

Hamlet Gold & Country Club v Prager

2007 NY Slip Op 32294(U)

July 19, 2007

Supreme Court, Suffolk County

Docket Number: 0025425/2005

Judge: Peter Fox Cohalan

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INDEX # 25425-05
RETURN DATE: 10-26-06 (004)
12-11-06 (005)
MOT. SEQ. # 004 & 005

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN

-----x
THE HAMLET GOLF & COUNTRY CLUB
HOMEOWNERS ASSOCIATION, INC.,

Plaintiff,

-against-

DAVID M. PRAGER, ROBIN K. PRAGER, "JOHN DOE"
and "JANE DOE 1-10", intended to be tenants or
persons in possession,

Defendants,

-and-

THADFORD REALTY CO., INC, and ALL BMW
PROPERTIES, INC.,

Non-Party
Purchasers of
Premises

-----x

CALENDAR DATE: January 24, 2007
MNEMONIC: MG; MD

PLTF'S/PET'S ATTORNEY:

SOMER & HELLER
2171 Jericho Tpke
Commack, NY 11725

DEFT'S/RESP ATTORNEY:

SAHN WARD & BAKER
333 Earle Ovington Blvd.;
Uniondale, NY 11553

Daniel P. McCormick, Esq.
Referee

Upon the following papers numbered 1 to 90 read on this motion to vacate and to disqualify counsel _____;
Notice of Motion/Order to Show Cause and supporting papers 1-21; 47-67 _____; Notice of Cross-Motion and
supporting papers _____; Answering Affidavits and supporting papers 22-38 ; 68-72 _____; Replying
Affidavits and supporting papers 39-46; 73-75 _____; Other 76-90 _____; and after hearing counsel in support of and
opposed to the motion it is,

ORDERED that this motion by the defendant, Robin K. Prager (hereinafter Prager), to vacate the judgment of foreclosure and sale of her residence (seq. #004) pursuant to CPLR §317 and 5015(a) is hereby granted, the judgment is vacated, the sale is annulled and the matter is remitted to the referee to conduct a new hearing on the amounts owed, if any, by the defendants in light of the allegation that payments were made and accepted on the amounts owed during the pendency of the foreclosure proceeding. The motion to disqualify counsel, Somer & Heller, Esqs. LLP., (seq. #005) as attorneys for the plaintiff in this mortgage foreclosure proceeding based upon the subsequent assignment of the premises to Stanley J. Somer, Esq. as purchaser, is denied as moot.

The plaintiff originally instituted this action seeking to foreclose on the defendants' residence located at 150 Country Club Drive in Commack, Suffolk County on Long Island, New York. The residence is a condominium and the plaintiff's complaint alleges that as of January 1, 2005 a lien in the amount of two thousand, one hundred and fifty four dollars and eighty five cents (\$2,154.85) was placed upon the Pragers' property for assessed

condominium common charges or maintenance charges which went unpaid. It is this lien which subsequently resulted in the foreclosure and sale of the defendants' residence. The action to foreclose the lien was commenced on October 18, 2005 and service on the defendants was conducted by "nail and mail" at the residence after the process server tried to serve the complaint at the residence on October 18, October 20 and then on October 21, 2005 by substituted service. Defendant Prager claims that she was at the hospital tending to her terminally ill husband, David M. Prager, who subsequently died during the pendency of this proceeding on March 23, 2006.

On January 26, 2006 this Court signed an ex-parte order of reference appointing an attorney, Daniel P. McCormick, Esq., as the referee to hear and compute the amounts owed as a result of the foreclosure. The report of the referee, dated June 21, 2006, noted that, as of February 2006, there was due and owing \$7156.25 in common charges and arrears with monthly common charges accruing at \$291.69 per month. Unbeknownst to the referee, nor made a part of his report, on April 4, 2006, Prager made a \$3500.00 payment towards the condominium monthly common charges which was accepted by the managing agent of the plaintiff. The Court thereafter approved the referee's report as written and entered a judgment of foreclosure and sale on August 4, 2006 without opposition and the property was noticed for sale on August 17, 2006 and sold by the referee on September 22, 2006. Apparently a second payment for \$4100.00, made on September 11, 2006, prior to the referee's sale, was for the remaining arrears on the common charges and that amount was noted on the plaintiff's records and credited to the defendant Prager's account but subsequently returned to her. The buyer at the sale was Michael Bello with All BMW Properties who purchased the property for \$326,000.00 and assigned his bid to Thadford Realty (hereinafter Thadford), a company owned by Stanley Somer, Esq., the attorney for the plaintiff in this foreclosure proceeding. Thereafter two (2) notices to quit were served on defendants on October 3, 2006. Thereafter this lawsuit was commenced.

