Deutsche Bank Natl. Trust Co. v Quinones

2011 NY Slip Op 31284(U)

May 16, 2011

Sup Ct, Queens County

Docket Number: 21059/08

Judge: Allan B. Weiss

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[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

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

DEUTSCHE BANK NATIONAL TRUST CO. As Trustee under Pooling and Servicing Agreement Dated as of November 1, 2006 Securitized Asset Backed Receivables Certificates Series 2006-WM3,

Plaintiff,

-against-

JOSE QUINONES, JOHNNY FERREIRA, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. As nominee for WMC Mortgage Corp., NYCTAB, NYCPVB, NYCECB, JOHNNY FERREIRA JR., MEKIDA AZCONA, CLARENCE FORD,

Defendants.

Index No: 21059/08

Motion Date: 4/20/11

Motion Cal. No.: 11

Motion Seq. No.: 3

The following papers numbered 1 to 12 read on this motion by defendant, Johnny Ferreira, for an Order vacating the default Judgment of Foreclosure and Sale, setting aside the foreclosure sale, vacating the referee's deed, and dismissing the action pursuant to CPLR 5015(a)(1) and (4)

	PAPERS NUMBERED
Order to Show Cause-Affidavits-Exhibits	1 - 6
Answering Affidavits-Exhibits..................	7 - 9
Replying Affidavits............................	10 - 12

Upon the foregoing papers it is ordered that this motion is granted and this action is dismissed.

The referee's deed dated, March 27, 2009, and filed in the Office of the City Register on April 13, 2009, CFRN 2009000107255 is vacated and set aside and the defendant, Johnny Ferreira is restored to possession.

[* 2]

This is an action to foreclose a mortgage, dated July 21, 2006, executed and delivered by defendants Johnny Ferreira and Jose Quinones, the owners of the premises known as 27-24 Curtis Street, East Elmhurst, New York, to MERS as nominee of WMC Mortgage Corp. to secure repayment of a note, evidencing a loan in the principal amount of $648,000.00, with interest. Plaintiff alleged that the defendants defaulted under the terms of the mortgage and note by failing to make the monthly installment payment of interest due and owing beginning on May 1, 2008, and continuing, and that as a consequence, it elected to accelerate the entire mortgage debt.

The plaintiff commenced this action on August 21, 2008. Upon the alleged default of the defendants, plaintiff moved by ex-parte applications for an Order of Reference and for a Judgment of Foreclosure and Sale. The foreclosure sale was held on March 27, 2009 and the referee executed a deed on the same date transferring ownership of the premises to the plaintiff, the successful bidder at the foreclosure sale.

The defendant, the present sole owner of the premises, pursuant to an unrecorded deed, dated January 26, 2009, moves to vacate the Judgment of Foreclosure and Sale, vacate and set aside the foreclosure sale, vacate the deed and restore him to possession.

In support of the motion, the defendant submitted his affidavit asserting, among other things that he was never served with process or any other notice and that did not know of this action until he received a notice to vacate the premises.

Defendant claims, that on or about April, 2008, prior to any default in the mortgage payments, he had retained Amerimoid, Inc., for a fee of $8,000.00, to obtain a loan modification, and he was told to stop making mortgage payments. Defendant further claims that he spoke to Miguelina Fana, the Amerimoid representative, several times inquiring about the modification, however, she never told him about the foreclosure action and she assured him not to worry things were progressing. When he received the ten (10) day Notice to Vacate the premises, written in Spanish, he immediately contacted Fana. Fana advised him to "urgently" see an attorney. Fana called Paul J. Solda Esq., told defendant to see him immediately because he would help defendant. Defendant claims he went to Solda who told him that he would represent defendant in the foreclosure matter and would regain title to his home. Defendant signed a retainer agreement hiring Solda to represent him in this action. [FN] Defendant claims that Solda appeared at the holdover proceeding, claiming to represent

all of the respondents, and entered into a stipulation dated June 30, 2009, consenting to respondents vacating the premises by August 31, 2009. Defendant further asserts that Solda was not authorized to enter into the stipulation and that he and his family only vacated the premises after Solda advised him that nothing further could be done.

Subsequently, defendant filed complaints against Solda with the Grievance Committee, which is pending, and a complaint against Amerimoid with the NY Attorney General resulting in a pending suit against Amerimoid. In February, 2010 defendant, pro se, also commenced an action in this court against, inter alia, Deutsch Bank, Pitnick & Margolin, LLC and Amerimoid, Inc., under Index No. 3699/10 to recover his property. Finally defendant claims that he did not know, and Solda never advised him, that a default judgment was entered against him and that he could move in the foreclosure action for relief from the default judgement.

In opposition to the motion, plaintiff submitted its attorney's affirmation and various documents including an affidavit of service. Counsel asserts that the affidavit of service is proof of proper service of process upon the defendant, Johnny Ferreria pursuant to CPLR 308(2) and defendant's conclusory claims are ineffective. Plaintiff further contends that defendant waived any jurisdictional defense to the instant action by participating in the holdover proceeding where he was represented by counsel. Finally, plaintiff asserts that the motion should be denied for the defendant's unreasonably long delay in moving to vacate the judgement which has caused the plaintiff severe prejudice.

Counsel's arguments are without merit.

