

Indymac Fed. Bank FSB v Garcia

2011 NY Slip Op 31748(U)

June 23, 2011

Sup Ct, Queens County

Docket Number: 20049/08

Judge: Bernice D. Siegal

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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

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INDYMAC FEDERAL BANK FSB,

Plaintiff,

-against-

Index No.: 20049/08
Motion Date: 3/23/11
Motion Cal. No.: 12
Motion Seq. No.: 5

WILFREDO GARCIA, MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., AS NOMINEE FOR
INDYMAC BANK F.S.B., CRIMINAL COURT OF THE
CITY OF NEW YORK, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE, CITY
OF NEW YORK ENVIRONMENTAL CONTROL BOARD,
CITY OF NEW YORK PARKING VIOLATIONS BUREAU,
and John Doe, Jane Doe,

Defendants.

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The following papers numbered 1 to 12 read on this motion by plaintiff for an order a) that the defendant be granted leave to renew its motion dated August 27, 2009 and that the stipulation dated March 24, 2010 be declared null and void; b) that the default judgment in favor of plaintiff in the above entitled action allowing for a foreclosure and sale be vacated pursuant to CPLR Rule 5015(a)(3) (fraud, misrepresentation, or other misconduct of an adverse party) due to plaintiff's use of various "Robosigners" who may have committed perjury in the preparation of the Affidavit of Amount Due made a part of the Judgment of Foreclosure and Sale; and c) that a preliminary injunction be placed enjoining the plaintiff, referee, or any other person(s) from selling or otherwise transferring any interest in the property, subject to the ruling of this court on this Order to Show Cause; and that a temporary restraining order restraining such acts be granted pending a hearing for said preliminary injunction; d) that defendants be granted a settlement conference and d) that, if this Court finds that the relief requested above cannot be granted due to standing or procedural defects then, that a temporary stay of the sale, auction, transfer, transfer of the deed, or any other form of disposal of the Property, by plaintiff, its employees, agents, assigns, or any other parties including any referee appointed, thus allowing defendant an opportunity to follow proper procedure under the applicable statutes or codes.

PAPERS
NUMBERED

Notice of Motion - Affidavits-Exhibits.....	1 - 4
Affidavit in Opposition.....	5 - 9
Reply Affirmation.....	10 - 12

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Facts

This is an action by IndyMac Federal Bank, FSB (“Plaintiff”) to foreclose upon a mortgage in the principal amount of \$475,200.00, executed by Defendant Wilfredo Garcia (hereinafter “Defendant” or “Garcia”), on August 7, 2006, on property located at 86-21 102rd Road, South Ozone Park, New York. Upon Defendant’s default in making the required payments, Plaintiff commenced the instant foreclosure action by filing the Summons and Complaint on August 11, 2008. Upon Defendant’s failure to answer, on October 15, 2008, a default judgment was granted and an Order of Reference issued. On February 4, 2009, the Hon. Patricia Satterfield granted Final Judgment of Foreclosure and Sale and confirmed the Referee’s Report. On or about August 27, 2009, defendant Garcia, through his counsel, brought an Order to Show cause with a Temporary Restraining Order (hereinafter “TRO”) seeking to stay the sale and vacate his default judgment and to allow him to interpose an answer and Counterclaims. The Order to Show Cause was predicated on a lack of personal service. At the traverse hearing the parties entered into a stipulation wherein defendant withdrew his Order to Show Cause, consented to the jurisdiction of the court and “waive[d] all defenses and right to interpose an answer.” In return, Plaintiff agreed to stop foreclosure proceedings for at least ninety days.

Approximately ten months after the stipulation was entered into, Plaintiff set a new sale date of February 18, 2011. Defendant Garcia now moves for an order seeking to vacate the terms of the

stipulation, vacate the default judgment and renew the original order to show cause, predominantly upon the grounds that the Affidavit of Amount Due is signed by Erica A. Johnson-Seck, (hereinafter Johnson-Seck”) Vice-President, an alleged “Robo-Signer.”

As more clearly set forth below, Garcia’s motion to renew is granted and upon renewal the stipulation entered into by the parties on March 24, 2010 and the Final Judgment of Foreclosure granted on default are hereby vacated.

Discussion

Renewal

“A motion for leave to renew must be based upon new facts not offered on the prior motion that would change the prior determination” (*Jackson Heights Care Center, LLC v. Bloch*, 39 A.D.3d 477 [2nd Dept 2007] quoting CPLR 2221[e][2].) “A motion to renew is intended to draw the court’s attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking leave to renew and therefore not brought to the court’s attention” (*Natale v. Jeffrey Samel & Associates*, 264 A.D.2d 384 [2nd Dept 1999].) “The requirement that a motion for renewal be based upon newly-discovered facts is a flexible one, and a court, in its discretion, may grant renewal upon facts known to the moving party at the time of the original motion.” (*Karlin v. Bridges*, 172 A.D.2d 644 [2nd Dept 1991].)

Garcia moves for an order to renew its original order to show cause which sought to vacate the default judgment based on alleged fraud on behalf of the plaintiff. (CPLR §5015(a)(3).) Garcia asserts that the recent discovery of alleged fraud in the preparation of Plaintiff’s affidavit to secure the Judgment of Foreclosure and Sale is sufficient basis to renew it’s prior order to show cause to vacate the default judgment.

