

Indymac Bank F.S.B. v Singh

2009 NY Slip Op 32244(U)

September 25, 2009

Supreme Court, Queens County

Docket Number: 2042/08

Judge: David Elliot

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M E M O R A N D U M

**SUPREME COURT - QUEENS COUNTY
I.A.S. PART 14**

INDYMAC BANK F.S.B.,

Index No.2042/08

Plaintiff,
-against-

By: **ELLIOT, J.**

Date:September 25,2009

HEMNAUTH SINGH, ETAL.,

Motion Date:August 18, 2009

Defendants.

Motion Cal. No. 18

Motion Seq. No. 3

In this mortgage foreclosure action, plaintiff moves for an order granting a judgment of foreclosure and sale.

Defendant Hemnauth Singh (Singh) cross-moves for an order pursuant to CPLR § 3012(d) granting defendant Singh an extension of time to serve and file an answer to the complaint on the ground of excusable delay and meritorious defenses to the action.

Defendant Singh submits his affidavit wherein he states that he received the summons and complaint in January 2008. He could not afford an attorney and contacted several places in an attempt to obtain free legal representation. He eventually met with the City Bar Justice Center in late March. Defendant Singh states that he had no idea how to answer the complaint or raise defenses.

As to the merits, defendant Singh asserts that a real estate broker referred him to the mortgage broker, appraiser and the lawyer who was to represent him in the transaction. The

broker misled him into believing that he was taking out a single mortgage loan with manageable monthly payments. Instead, he learned that he was issued two mortgages. The first is adjustable with ever increasing monthly payments. The second does not even pay itself off. Rather, after 15 years he will be responsible for a payment of \$101,347.72. His attorney at the time never explained any of this to him. The mortgage broker assured him that the mortgage payments would be affordable. Defendant Singh was not given a Good Faith Estimate until the closing at which time he found out that the monthly payment was more than he had anticipated. When he expressed his reservations, he was told that in six months he could refinance. He also believes that the property was over valued when he bought it and that falsely inflated appraisals were common at that time.

Defendant Singh's counsel argues that defendant Singh has shown a reasonable excuse for his delay as he could not afford to retain an attorney. When he became aware that pro bono legal services were available, he took the initiative to find an attorney. Defenses to this foreclosure action would include claims for fraud and deceptive acts and practices pursuant to GBL § 349. This transaction apparently resulted from a "One-Stop-Shop" operation in which the seller, the lender and a lawyer, purporting to act on behalf of the homeowner, were actually conspiring to dupe him into a transaction which yielded hefty fees and profits to everyone else involved. The predatory lending and deceptive business practices provide defendant Singh with meritorious legal defenses to this action.

In opposition to the cross-motion, plaintiff asserts that defendant Singh was personally served with a summons and complaint on January 28, 2008. Defendant Singh failed to appear and, on March 12, 2008, another copy of the summons and complaint were sent to him pursuant to CPLR § 3215(g)(3). Defendant Singh sent counsel a letter dated March 21, 2008 indicating that he had received the summons and was in the process of selling his home. This letter was treated as defendant's notice of appearance and he was not considered to be in default. All proceedings were done on notice to defendant Singh. On April 29, 2008, the order of reference was signed. Plaintiff's prior motion for a judgment of foreclosure and sale was denied without prejudice with leave to renew upon proper papers on September 17, 2008. A settlement conference was scheduled for February 11, 2009. Defendant Singh appeared and, after inquiring as to defendant's income, the court referee determined that the defendant could not afford to keep the premises based on his current income.

Plaintiff's counsel asserts that defendant Singh is not entitled to an extension of time to answer as his time to do so expired on or about February 17, 2008. Defendant has been an active participant in this action although he has never served any responsive papers until the present time. The fact that the defendant could not afford an attorney is not a reasonable excuse for a default or for the failure to timely serve an answer. Defendant Singh has not set forth a meritorious defense to this action. He does not deny that he failed to make monthly mortgage payments to plaintiff. The allegations that he may be the victim

of predatory lending and deceptive business practices are bare, conclusory and self-serving statements. This was a purchase money mortgage which assisted the defendant in purchasing the mortgaged premises. The lender had nothing to do with the amount of the purchase price or the value of the house. This was not a refinance and the note carried an initial 7.125% which is still the present rate. Such rate is not oppressive. In fact, in support of the cross-motion, it is asserted that defendant Singh's failure to make mortgage payments was due to his wife's becoming ill and the loss of a tenant. Defendant Singh signed the Truth In Lending Disclosure Statement which indicates that he was advised of what his payments would be.

Plaintiff's motion is denied.

Defendant Singh's cross-motion is granted to the extent that the verified answer in the form proposed annexed to the cross-motion is hereby deemed timely served.

To vacate the default, defendant Singh was required to show a reasonable excuse for his default and a meritorious defense. Chemical Bank v. Vasquez, 305 AD2d 438.

Under the circumstances of this case, there does not appear to have been any intent to abandon the matter by defendant Singh. Indeed, plaintiff was aware of defendant Singh's response to the service of the summons and complaint. While plaintiff notes that defendant Singh was put on notice of proceedings thereafter, the exparte order of reference was signed after defendant Singh's initial letter, the application therefor having been submitted to the court prior to said letter. Meritorious

defenses may exist including, but not limited to, whether plaintiff had standing to commence this action. The court cannot determine, on the papers submitted, whether plaintiff was entitled to commence this action. It appears that the assignment was dated after the filing of the summons and complaint although it contains a statement that it was effective prior to the commencement date. There is nothing to show, at this time, whether the mortgage and note had been delivered to plaintiff prior to the commencement date. The court will not, sua sponte, dismiss the action absent a proper request therefor.

Settle order and provide therein for the court to set a date for a preliminary conference.

J.S.C.