

LaSalle Bank, N.A. v Rodriguez

2011 NY Slip Op 31086(U)

April 28, 2011

Sup Ct, Queens County

Docket Number: 5129/07

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

LASALLE BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR MORGAN STANLEY LOAN TRUST-
2006-7

Plaintiff,

-against-

NATIVIDAD RODRIGUEZ, ET AL.,

Defendant

Index No: 5129/07

Motion Date: 2/16/11

Motion Cal. No.: 12

Motion Seq. No.: 3

The following papers numbered 1 to 9 read on this motion by defendant, Natividad Rodriguez, for an order vacating the default judgment of Foreclosure and Sale and allowing defendant to serve an answer

PAPERS
NUMBERED

Order to Show Cause-Affidavits-Exhibits	1 - 6
Answering Affidavits-Exhibits.....	7 - 9
Replying Affidavits.....	

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

This is an action to foreclose a mortgage given on or about February 10, 2006 by the defendants, Natividad Rodriguez, Maria Rodriguez and Reyes Manzueta in favor of MERS as nominee for Alliance Mortgage Banking Corp., affecting the premises known as 105-22 Princeton St., Jamaica, N.Y. 11435 to secure a note in the principal amount of \$524,000.00. The note and mortgage were thereafter assigned to the plaintiff. When the defendants defaulted in payment of the installment due on August 1, 2006 and the subsequent installments which continue to the present, the lender accelerated the debt and the plaintiff commenced this action to foreclose the mortgage.

It is noted that although the mortgage is signed by all three defendants mortgagors, Natividad Rodriguez, Maria Rodriguez and Reyes Manzueta, only Natividad Rodriguez executed the note despite the fact that under the deed filed in the Office of the City Register are Natividad Rodriguez is a 1% owner, while Maria Rodriguez is a 49% owner and Reyes Manzueta is a 50% owner of the property.

The defendants, Natividad Rodriguez and Reyes Manzueta defaulted in appearing and answering. The defendant, Maria Rodriguez, pursuant to Order dated, July 24, 2007, was served by publication and appeared by her Guardian ad Litem.

The plaintiff subsequently moved, by ex-parte motion for the appointment of a referee, amendment of the caption and for leave to serve a supplemental summons and amended complaint. Although the motion was made ex-parte, the defendant, Reyes Manzueta, pro se, opposed the motion and demanded dismissal asserting lack of personal jurisdiction over him, the plaintiff's lack of standing and various other claims. The plaintiff's motion for the appointment of the referee was granted by order dated December 4, 2007.

On October 8, 2008 the Office of Court Administration notified the defendants of the option for a foreclosure settlement conference. On January 27, 2009, the defendant, Reyes Manzueta appeared in the foreclosure settlement part and requested a conference. As a result, on January 27, 2009 conference was scheduled for February 25, 2009 and Manzueta was given written notice of the date of the conference. On February 25, 2009, neither Manzueta, nor any other defendant, appeared for the conference and the case was released for further proceedings.

The plaintiff thereafter moved on notice to Maria Rodriguez, Natividad Rodriguez and Reyes Manzueta for confirmation of the referee's report and for a Judgment of Foreclosure and Sale. The defendant, Reyes Manzueta, pro se, opposed the motion for appointment of the referee on the same grounds and the identical documents which he submitted in opposition to plaintiff's motion for appointment of a referee.

The court granted the plaintiff's motion by Memorandum Decision dated April 14, 2009 finding, inter alia, that the plaintiff established that it had standing and that personal jurisdiction had been obtained over defendant Reyes Manzueta and that defendant failed to raise a triable issue with respect to any alleged violation of State of Federal Law.

Plaintiff served a Notice of Settlement and a proposed Judgment on all the defendants on May 27, 2009, which none of the defendants opposed. The Judgment of Foreclosure and Sale was signed on June 15, 2009.

The plaintiff scheduled the Foreclosure Sale to be held on January 7, 2011. The defendant, Natividad Rodriguez, submitted the instant Order to Show Cause on January 6, 2011, on the eve of the foreclosure sale, seeking to vacate the judgment pursuant to CPLR 5015(a)(3) and for leave to serve an answer with defenses including lack of capacity, lack of standing, fraud, unconscionability and predatory lending in violation of various State and Federal statutes. Defendant also requests a settlement conference and for a stay of the execution of the judgment to allow a short sale of the property.

