

JP Morgan Chase Bank v Benitez

2013 NY Slip Op 31797(U)

July 29, 2013

Sup Ct, Suffolk County

Docket Number: 11-21109

Judge: W. Gerard Asher

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

P R E S E N T :

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 2-19-13
ADJ. DATE _____
Mot. Seq. # 001 - MG

-----X
JP MORGAN CHASE BANK, NATIONAL
ASSOCIATION, SUCCESSOR IN INTEREST
BY PURCHASE FROM THE FEDERAL
DEPOSIT INSURANCE CORPORATION AS
RECEIVER FOR WASHINGTON MUTUAL
BANK

FEIN, SUCH & CRANE, LLP
Attorneys for Plaintiff
747 Chestnut Ridge Road, Suite 200
Chestnut Ridge, New York 10977

Plaintiff,

- against -

MARVIN BENITEZ A/K/A MARVIN U.
BENITEZ; WASHINGTON MUTUAL BANK,
FA; "JOHN DOE #1-5" and "JANE DOE #1-5"
said names being fictitious, it being the intention
of Plaintiff to designate any and all occupants,
tenants, persons or corporations, if any, having or
claiming an interest in or lien upon the premises
being foreclosed herein,

ELLEN DURST-BLAIR, ESQ.
Attorney for Defendant
Marvin Benitez
250 Mineola Blvd., 2nd Floor
Mineola, New York 11501

Defendants.
-----X

Upon the following papers numbered 1 to 15 read on this motion for an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; ~~Notice of Cross Motion and supporting papers _____~~; Answering Affidavits and supporting papers 14 - 15; ~~Replying Affidavits and supporting papers _____~~; Other _____; (and after hearing counsel in support and opposed to the motion) it is;

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is hereby

ORDERED that this motion by plaintiff JP Morgan Chase Bank, National Association, successor in interest by purchase from the Federal Deposit Insurance Corporation as receiver for Washington

JP Morgan v Benitez
 Index No. 11-21109
 Page 2

Mutual Bank (JP Morgan) for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

ORDERED that plaintiff's application for leave to amend the caption of this action pursuant to CPLR 3025 (b), is granted; and it is further

ORDERED that the caption, the summons and complaint and notice of pendency are deemed amended by substituting JP Morgan Chase Bank, National Association in place and stead of JP Morgan Chase Bank, National Association, successor in interest by purchase from the Federal Deposit Insurance Corporation as receiver for Washington Mutual Bank; and it is further

ORDERED that the caption, the summons and complaint and notice of pendency are deemed amended by substituting the names of defendants Jeronimo Lopez in place of "John Doe #1"; Ernesto Orellana in place of "John Doe #2"; Roxana Orellana in place of "Jane Doe #1"; and, Victorina Benavides in place of "Jane Doe #2"; and it is further

ORDERED that the caption is amended by striking therefrom the names of "John Doe #3" through "John Doe #5" and "Jane Doe #3" through "Jane Doe #5"; and it is further

ORDERED that the caption of this action hereinafter appear as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF SUFFOLK**

JP MORGAN CHASE BANK, NATIONAL ASSOCIATION x

Plaintiff,

vs

MARVIN BENITEZ A/K/A MARVIN U. BENITEZ;
 WASHINGTON MUTUAL BANK, FA; JERONIMO
 LOPEZ; ERNESTO ORELLANA; ROXANA ORELLANA;
 VICTORINA BENAVIDES;

Defendants.

x

This is an action to foreclose a mortgage on premises known as 272 Wicks Road, Brentwood, New York. On January 11, 2006, defendant Marvin Benitez (Benitez) executed an adjustable rate note in favor of Washington Mutual Bank, agreeing to pay the sum of \$292,000.00 at the starting yearly rate of 5.825 percent. On January 11, 2006, defendant Benitez executed a first mortgage in the principal sum of \$292,000.00 on the subject property. The mortgage was recorded on February 2, 2006 in the Suffolk

County Clerk's Office. Subsequently, on September 25, 2008, Washington Mutual Bank was closed by the Office of Thrift Supervision and the FDIC was named receiver. Pursuant to the terms and conditions of a Purchase and Assumption Agreement between the FDIC as receiver of Washington Mutual Bank and JP Morgan, JP Morgan acquired all loans and loan commitments of Washington Mutual. The note contains the indorsement in blank of Cynthia Riley, vice president of Washington Mutual Bank.

