

Chase Home Fin. LLC v Tripp
2013 NY Slip Op 30358(U)
February 19, 2013
Supreme Court, Queens County
Docket Number: 2536/09
Judge: Allan B. Weiss
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M E M O R A N D U M

SUPREME COURT QUEENS COUNTY
CIVIL TERM PART 2

ALLAN B. WEISS

CHASE HOME FINANCE LLC,

Plaintiff,

-against-

CARL L. TRIPP, KAREN L TRIPP, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC.,
as Nominee and Mortgagee of Record,
ALLIANCE MORTGAGE BANKING CORP., NEW
YORK CITY ENVIRONMENTAL CONTROL BOARD,
NEW YORK CITY PARKING VIOLATIONS BUREAU,
NEW YORK CITY NEW YORK CITY TRANSIT
ADJUDICATION BUREAU, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE,

"JOHN DOES" and "JANE DOES", said names
being fictitious, parties intended being
possible tenants or occupants of premises,
and corporations, other entities or persons
who claim, or may claim, a lien against
the premises.

Defendants.

Index No.: 2536/09

Motion Date: 12/19/12

Motion Cal No.: 4

Motion Seq. No.: 1, 2

Motions Seq.#1 and Seq.#2 are combined for disposition.

This is an action to foreclose a mortgage, dated March 24, 2006 acknowledged and delivered by defendants, Carl L. and Karen L. Tripp(the Tripps) the owners of the premises known as 174-41 129th Street, Jamaica, N.Y. to Alliance Mortgage Banking Corp.(Alliance), to secure repayment of a note, evincing a loan in the principal amount of \$519,200.00. Plaintiff alleges that Alliance delivered the note to the plaintiff, Chase Home Finance, LLC (Chase) on September 7, 2006 and assigned the mortgage and note to plaintiff by assignment dated January 27, 2009. Plaintiff

further alleges that as a consequence of defendants' default under the terms of the mortgage and note by failing to make the monthly installment payment of interest due and owing beginning on November 1, 2008, and continuing to the present, it elected to accelerate the entire mortgage debt. The plaintiff commenced this action by filing the summons and complaint on February 3, 2009.

On April 10, 2012 plaintiff moved herein for an order substituting Federal National Mortgage Association (FNMA) as plaintiff in place of Chase, amending the caption to reflect the substitution and deleting the defendants s/h/a John Does and Jane Does, and, in effect, granting a default judgment against the Tripps and appointing a referee to ascertain and compute the amounts due plaintiff.

The Tripps oppose the motion and by Order to Show Cause dated August 9, 2012, move for an order dismissing the complaint or in the alternative vacating their default in failing to interpose an answer and granting leave to file a late answer pursuant to CPLR 3012(d).

In support of the motion, the plaintiff submitted a copy of the pleadings and the affidavits of service thereof, a copy of the mortgage, the underlying note and the subsequent assignment of the note and mortgage, and the affidavit of Andrew Fry, Foreclosure Specialist of IBM Lender Business Process Services, Inc. as servicer for FNMA as assignee of Chase which establish,

prima facie, the plaintiff's entitlement to an Order fixing the defendants, Carl L. Tripp's and Karen L. Tripp's default in answering and the additional relief requested in the motion.

In opposition to the motion and in support of their Order to Show Cause defendants assert that plaintiff has failed to submit proof of service of the statutory 90 day notice to establish proper service pursuant to RPAPL 1304, that the action must be dismissed pursuant to CPLR 3215(c) for failure to take proceedings for entry of a default judgment within one year.

The defendants do not deny service or receipt of the 90 day notice, but merely claim that plaintiff did not provide proof of service. However, Andrew Fry's affidavit is sufficient to demonstrate, prima facie, that service was properly made, and plaintiff, in reply, submitted the proof of service, including copies of the certified mailings.

Dismissal is also not warranted pursuant to 3215(c). CPLR 3215(c) provides that a complaint shall be dismissed for the failure to take proceedings for entry of a default judgment within one year of the default unless sufficient cause is shown why it should not be dismissed. The plaintiff has demonstrated sufficient cause why the complaint should not be dismissed through, inter alia, its original submissions and additional the affidavit of Jeff Anderson that it has a meritorious cause of action and that a substantial portion of the delay was due to the stay imposed by 22 NYCRR 202.12-a(7) during an ongoing foreclosure conference which, in this case lasted 17 months, was

adjourned numerous times to allow defedants time to submit proper financial documentation for a modification; and the delay caused by the October, 2010 Administrative Order 548/10 (superceded by Administrative Order 431/11) which imposed upon plaintiff's attorney significant additional procedures in order to comply (see BAC Home Loans Servicing, LP v. Mauer, 36 Misc.3d 1210(A) [2012])).

