

Aurora Loan Servs., LLC v Grant

2009 NY Slip Op 30338(U)

February 9, 2009

Supreme Court, Kings County

Docket Number: 43363/07

Judge: Karen B. Rothenberg

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At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 9th day of February, 2009

P R E S E N T:

HON. KAREN B. ROTHENBERG,

Justice.

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AURORA LOAN SERVICES LLC,

Index No. 43363/07

Plaintiff,

- against -

PHILIP GRANT ET ANO.,

Defendants.

-----X

The following papers numbered 1 to 7 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1-3, 4-5
Opposing Affidavits (Affirmations)_____	6
Reply Affidavits (Affirmations)_____	7
_____ Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers, defendant Philip Grant (defendant or Mr. Grant) moves pursuant to CPLR 2001 and CPLR 2221: (1) for an vacating this court's decision and order dated May 29, 2008, (2) upon denovo review of the file, for an order denying plaintiff Aurora Loan Services' (Aurora) first summary judgment motion to strike defendant's counterclaims, (3) upon denovo review of the file, for an order denying Aurora's second summary judgment

motion to strike defendant's affirmative defenses and counterclaims, and (4) upon denovo review of the file, granting defendant's motion to dismiss Aurora's complaint and severing defendant's counterclaims to proceed independently. Aurora moves, pursuant to CPLR 602 (b), for an order removing defendant's action currently pending in the Civil Court of the City of New York, Kings County to be jointly tried or consolidated with the instant action in Supreme Court. Upon such removal, Aurora further moves for an order dismissing the consolidated action pursuant to CPLR 3211(a)(5), (a)(7), and (a)(8).

The Initial Foreclosure Action

On November 21, 2006, Aurora commenced an initial action against defendant in Supreme Court, Kings County seeking to foreclose a mortgage on defendant's property located at 461 Halsey Street in Brooklyn. Defendant served an answer to the complaint which contained eleven counterclaims against Aurora sounding in (1) tortious interference with a mortgage contract, (2) violations of General Business Law §§ 349 and 350, (3) libel, (4) defamation of character, (5) predatory lending, (6) conspiracy to commit real estate fraud, (7) abuse of legal process, (8) negligence per se, (9) intentional tort, (10) prima facie tort, and (11) conspiracy to commit fraud. Thereafter, Aurora moved for summary judgment and defendant cross-moved to dismiss the complaint and to sever the counterclaims. On August 29, 2007, this court denied Aurora's motion for summary judgment and granted defendant's motion to dismiss based upon the fact that the holder of the mortgage (Lehman Brothers Bank, FSB) did not transfer the mortgage to Aurora (the servicing agent for the mortgage)

until after the action was commenced. The court also dismissed defendant's 12 counter-claims for failure to state a cognizable cause of action.

The Civil Court Action

By summons with endorsed complaint dated July 24, 2007 (i.e., prior to the dismissal of Aurora's initial Supreme Court action), Mr. Grant commenced an action against Aurora, Rosicki, Rosicki & Associates (Rosicki), and Tompkins, McGuire, Wachenfeld P.C. (Tompkins McGuire)¹ in the Civil Court of the City of New York, Kings County. The endorsed complaint listed causes of action sounding in intentional or negligent interference with mortgage contracts for 176 Sterling Place, Brooklyn, New York, slander, and loss of wages. In October 2007, Aurora, Rosicki and Tompkins McGuire separately moved for an order dismissing the Civil Court action pursuant to CPLR 3211 (a)(5) and (a)(7). By decision and order dated February 29, 2008, Hon. Peter P. Sweeney of the Civil Court denied those motions and directed Mr. Grant to serve all parties with a formal complaint within 30 days of service of a copy of the order.

When Mr. Grant failed to serve a formal complaint upon the parties in accordance with Judge Sweeney's decision and order, Aurora and Tompkins and McGuire again moved to dismiss the Civil Court action. However, on the June 11, 2008 return date for this motion, Mr. Grant submitted opposition which included a copy of a verified complaint. Accordingly, Judge Sweeney issued an order denying their motion to dismiss as moot. Judge Sweeney's

¹Rosicki was Aurora's former counsel in the first foreclosure action. Tompkins McGuire was substituted into the action as Aurora's counsel and remains in that position to date.

order further granted all defendants in the Civil Court action leave to move to dismiss the verified complaint for failure to state a cause of action provided that said motions were made within 45 days of the order. The verified complaint itself alleges five causes of action sounding in libel, negligence, breach of contract, intentional interference with a business contract, and trespass. The complaint acknowledges that “many of [the] actions in connection with this action are similar to those detailed in the counterclaims to [the first foreclosure action] and [the second foreclosure action], the damages sought herein are, in contrast to those cases, for injuries caused by the Defendants to [Mr. Grant’s] person and/or property interest in premises located at 176 Sterling Place, Brooklyn, NY 11217 during the period after the Verified Answer was interposed in [the first foreclosure action] through the day that Aurora commenced [the second foreclosure action].”

