

Tierone Bank v Niles
2009 NY Slip Op 30928(U)
April 16, 2009
Supreme Court, Suffolk County
Docket Number: 16966/2005
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX NO. 16966/2005

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

 TIERONE BANK,

Plaintiff,

-against-

ROSARIA NILES a/k/a SARINA NILES,
 UNITED STATES OF AMERICA/
 INTERNATIONAL REVENUE SERVICE,
 NEW YORK STATE DEPARTMENT OF
 TAXATION AND FINANCE, GEOFFREY M.
 PARKINSON, and LAURA J. NILES
 FOUNDATION, INC.,

Defendants.

ORIG. RETURN DATE: JANUARY 30, 2009
 FINAL SUBMISSION DATE: FEBRUARY 19, 2009
 MTN. SEQ. #: 006
 MOTION: MD

PLAINTIFF'S ATTORNEYS:

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**ATTORNEYS FOR WILSHIRE
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 516-512-0200

SELF-REPRESENTED DEFENDANT:

ROSARIA NILES
 223 LAKEVIEW AVENUE WEST
 BRIGHTWATERS, NEW YORK 11718

**ATTORNEYS FOR DEFENDANTS
 GEOFFREY M. PARKINSON AND
 LAURA J. NILES FOUNDATION:**

FARRELL FRITZ, P.C.
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REFEREE:

JOAN E. McNICHOL, ESQ.
 4 TIFFANY LANE
 SMITHTOWN, NEW YORK 11787
 631-265-1355

Upon the following papers numbered 1 to 9 read on this motion _____
TO STAY FORECLOSURE SALE AND VACATE JUDGMENT _____.

Order to Show Cause and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Affirmation in Opposition and supporting papers 6, 7; Notice of Hearing and supporting papers 8, 9; it is,

ORDERED that this motion by defendant ROSARIA NILES a/k/a SARINA NILES, by her son and attorney-in-fact, SALVATORE A. BONO (“defendant”), for an Order:

(1) staying the foreclosure sale of the real property commonly known as 223 Lakeview Avenue West, Brightwaters, New York, which was scheduled for January 20, 2009;

(2) vacating the Judgment of Foreclosure and Sale granted in this action on November 2, 2007, and entered on November 16, 2007;

(3) restraining plaintiff and the referee from advertising the foreclosure sale of the property;

(4) granting defendant an *in camera* inspection of the underlying mortgage documents;

(5) directing the appearance of plaintiff’s attorneys, EDWARD R. FINKELSTEIN, ESQ., DEBRA BODAIN BERNSTEIN, ESQ., ALEC SAUCHIK, ESQ., and DANIEL CHIU, ESQ., and ordering said attorneys to fully disclose their role and knowledge in the handling and duplicating of plaintiff’s mortgage instruments, and any other attorneys or personnel that prepared and/or filed the underlying summons and complaint, dated July 11, 2005, as well as any other personnel of the law firm who took possession of plaintiff’s mortgage documents before this action was commenced who may have knowledge of the “chain of command” (sic) of the allegedly forged mortgage documents; and

(6) directing that LELAND C. SHELBY, SR. and GEOFFREY MOORE PARKINSON, SR., officers and directors of defendant LAURA J. NILES FOUNDATION, INC., and plaintiff’s representatives, GREGORY J. DELLICARPINI, JOHN MATULA, and JOHN DOE, to appear before this Court and provide sworn testimony,

is hereby **DENIED** in its entirety for the reasons set forth hereinafter.

This action was commenced, on or about July 15, 2005, to foreclose a mortgage held by plaintiff in connection with the real property known as 223 Lakeview Avenue West, Brightwaters, New York ("property"). Plaintiff apparently subsequently assigned the subject mortgage to WILSHIRE INVESTMENT GROUP, LLC ("Wilshire"), but Wilshire has not provided the Court with the assignment. By Order dated April 19, 2006 (Werner, J.), the Court determined that plaintiff was entitled to summary judgment and the appointment of a referee to compute the amounts due plaintiff. Defendant then made a motion that the Court deemed one to reargue and renew, which was denied by Order dated October 23, 2006 (Werner, J.). On or about April 16, 2007, the referee issued a report wherein she indicated the amount due plaintiff as of that date was \$460,733.45. Thereafter, a Judgment of Foreclosure and Sale ("Judgment") was granted by this Court on November 2, 2007, and entered with the Clerk of Suffolk County on November 16, 2007.

Since the entry of Judgment, defendant has made numerous attempts to stay the enforcement thereof. First, she filed two applications in the Appellate Division, Second Department, for stays, each of which was denied by Decisions and Orders of that Court, dated January 25, 2008 and January 30, 2008, respectively (see *Tierone Bank v Niles*, 2008 NY Slip Op 62117[U]; *Tierone Bank v Niles*, 2008 NY Slip Op 62350[U]).

