

Bank of N.Y. v Hunt
2008 NY Slip Op 33703(U)
November 20, 2008
Supreme Court, New York County
Docket Number: 116822/06
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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Bank of New York as Trustee for the Certificateholders
of CWALT 2005-38,

Plaintiffs,

Index No.
116822/06

- against -

**DECISION
/ORDER**

Jonathan M. Hunt a/k/a Jonathan McIndoe Hunt, Executor of
the Estate of Lavina Nihoul Lounsbury a/k/a Lavina Lounsbury,
David A. Lounsbury a/k/a David Alan Lounsbury, heir of the
Estate of Lavina Nihoul Lounsbury a/k/a Lavina Lounsbury,
Paul C. Lounsbury a/k/a Paul Craig Lounsbury, heir to the
Estate of Lavina Nihoul Lounsbury a/ka/ Lavina Lounsbury,
New York State Department of Taxation and Finance, United
States of America-Internal Revenue Service, and Board of
Managers of 26 West 74 Condominium,

Motion Seq:
002

Defendants.

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HON. EILEEN A. RAKOWER

Plaintiff, Bank of New York as Trustee for the Certificateholders of CWALT 2005-38 ("BNY"), brings this action to foreclose on a Mortgage on real property located at 26 West 74th Street, Unit #1 in the County and State of New York. The Mortgage was executed on May 27, 2005 by Lavina Lounsbury to secure payment of the sum of \$640,000. A summons, complaint and notice of pendency were filed on November 9, 2006. Defendant the Board of Managers of 26 West 74 Condominium("the Board") answered and alleged that Ms. Lounsbury had passed away in May 2006. Defendant Paul Lounsbury a/k/a Paul Craig Lounsbury, heir to the Estate of Lavina Nihoul Lounsbury ("P. Lounsbury") appeared by letter dated January 7, 2007, likewise informing BNY that his mother, Ms. Lounsbury, had passed away. Thereafter BNY served a supplemental summons and amended complaint on the parties which reflected the joining of the executor, Jonathan M. Hunt ("Hunt") and the heirs to the estate. BNY mistakenly failed to include the Board in the amended

complaint so BNY brought a separate action as against the Board on August 24, 2007.

BNY now moves for an order granting judgment and appointing a referee to conduct the sale of the mortgaged premises. Previously, BNY brought a motion seeking an order striking the defendants' answers; consolidating the two actions; finding the non-answering defendants in default; and appointing a referee. The motion was granted pursuant to an order of this court dated March 21, 2008. On May 12, 2008 referee, Aimee L. Richter, determined that there is due and owing BNY the total sum of \$747,048.88 plus interest and other expenses from April 18, 2008. Additionally, Ms. Richter found that the premises should be sold in one parcel. P. Lounsbury opposes the motion. Referee, Aimee L. Richter, Esq. Submits a Notice of Computation

BNY, in support of its motion, submits: the summons and complaint filed November 9, 2006; a supplemental summons and complaint filed January 30, 2007; the summons and complaint in action number two filed August 24, 2007; affidavits of service served on the following defendants: the Board, served on December 20, 2006, the New York City Environmental Control Board, the New York City Parking Violations Bureau, and the New York City Transit Adjudication Bureau ("City defendants"), all served on November 24, 2006, Hunt, served on February 5, 2007, David A. Lounsbury, Heir to the Estate ("D. Lounsbury"), served on February 12, 2007, P. Lounsbury, served on February 12, 2007, New York State Department of Taxation and Finance, served on February 5, 2007, the Internal Revenue Service, served on February 15, 2007, the Board, served on September 24, 2007; the Board's answer; a letter from P. Lounsbury; a notice of appearance and waiver of service by counsel for the United States; a "Military Status Report;" and an Affidavit of Mailing served upon Hunt on May 29, 2007.

BNY asserts that the summons and complaint and notice of pendency were filed in the New York County Clerk's office on November 9, 2006, more than 20 days prior to the date of the instant application. BNY claims that all of the defendants were duly served with copies of the summons and complaint and the supplemental summons and complaint and that P. Lounsbury and the Board appeared by serving answers. All of the non-answering defendants were served with a notice of the instant application because they defaulted more than one year ago. Finally, BNY submits that all of the defendants are of sound mind and none of them are infants or absentees. Thus, BNY argues that it is entitled to the relief requested.

