

Onewest Bank FSB v Hossain
2014 NY Slip Op 32666(U)
September 17, 2014
Supreme Court, Bronx County
Docket Number: 381966/09
Judge: Mark Friedlander
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**NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25**

ONEWEST BANK FSB,

Plaintiff,

MEMORANDUM DECISION/ORDER

Index No.: 381966/09

-against-

KABIR HOSSAIN, MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., AS NOMINEE
FOR INDYMAC BANK, F.S.B., NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD,
"JOHN DOE #1 -5" and "JANE DOE #1-5," said
names being fictitious, it being the intention of
plaintiffs 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, and any parties, corporations
or entities, if any, having or claiming an interest or
lien upon the mortgaged premises,

Defendants.

HON. MARK FRIEDLANDER

Defendant, Kabir Hossain ("Hossain"), moves for an order: (1) pursuant to CPLR §§ 5222, 5015(a) and 3404, vacating the Judgment of foreclosure, entered on default against Hossain, and restoring the action to the calendar, on the grounds that : (a) Hossain was not served with the summons and complaint in this action; and that (b) Hossain has a reasonable excuse and meritorious defense to the action; and for an order (2) pursuant to CPLR §§ 2004 and 3012(d), granting Hossain leave to file and serve a late verified answer. The motion is decided as hereinafter indicated.

This is an action by plaintiff to foreclose a mortgage made by Hossain in the amount of \$416,000.00 on the real property known as 102 Bolton Avenue, Bronx, New York.

Hossain states, in his affidavit in support of the motion, the following:

“5. The Affidavit of Service herein alleges that I was personally served on September 12, 2013, at 10:00 A.M. I hereby swear that I was not served with the Summons and Complaint at that time. I was not home. I hereby swear that at the time of the purported service, I was working at my job as a store clerk at the convenience store Jerome Grocery, which is located at 3437 Jerome Avenue, Bronx, New York 10467. At that time shift was 6:00 A.M. to 6:00 P.M., and therefore, I was simply was not at the Premises where the service allegedly occurred.

“6. Furthermore, I hereby swear that I did not receive the Summons and Complaint, neither by mail nor from another person and that, *in fact, the Judgment of Foreclosure on default, with Notice of Entry, is the first document I ever received with respect to this action.* Upon receipt thereof, I promptly retained my attorney.” (*Italics added*).

The affidavit of service states that Hossain was personally served with the summons and complaint on September 12, 2009, not 2013. Hossain does not dispute or challenge the physical description of him given by the process server or proffer any proof to support his claim that he was at work at the time of the purported service of process. Hossain has not submitted sufficient proof to warrant a traverse hearing on the issue of personal jurisdiction.

The branch of Hossain’s motion seeking dismissal on the grounds of lack of personal jurisdiction is denied.

Hossain’s claim that he had no knowledge of this lawsuit until he was served with the Judgment of Foreclosure, with Notice of Entry, and that his default is excusable, is not credible as a matter of law.

Plaintiff’s attorney states that the Court had scheduled a foreclosure settlement conference for October 15, 2010, and Hossain appeared, via counsel, Salvatore Liga, who advised the Court that his client would be submitting an application for a loan modification and plaintiff’s attorney provided

Hossain's counsel with a HAMP application. The settlement conference was adjourned to January 18, 2011. In the interim, plaintiff's attorney withdrew plaintiff's motion for an Order of Reference. When neither Hossain nor his attorney appeared at the foreclosure settlement conference on January 18, 2011, the matter was marked off the settlement conference calendar. On or about August 24, 2011, plaintiff again moved for an Order of Reference. Hossain cross-moved, via counsel, to dismiss the complaint, or in the alternative, to compel plaintiff to accept a late answer to the complaint.

Justice Kibbie P. Payne issued a Decision/Order, dated February 3, 2012, which states, *inter alia*, that "Defendant Kabir Hossein's cross-motion for leave to file a late answer and to dismiss the complaint is denied with leave to renew upon proper papers. Defendant submitted an unnotarized affidavit, which will not be considered (see *BBY Diamonds Corp. v. Five Star Designs, Inc.* 6 AD3d 263)."

No explanation is given by Hossein for his failure to renew the motion for over 18 months. Further, no reply papers were submitted by Hossain on the instant motion to dispute the recitation of the chronology by plaintiff's attorney.

Lastly, since Hossain has not demonstrated an excusable default, the Court need not address the Hossain's claim of a meritorious defense. However, in the interests of completeness, the Court notes that plaintiff's attorney presents evidence that the mortgage and note, endorsed in blank, were transferred and assigned by actual physical delivery, which negates any claim of robo-signing. The Court notes that Hossain's belief that Erica Johnson-Seck is a robo-signer is insufficient to challenge the plaintiff's standing to foreclose. See, *Krakauer v. Indymac Mortgage Services*, 2013 WL 704773 (USDC, D. Hawaii). In *Krakauer*, the Court stated:

“... Plaintiffs’ evidence related to JohnsonSeck, Bly and Jones’ positions at different companies are not materially related to the issue of whether or not these agents had authority to sign the OneWest Assignments. The fact that these agents held different positions in different companies does not mean that the FDIC failed to authorize them to sign on the FDIC’s behalf. *See Beesley*, 2012 WL 5383555 at 6 (noting in the foreclosure context that the fact that a person holds positions in multiple companies does not automatically invalidate an assignment). The signature pages that Plaintiffs attach to their motion do not show that the signatures were obtained by fraud or forgery. *See Krakauer* NSJ Ex. 2 and 3. While plaintiffs may personally believe that the signatures are illegitimate, presenting random signature pages and a personal affidavit alleging fraud and forgery is insufficient to that such fraud or forgery actually occurred.”

Accordingly, Hossain’s motion seeking to vacate the Judgment of Foreclosure and for other ancillary relief is denied in its entirety.

The foregoing constitutes the Decision and Order of the Court.

Dated: 9/17/14



MARK FRIEDLANDER, J.S.C.