

Deutsche Bank Natl. Trust Co. v Wei Qiang Xu

2010 NY Slip Op 30936(U)

April 21, 2010

Supreme Court, Albany County

Docket Number: 6606-08

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

DEUTSCHE BANK NATIONAL TRUST
COMPANY, AS TRUSTEE FOR FFMLT
TRUST 2006-FF6, MORTGAGE PASS-
THROUGH CERTIFICATES, SERIES 2006-FF6,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 6606-08
RJI NO. 01-08-95005

WEI QIANG XU, MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC. as nominee
for NATION POINT A DIVISION OF NATIONAL
CITY BANK OF INDIANA,

Defendants.

Supreme Court Albany County All Purpose Term, March 30, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Steven J. Baum, P.C.
Brian M. Swann, Esq.
Attorney for Plaintiff
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David M. Freedman, Esq.
Attorney for Defendant Wei Qiang Xu
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Albany, New York 12207

TERESI, J.:

On August 5, 2008, Plaintiff commenced this action to foreclose a mortgage it holds on a parcel of real property (hereinafter the “property”) owned by defendant Wei Qiang Xu (hereinafter “Defendant”). On this record it is undisputed that Defendant failed to timely answer the complaint. On December 5, 2008 the Hon. John Egan referred this matter to a referee “to

ascertain and compute the amount due on the bond/mortgage”.

It is also undisputed that on December 19, 2008, the Plaintiff and Defendant entered into a forbearance agreement (hereinafter “Forbearance Agreement”). The Forbearance Agreement required Defendant to make an initial six thousand dollar payment, and then set forth a schedule of monthly payments (hereinafter the “Plan”). It further provided that Plaintiff would “allow [Defendant’s] loan to remain delinquent during this plan and... forbear from... continuing a foreclosure action.” The Forbearance Agreement does not provide Plaintiff with a unilateral right of termination, rather it specifically provides for termination upon Defendant’s failure to “remit payments in accord with the plan.”

Approximately one month after the Forbearance Agreement was signed, Defendant alleges that he engaged in a foreclosure settlement conference with Plaintiff. He alleges that the Hon. Patrick Monserrate conducted the conference, which was attended by Kevin Laurilliard, Esq. on behalf of Plaintiff. In its opposition papers, Plaintiff does not dispute such allegation.

Thereafter, on June 19, 2009, the Hon. John Egan executed a Judgment of Foreclosure and Sale (hereinafter “Judgment”). The Judgment confirmed the referee’s report, ordered the property sold and, in accord with the referee’s report, set forth a specific monetary award due Plaintiff under the mortgage. Conspicuously absent from either the Judgment or the referee’s report is any reference to the Forbearance Agreement.

On March 3, 2010, the property sold at a public foreclosure sale. Defendant now moves to vacate the Judgment and set aside the foreclosure sale. Plaintiff opposes the motion. Because Defendant demonstrated his entitlement to an Order vacating the Judgment, his motion is granted in its entirety.

CPLR §5015(a)(1)'s "excusable default" provision provides Defendant with the specific statutory basis for vacating the Judgment. Excusable default requires the Defendant to "establish both a reasonable excuse for the default and a meritorious defense to the underlying claim." (Hohenforst v. DeMagistris, 44 AD3d 1114, 1116 [3d Dept. 2007][quoting Trim v. Trim, 21 AD3d 1203 [3d Dept. 2005]; Washington Mut. Bank v. Fissette, 66 AD3d 1287 [3d Dept. 2009]; 333 Cherry LLC v. Northern Resorts, Inc., 66 AD3d 1176 [3d Dept. 2009]). On this record, Defendant made such showing.

Here, Defendant demonstrated a "reasonable excuse" for his default. Analyzing Defendant's excuse necessarily starts with the default he seeks to vacate. Defendant does not challenge his default in answering the Complaint, but rather seeks to vacate his default on Plaintiff's motion for Judgment. As such, his excuse need not address his failure to timely answer the complaint; rather, he must reasonably excuse his failure to oppose Plaintiff's motion for Judgment. Here, Defendant alleges that he defaulted on Plaintiff's motion for Judgment, because he never received notice of it. Such allegation is not contested or disputed by Plaintiff, nor has Plaintiff offered any proof that Defendant received notice its motion for Judgment.

While a Defendant who defaults in formally appearing, pursuant to CPLR §320(a), ordinarily waives notice of any further proceedings. Where a defendant informally appears, notice must be given. (USF&G v. Maggiore, 299 AD2d 341 [2d Dept. 2002]; Kurlander v. Willie, 45 AD3d 1006 [3d Dept. 2007]; NYCTL 1998-1 Trust v. Prol Properties Corp., 18 A.D.3d 525, [2d Dept. 2005]; Siegel, *New York Practice* [4th ed, 2005] §112, p 203). Here, although Defendant did not formally appear in this action, he did demonstrate that he informally appeared. On this record it is uncontested that Defendant both entered into the Forbearance

Agreement and engaged in a settlement conference with Plaintiff. Such acts establishing sufficient participation in the merits of this action to constitute Defendant's informal appearance. (USF&G, supra). As such, Defendant's failure to contest Plaintiff's motion for Judgment is reasonably excused because he never received notice of it.

Likewise, Defendant also demonstrated a "meritorious defense". Defendant alleges that he complied with the Forbearance Agreement's initial payment requirement, and monthly payments thereafter. He then alleges that Plaintiff wrongfully rejected, without explanation, his March, April and May 2009 payments. As such, Defendant demonstrated his compliance with the Forbearance Agreement and a potentially meritorious defense of "tender". (National Sav. Bank of Albany v. Hartmann, 179 AD2d 76 [3d Dept. 1992]). "Tender" is viable because Plaintiff was required to "forbear from... continuing [the] foreclosure action" while Defendant continued to make the Plan's payments. As such, Plaintiff was neither entitled to unilaterally cancel the Forbearance Agreement nor to collect the full amount of the accelerated mortgage, until Defendant breached the Forbearance Agreement. While Plaintiff's opposition papers specifically acknowledged such provision, it failed to allege that Defendant defaulted under the Forbearance Agreement.

Accordingly, because Defendant set forth both a "reasonable excuse" for his default on the Plaintiff's motion for Judgment and a "meritorious defense" to it, his motion is granted. The Judgment is vacated and the sale of the property is cancelled, null and void. To the extent not specifically addressed above, the parties' remaining contentions have been examined and found to be lacking in merit.

This Decision and Order is being returned to the attorneys for the Defendant. A copy of

this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
April 21, 2010



Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, dated March 11, 2010, Affidavit of Wei Qiang Xu, dated March 10, 2010, with attached unnumbered exhibits.
2. Affirmation of Brian Swann, dated March 24, 2010, with attached Exhibits A-C.