

Wachovia Mtge., FSB v Fleming
2012 NY Slip Op 31706(U)
June 25, 2012
Supreme Court, New York County
Docket Number: 109746/08
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT. ALICE SCHLESINGER

PART IA PART 16

Justice

Index Number : 109746/2008
WACHOVIA MORTGAGE, FSB
VS.
FLEMING, LEROY
SEQUENCE NUMBER : # 001
SUMMARY JUDGMENT

INDEX NO. 109746-08
MOTION DATE _____
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is granted to the extent provided in the accompanying memorandum decision, and defendant's cross-motion to dismiss is denied.*

FILED

JUN 28 2012

NEW YORK
COUNTY CLERK'S OFFICE

JUN 25 2012

Dated: _____

Alice Schlesinger
ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

-----X
WACHOVIA MORTGAGE, FSB F/K/A WORLD
SAVINGS BANK, FSB,

Plaintiff,

- against -

Index No. 109746/08
Motion Seq. No. 001

LEROY FLEMING; CRIMINAL COURT OF THE CITY
OF NEW YORK; NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD; "JOHN DOE 1" TO "JOHN DOE 25".
said names being fictitious ...,

Defendants.

FILED

JUN 28 2012

-----X
SCHLESINGER, J:

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Wachovia Mortgage, FSB, has moved in this foreclosure action for

summary judgment and the appointment of a referee to compute. Counsel also seeks to substitute the name of Kelvin Gram in place of "John Doe." Defendant Leroy Fleming has opposed the motion and cross-moved to dismiss based on improper service.

Because the loan is a residential sub-prime loan, the parties were referred to the court's specialized Mortgage Foreclosure Settlement Part and this Court also attempted to resolve the matter, but to no avail. The motions are therefore being determined at this time.

Background Facts

On November 16, 2006, defendant Leroy Fleming borrowed \$588,000.00 from World Savings Bank, FSB, at an adjustable rate of 7.847% for a term of 30 years. The loan was secured by a mortgage for the property at 640 West 138th Street, New York, New York. As confirmed by the affidavit of Angela Vargas, Assistant Secretary of Wachovia Mortgage, FSB, effective December 31, 2007, World Savings Bank became known as Wachovia Mortgages, FSB, due to a merger between the parent company for

World Savings and Wachovia. Mr. Fleming continued to make the required bi-weekly payments until he defaulted in February 2008. This lawsuit was commenced in July 2008.

In August 2008, Mr. Fleming, represented by counsel, served an Answer with seven affirmative defenses and five counterclaims. Plaintiff replied to the counterclaims, denying the allegations. In March 2009, plaintiff made the instant motion for summary judgment and related relief, seeking the dismissal of all defenses and counterclaims. Mr. Fleming opposed the motion and, with new counsel, cross-moved to dismiss. In both documents, Mr. Fleming asserted that he had not been properly served, but he offered no factual assertions or legal arguments in support of his various affirmative defenses or counterclaims.¹

Discussion

In support of its motion, plaintiff has presented not only an affirmation and memorandum of law from counsel, but also copies of the relevant documents and an affidavit from Wachovia's Assistant Secretary Angela Vargas establishing the required elements for a judgment of foreclosure. Additionally, in those papers plaintiff argues why the defendant's defenses and counterclaims lack merit, both based on the facts attested to by Vargas and the law asserted by counsel.

Regarding the First Affirmative Defense of improper service, plaintiff offers a copy of an Affidavit of Service attesting to the delivery of the summons and complaint and required notices to Josephine Fleming as a person of suitable age and discretion

¹ Mr. Fleming did assert that the law entitled him to a settlement conference. As indicated above, numerous conferences were held over an extended period of time, but no settlement was reached.

allegedly related to Mr. Fleming. The delivery was made to Mr. Fleming's residence at 11944 145th Street in Jamaica, a property other than the subject premises, on July 3, 2008, followed by a mailing on August 4, 2008.

As to the Second Affirmative Defense that the bank wrongfully refused partial payment, plaintiff asserts that the mortgage allows it to accelerate the debt upon the borrower's default and reject partial payments. In response to the Third Affirmative Defense and First Counterclaim that plaintiff failed to comply with the Home Owner's Protection Act, 15 USC §1639, plaintiff asserts compliance with the Federal Truth-in Lending Act, including the service on Fleming of the required disclosure statement on November 16, 2006 when he executed the loan documents. Plaintiff relies on the same point to respond to the Fourth Affirmative Defense and Second Counterclaim alleging that plaintiff did not understand the terms of the loan.