Accordingly, the branches of the defendants' motion to dismiss the complaint and upon dismissal vacating the Notice of Pendency and an award of attorneys fees are denied.

The branch of the defendants' motion seeking an extension of time to serve a late answer pursuant to CPLR 3012(d) is also denied as they have not established a reasonable excuse for their failure to timely serve an answer (see C & H Import & Export, Inc. v. MNA Global, Inc., 79 AD3d 784 [2010]; 599 Ralph Ave. Dev., LLC v. 799 Sterling Inc., 34 AD3d 726 [2006])). The showing necessary to establish entitlement to an extension of time to serve a late answer pursuant to CPLR 3012(d) is the same as that which a defendant must make to be entitled to the vacature of a default under CPLR 5015(a)(1) (see Stephan B. Gleich & Associates v. Gritsipis, 87 AD3d 216 [2011]) i.e. a reasonable excuse for the default and a potentially meritorious defense (see Deutsche Bank Nat. Trust Co. v. Conway, 99 AD3d 755 [2012]; Citimortgage, Inc. v. Brown, 83 AD3d 644 [2011])).

The defendants maintain that they did not ignore this action

and appeared at each of the many foreclosure settlement conferences, that they entered into a HAMP Trial Plan and made despite making the payments under the plan, the plaintiff failed to modify the mortgage and to provide a rational basis for its denial. Under the facts of this case, the defendants' excuse is insufficient.

Although negotiations between parties after service of a summons and complaint may be a sufficient excuse for a default (see Ocean Independent Bank v. Tyrnauer, 176 AD2d 926 [1991]), the defendant's reliance upon alleged negotiations with Chase, in this case, does not constitute a reasonable excuse. The defendants do not deny being served with the summons and complaint on February 5, 2009. The defendant's Karen L. Tripp's time to answer expired on February 25, 2009 and Carl L. Tripp's time to appear expired on March 23, 2009. However, the first foreclosure settlement conference was not held until May 27, 2009 long after the defendants' time to answer had expired (see Ocean Independent Bank v. Tyrnauer, supra). Moreover, defendants have failed to submit any excuse for their lengthy delay of more than three years after the action was commenced and for delaying until August, 2012, five months after plaintiff made the instant motion, to oppose and to move to vacate their default (see Deutsche Bank Nat. Trust Co. v. Gutierrez, 102 AD3d 825 [2013]; Garal Wholesalers, Ltd. v. Raven Brands, Inc., 82 AD3d 1041, 1042 [2011]; Bethune v. Prioleau, 82 AD3d 810, 810-811 [2011]).

Nor have defendants demonstrated even an arguably meritorious defense. Although the defense of standing is waived since the defendants failed to raise it in an answer or in a pre-answer motion to dismiss (see HSBC Bank, USA v. Dammond, 59 AD3d 679, 680 [2009]) the plaintiff has established, through competent documentary evidence that it was the owner of both the note and mortgage on the date the action was commenced. In addition, the plaintiff did not lose the right to continue this action by assigning the mortgage and note after commencing the action. Pursuant to CPLR 1018, an action "may be continued by or against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action." (see CPLR 1018; Wells Fargo Bank, N.A. v. Wine, 90 AD3d 1216, 1217 [2011]). Moreover, the plaintiff has moved to substitute the assignee FNMA as the plaintiff (see Wells Fargo Bank, N.A. v. Hudson, 98 AD3d 576, 577 [2012]).

Finally, the defendants' conclusory allegation of lack of good faith during the negotiations, without any factual allegations in support is insufficient to plead a meritorious defense. The denial of a modification alone does not constitute bad faith (see Wells Fargo Bank, N.A. v. June Joan Van Dyke, 101 AD3d 638 [2012]). The terms of the Trial Plan were not limited to making the required payments, but also included the requirement that defendants provide various financial documents. The defendants have failed to submit any evidence to substantiate

their conclusory claim that they complied with the plaintiff's document demands during the negotiations or any evidence of their present financial status. As plaintiff pointed out, there is nothing preventing defendants from seeking a modification at this time.

Accordingly, the plaintiff's motion, is granted and the defendant's motion is denied.

Settle Order.

Dated: February 19, 2013
D# 48

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J. S. C.