The defendants now move to vacate the judgment of foreclosure and sale pursuant to CPLR §317 and 5015(a) on a number of grounds, *inter alia*, lack of jurisdiction based upon improper service; excusable default based upon the terminal cancer of defendant, David M. Prager; the bid amount at the sale was unconscionable, representing only 25% of market value of the condominium, and also that the purchaser was not a bona fide purchaser. Plaintiff's counsel, in opposition, both on behalf of the plaintiff and also as a representative of Thadford, the ultimate assignee/buyer of the property, denied the key aspects of each of the allegations made by the defendants.

For the following reasons, the defendants' motion to vacate the foreclosure and sale pursuant to CPLR §5015(a) is granted, the judgment is vacated, the foreclosure sale is annulled and the matter is remitted to the referee to conduct a new hearing on the amounts owed, if any, by the defendants in light of the allegation that payments were made and accepted on the amounts owed during the pendency of the foreclosure proceeding. The denial of service and the issue of whether substituted service was proper and occurred under

the circumstances set forth is sufficient to warrant a traverse hearing on the question of jurisdiction and a traverse hearing will be scheduled for September 4, 2007 at 11:00 am. The defendants are directed to serve a copy of this court's order on all parties and the Court's Calender Clerk to ensure proper calender entry for that date and time. The Court has reviewed the defendants other contentions and finds them to be without merit.

Initially, it must be noted that the defendants in support of the motion to vacate the judgment and sale argue that service by the plaintiff was not proper and, therefore, the Court lacks jurisdiction. Ordinarily, the proof of the affidavit of service by the process server attesting to the personal delivery of a summons to a defendant is sufficient to support a finding of jurisdiction. However, where there is a sworn denial of receipt of the papers by the defendant, the affidavit of service is rebutted and the plaintiff must establish jurisdiction by a preponderance of the credible or believable evidence at a traverse hearing on jurisdiction. Moreover, even if the defendant eventually acquires actual notice and knowledge of the lawsuit, actual notice alone will not sustain improper service, nor subject that person to the Court's jurisdiction when there has not been compliance with the proper conditions of service. **Banker's Trust Co. of California N.A. v. Tsoukas**, 303 AD2d 343, 756 NYS2d 92 (2nd Dept. 2003); **Bank of America National Trust & Savings v. Herrick**, 233 AD2d 351, 650 NYS2d 754 (2nd Dept. 1994);

Here, in the case at bar, the plaintiff's process server claims to have attempted service on three (3) occasions on October 18 and October 20, 2006 and, finally, on October 21, 2006 the process server did a substituted service by "nail and mail" service. Defendant Prager who was at the hospital caring for her terminally ill husband, co-defendant, David M. Prager, claims not to have received service of process either by a copy of the summons and complaint left at her residence or by reception of a copy of the summons and complaint through the mail. This denial of service and the issue of whether substituted service was proper and occurred under the circumstances set forth is sufficient to warrant a traverse hearing on the question of jurisdiction.

The Court is troubled by the allegation by the defendants of tender and acceptance by the plaintiff of the common charges in arrears which serves as a basis for the defendant's motion to reopen the summary judgment decision granting foreclosure and ultimately the sale of the property. This condominium project, known as the Hamlet in Commack, contains million dollar homes and, in this case, the foreclosure complaint was premised upon the failure to pay common charges amounting to approximately \$2100.00. The referee appointed to compute the amounts owed thereafter calculated the amount as over \$7000.00 during the time when David M. Prager was gravely ill and ultimately succumbed to cancer. However, the referee was clearly unaware that Prager had made not only a partial payment of \$3500.00 which was accepted by plaintiff but also an additional \$4100.00 payment just prior to the sale of the residence which was acknowledged by the plaintiff in its record keeping and credited on the Prager account but ultimately returned when the sale took place. These facts coupled with the additional finding that the plaintiff Hamlet's

attorney, Stanley Somer, Esq. in this foreclosure action, was the owner of Thadford, the ultimate assignee/buyer, which acquired the defendants' condominium for \$326,000.00 (possibly worth much more) leads to the inescapable conclusion that the plaintiff and its attorney were not "on the same page" in this attempted foreclosure of the common charge lien allegedly owed by the defendants. A possible injustice could result when the plaintiff accepted payments of the common charges while at the same time its attorney processed a foreclosure and sale of the defendants' residence.

