Department, held that the Supreme Court lacked authority to dismiss a mortgage foreclosure action for failure to prosecute under CPLR 3216 because issue had not been joined. It reversed the order denying the plaintiff's motion to vacate the dismissal and restore the action, and dismissed as academic the appeal from a later order denying renewal.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Valerie Brathwaite Nelson, J.P.; Robert J. Miller, J.; Lara J. Genovesi, J.; Barry E. Warhit, J.
JURISDICTION	New York
DECIDED	November 2, 2022
DOCKET	2020-02636; 2020-02643
DISPOSITION	reversed
PROCEDURAL POSTURE	The plaintiff appealed from orders denying its motion to vacate an order dismissing the mortgage-foreclosure complaint under CPLR 3216 and restore the action to the active calendar, and denying its later motion for leave to renew.
STANDARD OF REVIEW	Whether the statutory preconditions for dismissal under CPLR 3216 were satisfied is a question of law reviewed on appeal; the court also considered an unpreserved legal issue appearing on the face of the record.
PRECEDENTIAL VALUE	Published New York appellate decision
PARTIES	U.S. Bank National Association v. Carlos Sanchez

TOPICS

- foreclosure
- civil procedure
- appellate procedure
- preservation of error

PRACTICE AREAS

civil procedure

mortgage foreclosure

appellate procedure

QUESTIONS PRESENTED

1. Whether the Supreme Court had authority to dismiss the foreclosure action for neglect to prosecute under CPLR 3216 when issue had never been joined.
2. Whether the plaintiff's unpreserved challenge to the statutory preconditions for dismissal could be considered on appeal.
3. Whether the appeal from the order denying renewal was academic after reversal of the order denying vacatur and restoration.

HOLDINGS

1. A court may not dismiss an action for neglect to prosecute under CPLR 3216 unless the statute's preconditions are satisfied, including that issue has been joined. Because no defendant had served an answer, issue was never joined, and the Supreme Court lacked power to dismiss the complaint under CPLR 3216.
2. The Appellate Division could reach the plaintiff's argument for the first time on appeal because it presented a question of law appearing on the face of the record and could not have been avoided if brought to the Supreme Court's attention.

KEY QUOTATIONS

"A court may not dismiss an action based on neglect to prosecute unless the CPLR 3216 statutory preconditions to dismissal are met"

"Since at least one precondition set forth in CPLR 3216 was not met, the court was without power to direct dismissal of the complaint pursuant to that statute"

FACTUAL BACKGROUND

The defendant allegedly executed a note secured by a mortgage on Brooklyn real property in April 2006. The plaintiff commenced a foreclosure action in March 2008. After a 2013 status conference, the Supreme Court directed the plaintiff to move for a judgment of foreclosure and sale within 90 days, but dismissed the complaint under CPLR 3216 when the plaintiff failed to do so. The record showed that none of the defendants had served an answer, so issue had never been joined.

PROCEDURAL HISTORY

The Supreme Court, Kings County, found that the defendant had defaulted and directed the plaintiff to move for a judgment of foreclosure and sale within 90 days or face dismissal. When the plaintiff did not comply, the court dismissed the complaint without prejudice under CPLR 3216. The Supreme Court denied the plaintiff's motion to vacate the dismissal and restore the action, and later denied renewal. The Appellate Division reversed the first

order, granted the motion to vacate and restore the action, and dismissed the appeal from the renewal order as academic.

DISPOSITION

reversed

REMAND INSTRUCTIONS

The order dated May 22, 2014, was reversed, the plaintiff's motion to vacate the September 24, 2013 dismissal order and restore the action to the active calendar was granted, and the appeal from the December 14, 2015 order was dismissed as academic.

CASES CITED

- Delgado v. New York City Hous. Auth., 21 A.D.3d 522, 522
- Bank of N.Y. v. Harper, 176 A.D.3d 907, 908
- Central Mtge. Co. v. Ango, 203 A.D.3d 692, 693
- OneWest Bank, FSB v. Singh, 186 A.D.3d 1388, 1389
- U.S. Bank, N.A. v. Picone, 170 A.D.3d 1070, 1072
- U.S. Bank N.A. v. Ricketts, 153 A.D.3d 1298, 1299
- U.S. Bank N.A. v. Bassett, 137 A.D.3d 1109, 1110
- Guy v. Hatsis, 107 A.D.3d 671, 671-672
- Deutsche Bank Natl. Trust Co. v. Beckford, 202 A.D.3d 1049, 1051

OPINION

PER CURIAM.

U.S. Bank N.A. v Sanchez (2022 NY Slip Op 06155) U.S. Bank N.A. v Sanchez 2022 NY Slip Op 06155 Decided on November 2, 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 2, 2022 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department VALERIE BRATHWAITE NELSON, J.P.