Chase sent a notice of default dated May 2, 2011 to defendant Benitez stating that he had defaulted on his mortgage loan and that the amount past due was \$7,604.58. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on July 5, 2011. In its complaint plaintiff alleges, in pertinent part, that defendant breached his obligations under the terms and conditions of the note and mortgage by failing to make his monthly payments. Defendant Benitez has not answered or appeared in this action.

The affirmation of Michael Gindi, Esq. affirms that a foreclosure settlement conference was held on September 7, 2012 wherein the instant matter was referred to an IAS judge. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves, *inter alia*, for an order of reference contending that none of the defendants have answered the complaint or moved with respect thereto and, the time in which to answer or move with respect thereto has expired.

Defendant Benitez, in opposition to the instant application, asserts that plaintiff has not complied with the notice provisions set forth in RPAPL §1303 and that plaintiff has failed to prove via affidavit or affirmation that the loan is or is not high-cost or sub-prime and that plaintiff has complied with Banking Law §595-a, §§6-1 or 6-m and §1304 of the RPAPL and seeks a denial of plaintiff's application. In addition, defendant seeks the following forms of relief: denial of plaintiff's motion, dismissal of plaintiff's action for lack of jurisdiction over the defendant due to plaintiff's lack of standing, or in the alternative, to permit defendant Benitez to appear and file a late answer. Rather than making a motion for these latter forms of relief, plaintiff, in opposing defendant's motion merely asked for this relief and argued why it should be granted. As such, the foregoing constitutes a violation of CPLR 2215 (*see New York State Div. Of Human Rights v Oceanside Cove II Apt. Corp.*, 39 AD3d 608, 835 NYS2d 246 [2d Dept 2007]; *Khaolaead v Leisure Video*, 18 AD3d 820, 796 NYS2d 637 [2d Dept 2005]; *Hergerton v Hergerton*, 235 AD2d 395, 652 NYS2d 77 [2d Dept 1997]; *Thomas v Drifters*, 219 AD2d 639, 631 NYS2d 419 [2d Dept 1995]; *Matter of Barquet v Rojas-Castillo*, 216 AD2d 463, 628 NYS2d 542 [2d Dept 1995]; *Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y.*, Book 7B, CPLR C2215:1; *Siegel, N.Y. Prac.* § 249, at 423 [4th ed.]). Since defendant merely requested this relief in his opposition papers, and did not make a motion on notice as defined in CPLR 2211, defendant is not entitled to the affirmative relief requested.

Furthermore, a defendant seeking to vacate his or her default under CPLR 5015(a)(1), 317 or 3012 must provide a reasonable excuse for the default and show a potentially meritorious defense (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr., Co.*, 67 NY2d 138, 501 NYS2d 8 [1986]; *ACT Prop., LLC v Ana Garcia*, 102 AD3d 712, 957 NYS2d 884 [2d Dept 2013]; *Deutsche Bank Natl. Trust Co. v Gutierrez*, 102 AD3d 825, 958 NYS2d 472 [2d Dept 2013]; *Wells Fargo Bank, N.A. v Russell*, 101

AD3d 860, 955 NYS2d 654 [2d Dept 2012]). Such is the case here, as defendant has offered no excuse for his default in answering, the court need not address whether defendant has a meritorious defense (*see Deutsche Bank Natl. Trust Co. v Gutierrez, supra; Wells Fargo Bank, N.A. v Russell, supra*).

Defendant's remaining demands for relief include dismissal of the complaint on the grounds that plaintiff allegedly lacks standing to prosecute its claims for foreclosure arising from its failure to serve notices required by RPAPL § 1303 and § 1304 and/or a lack of ownership in the note and mortgage. However, the defense of standing was waived by defendant due to his default in answering, the absence of any duly served answer raising such defense and his failure to timely move for dismissal under CPLR 3211 (*see Countrywide Home Loans Serv., LP v Albert, 78 AD3d 983, 912 NYS2d 96, supra; Deutsche Bank Trust Co., Am. v Stathakis, 90 AD3d 983, 935 NYS2d 651 [2d Dept 2011]; Holubar v Holubar, 89 AD3d 802, 934 NYS2d 710 [2d Dept 2011]; McGee v Dunn, 75 AD3d 624, 906 NYS2d 74 [2d Dept 2010]; see also HSBC Bank USA, NA v Schwartz, 88 AD3d 961, 931 NYS2d 528 [2d Dept 2011]; Wells Fargo Bank Minn., NA v Mastropaolo, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]*).

