

Wells Fargo Bank, N.A. v Logan
2009 NY Slip Op 33324(U)
April 23, 2009
Sup Ct, New York County
Docket Number: 114825/2007
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. PAUL GEORGE FEINMAN PART 12

Justice

Wells Fargo Bank, N.A.

- v -

Victor D. Logan

INDEX NO.

114825/07

MOTION DATE

2/18/09

MOTION SEQ. NO.

003

MOTION CAL. NO.

10

The following papers, numbered 1 to _____ were read on this motion to/for _____.

Notice of Motion/Petition — Affidavits — Exhibits _____

Answering Affidavits — Exhibits (Memo) _____

Notice of Cross-Motion — Affidavits — Exhibits _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

1

2

3

3,4

Cross-Motion: Yes ☒ No

Upon the foregoing papers, it is ORDERED that this motion

RECEIVED BY THE CLERK OF THE COURT WITH
THE ANNEXED DECISION AND ORDER

FILED

APR 28 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/23/09

JSJ
J.S.C.

Check one:

FINAL DISPOSITION ☒
DO NOT POST

NON-FINAL DISPOSITION
REFERENCE

Preliminary Conference _____

Compliance Conference _____

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X

WELLS FARGO BANK, N.A.

3476 Stateview Boulevard

Ft. Mill, SC 93065

Plaintiff,

against

Index Number 114825/2007

Submission Date Feb. 18, 2009

Mot. Seq. No. 003

Cal. No. 10

VICKI D. LOGAN, BOARD OF MANAGERS OF
ANSONIA CONDOMINIUM, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW
YORK CITY TRANSIT ADJUDICATION BUREAU,
JANE DOE,

Defendants.

-----X

Appearances: **For the Plaintiff:**
Steven J. Baum, PC
By: Michael J. Wrona, Esq.
PO Box 1291
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For Defendant Logan:
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2109 Broadway, #8-41
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NEW YORK

Papers considered in review of these motions to vacate judgment of foreclosure and sale:

Papers	Numbered
Order to Show Cause	1
Affirmation in Opposition	2
Reply	3
Sur-Reply	4

PAUL G. FEINMAN, J.:

In this action Wells Fargo Bank was previously awarded a judgment of foreclosure and sale against Vicki D. Logan for unit 17-19 at 2109 Broadway, New York, New York, a building known as the Ansonia Condominium. There is a another action against the defendant Logan and others seeking foreclosure related to unit 841 at the same building (*see, Wells Fargo Bank, N.A. v. Vicki Logan, Gregory Ilich, et al.*, Index No. 104294/2008). Defendant Logan, who is self-

represented, moves by order to show cause dated July 30, 2008 to vacate the judgment of foreclosure and sale which was issued on default on June 18, 2008, but which was not yet entered at the time the order to show cause was signed. At the time Logan sought the instant order to show cause, she did not seek a temporary restraining order staying the entry of the judgment. The judgment was entered by the County Clerk on September 5, 2008.

This action concerns a note and mortgage executed on August 2, 2005 (Opp. Ex. B). The Note, and the Record filed with the office of the City Registrar, indicates that the mortgage was taken out for the purchase of unit 17-19 in 2109 Broadway, but that Logan lives in unit 841 of the same building. As to unit 17-19, she defaulted on her payments commencing with the payment that was due in July 2007 (Wrona Aff. in Opp. ¶¶ 4-5). This action was commenced by purchase of an index number and filing the summons and complaint on November 5, 2007. According to the affidavit of service sworn to on November 15, 2007, plaintiff's process server served defendant by service upon a person of suitable age and discretion, namely the doorman of defendant's dwelling place, i.e. the 841 unit. In the affidavit of service, the process server indicates that the doorman denied him access to the building, but acknowledged that defendant lived at that address. The process server also avers that he made a follow-up mailing to the same address. This, on its face, complies with the service requirements set forth in CPLR 308 (2). Thus, when an application was made to the court for entry of a default judgment of foreclosure and sale, there was no basis to deny it based on improper service.

