

Indymac Bank, F.S.B. v Wright
2007 NY Slip Op 30307(U)
March 16, 2007
Supreme Court, Queens County
Docket Number: 0013287
Judge: David Elliot
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA Part 14
Justice

INDYMAC BANK, F.S.B. x Index
Number 13287

2006

- against -

Motion
Dates October 31,

2006

WAYNE C. WRIGHT, etc., et al.

Motion
Cal. Numbers 13 & 14

x

Motion Seq. Nos. 1 & 2

The following papers numbered 1 to 21 read on these separate motions by defendant Wayne C. Wright a/k/a/ Wayne Wright to compel the acceptance of his verified answer pursuant to CPLR 3012(d) and for summary judgment in his favor dismissing plaintiff's complaint as against him and on this cross motion by plaintiff for summary judgment in its favor and against defendant Wright and to strike defendant Wright's answer.

Papers
Numbered

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Upon the foregoing papers it is ordered that the motions are consolidated and determined as follows:

This action was commenced by plaintiff by filing a copy of the summons and complaint with the County Clerk on June 13, 2006. It seeks foreclosure of a mortgage given by defendant Wright on the property known as 115-22 202nd Street, Saint Albans, New York, to secure a note evidencing an indebtedness in the principal amount of \$46,000.00, plus interest at 6.75 percent per annum. Plaintiff alleges it is the holder of the subject mortgage and note and that defendant Wright defaulted by failing

to pay the monthly mortgage installment due on January 1, 2005, and subsequent installments. Plaintiff moved, ex parte, for leave to appoint a referee to ascertain and compute the sums due and owing it and to report whether the premises can be sold in parcels. Plaintiff alleged that defendant Wright neither appeared in the action, nor served an answer to the complaint. By order dated August 23, 2006, the motion was granted. On August 28, 2006, defendant Wright served his answer. On August 31, 2006, plaintiff filed and served a notice of return and rejection of answer stating that defendant Wright's time to answer had expired on August 1, 2006.

Defendant Wright now moves to compel acceptance of his answer pursuant to CPLR 3012(d) and for summary judgment in his favor dismissing plaintiff's complaint as against him. Plaintiff opposes defendant Wright's motions and cross-moves for summary judgment in its favor and against defendant Wright.

Under the circumstances here, including the reasonable excuse offered by defendant Wright for his delay in answering; the brief delay involved; the lack of prejudice to plaintiff from the delay; the lack of willfulness on the part of defendant Wright; the existence of a potentially meritorious defense, i.e., plaintiff's failure to follow conditions precedent to foreclose; and the public policy favoring the resolution of cases on the merits, this court, in the exercise of its discretion, excuses defendant Wright's delay in answering. (See Giladi v City of New York, 34 AD3d 733 [2006]; see also Bunch v Dollar Budget, Inc., 12 AD3d 391 [2004]; Sippin v Gallardo, 287 AD2d 703 [2001].)

Accordingly, defendant Wright's motion to compel plaintiff to accept service of his late answer is granted.

The branch of defendant Wright's motion to dismiss plaintiff's complaint as against him based on lack of personal jurisdiction is denied.

Defendant Wright's mere denial of receipt of the summons and complaint by mail failed to rebut the presumption of proper service created by the affidavit of service. (See Engel v Lichterman, 62 NY2d 943 [1984]; see also General Motors Acceptance Corp. v Grade A Auto Body, Inc., 21 AD3d 447 [2005]; Matrix Financial Services Corp. v McKiernan, 295 AD2d 579 [2002].) Moreover, the three attempts made by plaintiff's process server to personally serve defendant Wright at his residence satisfied the due diligence requirement to permit substitute service. (See CPLR 308[4]; see also Lemberger v Khan, 18 AD3d 447 [2005]; Friedman v Telesco, 253 AD2d 846 [1998].)

Although there is no requirement in New York that a

defaulting borrower be given an opportunity in writing to purge the default, the mortgage could so provide, and that is what the subject mortgage does at paragraph 22, "Lender's Rights if Borrower Fails to Keep Promises and Agreements." (See 1 Bergman on New York Mortgage Foreclosures § 4.04A.) Paragraph 22 requires that the mortgagee send a notice to the mortgagor and that said notice must state, among other things, the promise or agreement that the mortgagor failed to keep or the default that occurred, the action that the mortgagor must take to correct that default, a date (at least 30 days from the date on which the notice is given) by which the mortgagor must correct the default, and that if the mortgagor does not correct the default by the date stated in the notice, the mortgagee or another person may acquire the property by means of foreclosure and sale.

As the proponent of summary judgment motion, plaintiff has the initial burden of establishing its entitlement to judgment as a matter of law. (See Zuckerman v City of New York, 49 NY2d 557 [1980].) Plaintiff failed to meet this burden. Although plaintiff submitted proof of the existence of the note and mortgage and alleges defendant Wright's failure to make mortgage payments, plaintiff failed to proffer evidence sufficient to prove that it complied with the condition precedent contained in paragraph 22 requiring that it give defendant Wright notice prior to demanding full payment of the loan in the event of defendant's default. (See GE Capital Mortgage Services Inc. v Mittelman, 238 AD2d 471 [1997]; see also Moet II, Inc. v McCarthy, 229 AD2d 876 [1996].) To the extent that plaintiff relies on its March 20, 2006 letter to defendant Wright to satisfy the requirements of paragraph 22, such reliance is misplaced since said letter is a notice of acceleration and not a notice to cure as required by the express terms of paragraph 22 of the mortgage. Said letter does not set forth the action defendant Wright must take to correct the default, but rather seeks payment in full of the entire amount then remaining under the note and mortgage.

Accordingly, plaintiff's cross motion for summary judgment is denied.

The branch of defendant Wright's motion seeking summary judgment in his favor dismissing plaintiff's complaint as against him is granted.

Defendant Wright presented competent evidence demonstrating his entitlement to summary judgment as a matter of law. This evidence included defendant Wright's affidavit in which he avers that he never received a notice to cure as required under the terms of the note and mortgage. (See Moet II, Inc. v McCarthy, supra.)

Plaintiff, in opposition, failed to present competent evidence raising a triable issue of fact. Plaintiff does not assert that any notice was given to defendant Wright other than the March 20, 2006 letter, which, as noted herein, failed to meet the requirements set forth in paragraph 22 of the mortgage.

Dated: March 16, 2007

J.C.S.