State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: November 25, 2020 529168

JPMORGAN CHASE BANK NATIONAL ASSOCIATION,
Appellant,
v
MEMORANDUM AND ORDER
BARBARA J. KELLEHER,
Respondent,
et al.,
Defendants.

Calendar Date: October 22, 2020

Before: Garry, P.J., Clark, Devine, Aarons and Reynolds Fitzgerald, JJ.

RAS Boriskin, LLC, Westbury (Joseph F. Battista of counsel), for appellant.

Anderson Firm PLLC, Saratoga Springs (Michele L. Anderson of counsel), for respondent.

Clark, J.

In December 2009, plaintiff commenced this mortgage foreclosure action against defendant Barbara J. Kelleher (hereinafter defendant), among others, alleging that defendant failed to make a payment that was due under the note. Defendant did not file an answer or otherwise appear in the action, and, in January 2014, Supreme Court granted plaintiff's motion for a default judgment and an order of reference. More than two years later, in March 2016, plaintiff moved for a judgment of

foreclosure and sale. The following month, defendant cross-moved for dismissal of the complaint for lack of personal jurisdiction, arguing that she was never served with process and noting discrepancies between her appearance and the person described as having been served in plaintiff's affidavit of service. Supreme Court reserved decision and ordered a traverse hearing. Following several adjournments of the traverse hearing, plaintiff advised the court that it could not locate the process server to testify and essentially conceded that it could not meet its burden of showing proper service. At that point, in November 2018, plaintiff moved for an extension of time to serve defendant under CPLR 306-b. Defendant opposed the motion and submitted an affidavit in further support of her cross motion. Supreme Court denied plaintiff's motion for an extension of time and granted defendant's cross motion to dismiss the complaint and cancel the notice of pendency. Plaintiff appeals, primarily challenging the denial of its motion for an extension of time to effectuate service.

As relevant here, a court may, in the interest of justice, extend the time in which a plaintiff may effectuate proper service upon a defendant (see CPLR 306-b).[1] Whether to grant an extension of time for service in the interest of justice is a discretionary determination, requiring the trial court to engage in "a careful judicial analysis of the factual setting of the case" and balance competing interests (Leader v Maroney, Ponzini & Spencer, 97 NY2d 95, 105 [2001]; see Hine v Bambara, 66 AD3d 1192, 1193 [2009]). The trial court's determination is guided by various factors and circumstances that may be taken into consideration, including the plaintiff's diligence (or lack thereof), the expiration of the statute of limitations, whether the underlying cause of action is meritorious, the length in delay of service, whether the plaintiff promptly sought the

[1] To the extent that plaintiff contends that its motion for an extension of time to effectuate service should have been granted for good cause (see CPLR 306-b), such contention was not raised in Supreme Court and is therefore improperly raised for the first time on appeal (see Walker v Glaxosmithkline, LLC, 161 AD3d 1419, 1421 [2018]).

extension of time and any prejudice that may be borne by the defendant (see Leader v Maroney, Ponzini & Spencer, 97 NY2d at 105-106; Hine v Bambara, 66 AD3d at 1193). This Court should not disturb the trial court's discretionary determination unless such determination constitutes an abuse of discretion (see Matter of Richards v Office of the N.Y. State Comptroller, 88 AD3d 1049, 1050 [2011]; Della Villa v Kwiatkowski, 293 AD2d 886, 887 [2002]).

Upon review of the record, we find no abuse of discretion in Supreme Court's determination to deny plaintiff's motion for an extension of time to effectuate proper service. The statute of limitations had expired prior to plaintiff making its extension motion – a factor that weighs in favor of granting the extension motion. However, plaintiff engaged in a pattern of dilatory conduct throughout the action's pendency over nearly a decade.[2] Indeed, it took plaintiff roughly three years after commencing the action to file a request for judicial intervention and the case was administratively closed by Supreme Court on at least one occasion. Additionally, despite having been made aware of the service issue in April 2016, plaintiff did not ultimately move for an extension to serve the complaint until November 2018, roughly 2½ years later. Further, as Supreme Court recognized, the mortgage contains a significant error, which raises real concerns as to plaintiff's ability to prevail upon the merits.[3] In our view, Supreme Court weighed the appropriate factors and reasonably concluded that they did not militate in favor of plaintiff (see Chase Home Fin., LLC v Berger, 185 AD3d 1000, 1002 [2020]; Wells Fargo Bank, N.A. v Kaul, 180 AD3d 956, 958-959 [2020]; Deep v Boies, 121 AD3d 1316, 1323-1324 [2014], lv denied 25 NY3d 903 [2015]). Accordingly, we uphold Supreme Court's denial of plaintiff's motion for an extension of time to serve defendant.

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[2] Although two separate bankruptcy filings gave rise to two automatic stays, each stay was lifted after a few months.

[3] This unresolved mortgage error has prejudiced defendant, who owns a separate parcel of land that is apparently encumbered by the mortgage error.

To the extent that we have not addressed any of plaintiff's arguments, they are either not properly before us or lacking in merit.

Garry, P.J., and Reynolds Fitzgerald, J., concur.

Aarons, J. (dissenting).

In our view, Supreme Court abused its discretion in denying plaintiff's motion for an extension of time to serve process. Accordingly, we respectfully dissent.

