

**Vanderbilt Mtge. & Fin., Inc. v Archer**

2015 NY Slip Op 31315(U)

May 27, 2015

Supreme Court, Queens County

Docket Number: 9171/12

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE  
Justice

IA Part 6

VANDERBILT MORTGAGE AND FINANCE, INC.,

Plaintiff,

-against-

GAIL PALMORE ARCHER, et al.,  
Defendants.

Index  
Number 9171/12

Motion  
Dates February 9, 2015  
February 27, 2015

Motion Seq. Nos. 5 & 7

Motion Cal. Nos. 124 & 137

The following papers numbered 1 to 19 read on this (1) motion by Gail Palmore-Archer to reargue the prior motion for summary judgment granted to plaintiff by the court in an order dated February 13, 2013; and (2) motion by Palmore-Archer to vacate the judgment of foreclosure and sale and to vacate the judicial sale of the property to the plaintiff on the grounds of newly discovered evidence and on the grounds of fraud, misrepresentation, lack of standing and lack of personal jurisdiction pursuant to CPLR 5015 (a)(3)(c)(1).

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1 - 10
Answering Affidavits - Exhibits.....	11- 16
Reply Affidavits .....	17 - 19

Upon the foregoing papers it is ordered that the motions are denied.

This is an action to foreclose on a mortgage lien, which was commenced on May 2, 2012, by the filing of a summons and duly-verified complaint under index number

9171/2012. A Notice of Pendency of action was duly filed in the Office of the Clerk of Queens County. Since the filing of the said Notice of Pendency, the summons, verified complaint and Notice of Pendency have not been amended or supplemented by making new parties to the action, or so as to affect other property not described in said notice or so as to extend the claim of the plaintiff beyond the mortgaged premises. The Notice of Pendency, summons and verified complaint were duly served upon all defendants as indicated in the original affidavits of service filed with this court. Issue was joined by service of defendant Palmore-Archer's Verified Answer on or about June 15, 2012. The remaining defendants have not appeared.

On August 2, 2012, the court conducted a settlement conference pursuant to CPLR 3408, and Uniform Rule 202.12-A, at which time defendant Palmore-Archer appeared and a settlement conference was held. The court marked off the settlement conference from the calendar because the parties were unable to settle the matter.

A preliminary conference was held on September 9, 2012, setting forth a discovery schedule and the compliance conference was scheduled for January 3, 2013. On or about October 26, 2012, plaintiff moved for summary judgment. Palmore-Archer filed opposition to the motion and plaintiff replied to the opposition. Plaintiff's motion for summary/default judgment was marked "Fully Submitted" on November 16, 2012.

Although discovery was stayed due to the pending motion for summary judgment, a Compliance Conference was held on January 3, 2013. The Compliance Order set the deadline for a Bill of Particulars to February 8, 2013, and the Note of Issue to be filed by June 7, 2013. Palmore-Archer served a demand for a bill of particulars and plaintiff responded to the bill of particulars on January 14, 2013, in accordance with the Compliance Conference Order.

By decision and order dated February 13, 2013, the court granted plaintiff's motion for summary/default judgment, and the Order was entered on February 21, 2013. Plaintiff served a Notice of Entry upon defendants on February 25, 2013, and filed the same with this court on February 26, 2013. In its decision and order, the court directed plaintiff to settle the proposed order. Plaintiff served and filed the Notice of Settlement of the Order of Reference and Amendments. The court signed the proposed order of reference and amendments on May 8, 2013, and the same was duly entered with the court on May 16, 2013. Pursuant to the Order, Joseph N. Misk, Esq., was appointed as referee to ascertain and compute the amounts due to plaintiff under the note and mortgage. Plaintiff served the defendants with Notice of entry of the Order of Reference and Amendments on May 21, 2013.

On June 3, 2013, plaintiff served and filed the Note of Issue in accordance with the Compliance Conference Order. On June 10, 2013, Palmore-Archer served plaintiff's counsel with an (untimely) Notice of Appeal. On or about June 27, 2013, Palmore-Archer also filed a motion to reargue plaintiff's motion for summary/default judgment. Plaintiff opposed Palmore-Archer's motion. The (first) motion to reargue was denied by the court on November 13, 2013. In the interim, on August 20, 2013, Palmore-Archer appeared before the Appellate Division by Order to Show Cause seeking to have the proceedings stayed. Plaintiff also opposed the Application for a Stay. The Appellate Division denied the request for a stay pursuant to a Short Form Order dated September 6, 2013.

After Referee Misk computed the amounts due to plaintiff under the note and mortgage, plaintiff moved this court by Motion to confirm the referee's report and for a Judgment of Foreclosure and Sale. The motion was opposed by Palmore-Archer, and plaintiff replied to the opposition. Plaintiff's motion for a Judgment of Foreclosure and Sale was marked "Fully Submitted" by the Centralized Motion Part on September 10, 2013. By Short Form Order dated November 13, 2013, the court granted plaintiff's motion for a Judgment of Foreclosure and Sale. As directed in the Order, plaintiff submitted the proposed Judgment of Foreclosure and Sale to Motion Support.

