

Targee St. Internal Medicine Group, P.C. v Deutsche Bank Natl. Trust Co.
2010 NY Slip Op 32845(U)
September 24, 2010
Supreme Court, Queens County
Docket Number: 29456/09
Judge: Augustus C. Agate
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MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 24

TARGEE STREET INTERNAL MEDICINE
GROUP, P.C.

X

INDEX NO. 29456/09

BY: AGATE, J.

- against -

MOTION SEQ. NO.: 1

MOTION CAL NO.: 28

MOTION DATE: June 8, 2010

DEUTSCHE BANK NATIONAL TRUST
COMPANY, et al.

 X

In this reforeclosure action pursuant to RPAPL § 1503, plaintiff Targee Street Internal Medicine Group, Inc. (Targee) seeks an order granting a default judgment against each of the defendants, pursuant to CPLR 3215, and directing a time for the redemption of the real property known as 113-17 Delevan Street, Queens Village, New York, and further directing that if the defendants fail to redeem said property within such time, they will be precluded from redeeming said property or claiming any right, title or interest therein, pursuant to RPAPL § 1503. Defendant Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2004-2 (Deutsche Bank) cross-moves for an order vacating its default and extending its time to appear and answer, pursuant to CPLR 2004 and 3012(d); staying this action, pursuant to CPLR 2001, until there has been a final determination in a related action entitled *Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2004-2 v Eucharía Iwuchukwu, et. al.*, Index No. 17175/05; and, in the alternative, extending its time to appear and answer and joining

this action with the action commenced under Index No. 17175/05, pursuant to CPLR 602, 2004 and 3012(d).

Henry Harley and his son, Henry Harley Jr., acquired title, as tenants in common, to the real property known as 113-17 Delevan Street, Queens Village, New York, pursuant to a deed dated August 12, 1966 and recorded on August 19, 1966. Henry Harley Jr., as President of H & J Contractors, Inc., executed a promissory note, dated January 16, 1990, in the sum of \$65,000.00, payable to Nationwide Associates, Inc. (Nationwide). In connection with this loan, Henry Harley, executed a personal guaranty dated December 26, 1989, and Henry Harley Jr., and John Esposito executed personal guaranties dated January 26, 1990. Henry Harley and Henry Harley, Jr. executed a mortgage dated January 26, 1990 on the Delevan Street property, as collateral security for the Nationwide loan, dated December 26, 1989, which states that it is “subordinate to a mortgage made to Peoples Mortgage Co. Inc., dated 8/12/66 in the sum of \$18,700.00, recorded in Liber 208 at page 317 and in Liber 208 at page 320.” The Nationwide mortgage was recorded on February 20, 1990, and assigned to Targee on February 1, 1990, pursuant to a written assignment.

On April 11, 1991, Targee commenced an action to foreclose the Nationwide mortgage entitled *Targee Street Internal Medicine Group, P.C. v Henry Harley, et al.* (Index No. 6818/1991). A notice of pendency was filed on April 2, 1991, and a new notice of pendency was filed on January 23, 2008. Henry Harley died on May 6, 1994 during the

pendency of said action, and Howard H. Stein was appointed the administrator of the Estate of Henry Harley pursuant to Letters of Limited Administration dated December 28, 2005. Howard H. Stein, as Administrator of the Estate of Henry Harley, was thereafter substituted as a party defendant in that foreclosure action. A judgment of foreclosure and sale was ultimately entered on July 17, 2009, and Targee acquired title to the Delevan Street property pursuant to a foreclosure sale conducted on September 25, 2009. A referee's deed was executed, acknowledged, and delivered on October 2, 2009 and recorded on October 23, 2009.

On August 4, 2005, Deutsche Bank commenced an action entitled *Deutsche Bank National Trust Company as Trustee for the Long Beach Mortgage Loan Trust 2004-2 v Eucharía Iwuchukwu, Long Beach Mortgage Company, Walter Morris, Nationwide Associates Inc., Targee Street Internal Medicine Group, P.C.* (Index No. 17175/2005) to foreclose a mortgage dated February 25, 2004, and recorded on May 9, 2005, on the same Delevan Street property. It is alleged that the Delevan Street property had been conveyed to Frank Emeka pursuant to a deed dated June 23, 2003 executed by Henry Harley's purported attorney in fact, Henry Harley, III (a grandson) and by Henry Harley, and that Mr. Emeka conveyed said real property to Eucharía Iwuchukwu pursuant to a deed dated February 25, 2004. Eucharía Iwuchukwu executed a mortgage on the Delevan property in favor of Long Beach Mortgage Company (Long Beach), which secured a note in the principal amount of \$288,000.00.

