

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

WELLS FARGO BANK, NATIONAL ASSOCIATION
as Trustee etc.

Plaintiff,

-against-

ROSARIO ROLON, et al.

Defendant

Index No: 7880/07

Motion Date: 5/20/09

Motion Cal. No.: 27

Motion Seq. No.: 2

The following papers numbered 1 to 10 read on this motion by defendant, Rosario Rolon, for an Order vacating the default judgement of foreclosure and sale and dismissing the complaint or in the alternative permitting her to serve an answer and defend on the merits.

PAPERS
NUMBERED

Order to Show Cause-Affidavits-Exhibits	1 - 7
Answering Affidavits-Exhibits.....	8 - 10
Replying Affidavits.....	

Upon the foregoing papers it is ordered that this motion is determined as follows.

This is an action to foreclose a mortgage dated April 5, 2006 executed, acknowledged and delivered by defendant Rosario Rolon, the fee owner of the premises known as 85-08 89th Ave., Woodhaven New York, to New Century Mortgage Corporation (New Century), to secure repayment of a note, evidencing a loan in the principal amount of \$405,00.00, with interest. Plaintiff alleges that the defendant defaulted under the terms of the mortgage and note by failing to make the monthly installment payment of interest due and owing beginning on January 1, 2007, and continuing to the present, and that as a consequence, it elected to accelerate the entire mortgage debt.

The Plaintiff obtained a default judgment of foreclosure and sale dated April 30, 2008 against the defendant. Defendant now seeks to stay the foreclosure sale, vacate the judgment of foreclosure and sale, and for leave to serve a late answer pursuant to CPLR 317 and 5015. She asserts that her default in answering the complaint is excusable and that she has a meritorious defenses based upon the fraudulent and misleading statements made to her to induce her to enter into the mortgage. Defendant also moves to dismiss the complaint with prejudice pursuant to CPLR 3211(a)(1) & (7) alleging that the documentary evidence demonstrates that plaintiff has failed to state a cause of action.

Plaintiff opposes this motion.

A defendant seeking to vacate a default in answering a complaint pursuant to CPLR 5015(a)(1) must demonstrate a justifiable excuse for the default and a meritorious defense to the action (see CPLR 5015[a][1]; White v. Daimler Chrysler Corp., 44 AD3d 651 [2007]; Fekete v. Camp Skwere, 16 AD3d 544 [2005]; Caputo v Peton, 13 AD3d 474 [2004]; Glibbery v. Cosenza & Assoc., 4 AD3d 393 [2004]). When seeking to vacate a default pursuant to CPLR 317, the defendant must demonstrate that she did not receive actual notice in time to defend and a meritorious defense (Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co., Inc., 67 NY2d 138, 141-142 [1986]).

The defendant failed to demonstrate either lack of notice or a reasonable excuse for her default. The affidavit of service constitutes prima facie evidence of proper service upon defendant in accordance with CPLR 308(2) on March 28, 2007 (see Hamlet on Olde Oyster Bay Homeowners Assn., Inc. v. Ellner, 57 AD3d 732, 732-733 [2008]; Skyline Agency, Inc. v. Ambrose Coppotelli, Inc., 117 AD2d 135, 139 [1986]). The defendant's bare denial of receipt is insufficient to rebut the presumption of proper service created by a properly executed affidavit of service (see Hamlet on Olde Oyster Bay Homeowners Assn., Inc. v. Ellner, supra; De La Barrera v. Handler, 290 AD2d 476 [2002]) and insufficient to raise a question of fact warranting a hearing (see General Motors Acceptance Corp. v. Grade A Auto Body, 21 AD3d 447 [2005]; 96 Pierrepont, LLC v. Mauro, 304 AD2d 631 [2003]; Sando Realty Corp. v. Aris, 209 AD2d 682 [1994]). Moreover, defendant failed to offer any excuse for the additional delay of almost a year and waiting until the day before the scheduled foreclosure sale to make the instant motion despite being served with notice of entry of the Order of Reference on March 27, 2008 and the Judgment of Foreclosure and Sale on July 4, 2008 (see Malik v. Noe, 54 AD3d 733 [2008]; Miller v. Ateres Shlomo, LLC, 49 AD3d 612 [2008];

Bekker v. Flesichman, 35 AD3d 334 [2006]; 96 Pierrepont, LLC v. Mauro, supra).

The defendant has also failed to demonstrate a meritorious defense. Although the defendant does not have to establish her alleged defenses, she must allege evidentiary facts capable of being established at trial (see Figueroa v. Luna, 281 AD2d 204, 206 [2001]; Rodriguez v. Middle Atl. Auto Leasing, 122 AD2d 720, 722 [1986] appeal dismissed 69 NY2d 874 [1987]).

