

Countrywide Home Loans, Inc. v Brasco

2008 NY Slip Op 33245(U)

December 2, 2008

Supreme Court, Richmond County

Docket Number: 102447/2006

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No. 102447/2006
Motion No.:001**

COUNTRYWIDE HOME LOANS, INC.

Plaintiff

against

**ROBERT BRASCO, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE,
THE UNITED STATES OF AMERICA, NEW
YORK CITY TRANSIT AUTHORITY, TRANSIT
ADJUDICATION BUREAU, and THE CITY
OF NEW YORK PARKING VIOLATIONS
BUREAU,**

Defendants

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of this motion to vacate.

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavit	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendant Robert Brasco, through his attorney in fact Linda Brasco, moves this court by order to show cause to vacate the judgment of foreclosure obtained by the plaintiff on default, interpose an answer, and/or stay the foreclosure sale that was scheduled for September 17, 2008.

Facts

The defendant is the owner of the property located at 155 Mansion Avenue, Staten Island, New York. On July 16, 2002, the defendant executed a note and mortgage to First Financial Equities Inc. in which he borrowed the principal sum of \$284,900.00 with interest at the initial rate of 7.00%. The defendant is currently in federal prison on a white collar crime conviction and has been incarcerated prior to the commencement of this action. He is scheduled for release in March of 2009.

With knowledge of the defendant's incarceration, the plaintiff Countrywide Home Loans, Inc. (Countrywide) entered into a loan modification agreement with Linda Brasco, as power of attorney for the defendant, on July 5, 2005 . The agreement increased the principal balance of the loan to \$338,689.11 and extended the maturity date to June 1, 2035. The parties are in dispute as to the date of the mortgage assignment to Countrywide. The defendant says that it did not occur until September 2006, while Countrywide contends that the assignment took place on June 1, 2006 but was not memorialized in writing until September 5, 2006. The defendant defaulted on his mortgage obligations and consequently, the plaintiff commenced this action on August 11, 2006.

The defendant argues that the default judgment against him must be vacated for several reasons. First, the defendant alleges that Countrywide lacks standing because its assignment occurred after this action was started. Second, the defendant alleges he was not properly served. According to the defendant, Countrywide failed to exercise due diligence by serving defendant by affix and mail at the 155 Mansion Avenue property when Countrywide knew that defendant was in federal prison. Furthermore, defendant points out that the form of service is highly questionable as the process server spoke to an unknown white male who refused to identify himself, while still holding a conversation with this unidentified person about the defendant's military service. Lastly, the defendant maintains that Countrywide has failed to provide defendant with any alternatives to work out the mortgage payment. As mandated by the New York Unified Court System, the plaintiff has the burden of notifying the defendant of the mandatory settlement conference on all loans that emanate from sub-prime consumers, which defendant says Countrywide has failed to do. The defendant says that he will have the resources to satisfy the arrears upon release from prison in March of 2009. The defendant's wife is prepared to pay now the mortgage for the next six months as security.

In opposition, Countrywide argues that the defendant has no reasonable excuse or meritorious defense to the foreclosure action. First, Countrywide asserts it had ownership interest in the subject note and mortgage because the mortgage was assigned before the

commencement of this proceeding. Second, Countrywide gained personal jurisdiction over the defendant in two ways. A process server affixed and mailed the summons and complaint on August 19, 2008 to the property at 155 Mansion Avenue, Staten Island, New York. Moreover, Countrywide states, the filing of a notice of appearance by defendant's former counsel, Thomas Sirriani, Esq., on June 25, 2007 constitutes an appearance by defendant for purposes of jurisdiction. The filing of a notice of appearance waives any defects there may have been in the service of process.¹ Since an appearance is the equivalent to personal service of summons upon a party, Countrywide maintains to have personal jurisdiction over the defendant.

In response to the defendant's allegation that Countrywide refused to work out the mortgage debt, Countrywide proffers a copy of a letter to defendant's former attorney stating that the defendant should contact its mitigation department. Finally, Countrywide avers that this foreclosure action, along with defendant's two unsuccessful bankruptcy filings, have prejudiced the plaintiff's ability to collect on the mortgage note due to the defendant's delaying tactics.