P. Lounsbury, in opposition, argues that: (1) despite ample notice, BNY failed to substitute him as executor/administrator of his mother's estate and failed to give him an opportunity to answer on behalf of the estate; and (2) that his mother did not have the capacity to enter into the mortgage and/or the signatures on these loan documents were the product of fraud and misrepresentation. Specifically, P. Lounsbury claims that his mother was suffering from Parkinson's Disease for many years. In support of his claims, P. Lounsbury submits the Letters of Administration removing Hunt and appointing him as Executor of his mothers estate, a letter informing BNY that he is the new executor, an email requesting that he be kept abreast of any new developments in the action, and a copy of his mother's death certificate.

By way of reply, BNY argues that P. Lounsbury, who has been the executor of Ms. Lounsbury's estate since April 16, 2008, was obligated to seek to vacate the estate's default and to serve an answer on its behalf. Further, BNY argues, that before the court can consider the merits of the claims of a party in default, that party must first demonstrate that it is entitled to such default by showing that it had a reasonable excuse for the default and that it has a meritorious defense. To date, P. Lounsbury has not done so. Indeed, BNY asserts that it was not until the instant motion was brought that P. Lounsbury alleges, without any basis, that Ms. Lounsbury was incapacitated and that the loan was secured under fraud or misrepresentation.

The procedure used to obtain relief from a default judgment entered in a mortgage foreclosure action is to bring a motion to vacate pursuant to CPLR 5015 (see generally, *Rizzo v. Ippolito*, 137 AD2d 511[2nd Dept. 1988]). P. Lounsbury fails to establish here that he did not receive notice of the foreclosure action in time to defend it. It is clear that P. Lounsbury was aware of the foreclosure at least as of his January 7, 2007 letter/notice of appearance. (see generally, *Beila Associates v. 27-29 West 181 Street Assocaite*s, 205 AD2d 320[1st Dept. 1994]). The January 7, 2007 letter states, in relevant part:

This letter is a formal confirmation of my phone call to you December 6, 2006, in which I informed you that my mother . . . died on May 2, 2006 . . . it is my understanding that you may not take an action against a deceased person. If I am mistaken, and you may indeed continue with the very same foreclosure action you filed on 11/9/06, please contact me at the above address.

BNY has submitted the affidavit of service which shows that, after BNY received the letter from P. Lounsbury, it served him with an amended summons and complaint which has joined all necessary parties, including P. Lounsbury and other heirs to the estate. Thereafter, P. Lounsbury corresponded with BNY via a letter dated April 5, 2008 and by email sent on June 4, 2008. The letter informs BNY that P. Lounsbury is replacing Hunt as the executor of the estate. In the email to BNY, P. Lounsbury requests that BNY keep him “abreast” of any scheduled action in the case and asserted that he was doing everything in his power “to prevent foreclosure sale.” Thus, not only has P. Lounsbury failed to move to vacate the default, he failed to raise any defenses to the action either in his January 7, 2007 letter or in any of the subsequent correspondences which followed.

P. Lounsbury raises an issue as to Ms. Lounsbury’s competency, for the first time, in the instant motion. In reply to P. Lounsbury’s accusation that Ms. Lounsbury was incapacitated when she signed for the mortgage, BNY submits the affirmation of Robert Vexler, Esq., who acknowledged Ms. Lounsbury’s signature on the mortgage. Mr. Vexler states, in relevant part:

On or about May 27, 2005, I attended a closing of a loan . . . pertaining to property known as 26 West 74th Street, Unit #1 . . . at the Closing I personally witnessed and notarized the signature of Lavina Lounsbury . . . she appeared to be lucid and to have a clear understanding of the fact she was signing a mortgage secured by the Premises. She signed the mortgage without any physical assistance. She was able to converse in English. At no time at the Closing did Ms. Lounsbury appear to be suffering from any mental disease, defect or disability.

Finally, P. Lounsbury’s conclusory assertions of fraud and misrepresentation are unsupported. P. Lounsbury sites no specific act or acts; nor, does he suggest evidence of such wrongdoing here.

Wherefore it is hereby

ORDERED that plaintiff’s motion for an Order granting judgment and appointing a Referee to conduct the sale of the mortgaged premises as described in the complaint in this action is granted; and it is further

ORDERED ADJUDGED AND DECREED pursuant to the proposed the
“Judgment of Foreclosure and Sale,” attached hereto.

DATED: November 20, 2008



EILEEN A. RAKOWER, J.S.C.