Defendant's opposition to the instant motion on the separate ground that plaintiff's purported failure to serve the statutory notices required by RPAPL § 1303 and § 1304 constitutes a failure to satisfy statutory conditions precedent so as to warrant such a dismissal, is likewise denied. Consistently, appellate courts have determined that service of the statutory notices required by RPAPL § 1303 and § 1304 are conditions precedent to a mortgage foreclosure action (*see Aurora Loan Servs., LLC v Weisblum, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]; First Natl. Bank of Chicago v Silver, 73 AD3d 162, 899 NYS2d 256 [2d Dept 2010]*). It has further been established that, unlike other affirmative defenses which are waived if not timely raised, the failure to comply with these statutory conditions precedent may be raised at any time during the action (*First Natl. Bank of Chicago v Silver 73 AD3d at 163*). A failure to comply with the statutory notice provisions is not, however, a jurisdictional defect and thus does not constitute a ground for the vacatur of a judgment of foreclosure pursuant to CPLR 5015(a)(4) (*see Pritchard v Curtis, 101 AD3d 1502, 957 NYS2d 440 [3d Dept 2012]; see also Deutsche Bank Natl. Trust Co. v Posner, 89 AD3d 674, 933 NYS2d 52 [2d Dept 2011]*).

A statutory notice failure defense is also available to a defaulting defendant, but such availability is restricted to more limited circumstances. A defendant may advance a statutory notice defense as a "meritorious defense" in an application to vacate a default in answering on grounds encompassed by CPLR 5015(a)(1) or CPLR 317. As indicated above, a successful motion to vacate a default under these statutes requires the moving party to demonstrate a reasonable excuse for the default and a meritorious defense to the claim (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr., Co., supra; Wells Fargo Bank, N.A. v Russell, supra*). Where a reasonable excuse is established and the statutory notice conditions are successfully advanced as the defense, defendant need not further appear by answer and defend on the merits, but instead, may seek the immediate dismissal of the complaint on the grounds that plaintiff failed to satisfy either of the statutory notice conditions precedent. Where, however, the default is not vacated, as is the case here, dismissal due to a failure to satisfy a statutory condition precedent is not an available remedy. A party in default may thus advance a failure to satisfy a statutory condition precedent in opposition to a motion for a default judgment only if such opposition is accompanied by a viable cross motion to be relieved of such default (*see Wassertheil v Elburg, LLC, 94 AD3d 753, 941 NYS2d 679*).

JP Morgan v Benitez
 Index No.: 11-21109
 Page No. 5

[2d Dept 2012]; *Hosten v Oladapo*, 44 AD3d 1006, 844 NYS2d 417 [2d Dept 2007]; *Giovanelli v Rivera*, 23 AD3d 616, 804 NYS2d 817 [2d Dept 2005]).

Here, defendant's failure to establish a reasonable excuse for his default through a proper application, coupled with the non-jurisdictional nature of the statutory conditions precedent, vitiate any claim defendant may have had to a dismissal of plaintiff's complaint due to its purported failure to satisfy one or more of the statutory notice conditions precedent (*see Pritchard v Curtis, supra; Deutsche Bank Natl. Trust Co. v Posner, supra; Alaska Seaboard Partners Ltd. Partnership v Grant*, 20 AD3d 436, 799 NYS2d 117 [2d Dept 2005]).

Under these circumstances, the court need not address the merits of defendant's claims that the complaint should be dismissed because plaintiff failed to comply with the conditions precedent imposed by RPAPL §1303 and/or §1304. However, the court notes that the record is replete with proof of service of the RPAPL §1303 notice and it contains sufficient evidence of compliance with the RPAPL § 1304 notice condition requirements in light of the procedural posture of this case (*see Grogg v South Rd. Assoc., L.P.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]).

Accordingly, plaintiff's application for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (*see Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

The proposed order appointing a referee to compute pursuant to RPAPL §1321 is signed simultaneously herewith as modified by the court.

Plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court

Dated: July 29, 2013

W. Gerard Asker
 J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION