

JP Morgan Chase Bank v Etra

2007 NY Slip Op 33358(U)

October 12, 2007

Supreme Court, Nassau County

Docket Number: 9349-06/

Judge: Edward G. McCabe

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

Present: HON. EDWARD G. McCABE
Justice

TRIAL/IAS PART 1
NASSAU COUNTY

JP MORGAN CHASE BANK,

INDEX NO.: 06-19349

Plaintiff,

MOTION SEQ. NO.: 001

-and-

AARON ETRA; "JOHN DOE # 1-5" and
"JOHN DOE # 1-5" said names being
fictitious, it being the intention of
Plaintiff to designate any and all occupants,
tenants, persons or corporations, if any, having
or claiming an interest or lien upon the premises
being foreclosed herein,

Defendants.

X

The following papers were read on this application:

Order to Show Cause.....	1
Opposing Affirmation.....	2
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The Defendant, Aaron Etra, submits an application, pursuant to CPLR §317
and §5015, seeking an order vacating the default Judgment of Foreclosure and

Sale dated March 2, 2007, to set aside the Foreclosure Sale purportedly conducted April 24, 2007 and any subsequent conveyances of the subject property described as 86 Lewis Avenue in Atlantic Beach, New York. On May 29, 2007, this Court signed an order temporarily restraining any further proceedings by or on behalf of Plaintiff and Referee, Steven Kutner, Esq., including transferring, conveying, selling or otherwise encumbering the subject property or altering any ownership rights or interest of Aaron Etra therein.

The subject premises reportedly consists of a summer vacation home owned by members of the Defendant's family since it was constructed in 1955 and owned by the Defendant individually since 1995. The Defendant advises the Court the subject property was used as a summer vacation home and only occupied during the summer season.

The Defendant acknowledges falling behind in his mortgage payments in late 2006 and advises he contacted GMAC on March 5, 2007 to discuss curing his default and desire to bring his account up to date by the end of May 2007. Defendant claims he was advised this repayment arrangement was acceptable to GMAC and was directed to contact Plaintiff's attorneys to finalize the agreement. He had previously been through this same process when he fell into arrears in 2005. On April 2, 2007, the Defendant received a reinstatement report by e-mail

which states the report will expire on April 24, 2007 and warns if funds are not received on or before this date updated figures must be requested. On April 23, 2007, he was advised to disregard the April 2, 2007 reinstatement report, due to an error contained therein.

The Defendant states he never received notice of the pending foreclosure action until it was too late to act to protect his interests. Mr. Etra claims his first notice of the foreclosure sale was received on April 23, 2007 at 1:38 p.m. in the midst of a series of e-mail messages from Jill McManus regarding the reinstatement of the subject mortgage. Jill McManus is reportedly a legal assistant to Plaintiff's counsel, Nancy Campanozzi, Esq. of the Fein, Such and Crane, LLP. It is noted at the time of the foreclosure sale the Defendant was actively engaged in negotiations with GMAC regarding the reinstatement of the mortgage and had been given a reinstatement report which was not due to expire until April 24, 2007. It was Mr. Etra's understanding that the April 24th date was going to be extended and that he was being afforded the opportunity to reinstate his mortgage account by the end of May 2007, in accordance with his agreement with GMAC.

When the Defendant was finally able to speak to the attorney handling the matter for GMAC, Nancy Campanozzi, Esq. on April 24, 2007, he learned for the

first time that the foreclosure sale on his summer home was actually conducted on that very morning of April 24, 2007 and would not be held on April 27, 2007 as Plaintiff's representative had advised him in writing. The Defendant states he told Mrs. Campanozzi that he never received notice of the foreclosure proceeding or sale and that she responded there was nothing that either one of them could do about it. Mr. Etra says he then asked his counsel to approach the Plaintiff's attorneys and both Ms. Campanozzi and Lavell Ross declined to assist him. It wasn't until April 29, 2007 that the Defendant was able to get to the property in Atlantic Beach, scan through a batch of junk mail and locate a notice of pendency, summons and verified complaint, dated November 21, 2006 (5 months earlier). A copy of the published notice, postmarked March 19, 2007, was also amongst the mail he reviewed at the Atlantic Beach property on April 29, 2007.

