

JP Morgan Chase Bank, NA v Henry

2014 NY Slip Op 32980(U)

November 14, 2014

Supreme Court, Suffolk County

Docket Number: 18485/2008

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 10/22/14
SUBMIT DATE : 10/24/14
Mot. Seq. # 004 - MD
Mot. Seq. # 005 - MD
CDISP: YES

-----X
JP MORGAN CHASE BANK, NA, as Trustees :
C-Bass Mortgage Loan Asset Certificates, Series :
2005-RP2 Loop Drive, :
 :
Plaintiff, :
 :
-against- :
 :
PATRICK B. HENRY, CAROLYN HENRY, :
GOLD KEY LEASE, INC., LOUISA SALADINO :
NEW YORK STATE DEPARTMENT OF :
TAXATION AND FINANCE, UNITED STATES :
OF AMERICA ACTING THROUGH THE IRS, :
 :
Defendants. :
-----X

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PATRICK B. HENRY, Defendant
Self Represented
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Upon the following papers numbered 1 to 6 read on the motion by defendant Patrick (#004) to vacate the judgment of foreclosure and sale and to dismiss the complaint and its duplicate entry as motion sequenced #005; Notice of Motion/Order to Show Cause (#004) and affidavit of moving defendant Patrick Henry dated October 6, 2014 and admissions of service 1 - 2; Second Copy of Order to Show cause (#005) supporting papers 3; Answering Affidavits and supporting papers 4 - 5; Reply Affidavit by Ben Dicostanzo dated October 24, 2014 6; Other ; ~~and~~ **after hearing counsel in support and opposed to the motion** it is,

ORDERED that this motion (#004) by the defendant, Patrick B. Henry a/k/a Patrick Henry, for an order staying the foreclosure that was scheduled and dismissing the complaint and in the alternative, vacating the judgment of foreclosure and all prior proceedings and granting him leave to appear by answer is considered under CPLR 5015(4), 317, 3012 (d) and 5015(a)(1) and 5015 (a)(3) and is denied, and it is further .

ORDERED that motion (#005) by defendant, Patrick B. Henry a/k/a/ Patrick Henry, for the same relief which was incorrectly entered as a new and separate motion, is denied as moot.

From the records maintained by the Clerk of this Court and those maintained electronically by the Chief Clerk, it appears that this action was commenced on May 15, 2008 to foreclose the lien of the mortgage given to secure a mortgage note dated July 27, 2007 by defendant, Patrick B. Henry [hereinafter "moving defendant"], following his default under the terms of payment set forth in said note and mortgage. The moving defendant was served with the summons and complaint on May 20, 2008 pursuant to CPLR 308(1) by in hand delivery at the mortgaged premises and he defaulted in appearing in response thereto by answer, as did all of the other defendants served with process.

In January of 2009, the plaintiff moved for an order of reference pursuant to RPAPL § 1321. On June 15, 2009, the application was granted and an order of reference issued, in which the defaults in answering of all defendants served with process were fixed and determined. In February of 2010, the plaintiff moved for an order confirming the report of the referee to compute and for a judgment of foreclosure and sale. That application was granted by order and judgment issued on March 18, 2010. Following two changes in the representation of the plaintiff, a foreclosure sale was scheduled for October 8, 2014. Just two days prior thereto, moving defendant, Patrick Henry, made his first appearance in this action by the submission of an order to show cause seeking the relief outlined above.

On October 6, 2014, the Honorable Joseph A. Santorelli, J.S.C., signed the moving defendant's proposed order except those portions providing for a stay of the foreclosure sale scheduled for October 8, 2014. When returned to the courthouse, the Order to Show cause was entered as motion sequence 004 bearing a return date of October 22, 2014 and it and the papers attached were calendared to appear on the motion calendar of this court for October 24, 2014. Some time thereafter, and for reasons not apparent from the record, a copy of the Order to Show cause was submitted to the office of special term and entered as motion sequence 005. Attached to that submission was an October 23, 2014 affidavit of an agent of the moving defendant who claims to have recently been in contact with mortgage servicer, Ocwen, with respect to the transmission of loan modification documentation. That affidavit has been considered by the court to be one in reply to the plaintiff's opposing papers on motion sequence 004.

