

**Bank of Am., N.A. v Gowrie**

2011 NY Slip Op 30658(U)

February 25, 2011

Sup Ct, Queens County

Docket Number: 6216/2009

Judge: Augustus C. Agate

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24  
Justice

		x	Index
BANK OF AMERICA, N.A., etc.			Number <u>6216</u> 2009
- against -			Motion
			Date <u>December 14,</u> 2010
			Motion
SAMUEL L. GOWRIE, et al.			Cal. Number <u>2</u>
		x	Motion Seq. No. <u>3</u>

The following papers numbered 1 to 11 read on this motion by defendant Samuel L. Gowrie to vacate the judgment of foreclosure and sale dated November 9, 2009, and for leave to file a late answer.

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits .....	1-6
Answering Affidavits - Exhibits .....	7-9
Reply Affidavits .....	10-11

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

Plaintiff commenced this action by filing on March 13, 2009, seeking to foreclose a residential mortgage given by defendant Samuel L. Gowrie on the real property known as 236-07 Bentley Road, Rosedale, New York to secure a note evidencing a loan in the principal amount of \$540,000.00, plus interest. The mortgage lists Mortgage Electronic Registration Systems, Inc. (MERS) as the nominee for Lend America and Lend America's successors and assign, and indicates that MERS is the mortgagee of record for recording purposes. Plaintiff alleged that it is the holder of the subject mortgage and note, and that defendant Samuel L. Gowrie defaulted under the terms of the mortgage and note by failing to make the monthly installment payment due on October 1, 2008. Plaintiff also alleged that as a consequence,

it elected to accelerate the entire mortgage debt. The court granted plaintiff's ex parte application for an order of reference, and thereafter, plaintiff's ex parte application to confirm the referee's report and for a judgment of foreclosure and sale.

Defendant Samuel L. Gowrie makes no claim of lack of personal jurisdiction (CPLR 5015[a][4]), or lack of personal notice of the summons, or actual notice of the action, in time to defend (CPLR 317). Rather, defendant Samuel L. Gowrie asserts he was shocked to learn on November 3, 2010 that a default judgment had been entered against him, because he never intended to default in the action, and was not in default in appearing in the action. According to defendant Samuel L. Gowrie, since prior to the commencement of this action, he has been in regular communication with plaintiff's servicing agent for the purpose of modifying the terms of the mortgage, and he appeared at the mandatory residential foreclosure conference held before a Court Attorney Referee on June 10, 2009.

The Court Attorney Referee, in an order dated June 10, 2009, indicated that defendant Samuel L. Gowrie appeared at the residential foreclosure conference by counsel, and that plaintiff had signed a contract with the United States Treasury Department to participate in the Home Affordable Modification Program "in an effort to modify the loan herein." The Court Attorney Referee also indicated no settlement had been reached at the conference and thus would proceed "by Order of Reference/Motion." Defendant Samuel L. Gowrie asserts that at the conference, he was advised to continue working with the lender towards a modification of the loan, but was not informed of the substance or existence order of the Court Attorney Referee.

Defendant Samuel L. Gowrie also asserts that since October 2008, he has supplied plaintiff's servicing agent with various requested financial data, and recently (October 2010) sent it pay stubs, checking account statements, and a written statement from his daughter relative to her financial contributions to the household. Defendant Samuel L. Gowrie contends that the subject mortgage is a subprime, non-traditional home loan, and he is the victim of predatory lending practices engaged in by the original lender. He also contends that he never received various disclosure documents relative to the mortgage loan transaction, including at the closing of the transaction, or notification of any assignments of the mortgage. He seeks leave to vacate the judgment of foreclosure and sale and to serve a late answer.<sup>1</sup>

Plaintiff offers an affidavit of service dated March 19, 2009 by a licensed process server indicating defendant Samuel L. Gowrie was served by service of a copy of the

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<sup>1</sup>

Defendant Samuel L. Gowrie has not offered a proposed answer to the complaint in connection with this motion.

summons and complaint upon one “SHERWIN GOWRIE (FAMILY MEMBER)” at 236-07 Bentley Road, Apt. 1, Rosedale, New York, the actual dwelling place of defendant Samuel L. Gowrie, and a subsequent mailing of a copy of process to defendant Samuel L. Gowrie at the same address. This affidavit constitutes prima facie evidence of proper service pursuant to CPLR 308(2) (*see Beneficial Homeowner Service Corp. v Girault*, 60 AD3d 984 [2009]). Plaintiff filed the affidavit of summons with the County Clerk on March 20, 2009.

Defendant Samuel L. Gowrie failed to appear or respond to the complaint within the 30-day statutory period (*see* CPLR 320[a]), and therefore, was already in default in timely appearing or answering when he appeared with counsel at the mandatory residential foreclosure conference.<sup>2</sup> Moreover, defendant Samuel L. Gowrie makes no claim that his former attorney failed to advise him properly regarding his potential defenses, and has presented no proof that such attorney failed to serve an answer as an oversight or under a misapprehension that negotiations with the lender or its agent extended the time to answer.