In response to the Fifth Affirmative Defense and Third Counterclaim that plaintiff failed to comply with the Federal Truth-in Lending Act, plaintiff indicates that it utilized the forms prepared by the federal government. In response to the Sixth Affirmative Defense and Fourth Counterclaim that plaintiff failed to comply with the New York Consumer Protection From Deceptive Act and Practices statute found at General Business Law §349, plaintiff asserts that defendant Fleming failed to allege a specific consumer-oriented act or practice that was misleading in a material way and caused injury to the plaintiff. *See, Stutman v Chemical Bank*, 95 NY2d 24 (2000). The Seventh Affirmative Defense and Fifth Counterclaim duplicates the prior one. As to the counterclaims overall, plaintiff asserts that defendant must come forward with specific factual allegations to support the claims and avoid dismissal.

In his opposition papers and cross-motion, defendant Fleming addresses only his claim of lack of personal jurisdiction. Mr. Fleming provides his own affidavit in which he claims that the bank "did not correctly serve me. One copy of the papers were left at the subject premises and a second copy left on my mailbox at a second location." He does not mention Josephine Fleming or directly address the claim that she purportedly received a copy of the summons and complaint on the plaintiff's behalf. In the cross-motion to dismiss based on improper service, newly retained counsel argues that plaintiff failed to comply with the requirements of CPLR §308(2) governing substitute service in that the August 4 mailing was not completed within the required twenty days of the purported delivery of the papers on July 3.

In opposition to the cross-motion, plaintiff's counsel asserts that the motion is untimely as it was made in September 2009, about one year after defendant interposed his answer, dated August 21, 2008. Citing *Wiebusch v Bethany Memorial Reform Church*, 91D3d 315 (1st Dep't 2004), counsel argues that the defendant has waived his right to move to dismiss on jurisdictional grounds as he failed to move within sixty days of filing his answer as required by CPLR §3211(e). Additionally, he contends that the affidavit of service contained a typographical error; it should have read "July 30" rather than "July 3," as the complaint was not even drafted and filed until mid-July.

Although the affirmation of counsel would ordinarily be insufficient to correct the affidavit of service prepared by the process server based on his own personal knowledge of the actions he took, plaintiff is correct that defendant waived his right to move under CPLR §3211(e) That section provides in relevant part that:

an objection that the summons and complaint ... was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship.

Here, plaintiff correctly notes that the defendant did not move to dismiss on jurisdictional grounds for about one year after he served his answer. In his cross-motion, he does not seek an extension of time based on undue hardship, nor allege any facts that might demonstrate any type of hardship. The First Department in *Wiebusch* clearly stated that the 60-day statutory limit is a 'strict standard,' and it expressly stated that it would not reach the issue of whether service was proper because of its finding that the moving defendant had waived its rights by delaying more than 60 days before moving. That rule directly applies here to compel the denial of the defendant's cross-motion to dismiss for lack of personal jurisdiction.

Further, as the defendant has failed to address, let alone raise a triable issue of fact, as to plaintiff's motion for summary judgment on the six remaining defenses and five counterclaims, the plaintiff is entitled to summary judgment and the appointment of a referee to compute. However, the request to substitute Kelvin Gram for John Doe is denied, as the plaintiff has offered no explanation whatsoever as to who Kelvin Gram is and why he is a proper party here.

Accordingly, it is hereby

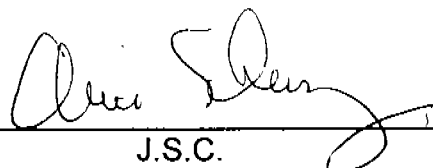
ORDERED that plaintiff's motion for summary judgment is granted, defendant's counterclaims are dismissed, and the plaintiff is awarded a judgment in its favor on the complaint and the appointment of a referee to compute; and it is further

ORDERED that defendant's cross-motion to dismiss for lack of personal jurisdiction is denied.

Plaintiff is directed to settle an order on notice to all defendants by submission to Room 119.

Dated: June 25, 2012

JUN 25 2012



J.S.C.

ALICE SCHLESINGER

FILED

JUN 28 2012

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