Deutsche Bank, in its foreclosure action, asserts that it is the holder of the Long Beach mortgage and note pursuant to an assignment dated July 29, 2005, and recorded on September 30, 2005. Deutsche Bank, conceded that the Nationwide mortgage was recorded on February 20, 1990, prior to the recording of the Long Beach mortgage. However, it asserts it is not bound by the Targee judgment of foreclosure, as it was not named or joined as a defendant in the Targee action, and its mortgage interest came into being after the expiration of the original notice of pendency in the Targee action.

Targee and Nationwide, in the Deutsche Bank foreclosure action, asserts that Targee is the holder of the Nationwide mortgage and that Deutsche Bank's mortgage is void because Iwuchukwu never acquired any valid ownership interest in the subject premises, and that her title to the property is defective. Targee commenced a third-party action on June 22, 2009 against Henry Harley, Jr. and Henry Harley III.

The court in the Deutsche Bank foreclosure action, in an order dated March 1, 2010, among other things, granted Nationwide and Targee's motion for an order issuing an "open commission" to conduct the deposition of Henry Harley, Jr. The court therein made no determination regarding the validity of the Iwuchukwu deed and alleged chain of title from the Harley's, the validity of the Deutsche Bank mortgage, or the priority of said mortgage.

On October 28, 2009, Targee commenced the within action to reforeclose its mortgage on the Delevan property under RPAPL § 1503. Defendant Deutsche Bank was

served with process on November 5, 2009, pursuant to CPLR 311. Defendant GMAC Mortgage LLC was served with process on November 12, 2009, pursuant to CPLR 311-a. Defendant Eucharia Iwuchukwu was served with process on December 16, 2009, pursuant to CPLR 308(2).

Targee alleges in its complaint that Deutsche Bank claims to hold a mortgage given by Eucharia Iwuchukwu to Long Beach which was recorded on May 9, 2005 and assigned to Deutsche Bank, and that the assignment was recorded on September 30, 2005; that GMAC Mortgage LLC (GMAC) claims to hold a mortgage given by Eucharia Iwuchukwu to Long Beach and recorded on May 9, 2005 which was assigned to GMAC and that the assignment was recorded on May 29, 2007; and that Eucharia Iwuchukwu claims a fee interest in the subject property pursuant to a deed recorded on May 2, 2005.

Targee now moves for a default judgment against all defendants, and seeks an order directing a time by which the defendants must redeem the subject property, and providing that upon the failure to redeem in such time, they shall be precluded from redeeming said real property, or claiming any right, title, or interest in said real property. Targee asserts that it has an absolute right to foreclose the equity of redemption as against all junior lienors and encumbrancers claiming an interest to the subject property who were not parties to Targee's foreclosure action.

Defendant Deutsche Bank cross-moves in opposition, and seeks an order vacating its default and extending its time to appear and answer, pursuant to CPLR 2004 and

3012(d); staying this action, pursuant to CPLR 2001, until there has been a final determination in the Deutsche Bank foreclosure action commenced under Index No. 17175/05; and in the alternative extending its time to appear and answer and joining this action with the action commenced under Index No. 17175/05, pursuant to CPLR 602, 2004 and 3012(d).

A party seeking to vacate a default must demonstrate both a reasonable excuse and the existence of a potentially meritorious defense (*see Tadco Constr. Corp. v Allstate Ins. Co.*, 73 AD3d 1022 [2010]; *Sime v Ludhar*, 37 AD3d 817 [2007]; *Professional Bookkeeper, Inc. v L & L N.Y. Food Corp.*, 18 AD3d 851 [2005]; *Fekete v Camp Skwere*, 16 AD3d 544 [2005]). In appropriate circumstances, certain law office failures may constitute reasonable excuses (*Goldman v Cotter*, 10 AD3d 289, 291 [2004]). The loss of legal documents may, in certain situations, constitute a reasonable excuse for vacating a default (*see Wilcox v U-Haul Co.*, 256 AD2d 973 [1998]; *Kasriels v Barnard Coll. of Columbia Univ.*, 256 AD2d 909, 910 [1998]).

