

Wells Fargo Bank, N.A. v Johnson

2011 NY Slip Op 30810(U)

March 24, 2011

Supreme Court, Suffolk County

Docket Number: 17197/2004

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

WELLS FARGO BANK, N.A., SUCCESSOR
BY MERGER TO WELLS FARGO HOME
MORTGAGE, INC. f/k/a NORWEST
MORTGAGE, INC.,

Plaintiff,

-against-

APPERTINE JOHNSON, UNITED STATES
OF AMERICA ACTING THROUGH THE IRS,
BISHOP STEVEN SMITH,

Defendants.

ORIG. RETURN DATE: AUGUST 11, 2010
FINAL SUBMISSION DATE: SEPTEMBER 16, 2010
MTN. SEQ. #: 005
MOTION: MOT D

PLTF'S/PET'S ATTORNEY:
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Upon the following papers numbered 1 to 10 read on this motion _____
TO STAY PROCEEDINGS AND OTHER RELIEF

Order to Show Cause and supporting papers 1-3; Affirmation in Opposition 4; Replying
Affirmation and supporting papers 5, 6; Sur-Reply Affirmation and supporting papers 7, 8;
Other Correspondence from Appertine Johnson dated 9/14/10 with enclosures - 9, 10; it is,

ORDERED that this motion by defendant, APPERTINE JOHNSON
("defendant") for an Order:

(1) pursuant to CPLR 2201, granting a stay of the sale of the
property located at 42 Heyward Street, Brentwood, New York ("Premises"),
presently scheduled for August 12, 2010;

(2) pursuant to CPLR 2005 and 5015 (a) (1) through (5), granting
relief from the Judgment of Foreclosure and Sale and the Order Amending
Judgment entered in connection with this action on May 9, 2008 and November
10, 2008, respectively;

(3) pursuant to CPLR 2004, 2005 and 3012 (d), granting an extension of time to answer, move or otherwise respond to plaintiff's summons and complaint in this action initiated on July 23, 2004;

(4) pursuant to CPLR 8501 (a), compelling plaintiff to provide security for costs, and, pursuant to CPLR 8502, as of right "upon motion by defendant without notice," staying this action until plaintiff files the statutory undertaking; and

(5) that a settlement conference be convened, notwithstanding the stage to which the action has proceeded and notwithstanding whether or not the loans falls within the purview of CPLR 3408,

is hereby **GRANTED** solely to the extent provided hereinafter.

Plaintiff commenced this action on or about July 23, 2004, seeking to foreclose a mortgage executed by defendant. On June 22, 1998, defendant executed and delivered a note and mortgage to plaintiff's predecessor-in-interest to secure the amount of \$66,804 in connection with the purchase of the Premises. The mortgage was recorded in the Suffolk County Clerk's Office on November 6, 1998, and was modified by a loan modification agreement dated April 11, 2003. The mortgage has allegedly been in default since January of 2004.

The defendant was served herein pursuant to CPLR 308 (4) on August 4, 2004, and failed to appear. Subsequently, plaintiff submitted an *ex parte* application for an Order of Reference, which was granted on December 10, 2004 (Werner, J.). Thereafter, plaintiff submitted an *ex parte* application for a Judgment of Foreclosure and Sale, which was granted on March 10, 2005 (Werner, J.). However, prior thereto, on March 4, 2005, defendant filed for bankruptcy protection under Chapter 13 of the United States Bankruptcy Code. By Order of the United States Bankruptcy Court dated October 17, 2007 (Eisenberg, J.), plaintiff's motion for relief from the automatic stay was granted. As such, plaintiff submitted an application to vacate the prior Judgment of Foreclosure and for a Judgment of Foreclosure and Sale, which was granted by this Court on April 30, 2008 ("Judgment"). By Order dated October 28, 2008, the Judgment was amended solely to change the newspaper to be used for advertising the notice of sale.

Defendant alleges that she purchased the Premises in 1998 so that her mother, who passed away on July 28, 2008, would have a "comfortable place to live out her last few years." Defendant alleges that title is held solely in her name, but her mother and step-father, defendant BISHOP STEVEN SMITH ("Smith"), lived at the Premises. Defendant claims that she would send money from her residence in Georgia directly to her mother for the mortgage payments, but, unbeknownst to her, Smith was pocketing the money. As such, the mortgage went into default. Defendant informs the Court that Smith was evicted from the Premises on January 31, 2009.

