

Wells Fargo Bank v Ghosh

2010 NY Slip Op 32181(U)

August 9, 2010

Sup Ct, Queens County

Docket Number: 9027/2007

Judge: Denis J. Butler

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER
Justice

IA Part 12

WELLS FARGO BANK, et al. x

Index
Number 9027 2007

- against -

Motion
Date May 25, 2010

UTTAM GHOSH, et al.

Motion
Cal. Number 31

_____ x

Motion Seq. No. 1

The following papers numbered 1 to 9 read on this motion by defendant Kanika Gill pursuant to CPLR 317 and 5015(a) to vacate the judgment of foreclosure and sale dated November 8, 2007, entered upon her default in answering, and to dismiss the complaint, or alternatively, pursuant to CPLR 2201, for a stay of the action pending the resolution of an action entitled *Gill v Ghosh*, (Supreme Court, Queens County, Index No. 23753/2009), and the conducting of a private sale of the real property known as 40-44 78th Street, Elmhurst, New York.

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits	1-4
Answering Affidavits - Exhibits	5-7
Reply Affidavits	8-9

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff commenced this action seeking to foreclose on a mortgage dated December 29, 2004 and recorded against the subject real property known as 40-44 78th Street, Elmhurst, New York on February 24, 2005, to secure repayment of a note, evidencing a loan

in the original principal amount of \$500,000.00, plus interest. The mortgage loan was extended to defendant Uttam Ghosh as the then sole record owner of the premises, by Griffin Mortgage Company. Plaintiff alleged that it is the current holder of the mortgage and underlying note, and that defendant Ghosh defaulted under the terms of the mortgage and note by failing to make the monthly installment payment of interest due on November 1, 2006, and thereafter, and as a consequence, it elected to accelerate the entire mortgage debt. Plaintiff named defendant Gill as a party defendant for the purpose of foreclosing Gill's ownership interest in the property, which was acquired allegedly by Gill subsequent to the making of the subject mortgage.

Defendant Gill asserts that she "never was personally served" with a copy of the summons and complaint. She additionally asserts that she made payments in connection with a repayment agreement, which allegedly effectuated a deacceleration of the entire mortgage debt and reinstatement of the original mortgage schedule, and "withdrawal" of the foreclosure action. She argues that plaintiff should be estopped from proceeding with the foreclosure sale insofar as plaintiff is seeking foreclosure based upon a new alleged default, i.e. the failure by defendant Ghosh to pay a monthly mortgage installment after completion of the repayment agreement, rather than on the original claimed default in payment as of November 1, 2006.

The affidavit of service dated April 17, 2007 of the licensed process server indicates service of process upon defendant Gill by delivery of a copy of the summons and complaint upon Dinesh Gill, "HUSBAND," on April 14, 2007, at 5:55 A.M. at the 2nd floor of the subject premises, and a subsequent mailing of a copy of the summons and complaint to defendant Gill at the same address. This affidavit is sufficient to establish prima facie evidence of proper service upon defendant Gill in accordance with CPLR 308(2) (*see Granite Mgt. & Disposition v Sun*, 221 AD2d 186, 186-187 [1995]; *Skyline Agency, Inc. v Ambrose Coppotelli, Inc.*, 117 AD2d 135, 139 [1986]).

Defendant Gill, in her motion papers, has failed to dispute the veracity or contents of the affidavit of service, or rebut the presumption of proper service created by the process server's affidavit (*see Roberts v Anka*, 45 AD3d 752 [2007]; *Anderson v GHI Auto Serv., Inc.*, 45 AD3d 512 [2007]). "A court need not conduct a hearing to determine the validity of the service of process where the defendant fails to raise an issue of fact regarding service" (*Hamlet on Olde Oyster Bay Homeowners Assn., Inc. v Ellner*, 57 AD3d 732, 733 [2008]); *see Simmons First Natl. Bank v Mandracchia*, 248 AD2d 375 [1998], *supra*; *Sando Realty Corp. v Aris*, 209 AD2d 682 [1994]). Thus, to the extent defendant Gill seeks to vacate the judgment of foreclosure and sale pursuant to CPLR 5015(a)(4) due to lack of personal jurisdiction based upon improper service of process, that branch of the motion is denied.