“The court, in its discretion, may relieve a party from the effect of its default upon, inter alia, proof of both a meritorious claim or defense and a reasonable excuse for the default (*see* CPLR 5015[a][1]; *Putney v Pearlman*, 203 AD2d 333 [1994]; *Household Fin. Realty Corp. v Delmerico*, 202 AD2d 636 [1994]; *Schiavetta v McKeon*, 190 AD2d 724 [1993]), or proof that the default was the result of the fraud, misrepresentation, or misconduct by an adverse party (*see* CPLR 5015[a][3]; *Oppenheimer v Westcott*, 47 NY2d 595 [1979]; *Putnam County Natl. Bank of Carmel v Simpson*, 204 AD2d 297 [1994]; *Christ-Mitch Realty Corp. v Clarkson Realty Corp.*, 122 AD2d 245 [1986])” (*Chemical Bank v Vazquez*, 234 AD2d 253 [1996]).

To the extent defendant Samuel L. Gowrie requests his default in timely appearing, or in answering, be vacated pursuant to CPLR 5015(a)(1) and leave be granted to him to serve a late answer pursuant to CPLR 3012, he has failed to offer a reasonable excuse for his default in timely appearing or answering (*see Lipp v Port Auth. of N.Y. & N.J.*, 34 AD3d 649, 649 [2006]; *Chemical Bank v Vazquez*, 234 AD2d 253 [1996], *supra*). To the extent defendant Samuel L. Gowrie asserts he was “working” with the lender or its agent, he has failed to provide any evidence of a specific oral or written misrepresentation by anyone associated with the lender which justifiably caused him to believe he was excused from

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The notice of appearance on file with the County Clerk indicates that counsel had agreed to appear for defendant Samuel L. Gowrie solely for the duration of the conference, and that counsel’s representation was to expire if the matter continued beyond the conference.

timely appearing in the action or answering the complaint. Nor has he demonstrated any basis for his belief that the status quo of the action would be maintained following his appearance in court (*see Mortgage Elec. Registration Systems, Inc. v Schotter*, 50 AD3d 983 [2008]; *see also Bodi v Orciuoli*, 195 AD2d 841 [1993]). Defendant Samuel L. Gowrie has also failed to offer proof to show that plaintiff agreed to forbear from prosecuting this action during any period of negotiations.

In addition, defendant Samuel L. Gowrie has failed to demonstrate a meritorious defense to the action.

To the extent defendant Samuel L. Gowrie makes no claim that he was not served with process, and failed to interpose an answer or timely pre-answer motion which asserted the defense of standing, he waived such defense pursuant to CPLR 3211(e) (*see HSBC Bank, USA v Dammond*, 59 AD3d 679 [2009]; *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239 [2007]).

Defendant Samuel L. Gowrie also failed to demonstrate the existence of a potentially meritorious defense to foreclosure based on fraud (*see U.S. Bank Nat. Assn. v Slavinski*, 78 AD3d 1167 [2010]; *Deutsche Bank Natl. Trust Co. v Sinclair*, 68 AD3d 914 [2009]; *McMorrow v Dime Sav. Bank of Williamsburgh*, 48 AD3d 646, 647-648 [2008]; *Deutsche Bank Natl. Trust Co. v Campbell*, 26 Misc 3d 1206[A], 2009 NY Slip Op 52678[U] [2009]) or alleged violations of the Truth in Lending Act (15 USC § 1601 *et seq.*), the Real Estate Settlement Procedures Act (12 USC § 2601 *et seq.*), the Home Ownership and Equity Protection Act of 1994 (15 USC § 1639), and General Business Law § 349 (*see Beach v Ocwen Fed. Bank*, 523 US 410 [1998]; *U.S. Bank N.A. v Pia*, 73 AD3d 752 [2010]; *Fremont Inv. & Loan v Haley*, 23 Misc 3d 1138[A], 2009 NY Slip Op 51186[U] [2009]; *Fremont Inv. & Loan v Laroc*, 21 Misc 3d 1124[A] [2008]). Plaintiff has offered documentary evidence in opposition to the motion which indicates defendant Samuel L. Gowrie received a Truth-In-Lending disclosure statement on August 3, 2009, and a HUD-1 settlement statement and executed an adjustable rate promissory note with an interest-only addendum.

Defendant Samuel L. Gowrie asserts plaintiff failed to serve him with the notice of its application for the judgment of foreclosure and sale, and therefore, the judgment should be invalidated.

A defendant's appearance in an action entitles him to service of all papers and notice of all proceedings through and subsequent to judgment (*see Home Sav. Bank v Chiola*, 203 AD2d 525 [1994]). However, a plaintiff's failure to provide notices of its application for a judgment is not necessarily fatal unless its omission prejudiced the defendant (*see 36*

*North Water, Inc. v Mark Caliper, Inc.*, 295 AD2d 499 [2002]; *Citibank v Badcock*, 206 AD2d 784, 785 [1994]).

Here, plaintiff's failure to provide defendant Samuel L. Gowrie, or the attorney who appeared on behalf of Gowrie at the conference, with notice of the application for the judgment is not fatal, since the omission did not prejudice defendant Samuel L. Gowrie. Defendant Samuel L. Gowrie and his present counsel have made no objection to the judgment's form or content, and the foreclosure sale has yet to occur.

Defendant Samuel L. Gowrie similarly has failed to establish that the default judgment was procured through fraud or misrepresentation within the meaning of CPLR 5015(a)(3) (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 69-70 [2003]).

The motion is denied. Plaintiff shall serve defendant Samuel L. Gowrie with a copy of a notice of any rescheduled sale, and all other papers and notices of all other proceedings subsequent to judgment (*see Home Sav. Bank v Chiola*, 203 AD2d 525 [1994], *supra*).

Dated: February 25, 2011

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AUGUSTUS C. AGATE, J.S.C.