The relief sought in the moving papers is vast and varied. First and foremost, defendant Henry sought a provisional stay of the foreclosure that was scheduled on the day after he obtained the signed Order to Show Cause of October 6, 2014 by which this motion was interposed. While Justice Santorelli denied the moving defendant's request for a temporary stay, it appears from the opposing papers of the plaintiff that the sale was cancelled. To the extent that defendant Henry seeks a permanent stay of the foreclosure sale, such application is denied, as are the remaining portions of his motion, for the reasons stated below.

Defendant Henry seeks to vacate the judgment of foreclosure and a dismissal of this action on the grounds that the court lacks in personam jurisdiction over him and the other members of his family. That application is considered under CPLR 5015(4) and 3211(a)(8) and is denied. The moving defendant claims that he was not properly and timely served with the summons and complaint (*see* ¶ 3 of moving defendant's affidavit in support of motion dated October 6, 2014). In addition, the moving defendant denies receipt of process in paragraph 11 of his supporting affidavit as follows: "Not having received

any legal papers and only still receiving a few calls from plaintiff's representatives threatening foreclosure I had no knowledge that a foreclosure action had been started until the end of August of 2014 from a person who was looking at the house and showed me a copy of the notice of sale". However, these bald, conclusory and nuanced claims of improper service and/or no service are insufficient to rebut the process server's attestation to his personal service of the summons and complaint upon the moving defendant on May 20, 2008 by in hand delivery. Such attestation is set forth in the process server's affidavit of service which is attached to the opposing papers of the plaintiff (*see HSBC Bank USA, Natl. Ass'n v Miller*, ___ AD3d ___, 2014 WL 5461646 [2d Dept 2014]; *Wells Fargo Bank, N.A. v Gioia*, 114 AD3d 766, 980 NYS2d 535 [2d Dept 2014]; *Citimortgage, Inc. v Bustamante*, 107 AD3d 752, 968 NYS2d 513 [2d Dept 2013]; *US Natl. Bank Ass'n as Trustee v Melton*, 90 AD3d 742, 934 NYS2d 352 [2d Dept. 2011]). The moving defendant's demands for a vacatur of the judgment of foreclosure and sale and dismissal of this action on the ground that the court lacks in personam jurisdiction over him are thus rejected as unmeritorious and are denied on that basis.

The moving defendants' claims for such relief, to the extent based on a purported lack of service of the summons and complaint upon his co-defendant wife, and his children, are also without merit. The defense of lack of personal jurisdiction due to a lack of, or improper service, is personal to the party or parties allegedly not served and, as such, leaves the moving defendant without authority or standing to raise such defense on behalf of those parties (*see Wells Fargo Bank, N.A. v Bowie*, 89 AD3d 931, 932 NYS2d 702 [2d Dept 2011]; *NYCTL 1996-1 Trust v King*, 13 AD3d 429, 787 NYS2d 61 [2d Dept 2004]; *Home Sav. of Am., F.A. v Gkanios*, 233 AD2d 422, 650 NYS2d 756 [2d Dept 1996]).

To the extent that the moving defendant claims an entitlement to a vacatur of the judgment and dismissal of the complaint due to a failure to serve upon him and the other members of his family the notice of sale, the judgment of foreclosure and sale and the other papers issued herein, such claims are similarly rejected as lacking in merit. Persons in default in answering who did not appear by notice and demand for service of such papers are not entitled such service, and even if they were, a lack of service of such papers is not jurisdictional in nature and would alone not warrant a vacatur of any sale, judgment or other proceedings (*see Alaska Seaboard Partners Ltd. Partnership v Grant*, 20 AD3d 436, 799 NYS2d 117 [2d Dept 2005]; *Olympia Mtge. Corp. v Ramirez*, 9AD3d 401, 780 NYS2d 611 [2d Dept 2004]; *Bank of New York v Agenor*, 305 AD2d 438, 758 NYS2d 817 [2d Dept 2003]).