Service under CPLR 308(2) is service “other than by personal delivery,” and defendant Gill seeks to avail herself of the provisions of CPLR 317 (*see Fleetwood Park Corp. v Jerrick Waterproofing Co., Inc.*, 203 AD2d 238 [1994]; *National Bank of Northern N.Y. v Grasso*, 79 AD2d 871 [1980]). Under that section, defendant Gill need not demonstrate a reasonable excuse for her default (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co.*, 67 NY2d at 141; *Samet v Bedford Flushing Holding Corp.*, 299 AD2d 404 [2002]; *Trujillo v ATA Housing Corp.*, 281 AD2d 538, 539 [2006]; *Kavourias v Big Six Pharmacy Inc.*, 262 AD2d 456 [1999]). Nevertheless, defendant Gill must establish that she did not personally receive notice of the summons in time to defend and has a meritorious defense (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co.*, 67 NY2d 138 [1986]; *Samet v Bedford Flushing Holding Corp.*, 299 AD2d 404 [2002], *supra*; *Trujillo v ATA Housing Corp.*, 281 AD2d at 538; *Kavourias v Big Six Pharmacy Inc.*, 262 AD2d at 456).

Defendant Gill, however, has failed to identify when, and by what means, she first learned of the pendency of the action, and, therefore, has failed to meet her burden of demonstrating that she lacked actual notice of the action in time to defend such claim (*see* CPLR 317; *Burnett v Renne*, 32 AD3d 449, 450 [2006]; *Jagiela v 1329 Realty, LLC*, 17 AD3d 533 [2005]; *Persaud v Gallante Props.*, 11 AD3d 442 [2004]; *see also Facey v Heyward*, 244 AD2d 452 [1997]; *Sorgie v Dalton*, 90 AD2d 790 [1982]).

That branch of the motion by defendant Gill which seeks to vacate the judgment of foreclosure and sale pursuant to CPLR 317 and to dismiss the complaint asserted against her is denied.

To the extent defendant Gill moves to vacate the judgment pursuant to CPLR 5015(a)(1), it is well settled that the proponent of a motion to vacate a default judgment under that provision must demonstrate a reasonable excuse for her failure to appear or answer the complaint, and a meritorious defense. Defendant Gill’s claim, that she was not personally served with process, is insufficient to establish a reasonable excuse for her default since she has offered nothing to rebut the contents of the affidavit of service of process (CPLR 5015[a][1]; *see Pezolano v Inc. City of Glen Cove*, 71 AD3d 970 [2010]). Defendant Gill claims that she negotiated with plaintiff to “save her house.” Even assuming, without deciding, that negotiations with plaintiff could constitute a reasonable excuse for her not having served an answer, defendant Gill fails to state when the negotiations took place. She merely states that the repayment agreement was reached with plaintiff in or around January 2008, which was after entry of judgment.

Insofar as defendant Gill has failed to establish a reasonable excuse for her default in answering the complaint, the court need not reach the issue of whether she has a meritorious

defense based upon estoppel (*see Levi v Levi*, 46 AD3d 519 [2007]; *Mjahdi v Maguire*, 21 AD3d 1067 [2005]; *Krieger v Cohan*, 18 AD3d 823 [2005]).

To the extent defendant Gill asserts that the judgment of foreclosure and sale must be amended to take into account the payments made pursuant to the repayment agreement, such assertion is without merit. *Deutsche Bank Nat. Trust Co. v Williams*, (62 AD3d 826 [2009], *revg* 17 Misc 3d 320 [2007]), relied upon by defendant Gill, is distinguishable from the facts herein, since the defendant mortgagor in that case made payments pursuant to a forbearance agreement prior to the entry of the judgment of foreclosure and sale, and the judgment amount did not reflect the crediting of such payments. The payments in this case, however, were made post-judgment, and therefore, shall be considered by the referee conducting the foreclosure sale to be in partial satisfaction of the judgment amount owed by defendant Ghosh (RPAPL 1354[1]).

With respect to the branch of the motion by defendant Gill for a stay of this action pending the outcome of the partition action, “[t]o impose a stay in one action pending the resolution of a related action, there must be a complete identity of parties, claims, and reliefs sought in the two actions (*see National Mgt. Corp. v Adolphi*, 277 AD2d 553 [2000]; *Guilden v Baldwin Sec. Corp.*, 189 AD2d 716 [1993]; *Sears v Country Developers*, 178 AD2d 708 [1991]; *Abrams v Xenon Indus.*, 145 AD2d 362 [1988])” (*Green Tree Financial Servicing Corp. v Lewis*, 280 AD2d 642 [2001]). The relief sought herein of foreclosure of the subject mortgage, is distinct from the relief sought in the action under Index No. 23753/2009. More importantly, defendant Gill has failed to demonstrate that her claimed ownership interest in the property is not subject to plaintiff’s mortgage.

With respect to that branch of the motion by defendant Gill for a stay of the foreclosure sale to allow her to arrange for a private sale of the property, she has failed to demonstrate that plaintiff is obligated under the terms of the mortgage or the repayment agreement to consent to any continued adjournment of the foreclosure sale to allow a private sale. Accordingly, that branch of the motion seeking a stay of this action is denied.

This Constitutes the Decision and Order of the Court.

Dated: August 9, 2010

J.S.C.