The Second Foreclosure Action

Following the dismissal of its first foreclosure action, and while the Civil Court action was pending, by summons and complaint dated November 27, 2007, Aurora commenced the instant second foreclosure action against defendant based upon the same alleged failure to tender monthly mortgage payments. However, this action was commenced after Lehman transferred the mortgage to Aurora. In his answer to the complaint, defendant asserted six counterclaims against Aurora and Lehman sounding in libel, false light invasion of privacy, invasion of privacy publication of private facts, intentional infliction of emotional distress, abuse of legal process, and trespass. The answer also asserted 16 affirmative defenses.

On January 22, 2008, Aurora and Lehman filed pre-answer motions to dismiss the counterclaims pursuant to CPLR 3211 (a)(5), (a)(7), and (a)(9). On the March 6, 2008 return date for this motion, there was confusion regarding whether the motion would be heard before this court, or before Justice Held. Ultimately, the matter was sent to Justice Held's part. However, due to the aforementioned confusion, when the matter was called, defendant was not present in the courtroom. According to Aurora's counsel, Margaret J. Cascino, Esq., she advised Justice Held that defendant was present in the courthouse but was not yet present in the courtroom. However, inasmuch as there was no opposition before him, Justice held granted Aurora's motion to dismiss the counterclaims "without opposition."² Thereafter, defendant appeared in the courtroom and attempted to speak with Justice Held. According to defendant, Justice Held told him "I am not hearing anything and would not have a conversation with me."

On March 7, 2008, defendant made a motion to vacate his default and reinstate his counterclaims. Defendant further moved for an order dismissing the complaint and awarding him punitive damages, and for the production of documents. On March 28, 2008, Aurora cross-moved for summary judgment, for an order striking defendant's answer and affirmative defenses.

²Ms. Cascino also acknowledges that Mr. Grant attempted to serve her with a cross motion on the return date. However, according to Ms. Cascino, she rejected these papers inasmuch as they were not served within the time frames set forth under CPLR.

In a decision and order dated May 29, 2008, this court denied defendant's motion to vacate his default. Specifically, the court ruled that defendant had demonstrated a reasonable excuse for his default given the confusion over whether the motion was returnable before this court or before Justice Held. However, the court further held that defendant failed to establish that his counterclaims were meritorious. In addition, the court denied defendant's motion to dismiss. In particular, the court found that the fact that Aurora (as opposed to Lehman) sent defendant a notice of default on the mortgage did not constitute grounds for dismissing the complaint. Finally, the court denied defendant's remaining applications seeking additional discovery, punitive damages, and leave to amend his pleadings.

With respect to Aurora's cross motion for summary judgment, the court found that Aurora had met its prima facie burden of demonstrating that defendant had defaulted under the mortgage agreement and defendant's opposition and alleged affirmative defenses were insufficient to raise any triable issues of fact. Accordingly, the court granted Aurora's cross motion for summary judgment.

On or about June 23, 2008, defendant made the instant motion pursuant to CPLR 2001 and CPLR 2221 seeking to vacate the May 29, 2008 decision and order of the court, and for a new order denying Aurora's motion to strike his counterclaims and affirmative defenses and granting defendant's motion to dismiss the complaint. Thereafter, Aurora made the instant motion for an order removing the Civil Court action to this court, and upon such removal, dismissing the transferred action.

Defendant's Motion

In support of his motion to vacate the May 29, 2008 order, defendant raises several arguments. In particular, defendant argues that Justice Held's March 6, 2008 determination to grant "without opposition" Aurora's motion to dismiss his counterclaims was a mistake which should be corrected pursuant to CPLR 2001 inasmuch as defendant was present in the courthouse and was prepared to submit opposition papers to the motion.