To the extent that the moving defendant claims an entitlement to a vacatur of the judgment of foreclosure and sale and a dismissal of the plaintiff's complaint upon this court's invocation of its inherent powers to avoid an injustice, such a claim is unavailing. To justify a court in setting aside and vacating a judgment on the ground of fraud, the fraud complained of must have been "extrinsic", that is, practiced in the very act of obtaining the judgment in such a way that a party was prevented from fully and fairly litigating the matter (*see Lockett v Juviler*, 65 NY2d 182, 490 NYS2d 764 [1985]; *Matter of Holden*, 271 NY 212, 2 N.E.2d 631[1936]; *Matter of Holden*, 271 NY 212, 2 N.E.2d 631 [1936];, *Augustin v Augustin*, 79 AD3d 651, 913 NYS2d 207 [1st Dept 2010]; *Shaw v Shaw*, 97 AD2d 403, 467 NYS2d 231 [1983]), as instances of intrinsic fraud or perjury have been held not to justify invocation of

the court's inherent powers to vacate its own judgment (*see Lockett v Juviler*, 65 NY2d 182, *supra*; *Jacobowitz v Herson*, 268 NY 130, *supra*; *see also Citimortgage, Inc. v Guarino*, 42 Misc.3d 962, 978 N.Y.S.2d 646 [Sup Ct. Suffolk Cty. 2014]). It is the movant's burden "to show that the prior order should be set aside by submission of sufficient evidence supporting the grant of such relief" (*Mortgage Elec. Registration Sys., Inc. v Dort-Relus*, 107 AD3d 861, 968 NYS2d 117 [2d Dept. 2013]). The moving papers here are devoid of any evidence tending to demonstrate that the circumstances of this action warrant invocation of the court's inherent power to vacate the judgment and prior proceedings on grounds of extrinsic fraud in the interests of substantial justice (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68, 760 NYS2d 727 [2002]; *Chase Home Fin., LLC v Minott*, 115 AD3d 634, 981 NYS2d 757 [2d Dept 2014]; *Citimortgage, Inc. v Brown*, 111 AD3d 593, 974 NYS2d 272 [2d Dept 2013]; *HSBC Mtge. Serv. v Talip*, 111 AD3d 889, 975 NYS2d 887 [2d Dept 2013]; *U.S. Bank N.A. v Slavinski*, 78 AD3d 1167, 1168, 912 NYS2d 285 [2d Dept 2010]).

Likewise unavailing are claims for vacatur and dismissal of the complaint pursuant to CPLR 5015(a)(3), which permits the court to relieve a party from an order or judgment on the ground of "fraud, misrepresentation, or other misconduct of an adverse party." To be entitled to such relief, the movant may show that the plaintiff engaged in acts of extrinsic fraud, misrepresentation, or other misconduct which induced the defendant into not appearing and/or defending against the claims interposed in the action and that the defendant did not unreasonably delay in seeking relief under CPLR 5015(a)(3) (*see HSBC Bank USA, Natl. Ass'n v Miller*, ___ AD3d ___, 2014 WL 5461646, *supra*; *Empire State Conglomerates v Mahbur*, 105 AD3d 898, 963 NYS2d 330 [2d Dept 2013]; *HSBC Bank USA, Natl. Ass'n v Pacyna*, 112 AD3d 1246, 978 NYS2d 392 [3d Dept 2013]; *U.S. Bank Natl. Ass'n v Allen*, 102 AD3d 955, 958 NYS2d 737 [2d Dept 2013]; *Citicorp Vendor Fin., Inc. v Island Garden Basketball, Inc.*, 27 AD3d 608, 810 NYS2d 673 [2d Dept 2006]; *Ames Capital Corp. v Davidsohn*, 24 AD3d 474, 808 NYS2d 229 [2d Dept 2005]). Alternatively, a moving defendant may succeed upon a showing that the plaintiff engaged in acts of intrinsic fraud in obtaining the judgment, by putting forth false testimony or other false proofs, *provided*, that such a showing is accompanied by a demonstration of a meritorious defense to the claim (*see New Century Mtge. Corp. v Corriette*, 117 AD3d 1011, 986 NYS2d 560 [2d Dept 2014]; *Bank of New York v Stradford*, 55 AD3d 765, 869 NYS2d 554 [2d Dept 2008]; *Bank of New York v Lagakos*, 27 AD3d 678, 810 NYS2d 923 [2d Dept 2006]; *Fischman v Gilmore*, 246 AD2d 508, 666 NYS2d 942 [2d Dept 1998]). Allegations of improper practices by the plaintiff or its agents in the preparation of papers submitted in unrelated matters are insufficient to establish acts of fraud (*see Citimortgage, Inc. v Bustamante*, 107 AD3d 752 *supra*; *Wells Fargo, N. A. v Levin*, 101 AD3d 1519, 958 NYS2d 227 [3d Dept 2012]; *Onewest Bank, FSB v Martinez*, 101 AD3d 969, 970, 955 NYS2d 532 [2d Dept 2013]; *Deutsche Bank Nat. Trust Co. v Hunter*, 100 AD3d 810, 954 NYS2d 181 [2d Dept 2012]). Here, there is no proof of any entitlement to relief pursuant to CPLR 5015(a)(3), as only unsubstantiated claims of wrongdoing on the part of the plaintiff or its agents are advanced.