Deutsche Bank concedes that it was served with process on November 5, 2009. Counsel for Targee, in a letter dated January 20, 2010 informed counsel representing Deutsche Bank in the Deutsche Bank foreclosure action that Deutsche Bank was in default in this action, and that a late answer would not be accepted. Targee thereafter served the within motion for a default judgment on Deutsche Bank's counsel in the Deutsche Bank

foreclosure action on March 16, 2010. Deutsche Bank served the within cross motion to vacate its default on May 3, 2010.

David Arnold, a vice president employed by JP Morgan Chase Bank, National Association (Chase), states in an affidavit that Chase is Deutsche Bank's attorney in fact and servicing agent for the subject mortgage. Mr. Arnold states that after Deutsche Bank was served with process, the summons and complaint were forwarded from a Chase department in Chatsworth, California to another department in Jacksonville, Florida, and was thereafter inadvertently lost or misplaced. Counsel for Deutsche Bank asserts that the failure to timely answer the complaint was neither willful nor deliberate, that the cross motion was delayed by attempts to locate the pleadings, and that Deutsche Bank did not intend to abandon its interest in either this action or the subject premises.

The court finds that under the circumstances presented here Deutsche Bank has established a reasonable excuse for its default. Deutsche Bank, however, has failed to establish the existence of a potential defense to this action for reforeclosure.

Contrary to Deutsche Bank's assertion, the expiration of the original notice of pendency in the Targee foreclosure action did not affect the priority of the recorded liens on the Delevan Street property. The purpose of the notice of pendency is "to afford constructive notice from the time of the filing so that any person who records a conveyance or encumbrance after that time becomes bound by all of the proceedings taken in the action" (*Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v Solow*

Bldg. Corp., 52 AD2d 533, 534 [1976]). It does not create rights that did not already exist (*2386 Creston Ave. Realty, LLC v M-P-M Mgt. Corp.*, 58 AD3d 158 [2008]; *Varon v Annino*, 170 AD2d 445 [1991]). Thus, regardless of the expiration of the original notice of pendency in the Targee foreclosure action, the Nationwide mortgage held by Targee was recorded prior to both the Long Beach mortgage held by Deutsche Bank and the GMAC mortgage. In addition, the Targee mortgage had not been extinguished in the Targee foreclosure action at the time the Deutsche Bank and GMAC mortgages came into existence.

The court further finds that contrary to Deutsche Bank's assertions, the within reforeclosure action is not barred by the statute of limitations. Section 1503 of the Real Property Actions and Proceedings Law establishes an action for reforeclosure where an original foreclosure judgment, sale or conveyance may be void or voidable as against any person. The statute grants a purchaser the right to maintain an action, "to determine the right of any person to set aside such judgment, sale or conveyance or to enforce an equity of redemption or to recover possession of the property, or the right of any junior mortgagee to foreclose a mortgage." The right to reforeclose against a junior lien is an absolute right (see *2035 Realty Co. v Howard Fuel Corp.*, 77 AD2d 870, 870-871 [1980]; *Monday Props. v A-1 Plumbing & Heating Co.*, 25 Misc 2d 625 [1960]; RPAPL § 1503). Moreover, Section 1503 specifically permits a reforeclosure action to be maintained even where an action against the defendant to foreclose the mortgage under which the foreclosure sale was held or to extinguish a right of redemption would be barred by the statute of limitations.

Targee, did not name Deutsche, GMAC Mortgage LLC or Eucharia Iwuchukwu as parties to the Targee foreclosure action, as their alleged respective liens and interests arose many years after the commencement of the Targee foreclosure action. However, Targee's failure to renew or extend the original notice of pendency, does not constitute "willful neglect" on the part of the plaintiff (*see* RPAPL § 1523). The court finds that Targee has an absolute right to maintain this action against the junior liens held by Deutsche Bank and GMAC, and against the encumbrancer, Eucharia Iwuchukwu. The court further finds that Targee has established its right to a judgment on default.

Accordingly, defendant Deutsche Bank's cross motion to vacate its default in answering the complaint, and for a stay and other relief is denied. Plaintiff's motion for a default judgment on its action for reforeclosure is granted as to all defendants. Plaintiff, in the order to be entered hereon, shall provide defendants with an opportunity to exercise their right of redemption for a period of 60 days from entry thereof, and shall further provide that in the event that defendants fail to redeem within the specified time period, shall be excluded from claiming any title or interest in the subject property, and their interest in the property shall be extinguished and terminated (*see* RPAPL § 1523).

Settle order.

Dated: September 24, 2010

AUGUSTUS C. AGATE, J.S.C.