ROBERT J. MILLER LARA J. GENOVESI BARRY E. WARHIT, JJ. 2020-02636 2020-02643 (Index No. 8531/08) [*1]U.S. Bank National Association, etc., appellant, vCarlos Sanchez, respondent, et al., defendants. Hinshaw & Culbertson, LLP, New York, NY (Matthew C. Ferlazzo and Schuyler B. Kraus of counsel), for appellant. Esagoff Law Group, P.C. (Alter & Barbaro, Brooklyn, NY [Bernard M. Alter and Troy J. Lambert], of counsel), for respondent.

DECISION & ORDER In an action to foreclose a mortgage, the plaintiff appeals from (1) an order of the Supreme Court, Kings County (Sylvia G. Ash, J.), dated May 22, 2014, and (2) an order of the same court dated December 14, 2015.

The order dated May 22, 2014, denied the plaintiff's motion to vacate an order of the same court dated September 24, 2013, directing dismissal of the complaint pursuant to CPLR 3216, and to restore the action to the active calendar.

The order dated December 14, 2015, denied the plaintiff's motion, in effect, for leave to renew its prior motion to vacate the order dated September 24, 2013, and to restore the action to the active calendar. ORDERED that the order dated May 22, 2014, is reversed, on the law, and the plaintiff's motion to vacate the order dated September 24, 2013, and to restore the action to the active calendar is granted; and it is further, ORDERED that the appeal from the order dated December 14, 2015, is dismissed as academic in light of our determination on the appeal from the order dated May 22, 2014; and it is further, ORDERED that one bill of costs is awarded to the plaintiff.

In April 2006, the defendant Carlos Sanchez (hereinafter the defendant) allegedly executed a note, which was secured by a mortgage on certain real property located in Brooklyn. In March 2008, the plaintiff commenced this action against the defendant, among others, to foreclose the mortgage.

In an order dated April 30, 2013, made after a status conference, the Supreme Court found that the defendant had defaulted in the action, and directed the plaintiff to move for a judgment of foreclosure and sale within 90 days or the complaint would be dismissed. By order dated September 24, 2013, the Supreme Court directed dismissal of the complaint, without prejudice, pursuant to CPLR 3216 based upon the plaintiff's failure to comply with the April 30, 2013 order.

Thereafter, the plaintiff moved to vacate the order dated September 24, 2013, and to restore the action to the active calendar. In an order dated May 22, 2014, the Supreme Court denied the motion with leave to renew upon submission of a motion for a judgment of foreclosure and sale.

The plaintiff then moved, in effect, for leave to renew its prior motion, inter alia, to vacate the order dated September 24, 2013, although it had not submitted a motion for a judgment of foreclosure and sale. In an order dated December 14, 2015, the court denied the motion.

The plaintiff appeals. "A court may not dismiss an action based on neglect to prosecute unless the CPLR 3216 statutory preconditions to dismissal are met" (*Delgado v New York City Hous. Auth.*, 21 AD3d 522, 522; see CPLR 3216[b]; *Bank of N.Y. v Harper*, 176 AD3d 907, 908).

As relevant to this appeal, CPLR 3216(b)(1) provides that no dismissal shall be made under this statute unless issue has been joined (see *Central Mtge. Co. v Ango*, 203 AD3d 692, 693; *Bank of N.Y. v Harper*, 176 AD3d at 908).

Here, contrary to the Supreme Court's statement in the order dated September 24, 2013, issue was never joined in the action, as none of the defendants had submitted an answer to the complaint. Since at least one precondition set forth in CPLR 3216 was not met, the court was without power to direct dismissal of the complaint pursuant to that statute (see *OneWest Bank, FSB v Singh*, 186 AD3d 1388, 1389; *Bank of N.Y. v Harper*, 176 AD3d at 908; *US Bank, N.A. v Picone*, 170 AD3d 1070, 1072; *U.S. Bank N.A. v Ricketts*, 153 AD3d 1298, 1299).

Although the plaintiff raises for the first time on appeal the argument that the CPLR 3216 statutory preconditions to dismissal were not met, we reach the argument because it involves a question of law that appears on the face of the record, and could not have been avoided if brought to the attention of the court (see *U.S. Bank N.A. v Bassett*, 137 AD3d 1109, 1110; *Guy v Hatsis*, 107 AD3d 671, 671-672).

The defendant's remaining contentions are without merit. Accordingly, the Supreme Court should have granted the plaintiff's motion to vacate the order dated September 24, 2013, and to restore the action to the active calendar.

In view of the foregoing, the appeal from the order dated December 14, 2015, must be dismissed as academic (see *Deutsche Bank Natl. Trust Co. v Beckford*, 202 AD3d 1049, 1051).
BRATHWAITE NELSON, J.P., MILLER, GENOVESI and WARHIT, JJ., concur. ENTER: Maria T. Fasulo Clerk of the Court