

Country Wide Home Loans, Inc. v Dunia

2014 NY Slip Op 32665(U)

September 22, 2014

Supreme Court, Bronx County

Docket Number: 381771/09

Judge: Mitchell J. Danziger

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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COUNTRY WIDE HOME LOANS, INC.,

DECISION AND ORDER

Plaintiff(s),

Index No: 381771/09

- against -

GONZALO J. DUNIA, NEW YORK CITY TRANSIT
ADJUDICATION BUREAU, "JOHN DOE 1" TO
"JOHN DOE 25," SAID NAMES BEING
FICTITIOUS, THE PERSON, PARTIES,
CORPORATIONS OR ENTITIES IF ANY, HAVING
OR CLAIMING AN INTEREST OR LIEN UPON
MORTGAGED PREMISES DESCRIBED IN THE
COMPLAINT,

Defendant(s).

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In this action for the foreclosure on a mortgage and sale of the real property which secures it, plaintiff moves, *inter alia*, pursuant to CPLR § 2221 granting renewal of this Court's order dated April 2, 2014, which granted defendant GONZALO J. DUNIA's (Dunia) motion seeking dismissal of this action, on default and without opposition. Plaintiff argues that its failure to oppose Dunia's prior motion was attributable to Dunia's failure to serve its new counsel with a copy of the prior motion and that upon renewal, this Court having now been apprised of the reason for plaintiff's default should vacate its prior order and deny Dunia's prior motion. Dunia opposes the instant motion on grounds, *inter alia*, that plaintiff fails to establish entitlement to renewal and

that even upon renewal, the law would nevertheless warrant that this Court dismiss plaintiff's action for its failure to move for a default judgment against Dunia within a year of his failure to interpose an answer.

For the reasons that follow hereinafter, plaintiff's motion is denied.

The instant action is for foreclosure upon a mortgage and the sale of the real property that secures it. Plaintiff's complaint alleges that on June 30, 2007, Darek J. Harris (Harris) Harris executed a note where he bound himself to pay \$566,524 to Hogar Mortgage and Financial Services (Hogar). The note was secured by a mortgage covering real property located at 787 Dawson Street, Bronx, NY (787), which mortgage Harris executed and delivered to Hogar's designee. The note and mortgage were assigned by Hogar to plaintiff and this action was commenced when Harris defaulted by failing to make timely payments thereunder. The complaint alleges that Dunia is listed as a defendant solely to extinguish his fee interest in 787, which interest was created by a deed from Harris to Dunia dated June 3, 2007.

Here, while plaintiff moves to renew this Court's decision dated April 2, 2014, which granted Dunia's motion to dismiss on default and without opposition, it is clear that renewal is unavailable to plaintiff since this Court's prior decision was not

decided on the merits. Instead, vacatur of an order granted on default is governed by CPLR § 5015(a)(1).

Vacatur of an order or judgement pursuant to CPLR §5015(a)(1), on grounds that it was obtained upon default, requires that the moving party demonstrate a reasonable excuse for the default and the legal merit of the claim or defense asserted (*M-Dean Realty Corp., v General Security Insurance Company*, 6 AD3d 169, 171 [1st Dept 2004]; *Goldman v Cotter*, 10 AD3d 289, 291 [1st Dept 2004]). On a motion to vacate a default, movant is only required to "demonstrate the existence of a possibly meritorious defense [or cause of action and it is] . . . not necessary for [the movant] to establish its defense [or cause of action] as a matter of law but merely to set forth facts sufficient to make out a prima facie showing" (*Kwong v Budge-Wood Laundry Serv.*, 97 AD2d 691, 692 [1st Dept 1983]; *Quis v Bolden*, 298 AD2d 375, 375 [2d Dept 2002]).

Whether the excuse proffered and the merits asserted are legally sufficient, rests within the sound discretion of the court (*Goldman* at 291). When a party fails to establish a reasonable excuse for the default, the court need not determine whether the party has established the merits of the claim or defense (*Lutz v Goldstone*, 31 AD3d 449, 450 [2d Dept 2006]). Similarly, the failure to demonstrate the merits of the claim or defense, is by itself, enough to warrant denial of a motion to vacate a default

(*Matter of William O.*, 16 AD3d 511, 511 [2d Dept 2005]).

Here, because plaintiff fails to move to vacate this Court's prior order under the correct section of the CPLR, it has, therefore, failed to establish entitlement to vacatur of this Court's prior order. Specifically, plaintiff fails to establish the merits of his cause of action which is fatal (*Matter of William O.* at 511). Specifically, plaintiff fails to tender an affidavit of merit, and while it submits a copy of its verified complaint, the same is verified by an attorney and, thus, cannot serve to establish the merits of its claim (*State Farm Mutual Automobile Insurance Company v Rodriguez*, 12 AD3d 662, 663 [2d Dept 2004]; *Martin v Zangrillo*, 186 AD2d 724, 724 [2d Dept 1992]). Accordingly, plaintiff's motion is denied.

Assuming arguendo, that the Court treated this motion as one for renewal, the new evidentiary submission upon which the motion is based - namely that plaintiff was never served with Dunia's prior motion - is insufficient to warrant renewal of this Court's prior order.

Generally,

[a]n application for leave to renew must be based upon additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore, not made known to the Court.

Renewal should be denied where a party fails to offer a valid excuse for not submitting the additional facts upon the original application

(*Foley v Roche*, 68 AD2d 558, 568 [1st Dept 1979]; *Healthworld Corporation v Gottlieb*, 12 AD3d 279 [1st Dept 2004]; *Walmart Stores, Inc. v United States Fidelity and Guaranty Company*, 11 AD3d 301 [1st Dept 2004]).

Here, Dunia previously moved to dismiss this action pursuant to CPLR § 3215(c), arguing that more than a year since he failed to appear had elapsed and plaintiff had failed to take a default. Pursuant to CPLR § 3215(c), a party who fails to take a default within a year after said default could have been taken, has abandoned his case and the remedy is dismissal. Thus, in order to avoid dismissal under this section, the plaintiff must offer a reasonable excuse for the failure to timely move for a default and must also demonstrate the merits of the action (*Truong v All Pro Air Delivery, Inc.*, 278 AD2d 45, 45 [1st Dept 2000]; *LaValle v Astoria Construction & Paving Corp.*, 266 AD2d 28, 28 [1st Dept 1999]; *State Farm Mutual Automobile Insurance Company v Rodriguez*, 12 AD3d 662, 663 [2d Dept 2004]). Accordingly, just as a the establishment of a meritorious cause of action is essential for the vacatur of an order issued upon default it is also essential to avoid dismissal of an action pursuant to CPLR § 3215(c). To the extent that, as noted above, plaintiff fails to sufficiently

establish the merits of its cause of action, were the Court to consider this motion as one for renewal, plaintiff's failure to demonstrate the merits of his cause of action would warrant denial of any such motion.

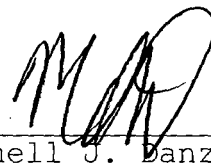
Based on the forgoing, plaintiff's motion is denied in its entirety insofar as absent vacatur of the prior order, all other aspects of its motion are moot. It is hereby

ORDERED that Dunia serve a copy of this Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : September 22, 2014

Bronx, New York



Mitchell J. Danziger, ASCJ