

JPMorgan Chase Bank, N.A. v Folkes

2015 NY Slip Op 31342(U)

February 6, 2015

Supreme Court, Queens County

Docket Number: 701086/2014

Judge: Robert J. McDonald

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

JPMorgan Chase Bank, National
Association,

Plaintiff,

- against -

Lloyd Folkes; Vivine Folkes; City of
New York Environmental Control Board;
City of New York Parking Violations
Bureau; City of New York Transit
Adjudication Bureau; and "JOHN DOE,"
said name being fictitious, it being
the intention of plaintiff to
designate any and all occupants of
premises being foreclosed herein, and
any parties, corporations or entities,
if any, having or claiming an interest
or lien upon the mortgaged premises,

Defendants.

- - - - - x

The following papers numbered 1 to 12 read on this motion by the
plaintiff for a default judgment in favor of the plaintiff and
against all of the non-appearing and non-answering defendants
including Lloyd Folkes and Vivine Folkes; for an order pursuant
to RPAPL § 1321 appointing a referee to ascertain and compute the
amount due to the plaintiff; for an order expunging an erroneous
satisfaction of Mortgage dated June 4, 2009; and for an order
modifying the caption to substitute certain named individuals for
the John Doe defendants; and the cross-motion of defendants Lloyd
Folkes and Vivine Folkes for an order vacating their default and
granting defendants leave to file a late answer:

Papers
Numbered

Notice of Motion-Affirmation-Affidavits-Exhibits	1 - 5
Notice of Cross-Motion-Affidavits-Exhibits.....	6 - 10
Affirmation in Opposition to Cross-Motion and Reply- Affidavits-Exhibits.....	11 - 12

In this mortgage foreclosure action, plaintiff, JP Morgan Chase Bank, moves for an order granting a default judgment against the defendants; appointing a referee to compute the sums due and owing to plaintiff; for an order expunging an erroneous Satisfaction of Mortgage dated June 4, 2009 and amending the caption with regard to the property owned by defendants, Lloyd Folkes and Vivine Folkes, located at 259-15 147th Drive, Rosedale, New York, 11432.

Based upon the record before this court, the defendants borrowed the principal sum of \$285,000 from IndyMac Bank, F.S.B. on September 26, 2006. The note and mortgage were transferred to plaintiff by assignment of mortgage dated April 21, 2009. The defendants executed a Consolidation, Extension and Loan Modification Agreement (CEMA) on December 5, 2012 creating a current principal balance of \$391,772.73. Plaintiff claims the defendants defaulted on the CEMA when they failed to make their monthly mortgage payments beginning on September 1, 2013. The plaintiff subsequently sent a 90 day notice of default to the defendants pursuant to RPAPL § 1304 and then subsequently accelerated the defendant's mortgage and brought this action to foreclose by filing a lis pendens and a summons and complaint on February 18, 2014.

Defendants, were served with copies of the summons and complaint and RPAPL § 1303 notices and on March 1, 2014, pursuant to CPLR 308, by leaving a copy of the summons and complaint on Lloyd Folkes personally and by mailing a copy of the summons and complaint to the defendants (see affidavit of service dated March 5, 2011 executed by process server Joseph Leggio). On May 29, 2014, defendants appeared pro se and served a verified answer with affirmative defenses and counterclaims. By letter dated June 12, 2014, plaintiff's counsel notified the defendants that their answer was being rejected as untimely as the answer was due to be served by April 22, 2014.

On May 14, 2014 the matter was referred to the Residential Foreclosure Settlement Part. The defendants failed to appear although duly notified of the date, and by order dated May 14,

2014, Justice Marguerite Grays directed the plaintiff to file a motion seeking an Order of Reference.

In support of the instant motion, the plaintiff submits the affirmation of regularity of counsel, Bridget M. Dehmler, Esq., the affidavit of merit of Phonesay Say; a copy of the Note and Mortgage and CEMA Agreement; copies of the affidavits of service on all the defendants; a copy of the pleadings; a copy of the mortgage assignment; 90 day notice of intent to foreclose; copy of the RPAPL 1304 notices served on the defendants with the summons and complaint; and a Certificate of Merit dated February 18, 2014, executed by Elizabeth A. Clarke, Esq.

In his affidavit in support of the motion, Phonesay Say, Vice President of JP Morgan Chase Bank, National Association states that he personally reviewed the records of Chase Bank in connection with the loan in this action. He states that a note dated May 4, 2009 in the original amount of \$368,869 was signed by the defendants and was secured by a mortgage on the property located at 259-15 147th Drive Rosedale, New York, 11422. The loan was modified by a Consolidation Extension Modification Agreement by combining certain previous Notes and Mortgages. The loan was further modified by a Loan Modification Agreement with the first modified payment due on December 1, 2012. He states that based upon his review of the records the defendants failed to make the payment due on September 1, 2013 and have failed to make subsequent payments to bring the loan current. As a result, the plaintiff elected to accelerate the entire loan balance. Mr. Say states that as of June 16, 2014, plaintiff's principal balance was \$386,595.68 and with interest escrow deficiency hazard insurance and other costs the total due to the plaintiff at this time is \$416,761.29. He states that the plaintiff is in possession of the original Note and was in possession of same at the time of the filing of the complaint. His review of the records also shows that a notice of default dated November 26, 2013 was sent to the defendants and a 90 day pre foreclosure notice as sent to the defendants by certified and first class mail on October 2, 2013.