Thereafter, defendant filed for bankruptcy protection, first under Chapter 13 then under Chapter 11, in the United States Bankruptcy Court for the Eastern District of New York. Wilshire alleges that it eventually moved for relief from the automatic bankruptcy stay when no payments were made. By Order dated October 27, 2008 (Grossman, J.), the Bankruptcy Court granted Wilshire's motion to lift the stay as to Wilshire with respect to the property ("Lift Stay Order"). Wilshire further alleges that defendant filed two additional motions in the Bankruptcy Court, to wit: (1) to reconsider the Lift Stay Order (which was considered and denied as part of the Lift Stay Order); and (2) to vacate the Lift Stay Order, which was denied by Order dated December 1, 2008 (Grossman, J.).

After the Bankruptcy Court lifted the stay, defendant filed another motion in the Appellate Division, Second Department, which sought, among other things, another stay of the foreclosure sale pending appeal. By Decision and Order dated January 13, 2009, this motion was denied by the Appellate Division and that Court, upon its own motion, dismissed the appeal on the ground that the right of direct appeal from the Order of October 23, 2006 terminated with the

entry of Judgment on November 16, 2007, and no appeal from the Judgment had been taken (*see Tierone Bank v Niles*, 2009 NY Slip Op 60549[U]).

Subsequent to the Second Department's Decision and Order dated January 13, 2009, Wilshire alleges it again scheduled the foreclosure sale, this time for January 20, 2009. By Order to Show Cause executed in Supreme Court, Suffolk County on January 16, 2009 (Mayer, J.), the foreclosure sale in this matter was stayed pending the return date of this application, to wit: February 19, 2009, and defendant neither applied for nor obtained an extension of the stay beyond that date.

Defendant now alleges, among other things, that she was fraudulently induced to enter the subject mortgage transaction by the officers of co-defendant LAURA J. NILES FOUNDATION, INC., including co-defendant GEOFFREY M. PARKINSON, in violation of state and federal law. Defendant also implicates members of the Central Intelligence Agency (CIA) in the "mortgage scheme interposed through" plaintiff, when they "installed a fraudulent mortgage device to secure my mother's home by fraud." However, these issues were raised, or could have been raised, in defendant's answer; in opposition to plaintiff's motion for summary judgment, which was granted by the Order of April 19, 2006 (Werner, J.); and in the motion by defendant to reargue and renew, which was denied by Order dated October 23, 2006 (Werner, J.). These Orders are now law of the case. This Court is mindful that it is not an appellate court, and as discussed hereinabove, the Appellate Division, Second Department, upon its own motion, dismissed the appeal from the Order of October 23, 2006 granting summary judgment to plaintiff.

Defendant further alleges that she was not properly served with the summons and complaint, but she nevertheless interposed an answer to the complaint on or about August 15, 2005. On this application, no party has submitted the answer for the Court's review, however, as will be discussed more fully below, the Court has reviewed the entire file in this matter as maintained by the Suffolk County Clerk. Although not labeled as such, defendant seems to have raised this as an affirmative defense in her answer by referring to the "questionable manner in which plaintiff delivered their (sic) Summons and Complaint." However, she failed to move for judgment on this ground within sixty (60) days after serving the pleading. Accordingly, this objection has been waived by defendant (*see CPLR 3211 [e]; Wiebusch v Bethany Mem'l Reform Church*, 9 AD3d 315 [2004]; *Aretakis v Tarantino*, 300 AD2d 160 [2002]).

In addition, defendant contends that she did not receive notice of plaintiff's application for a Judgment of Foreclosure and Sale prior to it being granted on November 2, 2007. The Court has reviewed and mined the entire file as maintained by the Suffolk County Clerk, and makes the following findings with respect to the procedural history of this action, beginning with the grant of summary judgment to plaintiff:

(1) By Order dated April 19, 2006 (Werner, J.), the Court determined that plaintiff was entitled to summary judgment and the appointment of a referee to compute the amounts due plaintiff. Plaintiff served this Order with Notice of Entry upon defendant on June 21, 2006. At the conclusion of the aforementioned Order, Justice Werner directed "Submit Order Granting Summary Judgment and Appointing Referee to Compute providing in blank for the appointment of a referee to compute," without any further direction that the order be submitted or settled on notice. The Court notes that 22 NYCRR § 202.48 (a) requires that proposed orders or judgments must be submitted for signature with proof of service on all parties where the order is directed to be settled or submitted on notice (see 22 NYCRR § 202.48 [a]);

(2) On May 31, 2006, plaintiff submitted an *ex parte* proposed Order of Reference, which was signed on June 30, 2006 (Werner, J.), granting summary judgment to plaintiff and appointing JOAN E. McNICHOL, ESQ., as referee herein. The Court notes that the aforementioned Order directed that a copy of the Order with Notice of Entry be served upon the owner of the equity of redemption, any tenants named in this action and any other party entitled to notice. On July 20, 2006, plaintiff served the Order of June 30, 2006 with Notice of Entry upon defendant;

(3) On August 3, 2006, defendant filed a motion, by Order to Show Cause, that the Court deemed one to reargue and renew plaintiff's motion for summary judgment, which was denied by Order dated October 23, 2006 (Werner, J.). On November 7, 2006, plaintiff served the Order of October 23, 2006 with Notice of Entry upon defendant;

(4) On or about April 16, 2007, the referee issued her report wherein she indicated the amount due plaintiff as of that date was \$460,733.45. On June 21, 2007, plaintiff served the report of the referee upon defendant. The Court notes that defendant was also provided copies of the correspondence between plaintiff's counsel and the referee prior to the referee issuing her report; and

(5) An *ex parte* Judgment of Foreclosure and Sale was granted by this Court on November 2, 2007, and entered with the Clerk of Suffolk County on November 16, 2007. On December 18, 2007, plaintiff served the Judgment with Notice of Entry upon defendant, and defendant acknowledges receiving the Judgment with notice of entry on or about that date.

