

Countrywide Home Loans Servicing v Burroughs

2011 NY Slip Op 33164(U)

December 6, 2011

Supreme Court, Suffolk County

Docket Number: 2053/2009

Judge: Joseph Farneti

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.

SHORT FORM ORDER

INDEX NO. 2053/2009

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

COUNTRYWIDE HOME LOANS SERVICING
LP,

Plaintiff,

-against-

ANNETTE BURROUGHS and MICHAEL
BURROUGHS,

Defendants.

ORIG. RETURN DATE: NOVEMBER 9, 2010
FINAL SUBMISSION DATE: SEPTEMBER 8, 2011
MTN. SEQ. #: 003
MOTION: MD

PLTF'S/PET'S ATTORNEY:
FEIN, SUCH & CRANE, LLP
747 CHESTNUT RIDGE ROAD - SUITE 200
CHESTNUT RIDGE, NEW YORK 10977-6216
845-371-4700

DEFT'S/RESP ATTORNEY:
ALICE A. NICHOLSON, ESQ.
60 IRVING PLACE
BROOKLYN, NEW YORK 11238
800-323-3038

REFEREE:
GARRETT W. SWENSON, JR., ESQ.
76 BAY ROAD
BROOKHAVEN, NEW YORK 11719
516-380-2808

Upon the following papers numbered 1 to 5 read on this motion _____

TO VACATE JUDGMENT OF FORECLOSURE

Order to Show Cause and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; it is,

ORDERED that this motion by defendant, ANNETTE BURROUGHS ("defendant"), for an Order:

(1) pursuant to CPLR 6313, staying the sale of the subject premises, 37 Arbutus Lane, Coram, New York ("Premises"), pending the hearing and determination of this motion;

(2) pursuant to CPLR 5015 (a) (1), (2) and (3), vacating the Judgment of Foreclosure granted by this Court on May 3, 2010 ("Judgment"), on

KAK

the basis of excusable default, newly discovered evidence, and fraud, misrepresentation or other misconduct of plaintiff;

(3) dismissing the complaint herein for lack of personal service upon defendant because plaintiff allegedly did not serve defendant or a person of suitable age, mental capacity, or discretion;

(4) pursuant to CPLR 3211 (a) (1), (3) or (10), dismissing the complaint herein, with prejudice, as documents and evidence before the Court are allegedly fraudulent or flawed, including but not limited to, the affidavit of merit and the assignment of mortgage;

(5) dismissing the complaint for plaintiff's lack of standing or capacity to sue in this Court or in this foreclosure proceeding;

(6) dismissing the complaint for plaintiff's failure to provide defendant with a 90-day notice pursuant to RPAPL 1304;

(7) dismissing the complaint herein for plaintiff's alleged lack of compliance with CPLR 3408, in that plaintiff failed to negotiate with defendant in good faith and plaintiff expended the Court and counsel's time and resources in engaging in bad faith conduct;

(8) cancelling the *lis pendens* filed in connection with this proceeding; and

(9) directing the Recording Office to remove from its filings a certain assignment of mortgage executed by Carrie Ehinger, purporting to transfer a certain mortgage executed by defendant on January 31, 2008, in the amount of \$352,217, from Mortgage Electronics Registration System, acting solely as nominee for First Rate Capital Corp. to Countrywide Home Loans Servicing LP; or

(10) in the event of a denial of the instant application to dismiss the complaint and related relief, pursuant to CPLR 3025 (b), granting defendant permission to amend her answer to the complaint herein,

is hereby **DENIED** in its entirety for the reasons set forth hereinafter. The Court has received opposition hereto from plaintiff.

By Order dated October 25, 2010, the Court (Baisley, J.) issued the following temporary restraining Order:

ORDERED that pending the return date of this motion execution of the Judgment herein and the sale of the [Premises], is stayed pursuant to the CPLR, including CPLR 6313.

In this foreclosure action, defendant failed to make the monthly mortgage installments due in April of 2008 through January of 2009, in connection with a mortgage affecting the Premises. As such, plaintiff commenced the instant action on January 14, 2009. Plaintiff indicates that defendant was served at the Premises pursuant to CPLR 308 (2), by service upon a person of suitable age and discretion, to wit: co-defendant MICHAEL BURROUGHS.

The matter was subsequently set down for settlement conferences, pursuant to CPLR 3408, on January 28, 2010, February 18, 2010, and April 22, 2010, wherein defendant appeared. After a resolution was unable to be reached, the settlement conference was marked "held" by the Court. On May 3, 2010, the Judgment was granted by this Court.

