

New York Community Bank v Carrera

2014 NY Slip Op 30010(U)

January 6, 2014

Supreme Court, Queens County

Docket Number: 27726/10

Judge: Bernice D. Siegal

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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

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New York Community Bank,

Plaintiff,

-against-

Bertha Carrera, Alfredo Covarrubias, Citibank, N.A.,
“John Doe” and “Jane Doe” said name being fictitious,
it being the intended of Plaintiff to designate any and
all occupants of the premises being foreclosed herein,

Defendants.

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Index No.: 27726/10
Motion Date: 6/26/13
Motion Cal. No.: 90
Motion Seq. No.: 2

The following papers numbered 1 to 12 read on this motion for (A) an order pursuant to CPLR §3211(a)(1), dismissing the complaint on the grounds that documentary evidence establishes a complete defense to this action, to wit: (a) the plaintiff’s own “Affidavit of Merit and Amount Due,” submitted to the Court ex parte by the plaintiff in a failed attempt to secure an Order of Reference, establishes the plaintiff’s improper service of the 90 day notice mandated by RPAPL §1304, which is a condition precedent to the plaintiff’s commencement and pursuit of this action, pursuant to RPAPL §1302, and (b) the putative assignment of the mortgage contains no reference to the note being assigned and accordingly the plaintiff did not and does not have standing or capacity to commence and pursue this action; (B) an order pursuant to CPLR §3211(a)(2), dismissing the complaint on the grounds that the Court lacks subject matter jurisdiction over the alleged dispute between the plaintiff and the moving defendants, given that the mortgage loan in question was issued by Ohio Savings Bank, the plaintiff is not Ohio Saving Bank and is instead New York Community Bank, the putative assignment does not assign the note and therefore the plaintiff does not have standing to pursue this action; (C) an order pursuant to CPLR §3211(a)(3), dismissing the complaint on the grounds that the plaintiff lacks capacity to sue in this action as the mortgage loan in question was issued by Ohio Savings Bank, the plaintiff is not Ohio Savings Bank and is instead New York Community Bank, the putative assignment does not assign the note and the plaintiff has not established any nexus to itself and the note: (D) an order pursuant to CPLR §3211(a)(3), dismissing the complaint on the grounds that the plaintiff failed to state a cause of action in that it failed to properly comply with all conditions precedent to commencing or pursuing this action, in that to the extent that plaintiff alleges that it served 90 day notice mandated by RPAPL §1304, which is a condition precedent to the plaintiff’s commencement and pursuit of this action pursuant to RPAPL §1302, even plaintiff’s own submissions establish that any mailing was sent to an incorrect address wholly unrelated to the moving defendants or the subject property; (E) an order pursuant to CPLR

§6514(a) cancelling the Notice of Pendency upon dismissal of the complaint; (f) an order pursuant to CPLR §6514(b) cancelling the Notice of Pendency upon the grounds that this foreclosure action was not commenced or prosecuted in good faith; (G) an order pursuant to CPLR §6514(c) directing the plaintiff to pay all of the moving defendants costs and expenses occasioned by the filing and cancellation of the Notice of Pendency, in addition to all costs incurred by the moving defendants as a result of this action; and (H) alternatively, should the plaintiff's complaint not be dismissed, an order pursuant to CPLR §3012(d) compelling the plaintiff-lender to accept the answer of defendant-borrower/joint-title holder Bertha Carrera ("Bertha") and defendant joint-joint title holder Alfredo Covarrubias ("Alfredo").

| | PAPERS NUMBERED |
|---|--------------------|
| Notice of Motion - Affidavits-Exhibits..... | 1 - 4 |
| Affirmation in Opposition..... | 5 - 9 |
| Reply Affirmation..... | 10 - 12 |

Upon the foregoing papers and upon oral argument held on December 4, 2013 it is hereby ordered that the motion is resolved as follows:

Defendants, Bertha Carrera ("Carrera") and Alfredo Covarrubias ("Covarrubias") (collectively as "Defendants") move for an order to dismiss the within action or in the alternative to compel Plaintiff, New York Community Bank (hereinafter "Plaintiff" or "NYCB") to accept Defendants' answer. As more fully set forth below, Defendants' motion to dismiss is denied in its entirety primarily upon the grounds that defendants failed to set forth a reasonable excuse for their over two year default in answering the summons and complaint.

Findings of Fact and Conclusions of Law

On July 6, 2006, Carrera duly executed and delivered to Ohio Savings Bank, the principal sum of \$573,000. On that same date, the Defendants duly executed and delivered to Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Ohio Savings Bank, their mortgage whereby they mortgaged the premises located at 80-19 155th Avenue, Howard Beach, NY 11414 (the

“Premises”).

Ryan Sabo, the Assistant Vice President of NYCB states in his affidavit that the Note was acquired by and delivered to Plaintiff pursuant to a Purchase and Assumption Agreement dated December 4, 2009 between Plaintiff and the Federal Deposit Insurance Corporation (“FDIC”).

