

Bank of Smithtown v Lightning Realty Corp.

2011 NY Slip Op 31302(U)

May 6, 2011

Supreme Court, Nassau County

Docket Number: 014129/09

Judge: Thomas P. Phelan

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice.

TRIAL/IAS PART 2
NASSAU COUNTY

BANK OF SMITHTOWN,

Plaintiff,

-against-

ORIGINAL RETURN DATE: 11/09/10
SUBMISSION DATE: 02/28/11
Index No. 014129/09
MOTION SEQUENCE #01

LIGHTENING REALTY CORP., DONALD JAFFE,
INC. RETIREMENT TRUST, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE
and TMG SERVICES, INC.,

Defendants.

The following papers read on this application:

Order to Show Cause.....	1
Affirmation in Opposition.....	2
Reply.....	3, 4
Sur-Reply.....	5
Memorandum of Law.....	6

Defendants Lightning Realty Corp. ("Lightning") and Donald Jaffe, Inc. Retirement Trust "Retirement Trust") move by Order to Show Cause dated October 26, 2010, for an order vacating the judgment of foreclosure and sale and dismissing the action. Plaintiff opposes the motion.

This action was brought to foreclose a mortgage consolidation and modification agreement made by and between defendant Lightning and plaintiff on April 25, 2004, in the amount of \$625,000.00. On June 22, 2006, defendant Lightning made and executed a subordinate mortgage to defendant Retirement Trust in the principal sum of \$150,000.00.

Defendant Retirement Trust submits that personal jurisdiction was never acquired over this defendant. On October 30, 2009, Donald Jaffe, Inc. Retirement Trust was purportedly served pursuant to CPLR 311 by service upon Eric Jaffe, its vice president. Thereafter, on January 6, 2010, Donald Jaffe, Inc. Retirement Trust B/S/U Donald Jaffe, CEO was purportedly served

pursuant to CPLR 308(4). As the summons and complaint in this action was filed on July 17, 2009, it was required to be served, pursuant to CPLR 306-b, by December 14, 2009.

Accordingly defendant was not served within the one hundred twenty-day period under CPLR 306-b. CPLR 306-b provides, however, that “[i]f service is not made upon a defendant within the time provided in this section, the court . . . shall . . . upon good cause shown or in the interest of justice, extend the time for service. Counsel for defendant Retirement Trust argues that plaintiff’s lack of diligence weighs against the court extending plaintiff’s time for service.

The Court of Appeals has affirmed a trio of Second Department cases. The court in *Leader* “reasoned that, although law office failure and the lack of reasonable diligence in effectuating service generally do not constitute good cause, the interest of justice standard of the statute was a separate, broader and more flexible provision which could encompass a mistake or oversight as long as there was no prejudice to the defendant. . . . when an interest of justice extension is sought, a court may consider any relevant factor before making its determination and that no one factor is dispositive” (*Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 102 [2001]).

Here, after numerous attempts to serve defendant Retirement Trust, service was effectuated only 23 days after the 120-day time period ended, and this defendant has not demonstrated that it will be prejudiced by the extension (*see, Abu-Aqlein v. El-Jamal*, 44 AD3d 884, 885 [2d Dept.]). Accordingly, the court *sua sponte* extends plaintiff’s time to serve the complaint upon defendant Retirement Trust *nunc pro tunc* in the interest of justice.

In support of its motion, defendant Lightning submits the affidavit of James Feynman, a purported officer, the affidavit of Donald Jaffe, a co-trustee of the Retirement Trust, and the affirmation of counsel for the Retirement Trust. It is submitted that after this action was commenced, a loan was arranged with the second mortgagee in order to bring the subject mortgage current. Mr. Feynman avers that on August 4, 2009, he “delivered two checks to Steven G. Pinks, Esq., one from Jafee and the other from Lightning” and that he “asked him to forward the checks to the Bank with the understanding that the payment was made in order to bring the mortgage loan current and to discontinue the foreclosure action” (Feynman Aff. ¶6). Copies of the checks totaling \$40,152.06 are attached to the moving papers, as well as a fax from plaintiff indicating the following information (Ex. A):

