

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D34064
N/Y/kmb

_____AD3d_____

Argued - January 3, 2012

MARK C. DILLON, J.P.
PLUMMER E. LOTT
SHERI S. ROMAN
JEFFREY A. COHEN, JJ.

2010-07472
2010-07473

DECISION & ORDER

U.S. Bank National Association, etc., appellant,
v Javier Gonzalez, respondent, et al., defendants.

(Index No. 4137/09)

D.J. & J.A. Cirando, Syracuse, N.Y. (John A. Cirando, Bradley E. Keem, Elizabeth deV. Moeller, and Vicki Jo Beighley of counsel), for appellant.

John C. Gray, Brooklyn, N.Y. (Sara L. Manaugh of counsel), for respondent.

In an action to foreclose a mortgage, the plaintiff appeals from (1) an order of the Supreme Court, Kings County (Saitta, J.), dated April 22, 2010, which granted that branch of the motion of the defendant Javier Gonzalez which was pursuant to CPLR 3211 to dismiss the complaint insofar as asserted against him, and (2) an order of the same court dated June 8, 2010, which granted that branch of the motion of the defendant Javier Gonzalez which was for the imposition of sanctions upon the plaintiff.

ORDERED that the order dated April 22, 2010, is reversed, on the law, without costs or disbursements, and that branch of the motion of the defendant Javier Gonzalez which was pursuant to CPLR 3211 to dismiss the complaint insofar as asserted against him is denied; and it is further,

ORDERED that the order dated June 8, 2010, is affirmed, without costs or disbursements.

The plaintiff commenced this action to foreclose a mortgage on property owned by the defendant Javier Gonzalez. Service upon Gonzalez of copies of the summons and complaint

October 3, 2012

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pursuant to CPLR 308(2) was completed on March 6, 2009, and Gonzalez was required to answer the complaint, appear, or move with respect thereto within 30 days of that date (*see* CPLR 320[a], 3211[e]). Gonzalez failed to do so, but by notice of motion dated October 21, 2009, he moved pursuant to CPLR 3211 to dismiss the complaint insofar as asserted against him. Gonzalez also moved for the imposition of sanctions upon the plaintiff pursuant to 22 NYCRR 130-1.1.

Gonzalez did not request an extension of time within which to serve and file a motion pursuant to CPLR 3211 to dismiss the complaint insofar as asserted against him, and he did not attempt to show good cause for his delay in making the motion, or even address the untimeliness of the motion (*see* CPLR 2004). Moreover, Gonzalez has not sought an extension of time to answer or appear in this action (*see* CPLR 3012[d]). Accordingly, the Supreme Court should have denied, as untimely, that branch of Gonzalez's motion which was pursuant to CPLR 3211 to dismiss the complaint insofar as asserted against him (*see Holubar v Holubar*, 89 AD3d 802; *McGee v Dunn*, 75 AD3d 624, 625).

However, in light of the fact that the plaintiff, inter alia, provided various affirmations and affidavits wherein it made a certain representation that proved to be false, and persisted in making that representation after it knew or should have known it to be false, the Supreme Court providently exercised its discretion in granting that branch of Gonzalez's motion which was for the imposition of sanctions upon the plaintiff (*see* 22 NYCRR 130-1.1[c][3]; *Schwab v Phillips*, 78 AD3d 1036, 1036-1037).

DILLON, J.P., LOTT, ROMAN and COHEN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court