

110 High St. LLC v 110 High St.
2012 NY Slip Op 33076(U)
December 27, 2012
Supreme Court, Wayne County
Docket Number: 74322/2012
Judge: Dennis M. Kehoe
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ORIGINAL

STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

110 High Street LLC

Plaintiff,

-vs-

DECISION
AND
ORDER

110 High Street, Newark, LLC
Peter S. Rivoli
People of the State of New York
Tracy Smith
Dennis DeWispelaere
Peter James
DeStaffan & Saracino
Dingus & Rivoli Orthodontics
Reed Eye Associates

Index No. 74322

2012

Defendants.

Harris, Beach, PLLC
David P. Martin, Esq., of Counsel
Attorneys for Plaintiff

John Nacca, Esq.
Attorneys for Defendant Peter S. Rivoli

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WAYNE COUNTY
SUPREME AND COUNTY COURT

The Plaintiff 110 High Street LLC (assignee of Standard Insurance Company) has moved for an order confirming the Order of Reference previously issued in the above mortgage foreclosure action, together with an application for a Protective Order directing that the Plaintiff need not respond to certain discovery requests submitted by the Defendant Peter S.

Rivoli, *pro se*. The Plaintiff has also filed a second motion, seeking a Judgment of Foreclosure, with related relief. The Defendant has, by his attorney, filed an Affidavit in Opposition, seeking the denial of the Plaintiff's motions in their entirety, and permitting the Defendant to serve a formal Answer and Discovery Demands. The Plaintiff has filed a Reply Affidavit, opposing the Defendant's applications.

The Plaintiff commenced this action by filing a Summons and Complaint, together with a Notice of Pendency, on May 16, 2012, which were subsequently personally served on the Defendant on May 28, 2012. The Defendant proceeded to send a letter to Standard Insurance Company ("Standard"), the original mortgagee, dated May 30, 2012 in which he requested verification of the debt under the provisions of RESPA and a copy of his "original wet signature promissory note". The Defendant's letter was forwarded by Standard to counsel for the Plaintiff, who responded to the Defendant by a letter dated June 20, 2012, advising him that RESPA was inapplicable, in that the subject premises are commercial in nature. Counsel also forwarded copies of the relevant assignments of mortgage, and offered the Defendant an opportunity to inspect the note at the firm's office.

The Defendant apparently chose to disregard the letter from the Plaintiff's counsel, and he proceeded to send a second letter dated August 3, 2012 to Standard, requesting nearly identical relief to that requested in the original letter. The Plaintiff then submitted an Order of Reference to the Court, which was signed on August 21, 2012. On August 29, 2012, counsel for the Plaintiff responded to the Defendant's second letter, advising him that he had waived his right to presentment of the loan documents and reiterating the inapplicability of the provisions of RESPA to the instant action.

The Defendant then sent a third letter to Standard dated August 30, 2012, indicating for the first time that he disputed the validity of the debt and including a list of 140 document demands and interrogatories. Throughout this exchange of correspondence, neither Mr. Rivoli nor the corporate Defendant has ever formally appeared or submitted an Answer to the Complaint. Nor did either Defendant ever communicate directly with the Plaintiff 110 High Street LLC, the current holder of the Note and Mortgage, or with Plaintiff's counsel. The Plaintiff now seeks an order confirming the original Order of Reference and declaring that the Plaintiff has no duty to respond to the Defendant's informal discovery demands.

The Defendant has now retained counsel and has opposed the Plaintiff's motion in its entirety. The Defendant concedes that he failed to file a formal Answer to the Plaintiff's Complaint. He has offered only a conclusory statement that he could not afford legal representation at the time that the action was commenced, and he maintains that his letter of May 5, 2012 to Standard should be treated as an Answer, which, he alleges, raises a valid issue regarding standing, based upon the identity of the actual holder of the Note. Counsel for the Defendant now reasserts that argument, maintaining that the Plaintiff does not have standing to prosecute this action, absent a valid endorsement of the Note, which must accompany any assignment of the Mortgage.

In exercising their judicial discretion, the courts have often demonstrated a certain leniency toward *pro se* litigants, regarding their compliance with statutory formalities such as timely appearances or the form of pleadings (See, e.g. Meyer v A & B America, Ltd., 160 AD2d 688 (2nd Dept, 1990)). However, that discretion is not unfettered. The papers submitted herein indicate that the Defendant forwarded all his correspondence to Standard, despite being informed after his first letter that the Plaintiff was represented by counsel and that Standard was no

longer the holder of the mortgage. The Defendant ignored the letters sent to him by the Plaintiff's attorney and did not avail himself of the offered opportunity to inspect the original note as he had requested. He has made only a perfunctory statement that he could not afford to hire an attorney when the action was commenced, and he only retained counsel some five (5) months later, after this motion was filed.

As to any defense to the action offered by the Defendant, the only claims set forth in his original letter involved a request for verification of the debt according to RESPA and an attempt to raise an issue regarding the Plaintiff's standing. The Defendant has apparently abandoned his RESPA argument, which was without merit. Therefore, the only remaining allegations deal with the issue of the assignment of the Note. In the Reply Affidavit, the Plaintiff has maintained that the Note was properly endorsed to the Plaintiff, and certified copies of the Note Endorsements are attached to the attorney affidavit.

The Court notes that no Cross-Motion has been made by the Defendant to vacate the Order and permit the filing of an Answer. However, even if a formal motion had been filed, this Court finds that it would be inappropriate under these circumstances to deem the

Defendant's correspondence as constituting a valid Answer, and the Defendant is therefore found to be in default. The Defendant has also failed to set forth a meritorious defense to the action, as the Plaintiff has been shown to have standing to bring this action as the lawful holder of the Note and Mortgage, and no genuine factual issues have been raised as to the underlying debt.

Therefore, the Plaintiff's motion to reconfirm the Order of Reference is granted in its entirety, and this Decision shall constitute the Order of the Court as to all matters raised in that motion. The Plaintiff's motion for a Judgment of Foreclosure is likewise granted, and the Court shall issue said Judgment simultaneously herewith.

Dated:

December 27, 2012
Lyons, New York



Honorable Dennis M. Kehoe
Acting Supreme Court Justice