

U.S. Bank N.A. v Slavinski

2009 NY Slip Op 30745(U)

March 17, 2009

Supreme Court, Nassau County

Docket Number: 07-3422

Judge: Edward G. McCabe

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

**Present: Hon. Edward G. McCabe,
Supreme Court Justice**

<hr/> <p>U.S. Bank National Association, as Trustee for CSFB HEAT 2006-6,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">-against-</p> <p>Barbara Ann Slavinski; Donna Slavinski,</p> <p style="text-align: center;">Defendants.</p> <hr/>	<p>FORECLOSURE PART NASSAU COUNTY</p> <p>INDEX NO. 07-3422</p> <p>MOTION SEQ. NO.: 4</p> <p style="text-align: right;">X</p>
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The following papers were read on this application:

Order to Show Cause.....	1
Affirmation in Opposition.....	2
Attorney Affirmation.....	3
Attorney Affirmation in Reply.....	4

The Defendant, Barbara Ann Slavinski, submits an application seeking an order a.) vacating the Judgment of Foreclosure and Sale obtained on default b.) rescinding the foreclosure sale of the property and c.) pending the hearing and determination of the motion, staying Plaintiff from taking any action to convey

title to the subject property and/or the Sheriff of Nassau County from taking any action to evict the Defendant from the subject property.

In support of her application the Defendant asserts various defenses involving fraud and predatory lending allegations. The Defendant acknowledges having made a prior motion to stay the foreclosure sale in which she asked the Court for additional time to try to save her home or be granted time to put it up for a private sale. She claimed in the prior application in July 2007, to have been unaware of the foreclosure proceedings until she called the Supreme Court. The prior application was submitted to the Hon. Geoffrey J. O'Connell, who denied the application, finding the Defendant was properly served with the summons and complaint on February 27, 2007. The Court also noted the Defendant does not deny she is in arrears in her mortgage payment obligations, but explains she had an injury which prevented her from being able to work. The Defendant at that time conceded she could not make payments necessary to reinstate the mortgage or make further monthly payments under the mortgage agreement. Based upon the information provided, Justice O'Connell denied the application to stay the foreclosure sale by order dated September 14, 2007.

In the instant application, the Defendant, Barbara Ann Slavinski, advises the Court she is not college-educated and says she did not know she was supposed to

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file an answer to the subject foreclosure action, since she is not an attorney. She also explains that she thought she was “answering” the summons and complaint by contacting the bank regarding a possible loan modification.

Ms. Slavinski claims when her sister was diagnosed with an advanced case of non-Hodgkins lymphoma in 2005, she needed funds for her medical treatment. She states the loan officer at Aames advised her she could help her obtain an interest only loan at a fixed rate of 6.25%. When she replied she was not happy with an interest only loan, she states Mr. McKenna told her not to worry because after six months elapsed, he would be able to reprocess the loan with a lower interest rate. She states she is not college-educated and earns \$30,000.00 a year working at Walmart. The bank appraised the house at \$550,000.00 at a time she believed it to be worth \$450,000.00. She attended the closing without an attorney and claims she did not receive a good faith estimate, truth-in-lending disclosure or any documents from Aames. She was advised copies of the signed documents would be mailed to her after closing. She states she was asked to sign a blank loan application. When she received her mortgage statement, Ms. Slavinski says she was surprised the monthly payment was not the \$2,500.00 promised, but was \$4,137.45. This was a monthly payment she clearly could not afford. When she called Aames, she states the lender then advised her to send in the first payment

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and told her that she'd see a credit in the second statement. The next statement came and the payment was wrong again. When she called Aames' office, no one answered the phone initially. When someone finally came to the phone, she learned that Aames was no longer in that office. They called the telephone number on the statement and found the loan had been assigned to American Servicing Company, that the interest rate on the loan was not the 6.25% promised, but 8.942% and the loan was not a fixed rate, but a balloon adjustable rate loan. The loan application signed in blank was completed with fraudulent information and allegedly misrepresented the Defendant's income. American Servicing reportedly refused to modify the Defendant's loan because, they explained, she could not afford it.

The Plaintiff opposes the application, arguing the defenses presented by the Defendants are unsubstantiated , conclusory statements which were either previously presented to the Court or if not, should have been. Plaintiff further points out the Defendants were represented by counsel during the bankruptcy proceeding and in a previous application to the Court. The Plaintiff also states a review of the HUD-1 form indicates that approximately \$376,000.00 of the \$440,000.00 mortgage proceeds were used to satisfy a Countrywide Mortgage

which already enumerated the property and the balance of approximately \$37,000.00 was paid directly to the Defendant borrower. The Plaintiff is under the impression that part of the \$37,000.00 was applied to Defendant's own personal debts, but does not specify the amount.

Pursuant to CPLR §5015(a) to vacate a default, the applicant must demonstrate a reasonable excuse for the default and a meritorious defense.

The Defendant's excuse for the default was previously rejected by Justice O'Connell by order dated September 14, 2007 who found service was properly made. The doctrine of collateral estoppel precludes the re-litigation of an issue previously decided between the same parties. See, Israel vs. Wood Dolson Co., 1 N.Y. 2d 116, 151 N.Y.S. 2d 1 (1956). There is no indication Justice O'Connell's order was appealed. Additionally, as Plaintiff argues the issues raised by the Defendant in this application should have been raised in the prior application to stay the sale. The Court agrees. CPLR §2221 requires a motion for leave to reargue "shall not include any matters of fact not offered on the prior motion", §2221 (e) requires a motion to renew to be specifically identified as such and 2221(e) (3) requires such motion to contain a reasonable justification for the failure to present such facts on the prior motion for similar relief. No such explanation has been provided to this Court. Justice O'Connell has since retired

and is unavailable to entertain a motion to renew or reargue and the underlying action has been referred to the undersigned Justice for consideration.

The Defendant is bound by Justice O'Connell's decision and order establishing valid service and thus fails to satisfy the requirement of a reasonable excuse for the default. The Court rejects the argument that Barbara Ann Slavinski didn't realize she needs to answer the complaint when the record reflects she retained an attorney to appear on her behalf in a bankruptcy proceeding and was represented by counsel who appeared on her behalf in a prior application. Furthermore, the time to raise these arguments should have been in the initial application to stay the sale, and no explanation has been provided why they failed to raise these defenses at that time. The CPLR §2221 clearly reads motions for leave to reargue shall not include any matters of fact not offered on the prior motion and motions for leave to renew are supposed to be specifically identified in that manner and are required to contain a reasonable justification for having failed to present such facts on the prior motion. The Defendant satisfies none of these requirements. The Defendant's failure to provide a reasonable excuse for her default and inability to rebut Justice O'Connell's finding of valid service made upon her, dispenses with the Court's need to consider her alleged unsubstantiated defense raised for the first time more than a year after the date of the Judgment of

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Foreclosure and Sale. Notably, the Defendant received substantial sums based upon this mortgage agreement and even if she was able to establish it was void or voidable, the Plaintiff would still have an equitable lien to the full extent of the amount borrowed.

Accordingly, based upon the foregoing, the Defendant's application is denied in its' entirety.

This constitutes the decision and order of the Court.

ENTER:

Dated: March 17, 2009
Mineola, NY



HON. EDWARD G. McCABE
J.S.C.

ENTERED
MAR 31 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

EGM/lmb/hh

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