An action to foreclose is an action in equity. The plaintiff here seeks to enforce a lien of condominium common or maintenance charges allegedly due and owing and, therefore, the action is subject to the cardinal principle of equity jurisprudence that one who seeks equity must do equity. A foreclosure proceeding of this lien for common charges against the defendants is such an action in equity and triggers the equitable powers of the Court. Carmody-Waite 2nd, **Foreclosure of Mortgages on Real Estate**, §92:31. In this foreclosure action, the plaintiff established its initial entitlement to judgment as a matter of law by submitting proof of the existence of the lien for common charges and evidentiary proof of the defendants' default in payment. **Household Finance Realty Corp. v. Winn**, 19 AD3d 545, 796 NYS2d 533 (2nd Dept. 2005); **Fleet National Bank v. Olasov**, 16 AD3d 374, 793 NYS2d 52 (2nd Dept. 2005). Once such a prima facie showing was made, the burden of proof shifted to the party opposing the application to come forward with sufficient evidence to controvert the summary judgment motion by demonstrating the existence of a genuine triable issue of fact. **Barcov Holding Corp. v. Bexin Realty Corp.**, 16 AD3d 282, 792 NYS2d 408 (1st Dept. 2005).

In **Emigrant Mortgage Co. Inc. v. Berger**, 14 Misc.3d 1202(A), 831 NYS2d 359 (2006), my colleague on the New York Supreme Court, Mr. Justice Spinner stated:

"On the other hand, where it is shown that the actions of the defaulting party were neither wilful nor gross and where the same would nonetheless result in a forfeiture disproportionate to the default, equity may properly intervene, **J.N.A. Realty Corp. v. Cross Bay Chelsea**, 42 NY2d 392 (1977). Too, where it is shown that the mortgagee may have acted in bad faith or in an unconscionable manner, equity may likewise intervene to do that which ought to be done. **Dime Savings Bank of New York v. Norris**, 78 AD2d 691 (2nd Dept. 1980).

Here, in the case at bar, this foreclosure action was instituted to foreclose on a lien for failure of the defendants to pay common charges of the condominium complex which were in arrears amounting to only \$2154.85. These accrued charges were incurred during a very difficult and stressful time for the defendants since the defendant David M. Prager was in

the hospital suffering from incurable cancer which ultimately caused in his death during the pendency of the foreclosure proceeding. The defendants' condominium was worth conservatively between \$750,000 to \$1,000,000.00 and was foreclosed as a result of a debt the referee calculated at approximately \$7,000.00 and the condominium was subsequently sold at auction for \$326,000.00.

Of particular concern is the fact that the defendant Prager made a \$3500.00 payment on April 4, 2006 on account of the accrued common charges after the appointment of a referee and before judgment, which was accepted by the plaintiff, yet the appointed referee was not notified of the payment and thus failed to take such payment into account in his report to the Court. The defendants also made a second payment of \$4100.00 on September 11, 2006 after the judgment of foreclosure was entered but before the sale, which was acknowledged by plaintiff and entered in its ledger (movant's papers, Exhibit H) but subsequently was returned by the plaintiff when the sale proceeded on September 22, 2006. It is acknowledged by the plaintiff that a payment was indeed accepted, which plaintiff now claims will be credited to defendants and that the other payment on September 11, 2006 was returned. Of course, complicating this process is the fact that an entity owned by the plaintiff's attorney was the ultimate buyer of the defendants' condominium.

In **Nassau Trust Company v. Montrose Concrete Products Corp.**, 56 NY2d 175, 451 NYS2d 663 (1982) the New York Court of Appeals in dealing with a similar issue stated:

“An estoppel ‘rests upon the word or deed of one party upon which another rightfully relies and so relying changes his position to his injury’ (**Triple Cities Constr. Co. v. Maryland Cas. Co.**, 4 NY2d 443, 448, 176 NYS2d 292, 151 NE2d 748; **Metroploitan Life Ins. Co. v. Childs Co.**, 230 NY 285, 292, 130 NE 295). It is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought (**White v. La Due & Fitch**, 303 NY 122, 128, 100 NE2d 167). While estoppel requires detriment to the party claiming to have been misled, waiver requires no more than the voluntary and intentional abandonment of a known right which, but for the waiver would have been enforceable”

Whether couched in terms of waiver or estoppel, the plaintiff accepted a partial payment of \$3500.00 on April 4, 2006 without informing either the referee conducting the computation or the Court and, thereafter, an additional payment of \$4100.00 was made on September 6, 2006 which was credited to the Pragers' account and then returned to Prager. Thus, the two payments made by defendants and accepted by the plaintiff constituted the very charges the referee calculated were due. The defendants' actions either relying on the acceptance of the payments or the plaintiff's credit of the September 2006 payment, appear to fall within an estoppel or waiver of the foreclosure. It appears disingenuous to argue that the plaintiff intended to proceed with the foreclosure while, at the same time, accepting payments and failing to inform either the referee or the Court of the defendants' payments. **First Union National Bank v. Tecklenburg**, 2 AD3d 575, 769 NYS2d 573 (1st Dept 2003). See also **North Fork Bank v. 163-35 L & M Realty Corp., et al.**, 298 AD2d 444, 748 NYS2d 773 (2nd Dept. 2002) wherein the court stated

“In light of our determination, we do not reach the issue of whether the plaintiff's acceptance of partial payments after electing to accelerate the mortgage loan constitutes a waiver of the right to accelerate or foreclose.”

