

Wells Fargo Bank, N.A. v Goans

2012 NY Slip Op 33830(U)

January 17, 2012

Supreme Court, Kings County

Docket Number: 26997/2009

Judge: Bernard J. Graham

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 36**

Index No.: 26997/2009
Motion Calendar No.
Motion Sequence No.

WELLS FARGO BANK, N.A.,

Plaintiff(s),

DECISION / ORDER

-against-

KYLE GOANS,

Defendant(s)

Present:
Hon. Judge Bernard J. Graham
Acting Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to :
vacate a default judgment.

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	
Order to Show cause and Affidavits Annexed.....	1-2
Answering Affidavits.....	3
Replying Affidavits.....	4
Exhibits.....	
Other:	

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Decision:

Defendant, by his attorneys, submitted an ex-parte order to show cause on or about October 28, 2011 for the purpose of vacating a default judgment obtained by plaintiff, Wells Fargo Bank N.A. ("Wells Fargo"), against the defendant.

The order to show cause was signed and made returnable in Part 36 of this Courthouse on November 7, 2011 before the undersigned. The matter was adjourned to December 2, 2011, and argument was heard on that date.

Background

Defendant, Kyle Goans ("Mr. Goans") had obtained a first mortgage and a home equity mortgage (hereinafter the "home equity mortgage") secured by his home located at 10 East 57th Street, Brooklyn, New York. Mr. Goans states that he lost his job in April 2009 and contacted Wells Fargo for the purpose of modifying his loan payments.

The record indicates that Mr. Goans was successful in modifying the first mortgage with Wells Fargo, however, the home equity loan was being negotiated between Mr. Goans and Wells Fargo's attorneys between August 28, 2009 and September 27, 2009, when negotiations ended. Wells Fargo initiated a lawsuit for a consumer debt on October 26, 2009. The lawsuit brought by Wells Fargo resulted in a default judgment rendered against Mr. Goans in an amount of \$82,040.80 on or about January 4, 2010.

Defendant brought an order to show cause on March 23, 2010 after becoming aware of a Notice of Garnishment which he received from the Marshal's office. The order to show cause was granted to the extent of ordering that a traverse hearing be held. A traverse hearing was conducted on February 28, 2011. The court ruled that process was properly served (though substituted service) upon the defendant.

A second order to show cause was brought by Mr. Goans, *pro se*, which was denied by this Court after argument on May 6, 2011.

The instant order to show cause was brought on behalf of defendant, by attorneys now representing defendant, to vacate the default judgment and argument was heard by this Court on December 2, 2011.

Discussion

Mr. Goans, by his attorneys, argues that the default judgment should be vacated on several grounds. Wells Fargo, in opposition, argues that the issue of service of process has been determined and that there is no reasonable excuse or meritorious defense available to Mr. Goans.

It is well settled that a motion to vacate a default judgment must establish a reasonable excuse and a meritorious defense (see CPLR 5015 (a) (1); Lane v. Smith, 84 A.D.3d 746).

Furthermore, the determination as to what constitutes a reasonable excuse is "left to the sound discretion of the court" Savino v. ABC Corp. 44 A.D.3d 1026 (2d Dept. 2007).

It appears that Mr. Goans, despite his arguments to the contrary, was served with process through the substituted service provisions of CPLR 308(2). Once this determination was reached by the Court, Mr. Goans would be obligated to file an appeal or move for reargument to

challenge that determination. Having not done so, the issue of service has been determined and the finding is the law of the case and binding upon this Court (see Hampton Valley Farms Inc. v. Flower & Medalie, 40 AD3d 699 (2d Dept. 2007)).

However, the traverse hearing only determined the issue of service of process and is not determinative of whether there is a reasonable excuse or a meritorious defense sufficient to set aside the default judgment based upon other considerations.