Garcia asserts that Johnson-Seck is a confirmed robo-signer as evidenced by recent

published decisions. (See *Onewest Bank, F.S.B. v. Drayton*, 29 Misc.3d 1021 [Sup.Ct. Kings County 2010]; see also *Indymac Bank, FSB v. Bethley*, 22 Misc.3d 1119(A) [Sup.Ct. Kings County 2009].) “A ‘robo-signer’ is a person who quickly signs hundreds or thousands of foreclosure documents in a month, despite swearing that he or she has personally reviewed the mortgage documents and has not done so.” (*Onewest Bank, F.S.B. v. Drayton*, 29 Misc.3d 1021 [Sup.Ct. Kings County 2010].)

Plaintiff, in opposition, does not refute defendant’s assertion that Johnson-Seck is a “robo-signer,” rather, Plaintiff asserts that accusations regarding Johnson-Seck were made public prior to the execution of the aforementioned stipulation, dated March 24, 2010, and therefore any alleged fraud or mistake was known or knowable to defendant’s attorney. “The requirement that a motion for renewal be based upon newly-discovered facts is a flexible one, and a court, in its discretion, may grant renewal upon facts known to the moving party at the time of the original motion.” (*Karlin v. Bridges*, 172 A.D.2d 644 [2nd Dept 1991].) Even if the court assumes that Garcia’s counsel, David Fuster, Esq., should have known of Johnson-Seck’s “robo-signing,” it is still not a complete defense to Garcia’s motion. Accordingly, Garcia’s motion to renew is granted.

Vacate Default Judgment and Stipulation

Upon renewal this court vacates the prior default judgment dated February 23, 2009, and the stipulation dated March 24, 2010.

CPLR § 3215(f) states:

On any application for judgment by default, the applicant shall file ... proof of the facts constituting the claim, the default and the amount due by affidavit made by the party.

Plaintiff submits a “reverified” Affidavit of Charlotte Warwick (hereinafter “Warwick”) attesting that the principal amount due on Garcia’s loan is \$472,326.52. Plaintiff contends that the Warwick affidavit cures the fraudulent Affidavit of Amount Due submitted by Johnson-Seck. However, the Judgment of Foreclosure and aforementioned Stipulation, dated March 24, 2010, where all signed under the assumption that the plaintiff had originally submitted non-fraudulent documentation. So while the fraudulent Affidavit of Amount Due may be a curable defect, the court cannot ignore the fact that the papers supporting the Judgment of Foreclosure and Sale and aforementioned stipulation were fraudulent.

In addition, a default judgment obtained through “extrinsic fraud,” which is “a fraud practiced in obtaining a judgment such that a party may have been prevented from fully and fairly litigating the matter” does not require the defendant to prove a reasonable excuse for such default. (*Bank of New York v. Lagakos*, 27 A.D.3d 678 [2nd Dept 2006] citing *Shaw v. Shaw*, 97 A.D.2d 403 [2nd Dept 1983].)

Furthermore, the court is concerned by Plaintiff’s position that the “events he (Garcia) complains of...make no factual difference to the amount he owes on his mortgage.” The statement is alarming as it implies that the court should ignore fraud when the fraud may not be directly relevant to the outcome of the particular case. The court requires an Affidavit of Amount Due and that requirement cannot be satisfied by submitting a fraudulent affidavit. (*Indymac Bank, FSB v. Bethley*, 22 Misc.3d 1119 [Sup.Ct. Kings County 2009] [prior to granting an application for an order of reference, the Court required an affidavit from Ms. Johnson–Seck, describing her employment history for the past three years].) Plaintiff has failed to deny defendant’s contention that the Johnson-Seck document was fraudulent. Therefore, the Plaintiff failed to submit “proof of the facts constituting the claim, the default and the amount due by affidavit made by the party”

as required by CPLR §3215(f) .

However, before the judgment on default can be vacated, the settlement stipulation must be vitiated. “Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation” (*Hallock v. State*, 64 N.Y.2d 224 (1984.) “It is the party seeking to set aside the stipulation ... who has the burden of showing that the agreement was the result of fraud..” (*Sweeney v. Sweeney*, 71 A.D.3d 989 [2nd Dept 2010].) As noted earlier, the fraud perpetrated by the Plaintiff had a domino effect that lead Garcia ultimately to enter into the stipulation. Garcia entered into the agreement on March 24, 2010 to avoid an immediate foreclosure he believed was obtained legally. Accordingly, Garcia has sufficiently established his burden by showing that he would not have entered the stipulation had he known that the Affidavit in support of the default judgment (vacated herein) was fraudulent.

Based on the foregoing, Garcia’s motion is granted to the extent of granting renewal and upon renewal granting the order to show cause dated August 27, 2009 vacating the default judgment of foreclosure and sale entered by this court on or about February 23, 2009 and the stipulation dated March 24, 2010 is declared null and void.

Dated: June 23 , 2011

Bernice D. Siegal, J. S. C.