Unlike the fact pattern presented in **Prudential Home Mortgage Company v. Cermele**, 226 AD2d 357, 640 NYS2d 254 (2nd Dept. 1996) here, in the instant case, the defendants did more than just offer to pay the arrears Prager actually tendered a partial payment on April 4, 2006 that was accepted and tendered the balance owed on September 11, 2006 before the sale which was acknowledged and credited by the plaintiff and then rejected and returned. Clearly, the forfeiture is disproportionate to the default. **Emigrant Mortgage Co. Inc. v. Berger**, supra.

The Court finds that the payments by Prager to the plaintiff and the receipt, acknowledgment and credit towards the defendants' account constitute not only a waiver by the plaintiff but shows bad faith and “oppressive or unconscionable conduct by the mortgagee” and therefore the defendants are entitled to equitable relief and the vacating of the judgment of foreclosure and sale of the defendants' premises. See, **EBC Amro Asset Management Limited v. Kaiser**, 256 AD2d 161, 681 NYS2d 539 (1st Dept. 1998); but see, contra, **NYCTL 1997-1 Trust et al. v. Vila**, 19 AD3d 382, 796 NYS2d 138 (2nd Dept 2005). The fact that the referee's calculations of the amounts owing under the foreclosure are incorrect as is also the judgment which did not take into account partial payments made by the defendants and accepted by the plaintiff just adds credence to the defendants' argument before the Court and warrants vacatur of the judgment and sale. See, **Household Finance Realty Corporation of New York v. Dunlap**, 15 Misc3d 659, 834 NYS2d 438 (2007).

A party seeking to vacate a default judgment must demonstrate (1) a reasonable excuse for the delay; (2) the absence of wilfulness, and (3) a prima facie showing of legal

merit. Generally, whether these criteria have been satisfied rests within the sound discretion of the court. County Asphalt, Inc. v. North Rockland Underground Corp., 96 AD2d 570, 465 NYS2d 257 (2nd Dept. 1983); Picotte Realty, Inc. v. Aragona, 87 AD2d 955, 451 NYS2d 220 (3rd Dept. 1982).

A motion to be relieved of a default pursuant to CPLR §5015 (a)(1) is addressed to the sound discretion of the Court, and the exercise of such discretion will generally not be disturbed if there is support in the record. In exercising such discretion, courts should undertake a balanced consideration of all relevant factors, including the merit or lack of merit in the action, the seriousness of the injury, the extent of the delay, the excuse for the delay, prejudice or lack of prejudice to the opposing party, and intent or lack of intent to deliberately default or abandon the action. I.J. Handa, P.C. v. Imperato, 159 AD2d 484, 552 NYS2d 356 (2nd Dept. 1990). In the case at bar, a careful review of the evidence presented by the defendants establishes a reasonable excuse for the delay, an absence of wilfulness and legal merit to their claims. The fact that the plaintiff was in receipt of payments unknown to the referee or the Court is most telling with regard to the conduct exhibited during the foreclosure proceeding by both the plaintiff and plaintiff's counsel. The fact that the actions taken by plaintiff in accepting payments and plaintiff's counsel in pursuing the foreclosure seem to be at odds with each other warrants this Court in exercising its equity jurisdiction to avoid an injustice in such a serious matter as the foreclosure of a person's residence. Finally, while defendants raise the issue of the defendant David M. Prager's intervening death as an impediment to the foreclosure action, there appears to be little legal merit to this argument. See, Brovender v. Williams, 3 AD2d 841, 161 NYS2d 439 (2nd Dept. 1957) citing to Hays v. Thomae, 11 Sickels 521, 56 NY 521 (1874).

Accordingly, the defendants' motion to vacate the judgment and foreclosure sale of the defendants' residence at 150 Country Club Drive in Commack, pursuant to CPLR §5015(a) is granted, the judgment is vacated, the sale is annulled and the matter remitted to the referee to calculate the amounts owed, if any, by the defendants. The defendants are referred to RPAPL §1341 with regard to any amounts calculated to be a continuing debt owed in this action. In light of the Court's findings and order, it need not reach the issue of the defendants' claims and arguments about the conduct of the plaintiff's counsel as the ultimate purchaser of the property or the request that plaintiff's counsel be disqualified from serving as plaintiff's counsel in this foreclosure proceeding.

The foregoing constitutes the decision of the Court.

Dated: July 19, 2007



J.S.C.