Defendant has now filed the instant application seeking the relief described hereinabove. On August 9, 2010, the Court (Pines, J.) declined to grant defendant any temporary injunctive relief, notwithstanding the fact that the Premises was scheduled to be sold on August 12, 2010. However, on August 11, 2010, the Court (Spinner, J.) granted defendant a stay of this action through August 19, 2010. By stipulation dated September 16, 2010, the plaintiff and defendant agreed to extend the stay pending a determination on the instant motion.

Defendant alleges that plaintiff failed to properly effect service of process upon her. According to two affidavits of service, both sworn to on August 10, 2004 in connection with service of process upon defendant herein, the summons and complaint were served upon her on August 4, 2004, pursuant to CPLR 308 (4), at 129 Dogwood Drive SW, Apt. 52, Atlanta, GA. The affidavits indicate that the neighbor stated that defendant lived in the apartment. These affidavits of service constitute *prima facie* evidence of service of process upon defendant pursuant to CPLR 308 (4). However, a defendant can rebut a process server's affidavit by a detailed and specific contradiction of the allegations in a process server's affidavit (see *Bankers Trust Co. of Cal., N.A. v Tsoukas*, 303 AD2d 343 [2003]). Here, defendant alleges she did not reside at that address on August 4, 2004, as in March of 2004, she moved into a friend's house located at 2885 Heather Drive, East Point, Georgia. In support thereof, defendant has submitted, among other things, her own affidavit and a letter from "Mark The Mover, Inc.," dated August 6, 2010, which indicates that on September 27, 2002, the company moved defendant's household items from 129 Dogwood Drive SW, Apt. 52, Atlanta, GA to their storage unit, and that defendant has been their storage customer since that time.

Defendant further alleges that she has a meritorious defense, in that she has made seventy-two (72) payments towards the mortgage since 2004, but plaintiff did not accept or properly credit those payments to her account balance. In addition, defendant contends that she paid a total of \$14,100 into the bankruptcy plan. Notwithstanding the foregoing, defendant claims that her indebtedness to plaintiff fluctuates and even increases despite the payments made. Moreover, defendant indicates that she has successfully completed at least one trial loan modification plan, and argues that she should now be in a final modification plan.

In opposition, plaintiff argues that defendant was properly served with process, and that defendant has not proffered a reasonable excuse for her default. Further, plaintiff alleges that defendant has known about this action since 2004 and has failed to defend herself, and thus, laches has now attached. Moreover, plaintiff contends that defendant has not presented a meritorious defense to the action, as she has failed to meet her obligation to repay the loan to plaintiff. As such, plaintiff seeks a denial of defendant's motion in its entirety.

A motion to vacate a default judgment may be made upon a showing of a reasonable excuse and a meritorious defense to the action (*see e.g. Kaplinsky v Mazor*, 307 AD2d 916 [2003]; *O'Leary v Noutsis*, 303 AD2d 664 [2003]). The moving party must present an affidavit made by a person with knowledge of the facts that indicates a meritorious defense, containing a specific showing of sufficient legal merit to warrant vacating the default (*see CPLR 5015 [a] [1]; Polir Constr., Inc. v Etingin*, 297 AD2d 509 [2002]). The motion is addressed to the sound discretion of the court, and the exercise of such discretion will generally not be disturbed if there is support in the record therefor (*see I.J. Handa, P.C. v Imperato*, 159 AD2d 484 [1990]; *Vista Plumbing & Cooling v Woldec Constr. Corp.*, 67 AD2d 761 [1979]; *Machnick Bldrs. v Grand Union Co.*, 52 AD2d 655 [1976]).

The Court finds that defendant has proffered a potential reasonable excuse for her default, as well as potential meritorious defenses. However, under the circumstances presented herein, and given the fact that defendant presently resides in the Premises, this motion is **GRANTED** solely to the extent that the parties are directed to appear for a settlement conference, pursuant to CPLR 3408, on **May 5, 2011, at 10:00 a.m., in Part 37, Arthur Cromarty Court Complex, 210 Center Drive, Riverhead**, so that the parties and Court may

attempt to resolve this matter. If no settlement is reached, defendant may renew her motion for vacatur of the Judgment and/or for permission to serve a response to the summons and complaint.

A stay of enforcement of the Judgment is hereby continued pending further Order of the Court.

The foregoing constitutes the decision and Order of the Court.

Dated: March 24, 2011



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

X NON-FINAL DISPOSITION