

GMAC Mtge. v Gary
2007 NY Slip Op 33897(U)
November 27, 2007
Supreme Court, New York County
Docket Number: 0601163/2004
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **PAUL G. FEINMAN**
Index Number : 601163/200

PART 52

GMAC MORTGAGE

vs

GARY, PATRICIA

Sequence Number : 003

VACATE

INDEX NO. 601163/04

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for VAC

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2,4
3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION AND ORDER.**

FILED

NOV 29 2007

NEW YORK
COUNTY CLERKS OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 11/27/07

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X
GMAC MORTGAGE,
Plaintiff,

Index Number 601163/2004
Mot. Seq. No. 003

- against -

PATRICIA GARY and NYC ENVIRONMENTAL
CONTROL BOARD,¹
Defendants.

DECISION AND ORDER

For the Plaintiff:
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631-969-3101

For the Defendant:
Patricia Gary, *pro se*
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FILED
NOV 29 2007
NEW YORK
COUNTY CLERK'S OFFICE

Papers considered in review of this motion to be relieved from production order:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Reply Affidavit.....	<u>3</u>
Defendant's Errata Sheets, Aug. 15, 2007.....	<u>4</u>

PAUL G. FEINMAN, J.:

Defendant Gary, who is self-represented, moves for relief from the decision and order of May 23, 2006, pursuant to CPLR 5015 (a) (2) and (3). She seeks to vacate, reverse, or modify the various branches of that decision and to stay the reference, and to amend her pleadings (CPLR 3025 [c]), citing CPLR 3212 (e) (2), CPLR 3212 (f), and CPLR 3212 (g). She also seeks to again interpose her former counterclaim which has now, pursuant to court directive, been filed as a second action entitled *Patricia Gary v GMAC Mortgage* (Index. No. 111954/2006).

The May 23, 2006 decision granted the plaintiff's motion for appointment of a referee and dismissed defendant's counterclaim, struck the proposed amended answer and counterclaim,

¹By decision and order of May 23, 2006, the caption was ordered amended to reflect that the actual co-defendant is the "NYC Environmental Control Board." The court's records have not yet been amended.

and allowed severance of the counterclaim which could be filed as its own action with the purchase of a new index number and the filing of a request for judicial intervention.²

CPLR 5015 (a) allows for vacatur of a judgment or order upon motion with notice as the court may direct.³ The statute sets forth four grounds on which a motion may be based. Defendant's motion is based on the second, "newly discovered evidence which, if introduced at the trial [or here, at the time of the motion to appoint a referee], would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404 [or here, for renewal pursuant to CPLR 2221]," and the third, "fraud, misrepresentation, or other misconduct of an adverse party." (CPLR 5015 [a] [2, 3]). The misconduct can be either of a type that prevents a party from presenting a full case, or one that entails the fraudulent items presented to and acted on by the court (Siegel's NEW YORK PRACTICE 3d ed., § 429, p. 729).

Defendant submits a lengthy affidavit and voluminous attachments but presents nothing that persuades the court to change its prior decision. The evidence she includes is, in general, more aptly described as evidence newly proffered. The documents consist primarily of items in existence long before the decision of May 23, 2006, none of which are claimed as recent discoveries as most were addressed to her or written by her. Thus, they are not properly considered on a motion brought pursuant to section 5015 (a) (2).⁴ The uncertified downloaded

²By previous decision and order of November 18, 2005, the court granted plaintiff's motion for summary judgment as against defendant, thus establishing her default and liability. This decision was not appealed.

³Although such a motion is to be brought by order to show cause (Siegel, NEW YORK PRACTICE, 3d ed. § 426 p. 725), the court entertains the instant motion nonetheless.

⁴To the extent they are relevant, they will be considered in the context of her opposition to GMAC's motion to dismiss *Patricia Gary v GMAC Mortgage*, Index No. 111954/2006.

documents dated June and July 2006, from websites that publish complaints by persons with loans serviced by GMAC, are hearsay and cannot be offered to prove plaintiff's contentions about GMAC's actions with respect to her mortgage (*see, Georgian Motel Corp. v New York State Liq. Auth.*, 184 AD2d 853 [3d Dept. 1992], *lv denied* 84 NY2d 811 [1994] [annulling revocation of license because it was based on unreliable hearsay information, including that one of the banks from which petitioner had obtained a mortgage had on its board a person with documented connections to elements of organized crime]). Her attempts to establish plaintiff's fraudulent conduct in servicing her loan, to the extent that the conduct occurred after May 23, 2002, are properly addressed as part of the reference on damages.⁵

In sum, nothing has been presented to change the court's decision to appoint a referee to compute and to dismiss her counterclaim and strike her amended answer and counterclaim, or to allow her to bring her counterclaim as a new action that seeks damages for plaintiff's alleged violation of consumer protection laws in its reporting of her mortgage payment history. The branches of her motion again seeking to amend, and for a stay of the reference are both denied. It is

ORDERED that the motion to vacate the decision and order of May 23, 2006, and for other relief, is denied in its entirety.

This constitutes the decision and order of the court.

Dated: November 27, 2007
New York, New York

FILED
NOV 29 2007
NEW YORK
COUNTY CLERK'S OFFICE

[Signature]

J.S.C.

⁵The branches of her motion based on CPLR 3212 (e) (2) (partial summary judgment and severance); CPLR 3212 (f) (facts unavailable to opposing party), and CPLR 3212 (g) (limiting issues for trial), are not considered as they are not proper in the context of the posture of the case.