

Wachovia Bank, N.A. v George
2009 NY Slip Op 33103(U)
December 21, 2009
Supreme Court, New York County
Docket Number: 102814/08
Judge: Walter B. Tolub
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SCANNED ON 1/5/2010
[1]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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WACHOVIA BANK, NATIONAL ASSOCIATION

Plaintiff,

Index No. 102814/08
Mtn Seq. 002, 003

-against-

ADRIAN GEORGE, CITY OF NEW YORK
MUNICIPAL CORPORATION ACTING BY AND
THROUGH ITS DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT, NEW YORK
CITY ENVIRONMENTAL CONTROL BOARD, NEW
YORK CITY TRANSIT ADJUDICATION BUREAU,
ROBERT RUBIN, ROCCO SIMON, AND JOHN DOE

Defendants.
-----x

FILED
DEC 30 2009
NEW YORK
COUNTY CLERK'S OFFICE

WALTER B. TOLUB, J.:

Motion sequence 002 and 003 are consolidated and resolved in the accompanying memorandum decision.

This is a foreclosure action involving a building located at 34 West 128th Street in Manhattan. By motion sequence 002, plaintiff moves, pursuant to CPLR 2221 for an order granting leave to reargue the January 6, 2009 decision issued by Hon. Carol Edmead,¹ and upon re-argument, a reversal of the ruling that plaintiff lacked standing to bring this action. Plaintiff additionally requests the court to fully consider the balance of the relief sought in motion sequence 001. Defendant Robert Rubin, pursuant to CPLR 2221, cross-moves for leave to reargue his cross-motion advanced in motion sequence 001. Upon re-

¹ The court notes that this matter has since been transferred multiple times until finally received by this court.

argument, defendant Rubin seeks an order granting him summary judgment against defendant Adrian George and for a judgment of foreclosure on any surplus monies above the judgment and lien in Plaintiff's foreclosure action. Defendant Rubin additionally seeks an order granting leave to serve an amended answer, and to have said amended answer deemed served.

By motion sequence 003, defendant Rubin moves for injunctive relief against defendant Adrian George pursuant to CPLR 6301, along with an order attaching, garnishing and sequestering the rental proceeds of the property in issue pursuant to CPLR 6201.

Background

Roughly two years ago, defendant Adrian George, appearing *pro se*, defaulted on a mortgage payment for the building located at 34 West 128th Street in Manhattan. The mortgage was issued by Credit Suisse First Boston Financial Corporation in 2005 (Notice of Motion for Reargument, Exhibit B). At the time that defendant George defaulted on the mortgage, the loan was held by Mortgage Electronic Registration Systems, Inc., as nominee for Credit Suisse First Boston Financial Corporation, its successors and assigns (*id.*).

On February 21, 2008, plaintiff filed a *Lis Pendens* and the instant Summons and Complaint with the New York County Clerk's office, and began service of the documents upon the named defendants in this action. By assignment dated February 27,

2008, Mortgage Electronic Registration Systems, Inc. assigned the mortgage to plaintiff (id.). The mortgage assignment was filed on March 7, 2008.

In September of 2008, plaintiff moved for summary judgment against defendants Adrian George and Robert Rubin (motion sequence 001). In opposition to the motion advanced against him, defendant Rubin, who holds a second mortgage on the subject property, cross-moved for summary judgment against defendant George.

By decision dated January 6, 2009, Judge Carol Edmead denied both plaintiff's motion for summary judgment, and defendant George's cross-motion. The denial of plaintiff's motion was predicated on a claimed failure to address Adrian George's claim that plaintiff no longer holds the note and mortgage for the subject property. The portion of defendant Rubin's cross-motion which sought leave to amend his answer was denied for failure to address the basis for the leave sought (see, Notice of Motion, Exhibit A, Decision dated 1/5/2009). The instant motion and cross-motion to reargue followed. After consideration, leave to reargue both motions is granted.

