

Trustco Bank v Rene-Aldrich

2008 NY Slip Op 33167(U)

November 26, 2008

Supreme Court, Albany County

Docket Number: 3141-08

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT
TRUSTCO BANK,

COUNTY OF ALBANY

Plaintiff,

DECISION and ORDER
RJI NO.: 01-08-093453
INDEX NO.: 3141-08

-against-

DONNA MARIE RENE-ALDRICH a/k/a
DONNA MARIE ALDRICH and CITIBANK
SOUTH DAKOTA N.A.,

Defendant(s).

Albany County Supreme Court All Purpose Term, September 26, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Linda L. Donovan, Esq.
Overton, Russell, Doerr & Donovan, LLP
Attorneys for Plaintiff
19 Halfmoon Executive Park Drive
Clifton Park, NY 12065

Debra J. Willsey, Esq.
Legal Aid Society of Northeastern NY
Attorneys for Defendant
55 Colvin Avenue
Albany, NY 12206

TERESI, J.:

Plaintiff, Trustco Bank, brings a motion to confirm the referee's report dated August 18, 2008, and for a judgment of foreclosure and sale of the premises located at 3 Lincoln Avenue, Albany, New York. Defendant opposes the motion and cross moves to vacate the referee's report, to vacate this Court's July 7, 2008 Order, to amend her answer, and to dismiss Plaintiff's complaint. Because the referee held no hearing and Defendant did not have a sufficient

opportunity to review or address the amount claimed by Plaintiff prior to the submission of the referee's report, Plaintiff's motion for confirmation of the referee's report and a judgment of foreclosure and sale for the subject premises is denied.

“[I]t is error to confirm a referee's report without either conducting a hearing on notice or otherwise affording the contesting party an opportunity to present its own proof or challenge the referee's computations.” (Sears v. First Pioneer Farm Credit, 46 A.D.3d 1282 [3d Dept. 2007] citing Shultis v. Woodstock Land Development Associates, 195 A.D.2d 677 [3d Dept.1993]).

On July 7, 2008, by Order of this Court, David M. Cooper Esq., was appointed referee to calculate the amounts due. Plaintiff served such order on Defendant with the papers upon which it was granted, and various documents prepared by Plaintiff's counsel for the referee. A referee's hearing was scheduled for July 30, 2008, and Defendant was served with a Notice of Hearing. Sometime between July 7 and July 30, Ms. Carrie Smith, Esq., of Legal Aid contacted Plaintiff's attorney on behalf of Defendant, and subsequently contacted the referee to schedule a new hearing date. In response, Plaintiff alleges, that the referee contacted Plaintiff's attorney and together they decided to “allow Ms. Smith a period of time to submit any evidence of a dispute regarding the balance due . . .” There is no evidence that this was communicated to Defendant or her counsel, or that a new hearing date was scheduled. Neither the referee nor Plaintiff's attorney received any documentation from Defendant or her counsel. The hearing never took place, and on August, 18, 2008, the referee's report was signed.

It is uncontested that a hearing was not held. It would be error to confirm this referee's report without affording Defendant an opportunity to present her own proof or challenge the referee's computations. (Sears, supra at 1286; Shultis, supra at 678-79). Accordingly, Plaintiff's

motion to confirm the referee's report and for a judgment of foreclosure and sale is denied. The referee is ordered to conduct a hearing, accept evidence from the Defendant, and file a supplemental report.

On her cross motion, Defendant moves to vacate this Court's July 7, 2008 Order pursuant to CPLR § 5015(a)(4). Defendant's assertion that the Court lacked jurisdiction to render the Order since neither Defendant nor her counsel were provided notice of Plaintiff's motion is not supported by the evidence.

As per Plaintiff's affidavit of service, on June 16, 2008, Plaintiff served Defendant with a Motion for Summary Judgment. Defendant did not oppose such motion, which was granted by Order of this Court on July 7, 2008. Defendant now denies being served with a Motion for Summary Judgment. Plaintiff, in opposition, submits an affidavit of service, which "constitutes prima facia evidence of proper service" (U.S. Bank Natl. Assn. v. Vanvliet, 24 A.D.3d 906, 908 [3d Dept. 2005]; see CPLR § 2103(b)(2); § 2103(c)). Defendant's bare denial of receipt fails to rebut that presumption. (Bankers Trust Co. of Cal. v. Tsoukas, 303 A.D.2d 343 [2d Dept. 2003]). Therefore, Defendant's assertion that she did not receive the papers does not create a question of fact as to whether service was made. (Engel v. Lichterman, 62 N.Y.2d 943, 944-45 [1984]).

