

HTFC Corp. v Christie

2008 NY Slip Op 31096(U)

April 9, 2008

Supreme Court, Nassau County

Docket Number: 7708-06/

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----x
HTFC CORPORATION.,

Plaintiff,

-against-

TRIAL TERM PART: 48

INDEX NO.:17708/06

MOTION DATE:3-14-08

SUBMIT DATE:3-27-08

SEQ. NUMBER - 002

**ALEX T. CHRISTIE, ADAM S. CALDERON,
CHASE MANHATTAN BANK USA, N.A., HTFC
CORPORATION, ADAM DIAZ, NANCY DIAZ,**

Defendants.
-----x

The following papers have been read on this motion:

- Notice of Motion, dated 2-15-08..... 1**
- Affidavit in Opposition, dated 3-6-08.....2**

Plaintiff's motion for judgment of foreclosure and sale is treated in effect as a motion for summary judgment, and the opposition of defendant Calderon is treated as if it were in opposition to the motion, and as an application to vacate the order of reference issued by this Court on September 8, 2007. The plaintiff's motion is granted and the requests of defendant are denied.

This is an action to foreclose a mortgage on premises known as 63 Carman Mill Road, Massapequa, New York, 11758. The above named defendant defaulted in answering but has

submitted opposition to this motion consisting of his own affidavit in which he alleges that plaintiff was involved in fraudulent behavior. In support of such contention, defendant attaches a copy of a decision in a case in the United States District Court for the Eastern District of Pennsylvania in which it was alleged that a house was sold for double its purchase price. Defendant lists seven properties including his own as examples to support his claim. Plaintiff does not reply.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief (*Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept. 1993)).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's

affirmation. *Olan v Farrell Lines*, 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southampton*, 29 AD3d 975 (2d Dept. 2006); *Cicccone v Bedford Cent. School Dist.*, 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries, Inc.*, 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol*, 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC*, 27 AD3d 684 (2d Dept. 2006).

Plaintiff has made a *prima facie* showing of entitlement to relief, thus shifting the burden to the opposing defendant to put forth evidence that triable issues of fact exist. Here, defendant has not submitted any facts to support his contention that a fraud was committed in his loan in this case. The loan was made to defendant Christie who signed the note and the mortgage. Defendant Calderon has failed to set forth his interest in the mortgaged premises and has not submitted any evidence from the original borrower. Further, the bare and conclusory allegations of fraud are not supported by any facts. Hence, defendant has

failed to raise a triable issue of fact with respect to his contentions, *Cf Popular Financial Services, LLC v. Williams*, 2008 WL 879967 (N.Y.A.D. 2d Dept), where the Court denied summary judgment in a foreclosure upon a finding that defendants had raised triable issues of fact on their claim of fraudulent inducement and under New York General Business Law §349. The complaint here states that defendant is the record owner at the time of its issuance in October 2006, but there is no indication as to how defendant came to be so and if he had any involvement in the loan.

The Court has considered whether defendant's opposition should be considered as a request to open his default and allow him to interpose an answer to the complaint. However, the same infirmities which apply to his opposition for judgment of foreclosure, apply to that option as well.

The Court, in its discretion, may relieve a party from the effect of its default upon proof of both a meritorious claim or defense and a reasonable excuse for the default. *Lemberger v. Congregation Yetev D'Satmar Inc.*, 33 AD3d 671 (2d Dept. 2006), *Chemical Bank v. Vasquez*, 234 AD2d 253 (2d Dept. 1996).

While it is not necessary for a defendant to establish the validity of its defense as a matter of law, it is necessary to demonstrate a defense that is potentially meritorious. *Marinoff v. Natty Realty Corp.*, 17 AD3d 412 (2d Dept. 2005), *Cupoli v. Nationwide Insurance Company*, 283 AD2d 2d 961 (4th Dept. 2001). Defendant has failed to proffer any facts indicating the presence of defenses that are potentially meritorious and has not offered

a reasonable excuse for his default in not answering the complaint. Hence the court denies any request to vacate the default.

This shall constitute the Decision and Order of this Court.

Submit judgment on notice.

ENTER

DATED: April 9, 2008


HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED

APR 14 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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