A judgment issued on default will not be vacated in the absence of a justifiable excuse for the default and a meritorious cause of action or defense (*Barasch v Micucci*, 49 NY2d 549 [1980]). In assessing the motion to vacate a default judgment, the court will consider, among

other factors, the presence of excusable neglect and delay, absence of prejudice, a meritorious cause of action or defense, nature of injuries, if applicable, good faith in prosecuting or defending the action (*Heffney v Brookdale Hosp. Center*, 102 AD2d 842 [2d Dept], *app. dismissed* 63 NY2d 770 [1984]). While a properly executed affidavit of service raises a presumption that a proper mailing occurred, and a mere denial of receipt is insufficient to rebut that presumption (*Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]), in this instance, given that Logan sought relief prior to entry of the judgment of foreclosure and sale, it cannot be said that defendant did nothing to promptly protect her rights. Given the totality of the circumstances here, including the potential confusion given that the unit being foreclosed upon was not the one to which the papers were addressed, and not the one at which the defendant resided, and given the lack of prejudice, there it cannot be said that defendant acted with inexcusable delay.

It is unclear exactly what defenses Logan, who is self-represented, is alleging. While she does not, for instance, offer bank records or canceled checks that would show she has paid and has not defaulted on her loan, she does attempt to suggest that plaintiff has engaged in fraudulent activities as concerns her loan or that her loan may have been illegally foreclosed (Reply, Logan Reply Aff. pp. 8-23), and the totality of her allegations seem to suggest, among other things, that her loan was fraudulently induced and that the plaintiff is not a proper holder in due course of her note, but rather merely a loan service. She contends that the terms to which she originally agreed were greatly changed in favor of the bank at the time of closing.¹ She compares the terms of the August 2, 2005, note, which allows for the rate to become adjustable after ten years and to change

¹According to the paperwork, defendant was represented by an attorney in fact at the closing who initialed all the documents (Opp. Ex. B).

annually thereafter (Opp. Ex. B), with an unsigned copy of a Truth in Lending Disclosure, dated July 28, 2005, which states that for ten years, the monthly payments were set at one amount, and would then re-set to a designated higher amount for the remainder of the loan, but also states that the loan “contain[s] a variable-rate feature,” the details of which “have been provided to you earlier” (Reply, Ex. S). It also unclear whether defendant is alleging that the instant note constitutes a high-cost home loan within the meaning of Banking Law 6-1.

On a motion to vacate a default judgment, the defendant need not conclusively establish her defense with evidence that would warrant dismissal of the action. Rather, given the public policy favoring resolution of matters on their merits as opposed to on default, a court need only be persuaded that a viable defense may exist. Also, given in particular that the defendant sought to vacate her default before entry of the judgment, it cannot be said that she has been totally lacking in diligence. Accordingly it is

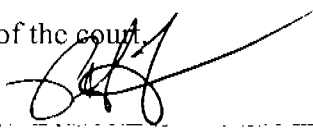
ORDERED that under the totality of the circumstances here, the court grants the motion to vacate the default judgment to the following extent:

1. Plaintiff shall be enjoined until further order of this court from proceeding with enforcement of the judgment of foreclosure and sale; and
2. The judgment of foreclosure and sale shall remain as security; and
3. Defendant Logan shall interpose an answer to the complaint within 30 days of entry of this decision and order and said answer shall concisely, in enumerated paragraphs, answer the complaint by paragraph and in separately numbered paragraphs set forth any affirmative defenses and counterclaims; and
4. Upon failure to comply with the foregoing, the plaintiff may apply to the court on ten

days' notice for vacatur of the stay of enforcement of the judgment.

This constitutes the decision and order of the court.

Dated: April 23, 2009
New York, New York



J.S.C.

FILED

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NEW YORK