

Sbarra v Sievernich

2011 NY Slip Op 32064(U)

July 13, 2011

Sup Ct, Suffolk County

Docket Number: 08-36999

Judge: Peter Fox Cohalan

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 2-9-11
ADJ. DATE 3-23-11
MNEMONIC: # 003 - MG

-----X
 JOSEPH SBARRA, :
 :
 Plaintiff, :
 :
 - against - :
 :
 ELEANOR SIEVERNICH, "JOHN DOE" and :
 "JANE DOE" (said names being fictitious, it :
 being the intention of Plaintiff to designate :
 any and all occupants of premises being :
 foreclosed herein, and any parties, :
 corporations or entities, if any, having or :
 claiming an interest or lien upon the :
 mortgaged premises), :
 :
 Defendants. :
 -----X

NICHOLAS J. FERRAR, ESQ.
 Attorneys for Plaintiff
 1100 Franklin Avenue, Suite 202
 Garden City, New York 11530

 BARBARA ALBOM, ESQ.
 Executrix of the Estate of
 Eleanor Sievernich
 166 Mercer Street, Suite 3A
 New York, New York 10012

Upon the following papers numbered 1 to 21 read on these motions to substitute and for leave to renew:
Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; Notice of Cross-Motion and supporting
papers___; Answering Affidavits and supporting papers 18 -21; Replying Affidavits and supporting papers___;
Other___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiff for an order pursuant to CPLR §1015 (a)
substituting Barbara Albom, as Executrix of the Estate of Eleanor Sievernich, deceased, for
Eleanor Sievernich as a party defendant, and for leave to renew his prior motion for an
order of reference pursuant to RPAPL §1321 is granted; and it is further

ORDERED that William F. Andes, Jr. Esq., with an office at 224 Griffing Avenue,
Riverhead, New York 11901 is appointed Referee to ascertain and compute the amount

Sbarra v Sievernich
Index No. 08-36999
Page No. 2

due on the note and mortgage in this mortgage foreclosure action and to examine and report whether the mortgaged premises can be sold in parcels; and it is further

ORDERED that pursuant to CPLR §8003 (a) the Referee be paid the fee of \$250.00 for the computation of the amount due plaintiff; 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 section 36.2 (d) ("Limitations on appointments based upon compensation"); and it is further

ORDERED that the plaintiff is directed to serve a copy of this order on all parties as well as the Calendar Clerk of this Court.

This is an action to foreclose a mortgage on property located at 3200 Cox Neck Road, Mattituck, New York. Said property was owned by Eleanor Sievernich (hereinafter Sievernich), who died on September 4, 2009. Sievernich and the plaintiff had executed a Building Loan Agreement, dated July 12, 2005, pursuant to which the plaintiff had loaned Sievernich two installments of \$375,000.00, the first on August 10, 2005 and the second on April 11, 2006, at the rate of 8% per year payable one month from the first advance and monthly thereafter. Sievernich had executed a mortgage note, dated August 10, 2005, in the plaintiff's favor promising to repay the \$750,000.00 by September 2008, when the entire principal balance from all advances that remained unpaid together with accrued interest would become due. As security, Sievernich also executed a mortgage, dated August 10, 2005, on the subject property. Barbara Albom, Esq. (hereinafter Albom), Sievernich's attorney and co-trustee, notarized the note, the mortgage, and receipts for the aforementioned sums. Sievernich defaulted when the balance of said loans came due in September 2008.

The plaintiff commenced this action on October 2, 2008. Sievernich, by her attorney Albom, submitted a notice of appearance and waiver, dated December 17, 2008, waiving service of all papers and notices of proceedings except notice of application for discontinuance, notice of sale, and notice of proceedings for surplus monies. Thereafter, the plaintiff moved for an order appointing a referee to compute the sums due and owing to the plaintiff. During the pendency of said motion, the Court was notified that Sievernich had died. By order, dated November 2, 2009, this Court denied the plaintiff's motion with leave to renew upon substitution of a legal representative for Sievernich's estate. Albom was appointed executrix of Sievernich's estate by preliminary letters testamentary issued by the Surrogate's Court of Suffolk County, New York, on November 12, 2010.