Discussion

Motion to Reargue (Sequence 002)

Addressing the cross-motion first, the court notes that the first portion of the relief sought by defendant Rubin is made

against a non-moving party, defendant George. A cross-motion may not be used to seek affirmative relief from a non-moving party (Jordan v. City of New York, 38 AD3d 336 [1st Dept 2007]), and as such, the relief sought simply cannot be granted. Defendant Rubin's second claim for relief as advanced in the cross-motion, is for "a judgment of foreclosure on any surplus of monies above the judgment and lien of the Plaintiff arising out of the judgment and sale in the Plaintiff's foreclosure action" (see, Cross-Motion, Exhibit 1, Notice of Cross-Motion for Summary Judgment). Again, the relief sought cannot be granted. As mentioned earlier, defendant Rubin, who seeks a default judgment against defendant George in a foreclosure action, is the holder of a second mortgage instrument which is subordinate to plaintiff's claims. Not only is defendant Rubin not yet entitled to any surplus monies because the foreclosure is incomplete, in order to obtain a default judgment in a foreclosure action, defendant Rubin, as the moving party, must first demonstrate compliance with the notice requirements of CPLR 3215(g). The papers annexed to defendant Rubin's cross-motion do not demonstrate compliance. As such, the relief sought must be, and is, denied.

The final prong of defendant Rubin's cross-motion seeks leave to serve an amended answer and to have said amended answer deemed served.

Leave to serve an amended answer is generally freely given (CPLR 3025(b)), provided that the claims advanced by a defendant are meritorious and are made without prejudice to the non-moving parties (see, Murray v. City of New York, 43 NY2d 400 [1977]; McCaskey, Davies & Associates, Inc. v. New York City Health and Hospitals Corp., 59 NY2d 755 [1983]). See generally, Barr, Altman, Lipshie, Gerstman, New York Civil Practice Before Trial, §15:990 [James Publishing 2009]).

In support of his application, defendant Rubin claims that in error, he failed to answer the complaint's fifteenth through twenty-first paragraphs. Review of the complaint reveals that the unanswered paragraphs of the complaint each assert claims that plaintiff holds a mortgage instrument which is superior to all other interests. Defendant Rubin's proposed amended answer which only contains general denials to plaintiff's claims are simply not meritorious. As such, the balance of defendant Rubin's cross-motion is denied.

This brings the court to the issue of whether or not plaintiff has standing to bring this action, a question which requires plaintiff to prove that it was both the holder or assignee of the subject mortgage and the underlying note at the time that the action was commenced (see, U.S. Bank, N.A. v. Adrian Collymore, 2009 WL 4432588 [2nd Dept 2009]; First Trust National Association v. Meisels, 234 AD2d 414 [2nd Dept 1996]).

The papers submitted in this action indicate that plaintiff was assigned the mortgage at issue on February 27, 2008, and that the assignment of the mortgage was recorded on March 7, 2008. The instant action, however, was commenced on February 21, 2008, roughly a week before the assignment took place and more than two weeks prior to its recording. Although plaintiff claims that it was always the holder of the subject mortgage, there are no documents annexed to any of the current or prior papers submitted in this action substantiating this claim. In the absence of this type of documentation, plaintiff, contrary to its contentions, fails to demonstrate an entitlement to a judgment of foreclosure as a matter of law because it appears that they did not hold the mortgage and note when they commenced this action on February 21, 2008 (Wells Fargo Bank, N.A. v. Marchione, 887 NYS2d 615 [2nd Dept 2009]).² As such, this court adheres to the January 6, 2009 decision issued by Hon. Carol Edmead.

Defendant Rubin's Motion for Injunctive Relief

The remaining issue for this court to address, is whether defendant Rubin is entitled to obtain injunctive relief against defendant Adrian George pursuant to CPLR 6301, along with an order attaching, garnishing and sequestering the rental proceeds of the property in issue pursuant to CPLR 6201. That question

²The court notes that barring any unaddressed statute of limitations issues, there is nothing barring plaintiff from commencing a new action to correct this error.

must be answered in the negative.

Contrary to defendant Rubin's arguments, and irrespective that this action appears to have been prematurely commenced and is likely to be commenced again to correct that error, plaintiff holds a lien superior to the interests of defendant Rubin. By law, once there is a validly executed order of foreclosure on the property, the first mortgage will be satisfied with the proceeds from the sale of the property. Only after the foreclosure action is completed will defendant Rubin have an opportunity to recover damages from the surplus monies. Not before.

Furthermore, the relief sought by defendant Rubin under both CPLR 6301 and 6201 is only available when the plaintiff's rights are jeopardy, not where the applicant for relief is the defendant (CPLR 6301, 6201). The relief sought in motion sequence 003 is therefore denied.

As such, it is

ORDERED that the motion and cross-motion advanced in motion sequence 002 are denied and the court adheres to the order issued in this matter on January 6, 2009; and it is further

ORDERED that the motion advanced by defendant Rubin in motion sequence 003 is denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 12/21/09

HON. WALTER B. TOLUB, J.S.C.