With respect to the moving defendants' asserted standing defenses, it is now clear that the issue of a plaintiff's standing is not jurisdictional in nature nor is it an element of the plaintiff's claim for foreclosure and sale (*see Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 242-244, 837 NYS2d 247 [2d Dept 2007]; *see also Plaza Equities, LLC v Lamberti*, 118 AD3d 688, 986 NYS2d 843

[2d Dept 2014]; *Wells Fargo Bank, N.A. v Gioia*, 114 AD3d 766 *supra*; *Citimortgage, Inc. v Friedman*, 109 AD3d 573, 970 NYS2d 706 [2d Dept 2013]; *HSBC Bank USA, N.A. v Taher*, 104 AD3d 815, 962 NYS2d 301 [2d Dept 2013]). Instead, a standing challenge is merely an affirmative defense that must be asserted in a timely pre-answer motion to dismiss or an answer (*see Southstar III, LLC v Entienne*, 120 AD3d 1332, 992 NYS2d 548, 549 [2d Dept 2014]; *JP Morgan Mtge. Acquisition Corp. v Hayles*, 113 AD3d 821, 979 NYS2d 620 [2d Dept 2014]; *U.S. Bank Natl. Ass'n v Denaro*, 98 AD3d 964, 950 NYS2d 581 [2d Dept 2012]; *Capital One, N.A. v Knollwood Prop. II, LLC*, 98 AD3d 707, 950 NYS2d 482 [2d Dept 2012]; *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624, 883 NYS2d 135 [2d Dept 2009]). Here, the moving defendant's failure to do so renders all asserted claims of a lack of standing on the part of the plaintiff unavailing due to waiver.

The moving defendant also asserts that the plaintiff's complaint fails to state a cause of action and is thus subject to dismissal. However, these claims are premised upon a purported lack of standing on the part of the plaintiff for various reasons. This claim is rejected on both procedural and substantive grounds. While this application, which sounds in one for dismissal pursuant to CPLR 3211(a)(7), is arguably not subject to waiver since the provisions of CPLR 3211(e) state that it "may be raised at any time" (*see Hense v Baxter*, 79 AD3d 814, 914 NYS2d 200 [2d Dept 200]), this court finds that claims of legal insufficiency pursuant to 3211(a)(7) may not be employed in cases that have gone to judgment absent the granting of a prior or concomitant application to vacate said judgment pursuant to CPLR 5015 or under the inherent powers doctrine (*see Nationscredit Financial Services Corp. v Atherley*, 91 AD3d 922, 937 NYS2d 603 [2d Dept 2012]).