A defendant's appearance in an action entitles her to service of all papers and notice of all proceedings through and subsequent to judgment (see CPLR 2103; *Home Sav. Bank v Chiola*, 203 AD2d 525 [1994]). However, a plaintiff's failure to provide notice of its application for judgment is not necessarily fatal unless its omission prejudiced the defendant (see *36 N. Water, Inc. v Mark Caliper, Inc.*, 295 AD2d 499 [2002]). From a review of the court file in this matter, it appears that defendant was not given prior notice of plaintiff's proposed Order of Reference (granted on June 30, 2006) or the Judgment (granted on November 2, 2007). However, as discussed hereinabove, 22 NYCRR § 202.48 (a) requires that proposed orders or judgments must be submitted for signature with proof of service on all parties, *where the order is directed to be settled or submitted on notice* (see 22 NYCRR § 202.48 [a] [emphasis supplied]). No such notice was directed herein, and defendant was subsequently served with both the Order and Judgment with notice of entry. Defendant had sought reargument of plaintiff's motion for summary judgment (denied by Order of October 23, 2006 [Werner, J.]), but had neither appealed from the Judgment, nor moved to modify or vacate the Judgment, and her time to do so has since expired.

Further, defendant was served with the report of the referee herein, as well as the correspondence between plaintiff's counsel and the referee leading up to the report. After service of the report, defendant failed to move to reject the report within thirty (30) days after notice of the filing thereof (see CPLR 4403; 22 NYCRR § 202.44 [a]). As such, the Court confirmed the report in the Judgment (see 22 NYCRR § 202.44 [b]). It is undisputed that defendant received notice of the pending sale date of January 20, 2009, as she filed the instant application on January 16, 2009 to stay the sale.

In view of the foregoing, the Court finds that there was no prejudice to defendant as a result of not receiving notice of plaintiff's application for a Judgment of Foreclosure and Sale. As shown hereinabove, defendant was fully aware of all the proceedings, the report of the referee, and the pending sale (see *36 N. Water, Inc. v Mark Caliper, Inc.*, 295 AD2d 499, *supra*; *Citibank v Babcock*, 206 AD2d 784 [1994]). Nor can there be a claim of prejudice by defendant in light of her multiple challenges to the Judgment and her numerous applications in various courts to stay the foreclosure sale (see *36 N. Water, Inc. v Mark Caliper, Inc.*, 295 AD2d 499, *supra*).

Moreover, defendant seeks an *in camera* inspection of the underlying mortgage documents, and an Order directing the appearance of plaintiff's attorneys, EDWARD R. FINKELSTEIN, ESQ., DEBRA BODAIN BERNSTEIN, ESQ., ALEC SAUCHIK, ESQ., and DANIEL CHIU, ESQ., to testify as to their role and knowledge in the handling and duplicating of plaintiff's mortgage instruments, as well as any other attorneys or personnel that prepared and/or filed the underlying summons and complaint, dated July 11, 2005. Defendant also seeks an Order directing the appearance of any other personnel of plaintiff's law firm who took possession of plaintiff's mortgage documents before this action was commenced who may have knowledge of the "chain of command" (sic) of the allegedly fraudulent mortgage documents. Defendant also seeks to have this Court direct LELAND C. SHELBY, SR. and GEOFFREY MOORE PARKINSON, SR., officers and directors of defendant LAURA J. NILES FOUNDATION, INC., and plaintiff's representatives, GREGORY J. DELLICARPINI, JOHN MATULA, and JOHN DOE, to appear before this Court and provide sworn testimony. Defendants GEOFFREY M. PARKINSON and LAURA J. NILES FOUNDATION, INC. oppose this request. The Court finds that defendant has not proffered any statutory or case law authority upon which to base such an Order.

Finally, with respect to a stay of the foreclosure sale, RPAPL 1341 (2) authorizes a court to stay all proceedings upon a judgment of foreclosure only if a defendant pays into court the amount due for principal and interest and the costs of the action, together with the expenses of the proceedings to sell, if any. On this record, defendant has not alleged compliance with RPAPL 1341 (2).

For the foregoing reasons, defendant's application for, among other things, a stay of execution of the Judgment of Foreclosure and Sale, is **DENIED** in its entirety.

The foregoing constitutes the decision and Order of the Court.

Dated: April 16, 2009



HON. JOSEPH FARNETI
Acting Justice Supreme Court