

Dao v Bayview Loan Servicing LLC
2015 NY Slip Op 31467(U)
July 29, 2015
Supreme Court, New York County
Docket Number: 650827/15
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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JOSEPH DAO,

Plaintiff,

Index No. 650827/15

-against-

DECISION/ORDER

BAYVIEW LOAN SERVICING LLC,

Defendant.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff Joseph Dao commenced the instant action against defendant Bayview Loan Servicing LLC (“Bayview”) seeking to set aside and vacate the sale of his shares of stock issued for his cooperative apartment (the “subject property”). Plaintiff simultaneously brought the instant motion by Order to Show Cause with a temporary restraining order seeking to declare invalid or otherwise null and void the auctioneer’s Certificate of Sale and Fact of the subject property; staying any eviction proceedings and restraining Bayview from commencing any such proceedings as against plaintiff for possession of the subject property; declaring null and void any documents that purport to assign defendant’s rights and interests in the subject property

following the auction; prohibiting the transfer of the subject property from defendant or any other entity or agent related or affiliated with them; permitting plaintiff to close on the sale of the subject property to a Dr. Ivan Gonzalez pursuant to their contract of sale; directing respondent to engage in settlement discussions; and granting petitioner costs and attorneys' fees. For the reasons set forth below, plaintiff's motion is granted in part and denied in part.

The relevant facts according to the complaint are as follows. On or about February 26, 2008, plaintiff purchased 279 shares in the cooperative corporation 523-533 Tenants Corp. and became the proprietary lessee of Apartment 4B at 533 East 84th Street, New York, NY (the "Unit"). In connection with that transaction, plaintiff obtained a loan in the principal amount of \$246,600.00 from JP Morgan Chase Bank, N.A. ("Chase") (the "Note"). As security to Chase for payment of the Note, plaintiff executed a security agreement conveying to Chase the collateral of his shares in the cooperative (the "Mortgage"). In or around February 2014, plaintiff allegedly defaulted on the Note and Mortgage by failing to make the required payments.

Based on plaintiff's alleged default, on or about July 11, 2014, a 90-day pre-foreclosure notice was allegedly sent to plaintiff and his wife, Christine Dao, via first class and certified mail (the "90-day Notice"). On or about August 19, 2014, Chase sent plaintiff and his wife an Acceleration Warning (Notice of Intent to Foreclose) explaining that plaintiff was past due on his mortgage payments and how he could cure the default. In or around November 2014, the Note and Mortgage were assigned from Chase to defendant Bayview. On the same day, a final demand notice was sent to plaintiff informing plaintiff that based upon his default, defendant was electing to accelerate the entire remaining balance due on the Note and that plaintiff had thirty days to pay said amount or defendant's counsel would commence non-judicial foreclosure

proceedings with respect to the subject property.

On or about February 11, 2015, the notice of public auction was published in the Observer Media (the "Notice of Sale"). The sale of the subject property was conducted on February 18, 2015 by public auction and the subject property was sold to a third-party purchaser. Thereafter, plaintiff commenced the instant action seeking a declaratory judgment that the sale of the subject property is null and void, ordering that the third-party purchaser of the subject property deliver the stock and proprietary lease to the court and ordering that the certificate of sale be canceled and simultaneously brought the instant motion by Order to Show Cause with a temporary restraining order.

As an initial matter, to the extent plaintiff's motion seeks summary judgment on his complaint, the motion must be denied as premature and procedurally improper. Pursuant to CPLR § 3212(a), "[a]ny party may move for summary judgment in any action, after issue has been joined...." As defendant has not yet answered plaintiff's complaint, plaintiff's motion, to the extent it seeks summary judgment, must be denied.

That portion of plaintiff's motion which seeks a preliminary injunction staying any eviction proceedings and restraining Bayview from commencing any such proceedings as against plaintiff for possession of the subject property and prohibiting the transfer of the subject property from defendant or any other entity or agent related or affiliated with them, assuming the transfer of the subject property has not already occurred, is granted. Pursuant to CPLR § 6301,

[a] preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the

defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.

To be entitled to a preliminary injunction, the movant must show a likelihood of success on the merits, irreparable injury absent the injunction and that the equities balance in the movant's favor. *See Aetna Insurance Co. v. Capasso*, 75 N.Y.2d 860 (1990). The decision to grant a preliminary injunction is committed to the sound discretion of the court. *See Doe v. Axelrod*, 73 N.Y.2d 748 (1988).