CPLR 5015(a)(3) allows a judgment to be vacated upon the grounds of fraud, misrepresentation, or other misconduct of an adverse party (see Oppenheimer v. Westcott, 47 NY2d 595, 603 [1979]). The defendant does not claim that the plaintiff engaged in any fraud, misrepresentation, or other misconduct that prevented him from fully and fairly litigating this matter, i.e. extrinsic fraud, (see In re Holden, 271 NY 212 [1936]; Heidari v. First Advance Funding Corp., aff'd 55 AD3d 669 [2008]; Putnam County Nat. Bank of Carmel v. Simpson, 204 AD2d 297 [1994]).

What defendant alleges, however, is that the underlying mortgage was obtained by fraud, i.e. intrinsic fraud, a defense the defendant could and should have asserted upon appearing in this action (see Bank of New York v. Lagakos, 27 AD3d 678 [2006]; Fidelity New York, FSB v. Hanover Companies, Inc., 162 AD2d 582 [1990]). Where, as here, the claim is "intrinsic" fraud, a court may vacate a default judgment pursuant to CPLR 5015 (a)(3) provided that movant demonstrates both a reasonable excuse for the default and the existence of a meritorious defense (see Bank of New York v. Lagakos, supra).

The defendant has failed to establish entitlement to vacature pursuant to CPLR 5015(a)(4).

In the first instance, the defendant does not move to vacate his default, does not assert lack of personal jurisdiction in either the motion or his proposed answer and does not offer any excuse for his failure to answer the complaint or otherwise appear in this action for almost four years. The defendant was served with the summons and complaint on March 8, 2007, however, his first appearance in this action was the submission, on January 6, 2011, the instant order to show cause. Thus, he has

failed to demonstrate a reasonable excuse for his default.

In support of a meritorious defense, the defendant submitted, inter alia, his affidavit and the affirmation of his attorney together with various articles the attorney downloaded from the internet regarding "Robosigning". Based upon these "articles" defendant and counsel, assert that there may be an issue as to whether the affidavit of Heather C. Carrico, submitted in support of the plaintiff's motion for summary judgment as to the amount due, was signed by a Robosignor, which action constitutes such fraud and misconduct on the part of the plaintiff that the judgment should be set aside.

The defendant's claim that Carrico's affidavit was signed by a Robosignor is unsupported by any evidence or factual allegations which would support a reasonable basis for believing that the affidavit in this case was signed by a Robosignor. Newspaper articles constitute inadmissible hearsay (see P & N Tiffany Properties, Inc. v. Maron, 16 AD3d 395 [2005] citing Borough Hall-Oxford Tobacco Corp. v Central Off. Alarm Co., 35 AD2d 523 [1970]) and no other basis for the claim is submitted.

Accordingly, the defendant's motion based upon CPLR 5015(a)(4) is denied.

The defendant further asserts that he was the victim of predatory lending in violation of various State and Federal Laws. He asserts in part that he was deceived by the mortgage broker who assured him that the monthly payments would be about \$2,000.00. However, he found himself obligated to pay \$3,275.00 when his income is only \$500.00 per week. In this regard, defendant claims that the mortgage broker failed to make any efforts to ascertain the defendant's ability to repay the loan (see e.g. New York Banking Law § 6-L[2][k]). The plaintiff does not deny these claims.

Accordingly, and in view of the issues raised by the defendant, Natividad Rodriguez, regarding whether he was a victim of predatory lending in violation of State and Federal Law, the default Judgement of Foreclosure and Sale with respect to Natividad Rodriguez is vacated.

The defendant's answer in the form annexed to the moving papers is deemed served. However, the defense of lack of standing is stricken. The court has previously determined based upon documentary evidence, that the plaintiff has, and had on the day of commencement of this action, standing to bring this action.

Plaintiff shall serve its reply to the counterclaims within 20 days after the defendant serves plaintiff with a copy of this order with notice of entry.

Dated: April 28, 2011
D# 44

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J.S.C.