

JP Morgan Chase Bank, NA v Bailey

2007 NY Slip Op 31094(U)

May 4, 2007

Supreme Court, Suffolk County

Docket Number: 0015899/2006

Judge: Carol MacKenzie

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SUPREME COURT • STATE OF NEW YORK
PART 22 SUFFOLK COUNTY

Present:

Hon. CAROL MACKENZIE
Justice

RETURN DATE:3/8/07
ADJOURNED: 3/26/07; 4/23/07
MOTION NO.: 03,04 MOT D
AMENDED DECISION AND ORDER

JP MORGAN CHASE BANK, NA AS
TRUSTEE FOR THE C-BASS MORTGAGE
LOAN ASSET BACKED CERTIFICATES,
SERIES 2005-RP1

Plaintiff,

- against -

JUDITH BAILEY, EVELYN HARVEY, ET AL
Defendant.

PLAINTIFF'S ATTORNEY

Steven J. Baum, PC
PO Box 1291
Buffalo, NY 14240

DEFENDANT'S ATTORNEY

Stephen P. Gelfand, Esq.
870 West Jericho Turnpike
Huntington, NY 11743

The Court in its deliberations has considered the following papers on these motions for various relief:

1. Notice of Motion and supporting papers;
2. Cross Motion and supporting papers;
3. Affidavit in Opposition and supporting papers
4. Affirmation in Reply and supporting papers.

The Plaintiff moves this court for an order granting an extension of time to reply to defendant's counterclaims; granting summary judgment; permission to treat the Verified Answer as a limited Notice of Appearance, entitling the defendants to receive, without prior notice, a copy of the Notice of Sale, Notice of Discontinuance and Notice of Surplus Money Proceedings; appointing a referee; directing "John Doe" be dropped as a party in this action and the caption be amended accordingly; and deeming the defendants to be in default and such be fixed.

The defendants oppose plaintiff's motion and argue that their request for an extension of time is untimely; plaintiff fails to provide an affidavit of merit and fails to provide a reasonable excuse for the delay. Defendants also argue that as there are material facts at issue summary judgment is inappropriate.

EXTENSION OF TIME TO REPLY

Service of an answer or reply shall be made within twenty days after service of the pleading to which it responds (CPLR §3012(a)). Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default (CPLR §3012(d)).

In the case at bar, plaintiff received defendants' answer containing counterclaims on December 11, 2006. By notice of motion dated February 8, 2007, plaintiff requests an extension to reply to defendants answer. Plaintiff does not show any reasonable excuse for such delay or default.

Accordingly, it is

ORDERED, that plaintiff's request for an extension to reply to defendant's answer is DENIED.

SUMMARY JUDGMENT

A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action shall be established sufficiently to warrant the court as a matter of law directing a judgment in favor of any party (CPLR §3212(b)). Mere speculation and conjecture is insufficient to create a genuine issue of fact to defend a motion for summary judgment (Dougherty v. Canard, 215 AD2d 521 (2d Dept. 1995)). The defendant must lay bare her proof and, avoiding conclusory allegations, set forth evidentiary proof sufficient to establish the existence of a triable issue of fact which required a trial of the action (see, Zuckerman v. City of New York, 49 NY2d 557 (1980)).

In the case at bar, plaintiff relies on the affidavit of a Foreclosure Specialist which does not claim any authority over or underlying familiarity with the records of plaintiff or how such are maintained. In fact, the affidavit offers only conclusory statements about the records. Further, defendant attaches copies of payments made to the plaintiff and disputes the allocation of said payments by plaintiff. Defendant also provides documentation showing that plaintiff acknowledged an error in disbursing the payments. Finally, defendant has raised counterclaims that require further discovery and should be litigated to trial.

Accordingly, it is

ORDERED, that plaintiff's motion for summary judgment is DENIED; and it is

ORDERED, that as there is an issue of jurisdiction over Evelyn Harvey, the plaintiff's request to treat the Verified Answer as a limited Notice of Appearance, entitling the defendants to receive, without prior notice, a copy of the Notice of Sale, Notice of Discontinuance and Notice of Surplus Money Proceedings is DENIED; and it is

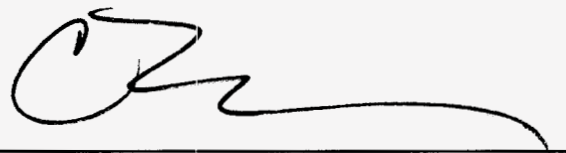
ORDERED, that plaintiff's request for the appointment of a referee is DENIED as premature; and it is

ORDERED, that plaintiff's request that "John Doe" be dropped as a party in this action and the caption be amended accordingly is GRANTED; and it is

ORDERED, that defendant's request for a default judgment against the plaintiff is GRANTED. Defendant may make an application to the clerk of the court within one year from today's date for a claimed sum upon submission of the requisite proof (CPLR §3215).

The foregoing constitutes the order of the court.

Dated: May 4, 2007
Central Islip, New York



CAROL MACKENZIE
J. S. C.