

Emigrant Funding Corp. v Nunez

2016 NY Slip Op 32089(U)

May 25, 2016

Supreme Court, Queens County

Docket Number: 16111/2009

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

This is an action to foreclose a mortgage on commercial property located at 99-11 37th Avenue, Corona, N.Y. 11368. Plaintiff commenced this action on June 18, 2009 by serving and filing a summons and verified complaint.

Prior to filing an answer in this action, Nunez commenced an action against plaintiff on June 18, 2009 under Index No. 19257/2009, in Supreme Court, Queens County. By decision dated December 7, 2009, plaintiff's motion to dismiss was granted and Nunez's complaint was dismissed.

On September 11, 2009, Nunez filed a verified answer in this action with five affirmative defenses, including that plaintiff failed to provide him with a HUD statement and copy of closing documents such as the Note, Mortgage, and Truth in Lending statement, and that he never received an accounting of the proceeds of the mortgage loan.

Thereafter, plaintiff and Nunez entered into a forbearance agreement dated November 30, 2009. The agreement barred plaintiff from advancing this action during a twelve month period, waived a portion of the default interest, and permitted Nunez to repay the arrears over a twelve month period. At the completion of the forbearance agreement, the loan would be reinstated and plaintiff would have discontinued the action. In exchange for the forbearance agreement, Nunez agreed to make the monthly payments, waived defenses, and confirmed the mortgage loan and amount owing.

Nunez failed to make the payment due for May 2010 under the forbearance agreement. Upon Nunez's failure to remit payment, plaintiff resumed the foreclosure action. Plaintiff moved for summary judgment on March 14, 2012. Plaintiff's motion was denied with leave to renew. Plaintiff renewed its motion, and was granted summary judgment by Order entered on November 28, 2012. Plaintiff was granted a Judgment of Foreclosure and Sale by Order entered on January 10, 2014. A foreclosure auction was scheduled for April 11, 2014. However, on April 10, 2014, Nunez filed a Chapter 7 bankruptcy in the Bankruptcy Court for the Eastern District of New York, which automatically stayed this action. The automatic stay was lifted by Order entered on January 22, 2016. A foreclosure auction was then scheduled for March 18, 2016. An auction was held, and plaintiff was the successful bidder.

Nunez now moves to vacate the Order granting summary judgment, the Order granting Judgment of Foreclosure and Sale, and the sale itself on the ground that Nunez did not actually receive any of the loan proceeds because the abstract company,

City Abstract LLC, held \$475,862.12 of the loan proceeds in escrow due to the open liens, mortgages, and violations against the premises. Nunez argues that plaintiff has failed to account for the \$475,862.12 as all that plaintiff has produced are portions of Environmental Control Board (ECB) violation descriptions. Nunez states that BGS intentionally removed portions from the submitted ECB violation details, which would have shown that the liens and violations were all paid prior the closing date.

In opposition, Helmut Borchert, Esq., a partner of BGS and plaintiff's counsel in this action, submits an affirmation contending that Nunez's the issues raised by Nunez are barred by the doctrine of res judicata and were waived by Nunez in the forbearance agreement. Regarding that branch of Nunez's application pursuant to Judiciary Law 487 and for sanctions, Mr. Borchert argues that Nunez cannot show that plaintiff, BGS, or himself has intentionally mislead the court or Nunez.

Under the doctrine of res judicata, or claim preclusion, a final judgment bars future actions between the same parties on the same cause of action (see Landau, P.C. v LaRossa, Mitchell & Ross, 11 NY3d 8 [2008]; Parker v Blauvelt Volunteer Fire Co., 93 NY2d 343 [1999]). Res judicata applies, generally, when there is a final, prior adjudication on the merits, that involved parties in the current case, or those in privity with them, and the claims involved in the current case were raised or could have been raised in the prior case (see Landau, P.C. v LaRossa, Mitchell & Ross, 11 NY3d 8 [2008]; Abraham v Hermitage Ins. Co., 47 AD3d 855 [2d Dept. 2008]; Sabatino v Capco Trading, Inc., 27 AD3d 1019 [2d Dept. 2006]). "A judgment of foreclosure and sale entered against a defendant is final as to all questions at issue between the parties, and concludes all matters of defense which were or might have been litigated in the foreclosure action" (Signature Bank v Epstein, 95 AD3d 1199 [2d Dept. 2012], quoting Long Is. Sav. Bank v Mihalios, 269 AD2d 502, 503 [2d Dept. 2000]).

Here, Nunez raised the same issues presented herein in his answer and also in the separate action he commenced against plaintiff. Nunez also failed to raise such, when he could have, in response to plaintiff's motion for summary judgment and plaintiff's motion for a final judgment of foreclosure and sale. Moreover, Nunez validly waived all defenses in the forbearance agreement, which was fully executed by his prior counsel as well as Nunez himself (see Petra CRE CDO 2007-1 Ltd. v 160 Jamaica Owners, LLC, 73 AD3d 883 [2d Dept. 2010][finding that defendants validly waived all defenses, counterclaims, and setoffs in the loan documents]). In any event, Nunez's claim that he was not

provided with a HUD closing statement is meritless as commercial loans are exempt from such Truth in Lending Act disclosure requirements (see 15 USC 1603[1]; State Bank of Albany v Roarke, 91 AD2d 1093 [3d Dept. 1983]; First Central Sav. Bank v 1467 Bedford Ave., LLC, 42 Misc.3d 1205[A][Sup. Ct., Kings Cnty. 2013]; Capital One, N.A. v Margiotta, 36 Misc.3d 1227[A][Sup. Ct., Kings Cnty. 2012]). Additionally, Nunez did receive a Loan Disbursal Authorization, and plaintiff has provided the Court with copies of the checks disbursed on the closing date. Nunez also signed a copy of the Settlement Statement with an itemization of all charges. Accordingly, Nunez's branch of his application to vacate the sale and the prior orders is denied as such issues were previously litigated.

Regarding that branch of the application to punish and for sanctions against plaintiff, BGS, and Helmut Borchert, Esq., this Court finds that Nunez has not established an intent to deceive (see Judiciary Law 487; Cullin v Spiess, 122 AD3d 792 [2d Dept. 2014]; Dupree v Voorhees, 102 AD3d 912 [2d Dept. 2013]; Boglia v Greenberg, 63 AD3d 973 [2d Dept. 2009]).

Accordingly, and based upon the above stated reasons, it is hereby

ORDERED, that defendant PERSIO A. NUNEZ a/k/a PERSION A. NUNEZ's application is denied in its entirety.

Dated: May 25, 2016
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.