In further support of his motion, defendant argues that the court overlooked or misapprehended several facts in rendering its May 29, 2008 decision and order. Specifically, defendant argues that the court failed to consider the fact that his failure to appear in Justice Held's part in a timely manner on the March 6, 2008 return date was not the result of mere confusion. Instead, defendant argues that his failure in this regard was caused by Aurora's counsel's deception and dishonesty regarding which courtroom the motion was returnable in. In addition, defendant maintains that the court overlooked the fact that Aurora's affidavit in support of its motion was not based upon personal knowledge or a review of admissible records. At the same time, defendant claims that the court overlooked the fact that he submitted a February 29, 2008 affidavit in opposition to Aurora's motion to strike the counterclaims.

In addition to these overlooked/misapprehended facts, defendant argues that the court overlooked and/or misapprehended applicable law in rendering the May 29, 2008 decision and order. In this regard, defendant argues that it was legally improper for the court to

decline to open a default where it was undisputed that the default was caused by the court's error and misconduct on the part of Aurora's counsel. Defendant further argues that it was improper for the court to dismiss his counterclaims: without considering all of his pleadings and submissions; based upon arguments not raised by Aurora; based on a ruling that they were insufficiently pled rather than considering whether causes of action exist; based upon an affidavit which does not allege personal knowledge and based upon hearsay evidence; and based upon an affidavit which is demonstrably false.

Finally, defendant offers a new argument as to why Aurora's statute of limitations defense is inapplicable. In particular, defendant argues that his counterclaims were not time-barred since, under CPLR 203(e), the statute of limitations was tolled between the time period he served his answer in the first foreclosure action and the court's dismissal of this action on August 29, 2007.

In opposition to defendant's motion, Aurora argues that defendant is not entitled to any relief under CPLR 2001. Specifically, Aurora maintains that this provision merely allows for the correction of defects and irregularities and does not extend to jurisdictional defects or matters of substance. Furthermore, to the extent that defendant moves for leave to reargue the motions that were decided in the court's May 29, 2008 decision and order, Aurora maintains that defendant has failed to point to any matters of law or fact that the court overlooked or misconstrued. Instead, Aurora argues that plaintiff merely re-hashes the same arguments that he presented on the prior motions before the court. Finally, to the extent that

defendant seeks leave to renew the May 29, 2008 decision and order, Aurora argues that defendant has failed to introduce any new evidence to support such a motion.

Turning first to that branch of defendant's motion which seeks to vacate the May 29, 2008 decision and order pursuant to CPLR 2001, this provision states in pertinent part that "the court may permit a mistake, omission, defect or irregularity to be corrected, upon such terms as may be just, or if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded." Here, defendant argues that the court was mistaken in holding him in default on the March 6, 2008 return date for Aurora's motion to strike his counterclaims inasmuch as he was in the courthouse and prepared to submit opposition papers on that date. However, contrary to defendant's argument, this is not the type of "mistake, omission, defect, or irregularity" that can be corrected pursuant to CPLR 2001. In this regard, although defendant has repeatedly alleged that counsel for Aurora deliberately misinformed Justice Held regarding defendant's whereabouts on the return date, counsel herself states in her March 27, 2008 affirmation that she informed Justice Held that defendant was in the courthouse. Moreover, defendant himself acknowledged in oral argument before the court on November 20, 2008, that he appeared in Justice Held's part after being held in default and attempted to tell Justice Held that he was present but "Judge held said I am not hearing anything and would not have a conversation with me." Thus, it is clear that the determination to hold defendant in default on March 6, 2008 was not based upon any mistaken belief that plaintiff was not present in the courthouse inasmuch as

defendant appeared in Justice Held's courtroom on the return date and made his presence known.

Turning to defendant's motion for leave to reargue, CPLR 2221(d)(2) provides that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." "Motions for reargument are addressed to the sound discretion of the court which decided the prior motion" (*Viola v City of New York*, 13 AD3d 439, 440 [2004]). Here, contrary to defendant's claims, the matters of law and fact set forth in defendant's present motion papers were not overlooked and/or misconstrued by the court in rendering its May 29, 2008 decision and order. Consequently, to the extent that defendant seeks leave to reargue the motions which were decided in the court's May 29, 2008 decision and order, said motion is denied.

Finally, defendant seeks, in part, leave to renew the motions decided in the May 29, 2008 decision and order. In particular, defendant raises the new argument that his counterclaims were not time-barred since, under CPLR 203(e), the statute of limitations was tolled between the time period he served his answer in the first foreclosure action and the court's dismissal of this action on August 29, 2007.

