

<b>Flagstar Bank v Bonaccolta</b>
2011 NY Slip Op 30645(U)
March 10, 2011
Supreme Court, Richmond County
Docket Number: 101392/08
Judge: Anthony I. Giacobbe
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

-----x

FLAGSTAR BANK, FSB,

Plaintiff,

TP 9

Present:

Hon. Anthony I. Giacobbe

-against-

LOUIS P. BONACCOLTA A/K/A LOUIS BONACCOLTA,  
LINDA LIEBER AND NYC ENVIRONMENTAL  
CONTROL BOARD,

DECISION AND ORDER

Index No. 101392/08

Motion No. 002

Defendants.

-----x

The following papers numbered 1 to 3 were fully submitted on the 18<sup>th</sup> day of November, 2010:

Order to Show Cause by Defendant Louis P. Bonaccolta with supporting papers (dated August 11, 2010)	1
Plaintiff's Affirmation in Opposition with supporting papers (dated September 24, 2010)	2
Reply Affirmation (dated November 3, 2010)	3

---

Upon the foregoing papers and oral argument with respect thereto, the motion of defendant Louis P. Bonaccolta, through his son and attorney-in-fact Robert Bonaccolta, by which, *inter alia*, defendant seeks an order “staying the foreclosure sale” of 385 Ramona Avenue, Staten Island, New York and requests additional time to negotiate a “short sale” with the plaintiff, is denied in accordance herewith.

In this foreclosure action, claiming that he did not receive a proper and timely Notice of Sale, defendant seeks to postpone plaintiff's enforcement of the default

Judgment of Foreclosure and Sale dated August 24, 2009, pending his attempt to negotiate a sale of the premises at issue in order to satisfy his mortgage debt obligations. A Referee's sale was scheduled for August 11, 2010 but was canceled.

To the extent relevant, it has not been disputed that defendant is in default of his mortgage payments, nor has any challenge been interposed here with respect to his default in these proceedings or with respect to the Judgment of Foreclosure and Sale. However, defendant attacks the regularity of the notice of foreclosure sale of the premises at issue, arguing that his receipt of said notice by regular mail two days before the auction date is improper and unfair, placing defendant "at such a disadvantage to protect his interest in 385 Ramona Avenue." In the Court's opinion, this attack is unfounded, and provides no basis for the relief requested. Defendant acknowledges receipt of said notice, for which plaintiff has submitted an unchallenged affidavit of service that indicates the pertinent Notice of Sale was served by mail upon defendant at the premises address and at defendant's Pennsylvania address on July 12, 2010.

The defense assertion, that defendant "has been actively attempting to negotiate with the plaintiff a short sale of 385 Ramona Avenue" is wholly unsupported, and, significantly, when the Court asked about this purported "short sale" at oral argument, counsel for defendant was unable to provide any particulars whatsoever. The Court notes that although defendant claims plaintiff agreed to negotiate a "short sale" -- while plaintiff asserts that it has no record of any attempt by defendant to enter into such an arrangement -- other than defendant's self-serving declarations, no evidence has been proffered to substantiate this claim. There is no indication that plaintiff has failed to negotiate a potential resolution in good faith, and defendant's "belief" to the contrary is not based upon demonstrable evidence. Moreover, the details and status of defendant's efforts are only vaguely described.

It should be pointed out that by Order To Show Cause dated November 2, 2009 defendant made a prior application (001) to, *inter alia*, stop the foreclosure sale of the

subject premises set for November 5, 2009, ostensibly due to a purported lack of service, but also to permit defendant to pursue a “short sale” and/or loan modification.<sup>1</sup> A “short sale” occurs when a foreclosing secured creditor allows its loan to be paid off for less than is actually owed on the secured debt through a sale or refinancing of the secured property. *See, In re Mi La Sul*, 380 BR 546, 548 fn1 (US Bankruptcy CT CD CA 2007). Defendant at bar has not shown that he has a buyer ready, willing and able to purchase the mortgaged premises, nor has he demonstrated by way of statutory or case law authority that he has a right to compel plaintiff to consent to any “short sale.” Now, as then, plaintiff maintains that defendant has not engaged in any sort of resolution efforts with plaintiff, in contrast with defendant’s unsubstantiated and broad assertions that he has been “actively” engaged in “numerous conversations” with unidentified “agents and representatives of the plaintiff” who made “promises” that were “never kept” over the course of these many months, as far back in time as before the commencement of this action but all “to no avail.”