In any event, the defendant's claims of legal insufficiency lack merit since they constitute nothing more than a recasting of his standing defense which, as indicated above, is an affirmative defense that was waived by his failure to raise it in an pre-answer motion to dismiss or answer timely served (*see* CPLR 3211[e]). Once waived, a standing defense may not be resurrected by its assertion in support of an untimely motion to dismiss pursuant to CPLR 3211 (*see EMC Mortg. Corp. v Gass*, 114 AD3d 1074, 981 NYS2d 814 [3d Dept 2014]; *U.S. Bank Natl. Ass'n. v Denaro*, 98 AD3d 964, *supra*; *U.S. Bank N.A. v Gonzalez*, 99 AD3d 694, 694–695, 952 NYS2d 59 [2d Dept 2012]; *Holubar v Holubar*, 89 AD3d 802, 934 NYS2d 710 [2d Dept, 2011]; *McGee v Dunn*, 75 AD3d 624, 906 NYS2d 74 [2d Dept 2010]; *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624, *supra*; *Wenz v Smith*, 100 AD2d 585, 473 NYS2d 527, 2d Dept 1984), or in support of an application to vacate a default under CPLR 5015(a)(1) (*see JP Morgan Mtge. Acquisition Corp. v Hayles*, 113 AD3d 821 979 NYS2d 620 [2d Dept 2014], *supra*; *Citibank, N.A. v Swiatkowski*, 98 AD3d 555, 949 NYS2d 635 [2d Dept 2012]; *CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]; *HSBC Bank, USA v. Dammond*, 59 AD3d 679, 875 NYS2d 490 [2d Dept 2009]). Even if the defendant's legal insufficiency claim was advanced directly and without and reference to a lack of standing on the part of the plaintiff, it is unavailing since it is clear that this court has authority to hear and determine claims for foreclosure and sale (*see Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, *supra*; *Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279, 820 NYS.2d 2 [1st Dept 2006]; *La Salle Bank Nat. Ass'n v. Kosarovich*, 31 AD3d 904, 820 NYS2d 144 [3d Dept 2006]). The moving defendant's resort to CPLR 3211(a)(7) in an effort to

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relieve him of his default and to gain a dismissal of the complaint on legal insufficiency grounds is thus rejected as procedurally improper and substantively lacking in merit.

Left for consideration are claims for vacatur of the judgment and either dismissal or an order granting the defendant leave to appear by a late answer which rest, not upon jurisdictional or other grounds of similar import such as fraud, but upon excusable default grounds. These claims are governed by CPLR 5015(a)(1) and/or 3012(d) and require a showing of a reasonable excuse for the default in answering and the possession of a meritorious defense to the claims interposed against the party in default (see *Mannino Dev., Inc. v Linares*, 117 AD3d 995, 986 NYS2d 578 [2d Dept 2014]; *Deutsche Bank Natl. Trust Co. v White*, 110 AD3d 759, 972 NYS2d 664 [2d Dept 2013]; *Wells Fargo Bank v Malave*, 107 AD3d 880, 968 NYS2d 127 [2d Dept 2013]; *Midfirst Bank v Al-Rahman*, 81 AD3d 797, 917 NYS2d 871 [2d Dept 2011]; *Community Preserv. Corp. v Bridgewater Condominiums, LLC*, 89 AD3d 784, 785, 932 NYS2d 378 [2d Dept 2011]). Where a claim of defective service is not established and the defendant relies entirely upon such claim as the justification for the default, an excusable default under CPLR 5015(a)(1) is not established (see *Servpro Indus., Inc. v Anghel*, ___ AD3d ___, 2014 WL 4851540 [2d Dept 2014]; *Wells Fargo Bank, N.A. v Gioia, supra*; *Deutsche Bank Natl. Trust Co. v White*, 110 AD3d at 760, 972 NYS2d 664 [2d Dept 2012]; *Deutsche Bank Natl. Trust Co. v Pietranico*, 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]; *Reich v Redley*, 96 AD3d 1038, 947 NYS2d 564 [2d Dept 2012]). Here, the sole proffer of a reasonable excuse was the moving defendant's unsuccessful improper service claim. The moving defendant's demands for relief pursuant to CPLR 5015 (a)(1) and 3012(d) are thus denied without the necessity of an inquiry into the existence of any meritorious defense to the plaintiff's claim.

In view of the foregoing, both motions (#004 and #005) by the moving defendant to vacate the judgment of foreclosure, to stay the sale of the premises directed therein and other relief are denied.

DATED: November 14, 2014



THOMAS F. WHELAN, J.S.C.