In this case, the record contains admissible evidence that Mr. Goans was engaging in an ongoing effort to modify the terms of both his first mortgage and his home equity mortgage beginning in August 2009. It appears that Wells Fargo, in fact, reached a modification of the terms of the first mortgage with defendant (see Wells Fargo letter dated March 16, 2010 annexed as Ex. "B" in defendant's Reply).

Upon a close inspection of the correspondence related to the negotiations regarding the modification of the home equity loan, it appears to the Court that Mr. Goans was given an unreasonably short period of time to respond to the request of Wells Fargo's attorneys. Jason P. Verhagen (Wells Fargo's attorney) states that his office contacted Mr. Goans on or about August 29, 2009 to advise Mr. Goans that the debt was assigned to his office for collection (see Verhagen Aff, par. 21 et seq. annexed to plaintiff's Reply).

Mr. Verhagen then states that Mr. Goans contacted his office on September 19, 2009. On September 27, 2009, according to Mr. Verhagen, Mr. Goans was asked to produce proof of financial hardship. Mr. Verhagen states that a decision was made to pursue a lawsuit on October 19, 2009, when such information was not provided.

Interestingly, the Court notes that the summons initiated by Mr. Verhagen's office is dated August 31, 2009 (see Ex. "E" annexed to defendant's Reply) which was approximately the date of the initial contact between the Verhagen law office and Mr. Goans. Also, the information requested by Mr. Verhagen's office had already been received by Wells Fargo in connection with the review of the first mortgage modification. These facts raise a question of whether the negotiation between Wells Fargo and the defendant were being conducted in good faith.

Counsel for Mr. Goans also raised the issue of the appropriateness of bringing a suit for monetary damages by Wells Fargo. The home equity loan obtained by Mr. Goans is a secured interest in Mr. Goans' residence and its terms are contained in the "Smartfit Home Equity Account Agreement and Disclosure Statement" (hereinafter the "Home Equity Agreement"). The Home Equity Agreement contains a default section which lists the options available to the lender

in the event of a default. These options include "closing the account"; refusal to "honor any advance requests"; and require "immediate payment in full" (see Par. 17 of the Home Equity Agreement annexed as Ex. "A" to defendant's Reply).

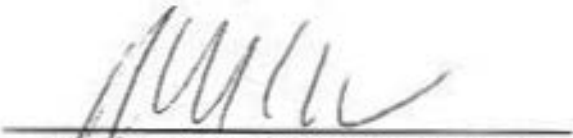
There is no provision in the Home Equity Agreement for bringing a lawsuit for monetary damages (as opposed to a mortgage foreclosure) by the lender. By bringing this suit as a monetary claim, Wells Fargo has avoided the mortgage foreclosure rules and laws which might be available to a home owner in a case such as this. Wells Fargo has effectively avoided the requirements of the CPLR Rule 3408 which requires foreclosure actions to have mandatory conferences with the Court and other protections available to home owners subject to foreclosure in New York State including the mandatory settlement conferences (see Uniform Civil Rules of the Supreme Court, Rule 202.12-a "Residential Mortgage Foreclosure Actions; Settlement Conference").

In this case, the actions of Wells Fargo point to a prima facie case of possible bad faith conduct, which has been ruled to be a grounds for vacatur of a judgment (see Deutsche Bank National Trust Company v. Miele, 873 N.Y.S. 2d 233 (Sup. Ct. Richmond Co. 2008)). In addition, the defendant has established that valid good faith efforts were being undertaken by the defendant to modify both the first mortgage and to modify the home equity mortgage. The decision to terminate the negotiations to modify the home equity mortgage was made unilaterally by Wells Fargo. These acts form a sufficient basis for the default judgment to be vacated (see Scarlett v. McCarthy, 2 AD3d 623 (2d Dept. 2003)).

It is the decision of this Court that the default judgment obtained by Wells Fargo against Kyle Goans be vacated and any and all collection efforts are hereby terminated at this time.

This shall constitute the decision and order of this Court.

Dated: January 17, 2012



Hon. Bernard J. Graham, Acting Justice
Supreme Court, Kings County

HON. BERNARD J. GRAHAM