"The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties" (Leader v Maroney, Ponzini & Spencer, 97 NY2d 95, 105 [2001]). When a court undertakes this analysis and balancing, it may examine a plaintiff's diligence, or lack thereof, in attempting to effectuate service, as well as the "expiration of the statute of limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time[] and prejudice to [the] defendant[]" (Pierce v Village of Horseheads Police Dept., 107 AD3d 1354, 1357 [2013] [internal quotation marks, brackets and citation omitted]; see Heath v Normile, 131 AD3d 754, 755 [2015]). The determination whether to grant or deny a motion for an extension of time under CPLR 306-b lies within the court's discretion (see Maiuri v Pearlstein, 53 AD3d 816, 816-817 [2008]; Della Villa v Kwiatkowski, 293 AD2d 886, 887 [2002]).

Supreme Court found, among other things, that plaintiff waited a significant amount of time before moving for an extension of time to effectuate service. The record, however, reflects that defendant Barbara J. Kelleher (hereinafter defendant) never answered the complaint. It was only after defendant cross-moved to dismiss the complaint that plaintiff was first alerted to the possibility of defective service. Indeed, until that point, which was almost seven years after the

complaint was filed, plaintiff had no reason or incentive to seek relief under CPLR 306-b. The issue of service was to be resolved in a traverse hearing, which was adjourned for different reasons, including inclement weather and a stay of the action due to defendant's bankruptcy filing. Once it became clear that plaintiff could not secure the process server's testimony, plaintiff promptly moved for an extension of time in accordance with a briefing schedule set forth by the court. Under these circumstances, we cannot say that plaintiff delayed in seeking an extension of time (see U.S. Bank Natl. Assn. v Kaufman, ___ AD3d ___, ___, 2020 NY Slip Op 06184, *1 [2020]; State of New York Mtge. Agency v Braun, 182 AD3d 63, 67 [2020]; Moundrakis v Dellis, 96 AD3d 1026, 1027 [2012]).

Defendant maintains that plaintiff could not prove a prima facie case due to an error in the mortgage, lack of standing and other various reasons. Defendant's argument, however, misconstrues one of the factors for a court's consideration. Plaintiff just had to demonstrate a potentially meritorious cause of action, which, in our view, it did here based upon the affidavit of merit (cf. OneWest Bank, F.S.B. v Mazzone, 186 AD3d 1815, 1817 [2020]). It was not incumbent upon plaintiff to prove a prima facie case when seeking relief under CPLR 306-b in the interest of justice. Whether plaintiff can ultimately make out a prima facie case or prevail on its claim in the face of the alleged deficiencies raised by defendant is best suited to be litigated in a motion to dismiss, motion for summary judgment or trial, and not within the context of a motion seeking an extension of time to serve process.

As to the remaining factors, notwithstanding plaintiff's delay in prosecuting the action, plaintiff attempted service upon defendant within one week after it commenced this action (see U.S. Bank Natl. Assn. v Kaufman, 2020 NY Slip Op 06184 at *1; Amica Ins. v Baum, 180 AD3d 1284, 1284-1285 [2020]; Wishni v Taylor, 75 AD3d 747, 749 [2010]; Mead v Singleman, 24 AD3d 1142, 1144 [2005]). Also favoring plaintiff was that the statute of limitations was close to expiring by the time defendant raised the issue of defective service (see Matter of Palmateer v Greene

County Indus. Dev. Agency, 38 AD3d 1087, 1089 [2007]).[1] Additionally, there was no demonstrable prejudice to defendant (see Dujany v Gould, 63 AD3d 1496, 1498 [2009]).[2] Based on the foregoing, and taking into account the public policy of favoring the resolution of cases on the merits (see Mead v Singleman, 24 AD3d at 1144), the denial of plaintiff's motion was an abuse of Supreme Court's discretion (see U.S. Bank N.A. v Viera, 187 AD3d 818, ___, 130 NYS3d 329, 330-331 [2020]; US Bank N.A. v Saintus, 153 AD3d 1380, 1381-1382 [2017]; Heath v Normile, 131 AD3d at 755-756; Wishni v Taylor, 75 AD3d at 749). Finally, in view of this position, we would deny defendant's cross motion as academic. For these reasons, we would reverse the order appealed from.

Devine, J., concurs.

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[1] We note that the action was timely when plaintiff filed the summons and complaint in December 2009. At this juncture, the statute of limitations has expired and, therefore, plaintiff would be barred from commencing a new action if it was denied an extension of time to effectuate service of process.

[2] Supreme Court noted that if plaintiff's motion was granted, defendant would be prejudiced because she would not be able to assert the affirmative defense of statute of limitations. We disagree. If plaintiff did ultimately succeed in effectuating service upon defendant, defendant would then be able to allege the statute of limitations as an affirmative defense in an answer or assert it as a ground for dismissal in a pre-answer motion.

ORDERED that the order is affirmed, with costs.

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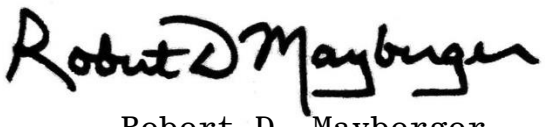

Robert D. Mayberger
Clerk of the Court