"A motion for leave to renew must be 'based upon new facts not offered on the prior motion that would change the prior determination' and must 'contain reasonable justification for the failure to present such facts on the prior motion'" (*Matter of Rush v County of*

Nassau, 44 AD3d 1056 [2007], quoting CPLR 2221 [e]). Thus, generally, the new evidence or argument upon which the renewal motion is based must be unavailable at the time the initial motion was made. However, to a degree, this rule is flexible and a court may exercise its discretion and grant renewal upon facts that were available or otherwise known to the movant at the time of the original motion provided there is some reasonable excuse for the initial failure to present the subject evidence (*Surdo v Levittown Pub. School Dist.*, 41 AD3d 486 [2007]; *Heaven v McGowan*, 40 NY3d 583, 586; *Lafferty v Eklecco, LLC*, 34 AD3d 754, 754-755 [2006]). Nevertheless, in the absence of such a reasonable excuse, a motion for leave to renew must be denied (*Hassell v New York Univ. Med. Ctr.*, 48 AD3d 632 [2008]).

Here, defendant has failed to offer any excuse for his failure to raise this new argument in opposing the motion to dismiss his counterclaims. Accordingly, that branch of defendant's motion which seeks leave to renew is denied.

Aurora's Motion Pursuant to CPLR 602 (b)

Aurora moves, pursuant to CPLR 602 (b), for an order removing the action commenced by Mr. Grant in the Civil Court to this court and consolidating that action with the instant second foreclosure action. Upon such removal, Aurora further moves for an order dismissing the action. In support of its motion, Aurora maintains that the claims set forth in Mr. Grant's Civil Court action are based upon the same allegations of fact and law contained in the counterclaims in the instant foreclosure action. Specifically, Aurora notes that both sets of claims are based upon allegations that Aurora and Lehman commenced a scheme to

use the foreclosure process to steal his title to the 461 Halsey Street property, that Aurora was not the mortgagor and refused to service the mortgage notwithstanding the fact that it received mortgage payments due, that Aurora was guilty of trespass, and that Aurora falsely reported to credit reporting agencies that Mr. Grant was in default on his mortgage. Aurora further notes that both the Civil Court action and the second foreclosure action revolve around the central issue of whether or not Mr. Grant was in default on his mortgage on the Halsey Street property.

In opposition to Aurora's motion, Mr. Grant argues that the Civil Court action and the instant foreclosure action involve separate facts and separate time frames. In particular, Mr. Grant points out that the Civil Court action pertains primarily to Aurora and Tompkins McGuires' actions in connection with the premises located at 176 Sterling Place after the first foreclosure action was dismissed and prior to the commencement of the (instant) second foreclosure action. In contrast, the instant foreclosure actions concerns Aurora's actions in connection with the 461 Halsey Street premises. Mr. Grant also notes that the Civil Court action and the instant foreclosure action involve different parties.

CPLR 602 (b) provides that "[w]here an action is pending in the supreme court it may, upon motion, remove to itself an action pending in another court and consolidate it or have it tried together with that in the supreme court." Generally speaking, "[w]here common questions of law or fact exist, a motion to consolidate [under CPLR 602 (b)] should be granted absent a showing of prejudice to a substantial right by the party opposing the motion"

(*Kally v Mount Sinai Hosp.*, 44 AD3d 1010 [2007]). Here, it is apparent that the Civil Court action and instant foreclosure action involve common questions of law and fact. Indeed, the complaint in the Civil Court action acknowledges as much. However, the court has already awarded Aurora summary judgment in this foreclosure action and denied defendant Mr. Grant's motion to vacate this determination. Under the circumstances, Aurora's motion to consolidate the Civil Court action with the instant foreclosure action is denied inasmuch as a final determination has been rendered in this supreme court action and there is no action remaining with which to consolidate the Civil Court action.³

Summary

In summary, defendant's motion pursuant to CPLR 2001 and CPLR 2221 is denied. Aurora's motion for an order pursuant to CPLR 602 (b), removing Mr. Grant's action in Civil Court to be jointly tried or consolidated with the instant action in Supreme Court and upon such removal, an order dismissing the consolidated action is likewise denied.

This constitutes the decision and order of the court.

ENTER

J. S. C. ...



³In light of the court's denial of Aurora's motion to consolidate, that branch of Aurora's motion which seeks dismissal of the Civil Court action is also denied.