Defendants’ opposition is without merit. It is beyond cavil that defendant defaulted on the subject mortgage. That attempts to sell the property or to renegotiate the terms of the loan were fruitless is unfortunate, but under the circumstances, not a bar to foreclosure. In the Court’s view, there is no evidence that plaintiff did anything that might have misled defendant to believe that it would refrain from commencing or prosecuting a foreclosure action. *See e.g., Bercy Investors, Inc. v. Sun*, 239 AD2d 161 (1<sup>st</sup> Dept. 1997).

Defendant avers that “at one point” he resided in Pennsylvania but moved to the subject premises to be closer to his son, Robert Bonaccolta, as well as his health care providers. Setting aside whatever defects which may appear on the form of acknowledgment for defendant’s New York Statutory Short Form Durable General Power

---

<sup>1</sup> Such prior motion (001) was adjourned several times and ultimately marked off the docket on February 5, 2010 due to defendant’s failure to appear or contact the Court. Thus, it would seem defendant’s current claim that “he has not made any other application for the relief requested herein” is not accurate.

of Attorney annexed to the moving papers, defendant's execution of this document on August 10, 2010 seemingly took place in the state of New Jersey, and wherein defendant lists his address -- and that of his son and attorney-in-fact, Robert Bonaccolta -- as 917 Sycamore Lane, Lebanon, Pennsylvania.<sup>2</sup> While the Court is not enured to defendant's assertion that he suffers from myriad physical ailments and infirmities, based upon all these facts and circumstances, his claims simply strain credulity.

Turning to defendant's argument that "it may be that Flagstar Bank FSB is not the proper mortgagor [sic]" such that plaintiff may lack sufficient standing to sue, such argument is improperly raised for the first time in his Reply, and therefore, will not be considered. *See, generally, Burlington Insurance Co. v. Guma Construction Corp.*, 66 AD3d 622 (2<sup>nd</sup> Dept. 2009); *Pinkston v. Weiss*, 238 AD2d 393 (2<sup>nd</sup> Dept. 1997). Moreover, were the Court to consider it, such argument would be unavailing, particularly in light of the fact that defendant is not contesting service and that the affidavits of service appear regular on their face, because where, as here, a defendant has failed to raise the affirmative defense of a plaintiff's lack of standing in an answer or pre-answer motion to dismiss, the objection is deemed waived. *HSBC Bank, USA v. Dammond*, 59 AD3d 679 (2<sup>nd</sup> Dept. 2009); *Wells Fargo Bank Minnesota, NA v. Mastropaolo*, 42 AD3d 239 (2<sup>nd</sup> Dept. 2007).

In short, defendant has failed to provide this Court with any evidence of his prospect of selling the subject premises, nor has he set forth any excuse for his default or defense to the underlying proceedings. In the Court's opinion, defendant has not demonstrated that this is a "proper case" for a stay or that he is entitled to an injunction (*see*, CPLR 2201, 6301; CPLR 5015(a); CPLR 317). In any event, it would appear that the relief sought by defendant has been achieved at least in part, *i.e.*, a temporary suspension of the foreclosure sale was ordered upon the signing of the instant Order To Show Cause,

---

<sup>2</sup> At the time of defendant's prior motion, defendant provided the same Pennsylvania address.

but, based upon the circumstances presented, injunctive relief is not warranted.<sup>3</sup>

Accordingly, it is

ORDERED, that defendant's motion is denied and all stays or temporary restraints are hereby vacated.

E N T E R

Dated: March 10, 2011

-----  
J.S.C.

---

<sup>3</sup> Parenthetically, with regard to defendant's allusion to pervasive industry-wide "irregularities" in the foreclosure process, the Court only notes that the October 20, 2010 Administrative Order of the Hon. Ann T. Pfau, Chief Administrative Judge of the Courts requires, effective immediately, *inter alia* that plaintiff's counsel in foreclosure actions shall file a prescribed affirmation, "[i]n cases where judgment of foreclosure has been entered but the property has not yet been sold as of such effective date, five business days before the scheduled auction, with a copy to be served on the referee."