

Deutsche Bank Trust Co. v Ghaness

2011 NY Slip Op 34204(U)

April 6, 2011

Supreme Court, Queens County

Docket Number: 9098 2008

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA Part 14
Justice

DEUTSCHE BANK TRUST COMPANY, et al., x

Plaintiffs,

- against -

NARHARRY GHANESS, et al.,

Defendants. x

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Motion
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The following papers numbered 1 to 10 read on this motion by defendant, Narharry Ghaness for an order granting leave to renew and reargue his prior motion to vacate a judgment of foreclosure and sale, which this court denied in its order of May 18, 2010, and upon such reargument and renewal, vacating the judgment of foreclosure and sale entered March 18, 2009, pursuant CPLR §§ 317 and 5015(a) (1), and dismissing the complaint; and in the alternative permitting defendant to file, nunc pro tunc, the proposed answer, and setting the matter down for a Mandatory Settlement Conference pursuant to CPLR 3408.

Papers
Numbered

- Order to Show Cause-Affirmations-Affidavit-Exhibit(A)..... 1-5
- Opposing Affirmation-Exhibits(A-U)..... 6-8
- Reply Affirmation..... 9-10

Upon the foregoing papers this motion is determined as follows:

Defendant Narharry Ghaness previously moved to vacate the judgment of foreclosure and sale entered on March 18, 2009, pursuant to CPLR 5015. This court, in its order of May

18, 2010, denied the motion, as Mr. Ghaness had failed to interpose an answer, even though he was aware of the foreclosure action, and admitted receipt of the complaint. Mr. Ghaness stated in his prior affidavit that he never answered the complaint as he thought that his only chance of saving his home was to evict the tenants with whom he was having problems, repair the property and then rent it out, so that the income would be sufficient to pay the mortgage. He stated that the attempt to evict the tenants was unsuccessful, that he sought to work out a short sale with the lender but that the buyer withdrew, and that the lawyer he consulted suggested that he file for bankruptcy. Mr. Ghaness did not assert that he was not served with the summons and complaint in the action.

This court also determined that, as Mr. Ghaness had failed to interpose an answer or file a timely pre-answer motion which asserted the defense of lack of standing, he had waived such a defense, and specifically cited to *HSBC Bank, USA v Dammond* (59 AD3d 679 [2009]).

Mr. Ghaness now seeks an order granting leave to reargue and renew its prior motion to vacate the judgment of foreclosure and sale, and asserts that he was never properly served with the summons and complaint in this action, and that he never received an additional copy of the summons and complaint in the mail, as required by CPLR 3215 (g) (3) (i). Defendant also seeks renewal and reargument with respect to the defense of lack of standing, and further asserts as an additional defenses to the foreclosure action. Upon reargument and renewal, defendant seeks an order dismissing the complaint, and in the alternative seeks an order granting leave to serve his proposed answer, nunc pro tunc, and setting the matter down for a conference pursuant to CPLR 3408.

A motion for reargument is one “based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.” (CPLR 2221[d] [2].) It is well settled that “[i]ts purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided.” (*Foley v Roche*, 68 AD2d 558, 567-568 [1979].) Nor does a motion for reargument “offer an unsuccessful party successive opportunities to present arguments not previously advanced.” (*Pryor v Commonwealth Land Title Ins. Co.*, 17 AD3d 434 [2005].)

A motion to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and shall contain a reasonable justification for the failure to present such facts on the prior motion.” (CPLR 2221 [e] [2], [3].)

Mr. Ghaness, in support of the within motion, has failed to demonstrate that the court overlooked or misapprehended any matters of fact or law, or that there are any new facts that would change the prior determination, or that there has been a change in the law.

