

HSBC Bank USA v Victorin

2010 NY Slip Op 32982(U)

October 22, 2010

Supreme Court, Queens County

Docket Number: 31192/09

Judge: Allan B. Weiss

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M E M O R A N D U M

SUPREME COURT QUEENS COUNTY
CIVIL TERM PART 2

HSBC BANK USA, NATIONAL ASSOCIATION, as
Indenture Trustee of the FBR
Securitization Trust 2005-1, Callable
Mortgage-Backed Notes, Series 2005-1

Plaintiff,

-against-

GARY VICTORIN,
NYCECB, NYCPVB NYCTAB

Defendant.

HON. ALLAN B. WEISS

Index No: 31192/09
Motion Date: 7/28/10
Motion Cal. No.: 16
Motion Seq. No.: 1

This is an action to foreclose a mortgage, dated April 20, 2005, given by defendant Gary Victorin to Accredited Home Lenders, Inc. to secure a loan and note in the principal amount of \$209,000.00 affecting the premises located at 91-18 214th Street, Queens, Village, N.Y., 11428. The mortgage and note were assigned to the plaintiff by assignment dated November 2, 2009. When the defendant defaulted in payment of the installment due on July 1, 2008 and the subsequent installments, the debt was accelerated by notice of acceleration, dated June 22, 2009 and the plaintiff commenced the instant action on November 19, 2009 and the defendant was served on November 30, 2009.

In response to the complaint, the defendant did not serve a notice of appearance, or an answer responding to the allegations of the complaint or make a pre answer motion (CPLR 320). Instead,

the defendant, Victorin, pro se, served and filed a "Notice and Demand for a Definite Statement of Allegations of *Bona Fide* Jurisdiction" (hereinafter the Notice and Demand), on December 8, 2008. The notice states that it is a "special appearance" not a general appearance and demands that plaintiff specifically state facts to support the basis of territorial, personal and subject matter jurisdiction so that the defendant can challenge jurisdiction and move to dismiss on that ground.

However, New York law does not require the plaintiff to plead in its complaint the basis of jurisdiction relied upon on. It is the burden of the defendant to raise the jurisdictional objection - see CPLR 3211(a)(8) and (e) - and only when the defendant does so must the plaintiff come forward to justify jurisdiction (see Fischbarg v. Doucet, 9 NY3d 375, 382 at n.5 [2007]).

The plaintiff now moves for an Order striking the defendant's answer (the Notice and Demand) and granting summary judgment, appointing a referee to ascertain and compute the amount due to the plaintiff and amending the caption.

To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and note, ownership of the mortgage and note, and the defendant's default in payment (see Capstone Bus. Credit, LLC v. Imperia Family Realty, LLC, 70 AD3d 882 [2010]; U.S. Bank Natl.

Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998-2] v. Alvarez, 49 AD3d 711, 712 [2008]). Where, as here, the plaintiff has established its entitlement to summary judgment, the burden shifts to the defendant to demonstrate "the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (see Mahopac Natl. Bank v. Baisley, 244 AD2d 466, 467 [1997]); Nassau Trust Co. v. Montrose Concrete Prods. Corp., 56 NY2d 175, 183 [1982]).

In opposition the defendant relying upon, inter alia, Federal Rules of Civil Procedure Rule 4(j), the Foreign Sovereign Immunity Act (28 U.S.C.A. § 1602 et. seq.) and the Constitution of the United States asserts that he is a "foreign state" as defined in 28 USC 1331(b)(1), that only the Federal Court has jurisdiction of this action (28 USC § 1330) and that service of the summons and complaint must be made in accordance with the 28 USC 1608(a)(4) so as to obtain personal jurisdiction over him.

Defendant is mistaken. The only explanation for defendant's misconception appears to be that he was served with process in Florida. The fact that defendant resides or has a residence in Florida, however, does not make him immune from suit in New York nor implicate the Foreign Sovereign Immunities Act in any way.

Contrary to defendant's claim 28 USC § 1330 entitled "Actions against Foreign States" does not apply by virtue of his residence in Florida.

Litigation in New York Courts are governed by New York's procedural rules (see Rudgayzer & Gratt v. Cape Canaveral Tour & Travel, Inc., 22 AD3d 148, 153 [2005] citing Felder v. Casey, 487 U.S. 131, 137 [1988]) not the Federal Rules of Civil Procedure (FRCP) which apply to civil actions and proceedings in the United States District Courts (FRCP-RC RULE 1).

Defendant is subject to personal jurisdiction in New York (see Kreutter v. McFadden Oil Corp., 71 NY2d 460, 467 [1988]). Under CPLR 302, New York's long-arm jurisdiction statute, the Supreme Court of New York may exercise jurisdiction over a non domiciliary in an action arising from the ownership, use or possession of any real property situated within the state (CPLR 302[a][4]). It is undisputed that the defendant, Victorin, is the owner of the real property which is the subject of this foreclosure action.

Equally without merit is the defendant's claim that the court lacks personal jurisdiction due to the improper service of the summons and complaint.

CPLR 313 provides in pertinent part that a person subject to the jurisdiction of the courts of New York under CPLR 302, may be served with the summons and complaint outside New York State in the same manner as service is made in New York by any person authorized to make service in New York and who is a resident of New York, or by any person authorized to make service by the laws

of the state in which service is made.

The affidavit of service of the summons and complaint established that Victorin was served in accordance with CPLR 308(2) on November 30, 2009 by delivery of the summons and complaint to Marie Mills a person of suitable age and discretion at the defendant's actual dwelling place in Florida and an additional copy mailed on December 3, 2009 to the same address . Defendant has offered nothing to rebut the contents of the affidavit of service of process (see Puco v DeFeo, 296 AD2d 571 [2002]; NYCTL 1997-1 Trust v Nillas, 288 AD2d 279 [2001]).

With respect to defendant's claim that the court lacks subject matter jurisdiction, New York's Supreme Court "is a court of original, unlimited and unqualified jurisdiction" (Kagen v. Kagen, 21 NY2d 532, 537 [1968]), and is competent to entertain all causes of action, including mortgage foreclosure actions (Matter of Fry v. Village of Tarrytown, 89 NY2d 714, 718 [1997]; Wells Fargo Bank Minnesota, Natl. Assn. v Mastropaolo, 42 AD3d 239, 244 [2007]; Security Pacific Natl. Bank v. Evans, 31 AD3d 278 [2006]).

In view of all of the above, the motion is granted.

Settle Order

Dated: October 22, 2010
D# 42

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J.S.C.