The Defendant objects to the Plaintiff's use of the unoccupied Atlantic Beach property address instead of his residence and dwelling place, given GMAC's ongoing correspondence sent to his permanent residence in New York City. He also could not understand how Plaintiff's representative could continue to negotiate the reinstatement of his mortgage loan throughout the month of April 2007, without mentioning the pending foreclosure action or the urgency of resolving the matter prior to any scheduled foreclosure sale. The record confirms

the Plaintiff was on notice that the Atlantic Beach property was an unoccupied summer home, as this was duly noted in capital letters on the process server's affidavit dated November 30, 2006. (See, Defendant's exhibit "S") The Defendant asks the Court to vacate the Foreclosure Sale and the Judgment of Foreclosure and Sale on the grounds he was denied the right to defend his property interests due to Plaintiff's failure to provide him with adequate notice of the foreclosure action.

The CPLR §308 provides: "Personal service upon a natural person shall be made by... 2) delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons and complaint to the person to be served by first class mail at his last known residence or to his actual place of business in an envelope bearing the legend personal and confidential...". Both delivery at the Defendant's dwelling place and mailing to his usual place of abode were required to complete personal service.

In this case, the Plaintiff served the doorman at Defendant's permanent residence on 5th Avenue in New York City, but mailed the various notices to the Defendant's unoccupied summer vacation home in Atlantic Beach. Though the Defendant objects to service made upon the doorman at his N.Y.C. apartment, courts in this State have found service upon a doorman to an apartment building to

satisfy the dwelling requirement of CPLR §308(2). See, Braun vs. St. Vincent's Hospital and Medical Center, 57 N.Y. 2d 909, 456 N.Y. S. 2d 763 (1982), E.I. Dupont, Glore Forgan & Co. vs. Chen, 41 N.Y. 2d 794, 396 N.Y.S. 2d 343 (1977).

However, it is clear the Plaintiff failed to satisfy the mailing requirement necessary to complete substituted service upon the Defendant. The Plaintiff offers no explanation for mailing the summons to the unoccupied Atlantic Beach property or for why Plaintiff's representatives continued to negotiate the repayment of the subject mortgage without mentioning the imminent foreclosure sale to the Defendant. The parties do not dispute Defendant's statement that his Fifth Avenue address was clearly listed in the mortgage documents and that the Defendant made his payments to Plaintiff from that N.Y.C. address. Plaintiff's Exhibit E is a summary of e-mail messages regarding the request for reinstatement figures in which Aaron Etra clearly includes his Manhattan address, telephone number, cell phone number and address. In addition, GMAC's welcoming letter to Mr. Etra, which advised him who would be servicing the consolidated mortgage, was sent to his Manhattan residence rather than to the Atlantic Beach address. (See Defendant's Exhibit "J")

In response, the Plaintiff states the Defendant acknowledges he defaulted in his obligation to make the required mortgage payments. The Defendant was

served by substitute service upon a person of suitable age and discretion at his residence. The Plaintiff also argues the affidavit of service is prima facie evidence of proper service and claims the Defendant's conclusory denials of service are insufficient to raise any material issue of fact. Simmons First National Bank vs. Mandracchia, 248 A.D. 2d 375 (Second Dept. 1998); American Business Credit, Inc. vs. Sanabria 19 A.D. 3d 624 (Second Dept., 2005).

These arguments fail when applied to the facts of this case, as the Defendant's denials of service were not conclusory. In fact, they were quite specific and corroborated by Plaintiff's own affidavit of service which confirmed in capital letters that the property served in Atlantic Beach was unoccupied. In addition, the Defendant explained Plaintiff had the Defendant's N.Y.C. address, the Defendant's mortgage payments were made from that address, the N.Y.C. address was listed in the mortgage documents as the address for such notices and Plaintiff's representatives were involved in negotiating repayment of the loan from that address throughout the month preceding the foreclosure sale, yet never mentioned the pending foreclosure action or sale to the Defendant property owner until after the sale took place.

The Plaintiff cites Chase Manhattan Mortgage Corp. vs. Cobbs, 4 A.D. 3d 383, 771 N.Y.S. 2d 387 (2004) for the premise "a foreclosure sale may be set aside

when fraud, collusion, mistake or misconduct casts suspicion on the fairness of the sale.” The Plaintiff further contends no equitable grounds exist to set aside a foreclosure sale where the sale is properly advertised, there is no evidence of irregularity that would have inhibited the attendance of prospective bidders, the sale price is not unconsciously low and there is no fraud or misconduct. See, Citicorp Mortgage, Inc. vs. Strong, 227 A.D. 2d 818, 642 N.Y.S. 2d 423 (1996). The Court finds the failure to have properly served the Defendant is a mistake on Plaintiff’s part which deprived the Defendant of an opportunity to protect his ownership of property which has been in his family for more than fifty-two years.