“April - September 2009 Payments	\$45,257.20
Legal Fees	\$2,415.25
Total	\$47,672.45”

An unsigned letter dated August 5, 2009, from Steven G. Pinks addressed to Bank of Smithtown indicating “To Be Picked Up” transmits the checks totaling \$40,152.06, stating:

“I understand that these payments bring the loan current through August and the next payment due is for September. I further understand that the foreclosure action

RE: BANK OF SMITHTOWN v. LIGHTENING REALTY CORP., et al. Page 3

which has been instituted by you is being discontinued as a result of these payment [sic]" (Ex. B).

Plaintiff acknowledges receiving the checks but denies receiving the letter. It is submitted that there were other requirements to be met before reinstatement of the loan: to wit: up-to-date financials and a plan to demonstrate adequate cash flow for future payments. According to plaintiff, the up-to-date financial information was not received until just before the death of Lightning's principals, George Canni and his wife, Theresa Maniaci, on October 4, 2009, in a boating accident.

Although plaintiff claims that the monies received were applied to the mortgage, the affidavit of debt, sworn to the 15th day of June, 2010, indicates that Lightning defaulted by failing to make the payment due on April 1, 2009 (Movant's Ex. C). The payments made would have advanced the default date to September 1, 2009. The affidavit does not reflect the payment of the sum of \$40,152.06.

It is well settled that on a motion to vacate a default judgment, defendant must demonstrate both a reasonable excuse for the default and the existence of a meritorious defense. (*Kaplinsky v. Mazor*, 307 AD2d 916 [2d Dept. 2003]). Equally well settled is the principle that "whether a default should be vacated is a matter within the sound discretion of the trial court (*see, Fidelity & Deposit Co v Anderson & Co.*, 60 NY2d 693)" (*Zachary v. County of Nassau*, 167 AD2d 537 [2d Dept. 1990]).

Defendants' proffered excuse for their default is their belief that the mortgage had been reinstated. Although the moving defendants have not set forth a meritorious defense, the court finds that the Judgment of Foreclosure and Sale was based upon a computation that failed to account for the \$40,152.06 paid subsequent to the commencement of the foreclosure action. Accordingly, the Judgment of Foreclosure of Sale dated July 19, 2010 (Phelan, J.) is hereby vacated and set aside; and it is hereby

ORDERED that DONAL M. MAHONEY, ESQ., Fiduciary No. 519566, with offices at 11 Heath Place, Garden City, New York 11530, (516) 334-5200, is hereby appointed Referee to ascertain and recompute the amounts due to plaintiff herein for principal, interest and other disbursements advanced, except for attorneys fees which will be assessed at the time of judgment, as provided for in the note and mortgage upon which this action is brought, to examine and report whether the mortgaged premises should be sold in one parcel and that Referee make his report to this Court with all convenient speed upon notice to the moving defendants; and it is further

ORDERED that, if required, said Referee take testimony pursuant to PRAPL section 1321; and it is further

ORDERED that by accepting this appointment the Referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36) including, but not limited to, section 36.2(c) ("Disqualifications from appointment") and 36.2(d) (Limitations on appointments based

upon compensation); and it is further

ORDERED that, pursuant to CPLR 8003(a), a fee of \$500.00 shall be paid to the referee for the computation stage and for the filing of his report; and it is further

ORDERED that the Referee is prohibited from accepting or retaining any funds for himself or paying any funds to himself without compliance with Part 36 of the Rules of the Administrative Judge.

This decision constitutes the order of the court.

Dated: 5-6-11

HON THOMAS P. PHELAN
Thomas P. Phelan
THOMAS P. PHELAN, J.S.C.

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Donal M. Mahoney, Esq.
Referee
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Garden City, NY 11530

ENTERED

MAY 10 2011

NASSAU COUNTY
COUNTY CLERK'S OFFICE