

US Bank N.A. v Walford
2016 NY Slip Op 32080(U)
June 30, 2016
Supreme Court, Queens County
Docket Number: 7910/12
Judge: Allan B. Weiss
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M E M O R A N D U M

SUPREME COURT QUEENS COUNTY
CIVIL TERM PART 2

HON. ALLAN B. WEISS

US BANK NATIONAL ASSOCIATION, as
Trustee for Credit Suisse First Boston
Mortgage Acceptance Corp., Mortgage
Pass-Through Certificates, Series
2006-1,

Index No: 7910/12

Motion Date: 3/28/16

Motion Seq. No.: 4

Plaintiff,

-against-

WINSTON WALFORD, JPMORGAN CHASE BANK,
N.A., as successor in interest to
Washington Mutual Bank, FA, CITY OF
NEW YORK ENVIRONMENTAL CONTROL BOARD,
ALICIA NOBLE,

Defendants.

Plaintiff moves for an Order confirming the referee's report and for a judgment of foreclosure and sale.

Defendant Walford opposes confirmation of the Referee's Report on the ground that the referee failed to give the defendant notice of the proposed report before moving for confirmation and that a hearing should have been held since the Affidavit of Amount Due is deficient.

In reply, the plaintiff submitted a copy of the Notice of Opportunity to Object to Proposed Computation and proof of service thereof demonstrating that the notice was served on defendant's present attorney, Nicholas P. Scunziano, on November 13, 2015. In addition, contrary to defense counsel's claim the

Power of Attorney sufficiently demonstrates the authority of the affiant to make the affidavit. Finally, defendant failed to submit any evidence of to raise an issue of fact requiring a hearing regarding the amount due.

An examination of the defendant, Walford's opposition indicates that he attempted to make a cross-motion, but failed to properly proceed by, inter alia, paying the motion fee and, thus, his cross-motion was rejected in the CMP Part. Although CPLR 2215 requires a non-moving party seeking affirmative relief to serve a notice of cross-motion to have a right to a determination on the merits and to an appeal (CPLR 5701 [a]) the court may, in its discretion consider the request (see Fried v Jacob Holding, Inc., 110 AD3d 56 [2013]). In this case, the affirmation in opposition clearly delineated the relief requested, the basis therefor, and plaintiff submitted opposition to the request. In addition, while no "Notice of Cross Motion" was attached to the opposition papers, the defendant submitted proof of service of a Notice of Cross Motion together with the supporting documents, but failed to pay the motion,

Thus, in the interest of avoiding a further motion and additional delay and in the interest of judicial economy the court will address the defendant's request on the merits (see Fried v Jacob Holding, Inc, supra).

The defendant requests in effect to vacate his default in failing to oppose the plaintiff's motion for summary judgment and vacating the default summary judgment, dated March 24, 2015 on the grounds of reasonable excuse for his default in failing to oppose the motion and a meritorious defense pursuant to CPLR 5015(a)(1), and upon vacature denying the motion; and to dismiss the complaint for plaintiff's failure to comply with RPAPL §1304.

In order to vacate an order made upon the defendant's failure to oppose a motion, the defendant is required to demonstrate both a reasonable excuse for the default and a potentially meritorious opposition to the motion (see CPLR 5015 [a] [1]; Hogan v Schwartz, 119 AD3d 650 [2014]).

As a reasonable excuse for his default, defendant asserts law office failure. The court may accept law office failure as an excuse where such claim is supported by a "detailed and credible" explanation of the default (see Remote Meter Tech. of NY, Inc. v Aris Realty Corp., 83 AD3d 1030 [2011]). Defendant asserts that he did not have an opportunity to oppose the plaintiff's motion because the motion was served on his prior attorney who, rather than opposing the motion, moved to withdraw.

Defendant's claim is unpersuasive and without merit. On the first return date of the plaintiff's summary judgment motion, August 15, 2014, both the plaintiff and his former attorney appeared in CMP at the motion calendar and obtained an

adjournment of the motion until October 10, 2014. By letter dated September 2, 2014, which defense counsel served upon plaintiff's counsel, the defendant discharged his former attorney and directed him to "cease all work" on the instant foreclosure case. Although defense counsel then moved to withdraw, it was the defendant's failure to obtain new counsel despite knowing of the pendency of the plaintiff's motion rather than the attorney's motion to withdraw which was the cause of defendant's default. On the contrary, the defendant took no steps for almost one year¹ and only after plaintiff made the instant motion for a judgment of foreclosure and sale, to move to vacate his default. In this regard it is pointed out that on May 22, 2015 plaintiff served defendant's present attorney with Notice of Entry of the March 24, 2014 Order. Such conduct evinces a deliberate rather than inadvertent default so as to further delay this action (see Wells Fargo Bank, N.A. v Krauss, 128 AD3d 813, 814-15, [2015]), leave to appeal dismissed, 26 NY3d 962 [2015]).

In view of the absence of a reasonable excuse, it is unnecessary to consider whether defendant sufficiently demonstrated the existence of a potentially meritorious defense to the motion (see Maida v Lessing's Rest. Servs., Inc., 80 AD3d 732 [2011]), which, in any event, he has not.

In view of all of the above, the plaintiff's motion is

¹The cross motion was served on March 16, 2016.

granted. Plaintiff is granted \$6,350.00 as reasonable attorney's fees.

Settle Judgment.

Dated: June 30, 2016

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J. S. C.