The CPLR §317 authorizes a person who was served with a summons other than by personal delivery to him or his agent for service, who does not appear, to defend the action within one year after he obtained knowledge of entry of the judgment, but in no event more than five years after such entry, upon a finding of the Court that he did not receive notice of the summons in time to defend his interests and has a meritorious defense. The Court finds a.) the Defendant’s application was made timely; b.) he was not personally served, had no knowledge of the sale and made no effort to avoid service; c.) he was deprived of the opportunity to defend his interest in the subject property;

d.) his property interest would be extinguished if the sale is permitted to stand and e.) he has the meritorious defense of estoppel in that he had a repayment agreement with Plaintiff for the subject mortgage loan and had acted in reliance thereon.

In Nassau Trust Company v. Montrose Concrete Products Corp., 56 N.Y.2d 175, 451 N.Y.S.2d 663 (1982) the New York Court of Appeals 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 N.Y.2d 443, 448, 176 N.Y.S.2d 292, 151 NE2d 748; Metropolitan Life Ins. Co. v. Childs Co., 230 N.Y. 285, 292, 130 N.E. 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 N.Y. 122, 128, 100 N.E.2d 167).

The Defendant acted in justifiable reliance upon his negotiations with Plaintiff’s representatives for the reinstatement of his loan. His receipt of the reinstatement report from Plaintiff led him to reasonably believe his mortgage account was going to be reinstated upon Plaintiff’s receipt of the amount past due, particularly so in view of the Defendant’s contractual rights to have the lender’s

enforcement of the mortgage discontinued and his right to receive notice of any foreclosure action and scheduled sale in advance of the sale.

A foreclosure sale made pursuant to faulty notice may be vacated only upon a showing that the lack of notice prejudiced the right of a party to participate in the sale. See, Marine Midland Bank, NA vs. Landsowne Management Association, Inc. (4th Dept. 1993) 193 A.D. 2d 1091, 598 N.Y.S. 2d 630, leave to appeal denied 82 N.Y. 2d 656, 602 N.Y.S. 2d 805. In this case, the Defendant owner's rights were severely prejudiced.

Furthermore, §231 of the Real Property Actions and Proceedings Laws recognizes the discretionary power of a court to set aside a foreclosure sale whenever there has been a failure to comply with the statutory notice provisions and a substantial right of a party has been prejudiced. See, Notey vs. Darien Construction Corp., 41 N.Y. 2d 1055, 396 N.Y.S. 2d 169 (1977). In a recent case entitled The Hamlet Golf and Country Club Homeowners Association, Inc. v. David M. Prager, et al, Index No. 25425/05, Justice Cohalan of Suffolk County Supreme Court invoked the equity powers of the Court and vacated a foreclosure sale of a residential home. In that case the homeowner was stunned to learn of the foreclosure, as she had never received or been served with a summons and complaint and had no notice of these events. Her husband was terminally ill with

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brain cancer at the time the foreclosure proceedings took place. The Judge vacated the default Judgment of Foreclosure and Sale, the Foreclosure Sale and restored ownership to her name.

Accordingly, based upon the foregoing, it is hereby

ORDERED, that the Defendant Etra's application for the vacatur of the Judgment of Foreclosure and Sale, is granted, the Foreclosure Sale is annulled and any subsequent conveyances of the subject property are set aside; and it is further

ORDERED, that title to the subject property identified as 86 Lewis Ave. in Atlantic Beach, N.Y. is restored to Defendant, Aaron Etra, and it is further ordered that the temporary restraining order dated May 29, 2007 is lifted.

This constitutes the decision and order of the Court.

ENTER:

Dated: October 12, 2007
Mineola, NY


HON. EDWARD G. McCABE

J.S.

ENTERED

OCT 17 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

FAX/MAIL TO:

Robert M. Calica, Esq.
Rosenberg, Calica & Birney, LLP
100 Garden City Plaza, Suite 408
Garden City, NY 11530-3200
Tele: (516) 747-7400
Fax: (516) 747-7480

Michael S. Hanusek, Esq.
Fein, Such & Crane, LLP
747 Chestnut Ridge Rd., Suite 200
Chestnut Ridge, NY 10977-6216
Tele: (845) 371-4700
Fax: (973) 538-8234