Defendant further erroneously claims that Plaintiff's Summary Judgment Motion must be vacated, because it was not served on her counsel. However, there is no proof that Defendant's present counsel had contacted Plaintiff's attorney, had appeared in this action, or that Defendant had even retained counsel, prior to this Court's July 7, 2008 Order. Because Defendant appeared pro se, and had no counsel at record, Plaintiff had no obligation under CPLR § 2103 to serve

Defendant's counsel with their Summary Judgment Motion in this action prior to July 7, 2008. Defendant as her own counsel was properly served pursuant to CPLR § 2103(c), which prescribes service by mail upon the party. Accordingly, this portion of Defendant's motion is denied.

Defendant also moves to vacate this Court's July 7, 2008 Order pursuant to CPLR § 5015(a)(3) and to dismiss Plaintiff's complaint on the grounds that Defendant was not in default when the action was filed, the action was premature, and the actions of Plaintiff created the default. Defendant does not support her assertions with factual evidence or by legal arguments supported by statute or case law. Defendant merely asserts broad, conclusory, and unsubstantiated allegations. (Tully v. Golden, 12 A.D.3d 1153 [4th Dept. 2004], app. dism., 4 N.Y.3d 847 [2005]). Defendant even states that she "routinely" pays her mortgage payment the month following its due date, an admission of default. Accordingly, the motion is denied.

Defendant's motion to serve an amended answer pursuant to CPLR § 3025 is also denied as it is neither submitted with a proposed amended answer (Chang v. First Am. Tit. Ins. Co. of N.Y., 20 A.D.3d 502 [2d Dept. 2005]), nor supported by an evidentiary showing. (D'Orazio v. Mainetti, 39 A.D.3d 981, 982 [3d Dept. 2007]).

Defendant further claims that Plaintiff is precluded from foreclosing since Plaintiff has unclean hands. Defendant submits no facts that demonstrate "Plaintiff's conduct was immoral or unconscionable." (Connecticut Nat. Bank v. Peach Lake Plaza, 204 A.D.2d 909, 910-11 [3d Dept. 1994]; Blueberry Investors Co. v. Ilana, 184 A.D.2d 906, 907 [3d Dept. 1992]). Accordingly, this portion of Defendant's motion is denied.

Finally, Defendant seeks permission to make her mortgage payments. It is worth noting

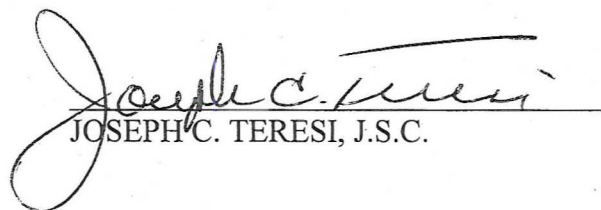
that as early as May 13, 2008, Plaintiff's counsel instructed Defendant that she could have her loan reinstated if she made a lump sum payment, which includes missed payments, costs, late charges, and attorney's fees. Both Defendant and her counsel assert that Defendant is ready, willing, and able to make a lump sum payment of her mortgage payments, however no allegation is made that Defendant has attempted to actually make such payment. "Where an action is brought to foreclose a mortgage upon real property upon which any part of the principal or interest is due . . . and the defendant pays into court the amount due for principal and interest and the costs of the action . . . the court shall . . . Dismiss the complaint without costs against plaintiff, if the payment is made before judgment directing sale . . ." (Real Property Actions & Proceedings Law § 1341(1)). Permission by the Court is not required in order for Defendant to make these payments.

Accordingly, Plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale is denied, Defendant's motion to vacate the referee's report is granted, and the remainder of Defendant's motions are denied. The referee is ordered to conduct a hearing, accept evidence from the Defendant, and file a supplemental report.

All papers, including this Decision and Order, are being returned to the attorney for the Plaintiff. Plaintiff shall comply with CPLR § 2220 for the filing and service of this Decision and Order. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: November 26, 2008
Albany, New York


JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion of Linda L. Donovan, dated August 29, 2008, with attached referee's report dated August 18, 2008.
2. Notice of Cross Motion of Debra J. Willsey, dated September 22, 2008, with attached Attorney Affirmation of Debra J. Willsey, dated September 22, 2008, with attached Affidavit of Donna Marie Rene-Aldrich, dated September 19, 2008, and with attached Exhibits A-J.
3. Affidavit in Opposition of Cross Motion of Linda L. Donovan, dated September 23, 2008 with attached Exhibits A-F.
4. Reply Affidavit of Donna Marie Rene-Aldrich, dated September 25, 2008.