In the instant action, plaintiff's motion for a preliminary injunction staying any eviction proceedings and restraining Bayview from commencing any such proceedings as against plaintiff for possession of the subject property and prohibiting the transfer of the subject property from defendant or any other entity or agent related or affiliated with them, assuming the transfer of the subject property has not already occurred, must be granted on the ground that plaintiff has established a likelihood of success on the merits of his claim that the contents of the Notice of Sale was insufficient; that he will be irreparably injured absent a preliminary injunction and that the equities balance in his favor as there is a risk that he may be evicted from the Unit. Pursuant to UCC § 9-613,

(a) The contents of a notification of disposition are sufficient if the notification:

...

(4) states that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting....

Further, pursuant to UCC § 9-613(b), "[w]hether the contents of a notification that lacks any of the information specified in subsection (a) are nevertheless sufficient is a question of fact." The

Notice of Sale published by defendant states as follows:

NOTICE OF SALE OF COOPERATIVE APARTMENT SECURITY BY VIRTUE OF A DEFAULT under the terms of a Security Agreement dated February 26, 2008, executed by Joseph & Christine Dao, debtor(s), to JPMorgan Chase Bank, N.Y., secured party, in accordance with its rights as holder of the Security, Bayview Loan Servicing, LLC, by Jessica Prince-Clateman, DCA #1097640 and/or Vincent DeAngelis, DCA # 1127571 and/or Karen Loicano, DCA #1435601 and/or Liza Wilson, DCA #1435604 will conduct a public foreclosure sale of the security consisting of 279 shares of stock of 523-533 Tenants Corp., all right, title and interest in and to a Proprietary Lease between said Corporation and debtor for apartment 4B, in building known as 533 East 84th Street, New York, NY 10028 together with all fixtures and articles of personal property now or hereafter affixed to or used in connection with said apartment on February 18, 2015, at 2:15PM in room 130 of the New York County Courthouse, 60 Centre St., New York, NY 10007 in satisfaction of an indebtedness in the principal amount of \$224,687.26 plus interest, late fees, attorney fees, maintenance in arrears and all other advanced charges. Apartment is sold "AS IS" and possession to be obtained by the purchaser. Said sale is subject to: payment of all sums due, if any, to 523-533 Tenants Corp. and the consent if necessary, of said corporation; any existing tenancy; payment of all expenses and fees of the secured party with respect thereto; terms of the sale and auctioneer's fees. The secured party reserves the right to bid. A 10% down payment in certified funds or bank check payable to Shapiro, DiCaro & Barak, LLC is required at sale with a balance of bid due within thirty (30) days. SHAPIRO, DICARO & BARAK, LLC (escrowee) 585-247-9000. Ashley Legal Advertising Corp. 516-767-51555. – File No. 14-035050 - #85450.

As it is undisputed that the Notice of Sale does not state that the debtor is entitled to an accounting of the unpaid indebtedness and that it does not state the charge, if any, for such accounting, the Notice of Sale failed to include information specified in UCC § 9-613(a), and thus, there exists an issue of fact as to whether the contents of the Notice of Sale was sufficient. Further, plaintiff has established irreparable harm and that the equities balance in his favor as

there is a serious risk that plaintiff may be evicted from the Unit if an injunction is not granted.

Defendant's assertion that plaintiff's motion should be denied on the basis of laches is without merit as it is undisputed that plaintiff only found out about the public auction on February 17, 2015, the day before the auction took place, that he attempted to adjourn the auction due to the fact that he was in contract with a third-party for the purchase of the subject property, and that he commenced the action and brought the instant motion by Order to Show Cause within thirty days thereafter. Thus, any delay in commencing this action or seeking the instant relief was not unreasonable.

However, the remainder of plaintiff's motion must be denied as much of the temporary relief plaintiff seeks would result in the granting of the ultimate relief sought by plaintiff. The plaintiff should not be granted the ultimate relief sought in a preliminary injunction as the purpose of a preliminary injunction is to preserve the status quo pending a hearing on the merits rather than determining the ultimate right of the parties. *See Matter of 35 NY City Police Officers v. City of New York*, 34 A.D.3d 392, 393-394 (1st Dept 2006). In the present case, the remaining relief plaintiff seeks in his motion, an Order declaring invalid or otherwise null and void certificate of sale of the subject property; declaring null and void any documents that purport to assign defendant's rights and interests in the subject property following the auction; and permitting plaintiff to close on the sale of the subject property to a Dr. Ivan Gonzalez pursuant to their contract of sale, would result in and be the product of the vacatur of the sale of the subject property and a cancellation of the certificate of sale, which is the ultimate relief being sought by plaintiff in this action.

Finally, that portion of plaintiff's motion which seeks an Order directing defendant to