Mr. Ghaness, in his prior motion, previously sought to vacate the judgment of foreclosure and sale pursuant to CPLR 5015(a) (1), and thus was required to demonstrate a reasonable excuse for his failure to appear or answer and a potentially meritorious defense (*see* CPLR 5015[a][1]; *Hageman v Home Depot USA, Inc.*, 25 AD3d 760, 761, [2006]; *Fekete v Camp Skwere*, 16 AD3d 544, 545, [2005]). Mr. Ghaness, however, failed to offer a reasonable excuse for his default.

Mr. Ghaness now claims that his default was excusable because he was not properly served. Plaintiff, in opposition, has submitted an affidavit of service from the process server who served Mr. Ghaness with a copy of the summons and complaint on April 17, 2008, which was filed with the County Clerk on April 18, 2008. Said affidavit of service constitutes prima facie evidence that Mr. Ghaness was validly served pursuant to CPLR 308 (2) (*see Bank of N.Y. v Segui*, 68 AD3d 908, [2009]; *Wells Fargo Bank, NA v Chaplin*, 65 AD3d 588, 589, [2009]; *Cavalry Portfolio Servs., LLC v Reisman*, 55 AD3d 524, [2008]), and defendant's bare and unsubstantiated denial of "proper" service is insufficient to rebut the presumption of proper service (*see Citimortgage, Inc. v Phillips*, ___ AD3d ___, 2011 NY Slip Op 2343 [2011]; *Sturino v Nino Tripicchio & Son Landscaping*, 65 AD3d 1327, [2009]; *Beneficial Homeowner Serv. Corp. v Girault*, 60 AD3d 984, [2009]; *Hamlet on Olde Oyster Bay Homeowners Assn., Inc. v Ellner*, 57 AD3d 732, [2008]; *Mortgage Elec. Registration Sys., Inc. v Schotter*, 50 AD3d 983, [2008]; *Rosario v Beverly Rd. Realty Co.*, 38 AD3d 875, [2007]; *Bankers Trust Co. Of Cal. v Tsoukas*, 303 AD2d 343, 343-344, [2003]).

To the extent that Mr. Ghaness now seeks to vacate the judgment of foreclosure and sale pursuant to CPLR 317, he did not previously raise this ground in his prior motion and does not state why he failed to do so. In addition, relief pursuant to CPLR 317 is unavailable, where as here, the defendant failed to demonstrate that he did not receive notice of the within action in time to defend (*see* CPLR 317; *Coyle v Mayer Realty Corp.*, 54 AD3d 713 [2008]).


To the extent that Mr. Ghaness now claims that plaintiff failed to serve an additional copy of the summons pursuant to CPLR 3215 (g) (3), Mr. Ghaness failed to previously raise this argument in its prior motion. Furthermore, this claim is rejected as plaintiff's prior opposition papers contain a copy of an affidavit of service pursuant CPLR 3215 (g) (3), which recites that a copy of the summons was mailed to Mr. Ghaness at his last known residence on April 17, 2008. Said affidavit, which was filed with the County Clerk on April 18, 2008, constitutes prima facie evidence of compliance with additional notice requirement set forth

in CPLR 3215(g)(3)(i), and defendant's bare and unsubstantiated denial of receipt is insufficient to rebut the presumption of such compliance.

Finally, the court finds that defendant has failed to establish that there has been any change in the law with respect to *HSBC Bank, USA v Dammond*, (*supra*). The Appellate Division, Second Department, in *Deutsche Bank Natl. Trust Co. v Hussain* (78 AD3d 989 [2010]), recently reiterated that where, as here, a defendant failed to interpose an answer or file a timely pre-answer motion asserting the defense of lack of standing pursuant to CPLR 3211(e), the defendant waived that defense (*see also Deutsche Bank Natl. Trust Co. v Young*, 66 AD3d 819, [2009]).

Accordingly, defendant's motion for leave to reargue or to renew the prior motion which resulted in the order of May 18, 2010, is denied. Any stays previously imposed pursuant to the October 14, 2010 order to show cause are hereby vacated.

Dated: April 6, 2010



J.S.C.

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