A party moving to vacate his default pursuant to CPLR 5015(a)(1) must demonstrate a reasonable excuse for the default and a potentially meritorious defense (see Eugene Di Lorenzo, Inc. v. A.C. Dutton Lbr. Co., 67 NY2d 138, 143 [1968]). The defendant is relieved of that obligation when the basis for vacature is lack of personal jurisdiction (Harkless v. Reid, 23 AD3d 622 [2005]; Steele v. Hempstead Pub Taxi, 305 AD2d 401 [2003]). In the absence of personal jurisdiction, all subsequent proceedings are rendered null and void (see Feinstein v. Bergner, 48 NY2d 234, 241 [1979]; Muslusky v. Lehigh Val. Coal Co., 225 NY 584, 587 [1919]) and subject to vacature at any time without any conditions (see McMullen v. Arnone, 79 AD2d 496, 499 [1981] and cases cited therein).

It is, at all times, the plaintiff’s burdento prove that jurisdiction over the defendant was obtained by proper service of process (see Pearson v. 1296 Pacific Street Associates, Inc., 67 AD3d 659 [2009] lv denied 14 NY3d 705 [2010]; Munoz v. Reyes, 40 AD3d 1059 [2007]). A process server's affidavit of service ordinarily constitutes prima facie evidence of the facts contained therein and proper service (see Deutsche Bank Nat. Trust Co. v. Pestano, 71 AD3d 1074 [2010]; Frankel v. Schilling, 149 AD2d 657, 659 [1989]).

Here, the plaintiff has failed to submit any proof of service upon the defendant in this action. The affidavit of service plaintiff submitted has a Supreme Court, Kings County caption with Index Number 74150/08 (not the index number of the instant action) and was filed in the office of the County Clerk of Kings County. In addition, the affidavit of service asserts that service was made at 17-24 Curtis Rd, East Elmhurst, N.Y. which is not the foreclosed premises nor the premises which was the subject of the holdover proceeding nor defendant’s actual dwelling place when the action was commenced. The affidavit of service produced by the plaintiff, on its face, demonstrates lack of personal jurisdiction, and a traverse hearing is unnecessary. Plaintiff’s attorney’s assertion that regardless of the defective affidavit of service, the defendant was properly served is without probative value since he has no personal knowledge of the facts (see JMD Holding Corp. v. Congress Fin. Corp., 4 NY3d 373, 384-385 [2005]; Warrington v. Ryder Truck Rental, Inc., 35 AD3d 455 [2006]).

With respect to plaintiff’s claim of waiver, there was no waiver in this case. In appropriate circumstances, a defendant may be deemed to have waived his jurisdictional defense (see e.g. Lomando v. Duncan, 257 AD2d 649 [1999]; Biener v. Hystron Fibers, Inc., 78 AD2d 162 [1980]). A valid waiver "requires no more than the voluntary and intentional abandonment of a known right which, but for the waiver would have been enforceable" (Nassau Trust Co. v. Montrose Concrete Prods. Corp., 56 NY2d 175, 184). It may arise by an express agreement or by such conduct or a failure to act that will evince an intent not to claim the purported advantage (Hadden v. Consolidated Edison Co. of N.Y., 45 NY2d 466, 469 [1978]). A waiver “is not created by negligence, oversight, or thoughtlessness, and cannot be inferred from mere silence” (Peck v. Peck, 232 AD2d 540, 540 [1996]; see Golfo v. Kycia Associates, Inc., 45 AD3d 531 [2007]. Intent is an essential element of a waiver, and requires that the person against whom the waiver is asserted had, at the time or the waiver, actual or constructive knowledge of the existence of his rights or of the relevant facts to support such right and chose

not to take advantage of it (S. & E. Motor Hire Corporation v. New York Indemnity Co., 255 NY 69 [1930]; see also Savasta v. 470 Newport Associates, 180 AD2d 624 [1992] Airco Alloys Division, Airco Inc. v. Niagara Mohawk Power Corp., 76 AD2d 68 [1980]).

In this case, there is no evidence from which the defendant's knowing and intelligent waiver may be inferred. It appears that the defendant was initially misled by Amerimoid. Thereafter, defendant sought legal counsel and relied on his attorney's advise. Solda's ineffective representation, whether fraudulent or incompetent, deprived the defendant of the opportunity to contest jurisdiction in this action (see Hadden v. Consolidated Edison Co. of N.Y., supra at 469-470). There is no indication in the stipulation, and plaintiff does not claim, that the defendant personally appeared and was present in the Housing Court and fully advised of the possible consequences of the stipulation (compare In re Parkside Ltd. Liability Co., 294 AD2d 582 [2002], lv to appeal dismissed in part and denied in part 98 NY2d 762 [2002]). In addition, the defendant has done nothing to indicate that he acknowledged the validity of the default judgment. On the contrary, not knowing what else to do, he commenced, pro se, a separate action to try to regain the property (see e.g. In re Enforcement of Tax Liens ex rel. County of Orange, 75 AD3d 224 [2010]).

Finally, it is pointed out that even if, as plaintiff claims, the defendant was served pursuant to CPLR 308(2), no affidavit of service was filed in this action, thus, the defendant is not in default. Service pursuant to CPLR 308(2) is complete, and the defendant's time to answer begins to run ten days after filing proof of service (see CPLR 320[a]; 3012[c]; Zareef v. Wong, 61 AD3d 749 [2009]; Marazita v. Nelbach, 91 AD2d 604 [1982], appeal withdrawn 58 NY2d 826 [1983]). No affidavit of service has been filed in this action and the plaintiff has never moved for leave to file the affidavit of service. The plaintiff's actions, or rather inaction, has contributed if not caused the delay it claims is prejudicial.

Dated: May 16, 2011
D# 44

....
J.S.C.

[FN] A signed retainer agreement, dated May 21, 2009, is annexed to the complaint in the action commenced in this court on February 16, 2010 by the plaintiff under Index No. 3699/10 which also indicates that defendant paid the attorney a $2,000.00 retainer.