Defendant has now filed the instant application for a stay and to vacate the Judgment based upon the arguments delineated hereinabove. Initially, defendant alleges that co-defendant MICHAEL BURROUGHS is mentally incapacitated, and therefore service upon her was defective. The burden of proving that personal jurisdiction has been acquired over a defendant in an action rests with the plaintiff (*see Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d 343 [2003]; *Bank of Am. Nat. Trust & Sav. Assn. v Herrick*, 233 AD2d 351 [1996]; *Frankel v Schilling*, 149 AD2d 657 [1989]). A process server's affidavit of service establishes a *prima facie* case as to the method of service and, therefore, gives rise to a presumption of proper service (*see Household Fin. Realty Corp. of N.Y. v Brown*, 13 AD3d 340 [2004]; *Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d 343, *supra*; *Frankel v Schilling*, 149 AD2d 657, *supra*). However, where there is a specific sworn denial that a defendant was served with process, the affidavit of service is rebutted, and the plaintiff must establish jurisdiction at a hearing by a preponderance of the evidence (*see Mortgage Access Corp. v Webb*, 11 AD3d 592 [2004]; *Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d 343, *supra*; *Kingsland Group v Pose*, 296 AD2d 440 [2002]). In this case, the Court finds that

defendant has failed to specifically rebut the process server's affidavit, which, as discussed, indicates that defendant was served by substitute service at the Premises, as prescribed by CPLR 308 (2). Defendant has proffered nothing more than an unsupported statement that co-defendant MICHAEL BURROUGHS is mentally incapacitated. Moreover, defendant appeared in this action by service of an answer on or about January 28, 2009. Within defendant's answer she failed to raise the affirmative defense of lack of personal jurisdiction, and failed to move for judgment on that ground within sixty (60) days after service of the pleading. As such, that defense has been waived (see CPLR 3211 [e]; *Wiebusch v Bethany Mem'l Reform Church*, 9 AD3d 315 [2004]; *Aretakis v Tarantino*, 300 AD2d 160 [2002]).

Next, with respect to defendant's argument regarding lack of standing, in order to prove standing a plaintiff must demonstrate that it was the owner of the note and mortgage at the time it commenced the foreclosure action (see e.g. *Fannie Mae v Youkelsone*, 303 AD2d 546 [2003]). However, any argument that a plaintiff lacks standing, if not asserted in the defendant's answer or in a pre-answer motion to dismiss the complaint, is waived pursuant to CPLR 3211 (e) (see CPLR 3211 [e]; *Wells Fargo Bank Minn., N.A. v Perez*, 70 AD3d 817 [2010]; *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624 [2009]; *HSBC Bank, USA v Dammond*, 59 AD3d 679 [2009]). Here, defendant raises, for the first time, the issue of standing based upon the underlying mortgage documents. The Court finds that defendant waived such a claim by failing to make a pre-answer motion to dismiss the complaint on that ground or by asserting that defense in her answer.

Further, a motion to vacate a default may be made upon a showing of a reasonable excuse and a meritorious defense (see e.g. *Kaplinsky v Mazor*, 307 AD2d 916 [2003]; *O'Leary v Noutsis*, 303 AD2d 664 [2003]). The moving party must present an affidavit made by a person with knowledge of the facts that indicates a meritorious defense, containing a specific showing of sufficient legal merit to warrant vacating the default (see CPLR 5015 [a] [1]; *Polir Constr., Inc. v Etingin*, 297 AD2d 509 [2002]). The motion is addressed to the sound discretion of the court, and the exercise of such discretion will generally not be disturbed if there is support in the record therefor (see *I.J. Handa, P.C. v Imperato*, 159 AD2d 484 [1990]; *Vista Plumbing & Cooling v Woldec Constr. Corp.*, 67 AD2d 761 [1979]; *Machnick Bldrs. v Grand Union Co.*, 52 AD2d 655 [1976]). As discussed, defendant did not default herein, but rather appeared by service of an answer. With respect to defendant's allegations of fraud in the underlying mortgage

documents, the Court finds that defendant failed to establish fraud or misrepresentation on the part of plaintiff sufficient to entitle her to vacatur of the Judgment pursuant to CPLR 5015 (a) (3) (see *Tribeca Lending Corp. v Crawford*, 79 AD3d 1018 [2010]; *Rossrock Fund II, L.P. v Commack Inv. Group, Inc.*, 78 AD3d 920 [2010]; *Bank of N.Y. v Stradford*, 55 AD3d 765 [2008]).

Finally, with respect to defendant's application to stay the foreclosure sale, RPAPL 1341 (2) authorizes a court to stay all proceedings upon a judgment of foreclosure only if a defendant pays into court the amount due for principal and interest and the costs of the action, together with the expenses of the proceedings to sell, if any (RPAPL 1341 [2]). Defendant has not alleged compliance with RPAPL 1341 (2).

Accordingly, defendant's motion is **DENIED** in its entirety.

The foregoing constitutes the decision and Order of the Court.

Dated: December 6, 2011



HON. JOSEPH FARNETI
Acting Justice Supreme Court

FINAL DISPOSITION

NON-FINAL DISPOSITION