Discussion

The defendant argues that the plaintiff's default foreclosure judgment should be vacated because he has both a reasonable excuse for his failure to appear and a meritorious defense to the underlying action.²

Reasonable Excuse

It is not contested that the defendant's time to answer the plaintiff's complaint has expired. Instead, the issue is whether his excuse is reasonable. The determination of what constitutes a reasonable excuse is “. . . left to the sound discretion of the court. . .”³ The issue

¹ *Shoonmaker v. Ford Motor Co.*, 79 AD2d 1067 [3d Dept 1981].

² *CPLR* § 5015(a)(1).

³ *Savino v. “ABC Corp.”*, 44 AD3d 1026, [2d Dept 2007].

before this court is whether the defendant's excuse that he failed to answer the plaintiff's complaint because he was never served at his current dwelling and was never notified by his former attorney is reasonable. This court concludes in the affirmative.

The Appellate Division's Second Department has long recognized that a default judgment may be overturned where the interest of justice requires such action.⁴ In addition, the Appellate Division reasoned that there is a “. . . strong public policy that actions be resolved on their merits . . .” rather than on default, especially where there is evidence that the default by the defendant was not wilful, nor where there is prejudice to the plaintiff.⁵

Countrywide deprived the defendant of due process of law by failing to serve him in prison when Countrywide knew that the defendant was incarcerated. The United States Supreme Court has held that where the plaintiff knows that the defendant was not at the address where notice was served because the defendant was in prison, the plaintiff violated defendant's due process rights. The Court ruled that while service may be permissible under statute, due process requires that notice be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”⁶ Countrywide violated the defendant's due process rights by knowingly serving him at an address where the defendant did not reside when it was aware that he was in prison. Countrywide should have served the defendant in prison. Consequently, Countrywide lacks personal jurisdiction over the defendant.

⁴*Gunther v. American Label Co., Inc.*, 243 AD 528, [2d Dept 1934].

⁵*New York Univ. Hosp. Rusk Inst. v. Illinois Natl. Ins. Co.*, 31 AD3d 511, [2d Dept 2006].

⁶*Robison v. Hanrahan*, 400 US 38 [1972] citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 [1950].

Furthermore, the defendant maintains that he never received a copy of the notice of appearance filed by Mr. Sirriani. In fact, the defendant's wife asserts that she has not heard from Mr. Sirriani since her initial meeting with him. Although law office failure is an insufficient basis to vacate a default, the court can exercise "its broad discretionary powers to relieve a party of a default if the interests of justice will be furthered by such action."⁷ The facts before this court demonstrate that Countrywide knowingly served defendant at a wrong address, violating the defendant's due process rights. Hence, the defendant's failure to properly answer is reasonable and the court grants him an opportunity to file an answer to Countrywide's complaint.

Meritorious Defense

The second prong that must be demonstrated by a moving party seeking to vacate a default judgment is a meritorious defense.

The defendant has shown his willingness to negotiate a work out agreement by paying the mortgage for the next six months as security. The court favors settlement among parties; therefore, the court will give the defendant an opportunity to file his answer and hopefully reach a settlement agreement with Countrywide.

Conclusion

After careful consideration of the documentary evidence presented by both parties, this court finds that the defendant successfully met his burden to vacate the default judgment taken against him.

⁷ *Batista v. St. Luke's Hospital, Woman's Hospital Division*, 46 AD 2d 806 [2d Dept 1974].

Accordingly, it is hereby:

ORDERED, that the defendant's motion to vacate the order of reference entered on June 25, 2007 is granted; it is further

ORDERED, that the defendant shall serve and file his answer within thirty days of the entry of this decision and order; it is further

ORDERED, that all parties return to DCM Part 3 for a Preliminary Conference on **Monday, January 12, 2009 at 9:30 A.M.**

ENTER,

DATED: December 2, 2008

Joseph J. Maltese
Justice of the Supreme Court