The plaintiff now moves, by order to show cause, for an order pursuant to CPLR §1015 (a) substituting Albom, as Executrix of the Estate of Eleanor Sievernich, deceased,

Sbarra v Sievernich
 Index No. 08-36999
 Page No. 3

for Sievernich as a party defendant and for leave to amend all papers in this action accordingly. The plaintiff has submitted a copy of the Surrogate’s Court’s Certificate of Appointment of Executor, dated November 30, 2010, indicating that Albom, the preliminary executor, is restricted from selling or disposing of any real property without prior Court order. Albom, in her affirmation submitted in response to the motion, states that she takes no position with respect to the motion for substitution. Therefore, the request for substitution is granted (see CPLR §1015 [a], CPLR §1021; **Burton v City of New York**, 83 AD3d 635, 919 NYS2d 910 [2nd Dept 2011]). The caption of this action is amended as follows:

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF SUFFOLK

-----X	:
JOSEPH SBARRA,	:
	:
Plaintiff,	:
	:
- against -	:
	:
BARBARA ALBOM, as Executrix of the	:
Estate of ELEANOR SIEVERNICH,	:
deceased, "JOHN DOE" and "JANE DOE"	:
(said names being fictitious, it being the	:
intention of Plaintiff to designate any and	:
all occupants of premises being foreclosed	:
herein, and any parties, corporations or	:
entities, if any, having or claiming an interest	:
or lien upon the mortgaged premises),	:
	:
Defendants.	:
-----X	:

The plaintiff also moves for leave to renew his prior motion for an order appointing a referee to compute.

"[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default" (**Republic Natl. Bank of N.Y. v O’Kane**, 308 AD2d 482, 482, 764 NYS2d 635 [2nd Dept 2003] quoting **Village Bank v Wild Oaks Holding, Inc.**, 196 AD2d 812, 812, 601 NYS2d 940 [2nd Dept 1993]).

Sbarra v Sievernich
Index No. 08-36999
Page No. 4

Here, the plaintiff has produced the note, mortgage, Building Loan Agreement, loan receipts, and his affidavit demonstrating that Sievernich defaulted under the terms of the loan documents (see **Argent Mtge. Co., LLC v Mentasana**, 79 AD3d 1079, 1080, 915 NYS2d 591 [2nd Dept 2010]; **Republic Natl. Bank of N.Y. v O'Kane**, 308 AD2d at 482). There is no evidence of any tenants or other residents of the premises. The plaintiff has established his prima facie entitlement to judgment against the defendant mortgagor (see **Cochran Inv. Co., Inc. v Jackson**, 38 AD3d 704, 704-705, 834 NYS2d 198 [2nd Dept 2007]; **Household Finance Realty Corp. of New York v Winn**, 19 AD3d 545, 546, 796 NYS2d 533 [2nd Dept 2005]).

Thus, the burden has shifted to the defendant to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action. Such defenses include waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct by the plaintiff (see **Capstone Business Credit, LLC v Imperia Family Realty, LLC**, 70 AD3d 882, 883, 895 NYS2d 199 [2nd Dept 2010]; **Mahopac Natl. Bank v Baisley**, 244 AD2d 466, 467, 664 NYS2d 345 [2nd Dept 1997], *lv dismissed* 91 NY2d 1003, 676 NYS2d 129 [1998]).

A defendant who seeks to successfully oppose a motion for leave to enter a default judgment based on the failure to timely serve an answer and seeks leave to extend the time to appear or to compel acceptance of an untimely answer must provide a reasonable excuse for the default and for the delay and show a potentially meritorious defense (see **Deutsche Bank Natl. Trust Co. v Rudman**, 80 AD3d 651, 652, 914 NYS2d 672 [2nd Dept 2011]; **May v Hartsdale Manor Owners Corp.**, 73 AD3d 713, 900 NYS2d 359 [2nd Dept 2010]).

Although Sievernich had submitted a notice of appearance, she nevertheless defaulted in this action by failing to serve an answer (see **U.S. Bank Nat. Assn. v Slavinski**, 78 AD3d 1167, 912 NYS2d 285 [2d Dept 2010]). Albom now seeks to interpose a late answer, and gives as a reason for the delay the attempts by the parties to reach a resolution without further Court intervention. The proposed answer admits to the execution of the mortgage loan documents and that the plaintiff advanced Sievernich the first installment of \$375,000.00 and then an additional sum of money, but denies that she defaulted. The proposed answer alleges failure to state a cause of action, statute of limitations, and lack of personal jurisdiction as affirmative defenses.

In her affirmation, Albom asserts that the non-parties Thomas Bucco and Ann Bucco are interested parties to this action inasmuch as Thomas Bucco had entered into an agreement with Sievernich to purchase a 50% interest in the premises through an arrangement in which Sievernich borrowed the subject loan sums to enable Thomas Bucco to purchase the 50% interest in the premises and complete the ongoing and substantial renovation of the premises. Albom further asserts that, in essence, Thomas Bucco agreed to repay the subject \$750,000.00 loan and implies that the plaintiff should look to him for