The mortgage was assigned by assignment of mortgage from MERS to Plaintiff on October 22, 2010.

Sabo contends that the Defendants defaulted in the payment of the principal and interest on June 1, 2010.

On February 11, 2010, Defendants were sent a ninety day notice. Pursuant to Paragraph 22 of the mortgage, Defendants were sent a thirty day notice.

The within action was commenced on November 3, 2010 by the filing of the summons and complaint.

It is undisputed that Defendants have not filed an answer and are in default. It is well settled that a “defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action when ... moving to extend the time to answer or to compel the acceptance of an untimely answer.”

(*Maspeth Federal Sav. and Loan Ass'n v. McGown*, 77 A.D.3d 890, 891 [2nd Dept 2010]; *Lipp v. Port Authority of New York and New Jersey*, 34 A.D.3d 649 [2nd Dept 2006].)

CPLR §3012(d) provides that the defendant must demonstrate “both a reasonable excuse for her default in failing to serve a timely answer and the existence of a potentially meritorious defense to the action.” (*Weinstein v. Schacht*, 98 A.D.3d 1106, 1107 [2nd Dept 2012]; *see Westchester Medical Center v. Allstate Ins. Co.*, 80 A.D.3d 695 [2nd Dept 2011].) “The determination of what constitutes a reasonable excuse lies within the sound discretion of the

Supreme Court.” (*Maspeth Federal Sav. and Loan Ass'n v. McGown*, 77 A.D.3d 890, 891 [2nd Dept 2010]; *Moriano v. Provident New York Bancorp*, 71 A.D.3d 747 [2nd Dept 2010].) In the within action, the affidavit of the plaintiff's process server constituted prima facie evidence of proper service of the summons and complaint upon the Defendants

Here, the moving Defendants defaulted in answering the summons and complaint served upon them in November of 2010.

Defendants retained the Law Offices of Jose A. Polanco, who sent a loan application for the Defendants less than two weeks after they were served with the Summons and Complaint. Furthermore, on April 26, 2011, Defendants's current attorneys filed a Notice of Appearance, but failed to answer the complaint or raise any defenses until December of 2012. Said proposed answer was rejected by Plaintiff.

Defendants also contend that their delay was due, in part, to ongoing settlement discussions. However, Defendants attended one mandatory settlement conference on May 6, 2011 and failed to move for relief until the within motion. Defendants reliance on settlement discussions does not constitute a reasonable excuse. (*Community Preservation Corp. v. Bridgewater Condominiums, LLC*, 89 A.D.3d 784 [2nd Dept 2011]; ; *Maspeth Federal Sav. and Loan Ass'n v. McGown*, 77 A.D.3d 889 [2nd Dept 2010].) Accordingly, Defendants failed to establish a reasonable excuse for their delay in filing a late answer.

In addition, Defendants fail to address the untimeliness of the within motion and accordingly, the branch of Defendants' motion pursuant to CPLR 3211 to dismiss the complaint is denied. It is undisputed that Defendants are in default. It is well settled that a party in default may not seek affirmative relief pursuant to CPLR 3211 absent the vacatur of their defaults. (See CPLR 2004; *U.S. Bank Nat. Ass'n v. Gonzalez*, 99 A.D.3d 694 [2nd Dept 2012][denying motion

to dismiss for failing to request an extension of time to serve and file a motion pursuant to CPLR 3211 and failure to show good cause of the delay in making the motion]; see *Holubar v. Holubar*, 89 A.D.3d 802 [2nd Dept 2011]; *Deutsche Bank Trust Co., Americas v. Stathakis*, 90 A.D.3d 983 [2nd Dept 2011].) The defendant's motion to dismiss the complaint in this action was untimely, since it was made after the time to file an answer had lapsed. (CPLR 3211(e); *U.S. Bank Nat. Ass'n v. Gonzalez*, 99 A.D.3d 694 [2nd Dept 2012])[holding that denial of motion to dismiss was warranted when defendant failed to request an extension of time within which to serve and file a motion pursuant to CPLR 3211 to dismiss the complaint and defendant did not attempt to show good cause for his delay in making the motion]; *Holubar v. Holubar*, 89 A.D.3d 802 [2nd Dept 2011]; *McGee v. Dunn*, 75 A.D.3d 624 [2nd Dept 2011])[holding that court improvidently exercised its discretion in granting an untimely motion to dismiss].)

In reply, Defendants erroneously rely upon a Status Conference Order in which this court directed the Plaintiff to file an Order of Reference. The court notes that the Status Conference Order did not extend Defendants' time to bring a motion to dismiss.

Conclusion

For the reasons set forth above, Defendants' motion is denied in its entirety.

Dated: January 6, 2014

Bernice D. Siegal, J. S. C.