

**Mortgage Elec. Registration Sys., Inc. v  
Gibbs**

2007 NY Slip Op 31653(U)

May 14, 2007

Supreme Court, Kings County

Docket Number: 0010157/2005

Judge: Anthony J. Cutrona

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**MEMORANDUM**

SUPREME COURT : KINGS COUNTY

(IAS Term, Part 34)

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MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC. as Nominee for  
U.S. BANK, N.A., as Successor in Interest to  
ALLIANCE MORTGAGE BANKING CORP.,

Plaintiffs,

By Cutrona, J.

Dated: May 14, 2007

- against -

Index No. 10157/05

KENWYN GIBBS, et al.,

Defendants.  
-----X

Plaintiff Mortgage Electronic Registration Systems, Inc. as Nominee for U.S. Bank, N.A., as Successor in Interest to Alliance Mortgage Banking Corp. moves for a judgment of foreclosure and sale. Defendant Terese Payne Marcelle moves, by order to show cause, for an order vacating the appointment of a referee, permitting her to interpose an answer, and setting this matter down for a traverse hearing on the issue of service.

Plaintiff commenced this action on April 5, 2005 to foreclose a mortgage executed by Marcelle and defendant Kenwyn Gibbs and encumbering the subject property at 1357 St. Mark's Place in Brooklyn. According to the affidavits of service of plaintiff's process servers, Gibbs and Marcelle were served by delivery of the summons and complaint to "Keith Marcella" at the subject premises on April 23, 2005, and by the mailing of copies of the summons and complaint to Gibbs and Marcelle at the subject premises on May 2, 2005. Each of the affidavits of service attesting to the delivery of the summons and complaint to Keith Marcella contained the following statement:

"I inquired as to whether Defendant is a member of the Armed Forces and was advised that defendant is not in the military Service or a

dependent of a member of the Armed Forces as defined in the Soldiers and Sailors Civil Relief Act and the Service Members Civil Relief Act of 2003.”

On or about May 15, 2005, a notice of appearance on behalf of Gibbs and Marcelle was executed by Gibbs, pro se, and served upon the attorneys representing plaintiff at the time. On December 5, 2005, an order was issued by this court appointing a referee to compute the sums due under the mortgage. The referee issued a report on October 2, 2006, wherein she found the sum of \$404,391.77 due under the mortgage. On December 4, 2006, plaintiff brought the instant motion to confirm the referee’s report, for a judgment of foreclosure and sale, and an award of legal fees. In response to this motion, Marcelle brought the instant order to show cause seeking to vacate the order appointing the referee, permitting Marcelle to interpose an answer and scheduling a traverse hearing on whether she was properly served. Marcelle argues that despite the language in the affidavit of service, she was on active duty in the United States Army at the time of the purported service of the summons and complaint and plaintiff thus failed to comply with the provisions of the Federal Soldiers’ and Sailors’ Civil Relief Act (FSSCRA). Marcelle contends that as a result of this alleged failure, the order appointing the referee, which was issued on default, must be vacated and Marcelle should be entitled to serve an answer.

The FSSCRA prohibits the entry of a default judgment without court order where an affidavit of nonmilitary service has not been filed. In pertinent part, 50 USC § 520(1) provides:

“In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in the military service . . .”

Accepting Marcelle's contentions that she was on active duty at the time of the service of the summons and complaint, and that the affidavit of service which indicated that she was not in military service thus fails to comply with the non-military affidavit provisions of the FSSCRA, the statute nonetheless is not applicable in this instance as a notice of appearance was in fact made on Marcelle's behalf. While Marcelle may not have been aware or may not have consented to the notice of appearance executed pro se by Gibbs, Marcelle was subsequently represented by counsel as shown by a law office letter dated September 26, 2005, prior to the entry of the order appointing the referee, wherein plaintiff's attorney was notified that Marcelle was on active duty and a stay of the foreclosure proceedings was requested. Under these circumstances, Marcelle is not entitled to vacatur of the order appointing the referee under the FSSCRA (*see Title Guarantee & Trust Co. v Duffy*, 267 App Div 444 [1944]).

Further "[a] failure to comply with [the FSSCRA] supports 'vacatur of a default judgment only upon a showing that the judgment was entered against a party who was on active duty, or dependent upon someone who was, and who could show a meritorious defense to the underlying claim'" (*Palisades Acquisition, LLC v Ibrahim*, 12 Misc 3d 340 [2006] quoting *Citibank, N.A. v McGarvey*, 196 Misc 2d 292, 300 [2003]). Here, Marcelle does not identify any meritorious defense to the merits of the foreclosure action. Her contention that there has been "partial payment" of the amounts alleged due is insufficient (*see First Federal Sav. Bank v Midura*, 264 AD2d 407 [1999]).

Marcelle further contends that she was not properly served based on the fact that she received a copy of the summons and complaint in December 2006. However, plaintiff states that this was an additional copy that was mailed prior to its seeking a judgment. There is no indication that a prior copy of the summons and complaint was never actually mailed on May 2, 2005. Marcelle's

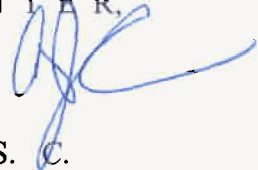
[\* 4 ]

allegations amount to mere denial of service, which is insufficient to rebut the presumption of proper service raised by the affidavits of service (*see Carrenard v Mass*, 11 AD3d 501 [2004]; *Truscello v Olympia Constr.*, 294 AD2d 350, 351 [ 2002]; *De La Barrera v Handler*, 290 AD2d 476 [2002]).

As a result, Marcelle's motion is denied in all respects. Plaintiff's motion for a judgment of foreclosure and sale, confirmation of the referee's report and associated legal fees is granted.

Settle order and judgment.

E N T E R,



J. S. C.