Subsequently, Palmore-Archer filed a second motion to reargue/renew plaintiff's motion for summary judgment. Following opposition, the motion was denied (Lebowitz, J.). On or about June 18, 2014, Justice Lebowitz signed the Judgment of Foreclosure and Sale, and Confirmed the Referee's report. The Judgment of Foreclosure and Sale was served with Notice of Entry upon all parties. The Judgment of Foreclosure and Sale directed plaintiff to advertise the foreclosure auction via public notice in the Jamaica Times, to be held at the Queens County Supreme Court, Courtroom 25, at 10:00 a.m., on a Friday under the direction of Referee Misk, Esq. Plaintiff published the Notice of Sale with the Jamaica Times, as directed and a copy of the Notice of Sale was duly served on Palmore-Archer, the equity holder.

On or about September 22, 2014, Palmore-Archer filed and served a third motion to renew/re-argue plaintiff's motion for summary judgment. On the eve of the foreclosure sale, to wit, on October 9, 2014, Palmore-Archer sought a stay of the foreclosure sale ex parte. This Court declined to sign the Order to Show Cause, and on Friday, October 10, 2014, the Referee auctioned the property to the highest bidder. The Referee executed a Memorandum of Sale. Palmore-Archer failed to redeem the property prior to the foreclosure sale, and the equity of redemption was extinguished by the said foreclosure sale.

After the foreclosure sale was held and defendant's right of redemption was extinguished, Palmore-Archer filed and served the instant (fourth) motion, this time pursuant to CPLR 5015(a)(3)(c)(1), with a return date of November 25, 2014. The motion is opposed.

### ***Discussion***

The motion to re-argue is denied as untimely, and otherwise on the merits.

The instant motion for re-argument of the February 25, 2013 Memorandum Decision (dated February 13, 2013), is made more than one year and 10 months after defendant Palmore-Archer was served with Notice of Entry of the Order, and is therefore untimely pursuant to CPLR 2221(d)(3). Even where a motion for re-argument is technically untimely under CPLR 2221(d)(3), a court has discretion to reconsider its prior ruling ( *HSBC Bank USA, N.A. v. Halls*, 98 AD3d 718,721 [2nd Dept 2012] ). However, the Court declines to do so here where defendant has made two (2) prior motions to re-argue which were previously entertained, and defendant asserts for the first time that she was improperly served. The affidavits of service filed with this court indicate that plaintiff timely served and filed the Notice of Entry of the Memorandum Decision and the Order of Reference. A process server's affidavit of service constitutes prima facie evidence of proper service (see *U.S. Bank N.A. v. Hasan*, 126 AD3d 683, 684 [2d Dept 2015]; *Deutsche Bank Natl. Trust Co. v. Quinones*, 114 AD3d 719 [2d Dept 2014]). Here, plaintiff submitted affidavits of service establishing, prima facie, that defendant was properly served pursuant to CPLR 308(2) (see *F.I. duPont, Glore Forga & Co. v. Chen*, 41 NY2d 794, 797 [1977]; *Summitbridge Credit Investments, LLC v. Wallace*, --- N.Y.S.3d ---, 2015 WL 2075845 (N.Y.A.D. 2d Dept), 2015 N.Y. Slip Op. 03825; *Bank of Am., N.A. v. Grufferman*, 117 AD3d 508 [1<sup>st</sup> Dept. 2014]; cf. *McCormack v Goldstein*, 204 AD2d 121, 122).

Furthermore the motion at bar which is, in effect, a third motion for re-argument is denied on the merits. A motion for re-argument is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law (see *Pahl Equip. Corp. v. Kassis*, 182 AD2d 22 [1<sup>st</sup> Dept 1992]; *Foley v Roche*, 68 AD2d 558 [1<sup>st</sup> Dept 1979]). Here, defendant failed to demonstrate that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law in dismissing the complaint. Defendant also submits, in this third attempt, arguments which were previously addressed and rejected by the court and new arguments which were not properly presented previously. A motion to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or

to present arguments different from those originally presented (*see McGill v Goldman*, 261 AD2d 593, 594 [1999]; *Matter of Mayer v National Arts Club*, 192 AD2d 863, 865 [1993]; *Pahl Equip. Corp. v Kassis*, *supra*; *Foley v Roche*, *supra* ).

Defendant's remaining contentions with regards to the motion to re-argue are without merit.

Defendant's motion to vacate the judgment of foreclosure and sale and to vacate the judicial sale of the property to the plaintiff on the grounds of newly discovered evidence and on the ground of fraud, misrepresentation, lack of standing and lack of personal jurisdiction, is denied. Defendant has not presented any evidence or arguments that have not been previously presented and previously ruled upon by this court in its prior decisions and orders. Defendant has failed to present any new evidence which would tend to show that the judgment of foreclosure and sale was obtained by fraud or misrepresentation. Further, the foreclosure sale extinguished as a matter of law any further right on behalf of the defendant to redeem the property (*see American Holdings Inv. Corp. v Josey*, 71 AD3d 927 [2d Dept 2010]; *Chase Manhattan Mtge. Corp. v. Harper*, 54 AD3d 987 [2d Dept 2008]; *NYCTL 1996-1 Trust v. Moore*, 51 AD3d 885 [2d Dept 2008]).

Accordingly, it is hereby, ORDERED, that defendant's motion to re-argue and motion to vacate the judgment of foreclosure and sale are denied.

This constitutes the decision and order of the court.

Dated: May 27, 2015

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**Howard G. Lane, J.S.C.**