

Nationstar Mtge., LLC v Campos
2015 NY Slip Op 31316(U)
June 3, 2015
Supreme Court, Queens County
Docket Number: 9677/13
Judge: Allan B. Weiss
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M E M O R A N D U M

SUPREME COURT QUEENS COUNTY
CIVIL TERM PART 2

NATIONSTAR MORTGAGE, LLC,

Plaintiff,

-against-

RAFAEL CAMPOS, "JANE" CAMPOS,
AN OCCUPANT WHOSE FIRST NAME REMAINS
UNKNOWN TO PLAINTIFF,

Defendants.

HON. ALLAN B. WEISS

Index No: 9677/13

Motion Date: 3/25/15

Motion Seq. No.: 2

In this action to foreclose a mortgage, plaintiff moves for an Order confirming the referee's report and for a default judgment of foreclosure and sale.

The defendant, Fanny Campos, s/h/a "Jane Doe" and denominated in the caption as "Jane" Campos, opposes and cross-moves to vacate her default, vacate the Order of Reference and allow her to interpose a late answer.

A defendant seeking to vacate her default pursuant to CPLR 5015(a)(1) must demonstrate both a reasonable excuse for the default in appearing and answering the complaint and a meritorious defense to the action (see; Eugene Di Lorenzo, Inc. v. A.C. Dutton Lbr. Co., 67 NY2d 138, 141 [1986]; Gray v. B.R. Trucking Co., 59 NY2d 649 [1983]). In addition, pursuant to CPLR 3012(d), a defendant who has failed to timely appear in an action

may move to compel the plaintiff's acceptance of an untimely answer "upon such terms as may be just and upon a showing of reasonable excuse for [the] delay or default" (CPLR 3012[d]; see New York & Presbyt. Hosp. v. Auto One Ins. Co., 28 AD3d 441 [2006]). The showing of reasonable excuse which must be establish under CPLR 3012(d) is the same as that which a defendant must make to be entitled to the vacature of a default under CPLR 5015(a)(1) (see Stephan B. Gleich & Associates v. Gritsipis, 87 AD3d 216 [2011]).

When a defendant seeking to vacate a default judgment pursuant to CPLR 5015(a)(1) raises a jurisdictional objection "the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacature of the default under CPLR 5015(a)(1) (see HSBC Bank USA, Nat. Ass'n v. Miller, 121 AD3d 1044, 1045 [2014] quoting Canelas v. Flores, 112 AD3d 871, 871 [2013]).

In support of her cross-motion, defendant offers as a reasonable excuse for her default, in effect a claim of lack of personal jurisdiction, that she was never served as a named defendant or as the owner of the property.

CPLR § 1024 authorizes actions against unknown parties, and the use of fictitious names such as "John or Jane Does", where the name or identity of a person who is intended to be made a party is unknown, provided that the intended defendant is served and described in such a way as to fairly apprise the party that

he or she is an intended defendant (see City of Mt. Vernon v. Best Development Co., 268 NY 327, 331 [1935]; Salerno v. Holden, 258 AD 50 [1939] affirmed 284 NY 759 [1940]). In this case the defendant was personally served by in hand delivery (CPLR 308[1]) of the summons and complaint and required notices. At the time that defendant was served, she was not the tiled owner of the property, but merely an occupant and the co-defendant mortgagor's wife. The defendant identified herself to the process server as the mortgagor's wife, but refused to give her full first name at the time she was served. The description in the caption was sufficient to apprise the defendant that she was an intended defendant. Once she was served in accordance with CPLR 308(1), which she does not deny, the court obtained personal jurisdiction and defendant is not entitled to vacature pursuant to CPLR 5015(a)(4).

Defendant has also failed to establish her entitlement to a discretionary vacature pursuant to CPLR 5015(a)(1). Defendant's excuse that she did not know that she had to answer or that her appearance at the foreclosure settlement conference was an appearance in the action do not constitute a reasonable excuse. The summons, which was served upon her, contained the specific language mandated by RPAPL 1320 warning her that she should "[s]peak to an attorney or go to the court," and that she "must respond by serving a copy of the answer" or risk the loss of her home, and on August 12, 2013 she was already in default (see HSBC

Bank USA, N.A. v. Lafazan, 115 AD3d 647, [2014] ; Chase Home Finance, LLC v. Minott, 115 AD3d 634 [2014]).

Defendant has also failed to demonstrate even an arguably meritorious defense. With respect to defendant's claim of lack of standing, this defense was waived since she failed to assert it in an answer or pre-answer motion (see Wells Fargo Bank, N.A. v. Erobo, 127 AD3d 1176 [2015]). Once a standing defense is waived, it may not be asserted by a party in default in support of an application to vacate such default under CPLR 5015(a)(1) (see U.S. Bank, N.A. v. Bernabel, 125 AD3d 541, [2015]; JPMorgan Mtge. Acquisition Corp. v. Hayles, 113 AD3d 821 [2014]).

Defendant's reliance upon Gain-St. Germain Depository Institutions Act is misplaced since the acceleration of the mortgage in this case was not pursuant to the "due on sales" clause of the mortgage, but rather on the default in payment of the obligations due under the note and mortgage. Although the Fannie Mae Servicing Guidelines require the plaintiff to offer an opportunity to modify the mortgage under certain circumstances, there is no claim by defendant that she has made an application for modification or that she qualifies under the terms of the Guidelines. Notwithstanding, even the pendency of an application for a modification is not a defense to foreclosure. Finally, the defendant has failed to submit any evidence tending to demonstrate that there is a likelihood that she would qualify for a modification so as to warrant delaying the foreclosure and

referring this case back to the foreclosure settlement part (see Bank of New York v. Agenor, 305 AD2d 438 [2003]).

Accordingly, the defendant's cross-motion is denied. The plaintiff's motion for an Order confirming the referee's report and for a judgment of foreclosure and sale is granted.

Settle Judgment.

Dated: June 3, 2015
D# 52

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J.S.C.