Insofar as the motion to dismiss the complaint is based upon CPLR 3211(a)(5) & (7), a failure to state a cause of action and upon documentary, the defendant has failed to submit any documents to support her claim that plaintiff did not own the note and mortgage at the time the action was commenced.

Nor has the defendant established a meritorious defense with respect to her claim that the lender, New Century engaged in fraud and coercion, and predatory lending practices, to induce her to accept a loan beyond her means to repay.

Defendant does not rely on any State or Federal Statute in support of her claim of predatory lending nor has she submitted any proof that she falls under the protections of any State or Federal Statute. In opposition to the defendant's motion, the plaintiff submitted the documents surrounding the instant transaction which demonstrate that the defendant's defenses are without merit.

The documents demonstrate that the loan was not a "high cost home loan" as that term was defined in Banking Law § 6-1, as of the date of the making of the subject loan inasmuch as mortgage loans with principal amounts exceeding \$300,000.00 were not covered by the statute (see former Banking Law § 6-1[1][d] and § 6-1[1][e][i][B][L 2002, c 626 § 1]). Even if the statute were applied, the subject loan does not qualify as a high cost loan as defined in Banking Law § 6-1(1)[d] and § 6-1(1)[g]. Nor does the subject loan the qualify as a high cost home loan under the Federal Statute (see 15 USC §1602).

Defendant also asserts that New Century, through its "representative" engaged in fraud and coercion by making false statements to induce her to accept a loan that was beyond her means to repay. She claims that New Century failed to consider her repayment ability and was given something by "the representative" which contained false, inaccurate information as to her financials. She further claims that the representative falsely represented that the loan was a 30 year fixed rate loan, that taxes and insurance were included in the monthly payments,

that there were no penalties or restrictions and discouraged her from consulting an attorney.

To recover for fraud, a plaintiff must prove (1) a misrepresentation or an omission of material fact which was false and known to be false by the defendant, (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) justifiable reliance of the plaintiff on the misrepresentation or material omission, and (4) injury" (see Lama Holding Co. v. Smith Barney Inc., 88 NY2d 413, 421 [1996]; Orlando v. Kukielka, 40 AD3d 829, 831 [2007]).

The documentary evidence submitted by the plaintiff, which defendant admittedly read, had explained to her and signed, expressly contradict defendant's claims. In particular, the note at the top in bold, large type, states that it is an adjustable rate balloon note. The loan application, signed and initialed at each page by defendant, states that defendant has a monthly income in an amount significantly greater than her "Base Employee Income". Here, the defendant played a significant role in inducing the lender to make the loan and her the claim that the lender based its determination to make the loan upon some unknown information from an unknown source is without merit.

As a general rule, the signer of a written agreement is deemed to be conclusively bound by its terms, in the absence of a showing of fraud, duress or some other wrongful act on the part of a party to the contract (see Pimpinello v. Swift & Co., 253 NY 159 [1930]; Columbus Trust Co. v. Campolo, 110 A.D.2d 616 [1985], affd 66 NY2d 701 [1985]). To the extent that the defendant claims she did not understand the contents she risked that the lender would be induced to give her a loan she could not afford. The defendant's other claims as to false statements are also contradicted by the disclosures she signed which clearly state the nature of the loan as well as what the monthly payments represent principal and interest without any mention of taxes or insurance, and the consequences of her default.

Insofar as her claim that she was coerced into entering into the transaction and to forego the advice of an attorney, defendant presented no evidence tending to show an absence of meaningful choice on her part (see King v. Fox, 7 NY3d 181 [2006]; Gillman v. Chase Manhattan Bank, N.A., 73 NY2d 1 [1988]). It appears that the defendant may have made a bad bargain which does not excuse his default.

Accordingly, the defendant's motion for an order vacating the Judgment of Foreclosure and Sale and dismissing the action,

or, in the alternative, vacating her default and permitting her to defend on the merits is denied.

The branch of the defendant's motion seeking a stay of the foreclosure sale is also denied. Pursuant to RPAPL 1341, in an action to foreclose a mortgage, the court shall grant a stay of all proceedings if, after judgment directing the sale and before the sale, the defendant pays into court the amount due for the principal and interest, the costs of the action, together with the expenses of the proceedings to sell (Finance Inv. Co. [Bermuda] v. Gossweiler, 145 AD2d 463 [1988]). RPAPL 1341 is mandatory, and does not allow for a discretionary interpretation or application (see, Green Point Sav. Bank v. Oppenheim, 237 AD2d 409 [1997] lv denied, 90 NY2d 806 [1997]). Thus, once the judgment of foreclosure and sale is entered, the only way to obtain a stay of the sale is to comply with RPAPL 1341(2), which the defendant has failed to do.

Dated: July 10, 2009
D# 38

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J.S.C.