The plaintiff, based upon the evidence submitted, that it has made a prima facie showing that it is entitled to a default judgment and an order of reference. Plaintiff contends that although the defendant's served an answer to the summons and complaint it was untimely and rejected by the plaintiff. Further, counsel asserts that the plaintiff was lawfully served with a summons and complaint and that the court therefore has personal jurisdiction. Counsel also presents evidence that the defendant was properly served with notices pursuant to RPAPL §§ 1303, 1304

and 1306. Plaintiff has presented evidence that it was in possession of the note and mortgage at the time of commencement and is still the holder of the subject note and mortgage. Therefor, plaintiff asserts that the complaint states a proper cause of action for foreclosure as it names the parties, the obligation, the default, and states that the plaintiff is the lawful holder of the note and mortgage.

In opposition, defendants cross-move by counsel, Clover M. Barrett, Esq. for an order pursuant to CPLR 5015 vacating the defendants' default and compelling plaintiff to accept a late answer. Counsel asserts that the defendants have established a reasonable excuse for their delay. The defendants submit an affidavit dated December 2, 2014, in which they state that they obtained a mortgage from Indy Mac Bank in June 2006. They also state that they fell behind on the mortgage and obtained a mortgage modification with lower monthly payments from Chase. They again fell behind in the mortgage. They state that they were in the process of pursuing another modification under HAMP in March 2014 when they received the summons and complaint in this action. They stated that they served a pro se answer to the plaintiff's complaint on May 29, 2014. They state they did not intend to default and that because they are not attorneys they were unaware that the answer was not timely. They state that they have now retained counsel and seek to defend the action on the merits. They state that the plaintiff has failed to show it is the true owner or assignee of the note or that the assignors had the authority to assign the note. They state that because of the short delay in serving the answer the plaintiff will not be prejudiced if they were permitted to serve late answer.

With respect to a meritorious defense, defendants' counsel asserts that the plaintiff has not demonstrated, prima facie, its standing to sue. Counsel claims that the plaintiff has not demonstrated that it is in fact the true owner or that the purported assignor of the mortgage had the authority and right to assign the mortgage to plaintiff. Counsel claims that there has been no showing that there was language in the Indy Mac Mortgage that MERS had the specific right and authority to assign the mortgage.

Upon review and consideration of the plaintiff's motion, defendants' cross-motion and affirmation in opposition, and the plaintiff's reply thereto, this court finds that the plaintiff's motion for a default judgment and an Order of Reference is denied and the cross-motion of the defendants for leave to serve a late answer pursuant to CPLR 3012(d) is granted.

Pursuant to CPLR 3012(d): "Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default."

The Courts have held that as a general rule, a defendant seeking to vacate a default judgment entered upon his or her failure to answer or appear, must demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the action (see CPLR 5015[a][1]; 3012 [d]; U.S. Bank Nat. Assn. v Slavinski, 78 AD3d 1167 [2d Dept. 2010]; Maspeth Federal Savings and Loan Association v McGown, 77 AD3d 890 [2d Dept. 2010]; Ryan v Breezy Point Coop., Inc., 76 AD3d 523[2d Dept. 2010]; Taddeo-Amendola v 970 Assets, LLC, 72 AD3d 677 [2d Dept. 2010]; Perfect Care, Inc. v Ultracare Supplies, Inc., 71 AD3d 752 [2d Dept. 2010]; Zarzuela v Castanos, 71 AD3d 880 [2d Dept. 2010]; Bank of N.Y. v Sequi, 42 AD3d 555 [2d Dept. 2007]).

Here, this court finds that the defendant has offered a reasonable excuse for serving the pro se answer five weeks late and have shown that there was no intentional or knowing default. Further, there is a strong public policy favoring the resolution of cases on the merits. The defendants acted diligently and never intended to willfully abandon its defense. In addition, the plaintiff will not be prejudiced as a result of the defendant's short delay in serving an answer (see Vellucci v Home Depot U.S.A., Inc., 102 AD3d 767 [2d Dept. 2013]; Arias v First Presbyt. Church in Jamaica, 97 AD3d 712 [2d Dept. 2013]; Zeccola & Selinger, LLC v Horowitz, 88 AD3d 992 [2d Dept. 2011]; Covaci v Whitestone Constr. Corp., 78 AD3d 1108 [2d Dept. 2010]; Chakmakian v Maroney, 78 AD3d 1103 [2d Dept. 2010]; Performance Constr. Corp. v Huntington Bldg., LLC, 68 AD3d 737 [2d Dept. 2009]).

This Court also finds that the defendants have a potentially meritorious defense. As stated by the defendants the plaintiff must show that MERS, acting a nominee for the original lender, had authority to assign the note (see Citibank, N.A. v Herman, 2015 NY Slip Op 00838 [2d Dept. 2015]; Midland Mtge. Co. v Imtiaz, 110 AD3d 773 [2d Dept. 2013]; Homecomings Fin. v Guldi, 108 AD3d 506 [2d Dept. 2013]).

Accordingly, the defendants' cross-motion for an order pursuant to CPLR 3012(d) to compel the acceptance of a late answer is granted, and the proposed answer with counterclaims annexed to the cross-motion papers shall be deemed served upon service of a copy of this order bearing the date stamp of the

County Clerk, with notice of entry. Plaintiff shall serve a reply within 30 days of the service of a copy of this order with notice of entry.

Dated: February 6, 2015
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.