

**Wells Fargo Bank, N.A. v Galizio**

2015 NY Slip Op 31593(U)

April 27, 2015

Supreme Court, Suffolk County

Docket Number: 5584/2011

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 DATES: 4/3/15 (restored)  
SUBMIT DATE: 4/315  
Mot. Seq. # 001 - MG  
Mot. Seq. # 002 - XMD  
CDISP: NO

-----X

WELLS FARGO BANK, N.A., :  
Plaintiff, :  
 :  
-against- :  
 :  
MICHAEL GALIZIO, KAG REAL ESTATE, :  
PEOPLE OF THE STATE OF NEW YORK, :  
"JOHN DOE #1" through "JOHN DOE", said :  
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

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Upon the following papers numbered I to 17 read on this motion by the plaintiff for an order of reference and cross motion to serve a late answer; Notice of motion and supporting papers 1-9; Notice of Cross Motion & Supporting papers 10-13; Opposing papers; 14-15; Reply papers 16-17; Other \_\_\_\_\_; it is

**ORDERED** that this motion (#001) by the plaintiff for an order fixing the defaults in answering of all defendants served with process and the appointment of a referee to compute amounts due under the note and the mortgage that are the subject of this foreclosure action is considered under CPLR 3215, RPAPL § 1321 and is granted; and it is further

**ORDERED** that the cross motion (#002) by the obligor/mortgagor defendant, Michael Galizio, and his non-party transferee for an extension of time to serve a late answer and “dismissing” the plaintiff’s motion is considered under CPLR 3012(d) and is denied.

The plaintiff commenced this action in February of 2011 to foreclose the lien of a February 4, 2008 mortgage given by the defendant Galizio to secure a mortgage note of the same date in favor of the plaintiff who advanced monies in the principal amount of \$247,500.00 to assist in the defendant’s purchase of a non-conforming two family house in Shirley, New York. The defendant is alleged to have defaulted in making the monthly payments due on August 1, 2010.

The record reflects that at the time of the commencement of this action, defendant Galizio was no longer the owner of the subject premises as he had conveyed the subject property to his co-defendant company, Kag Real Estate Services, Inc., [hereinafter Kag Real Estate] by deed dated May 19, 2008 that was recorded in the office of the County Clerk on June 4, 2008. The plaintiff thus joined Kag Real Estate, as a party defendant and it described it as the “Record Owner” of the mortgaged premises in its complaint. The mortgaged premises were thereafter conveyed by defendant Kag Real Estate to a non-party, East Point Realty Management Corp., by a deed from defendant Kag Real Estate dated March 20, 2013 that was recorded on April 3, 2013. Executing the deed on behalf of Kag Real Estate Services, Inc., was the defendant obligor/mortgagor, Michael Galizzo.

At the time of this second conveyance, the mortgaged property “was an illegal two family rental” that was the subject of various violations of town building and zoning codes (*see* ¶ 5 of defense counsel’s affirmation in support of cross motion). Defendant Galizio allegedly escaped liability for such violations when East Point Realty Management, Corp., agreed to substitute in for him and/or Kag Real Estate in a pending District Court action and to cure all violations and bring the property into compliance (*id.*, ¶ 6; *see also* affidavit of defendant Galizio in support of cross motion). Underlying the District Court proceeding were citations and summonses issued to defendant Galizio during a six month period beginning in May of 2011 charging him with “no rental registration, illegal accessory apartment and litter” (*see* ¶¶ 4-5 of the affidavit of defendant Galizio in support of cross motion).

Following service of the summons and complaint upon defendant Galizio on February 17, 2011, he defaulted in appearing in this action by answer as did the other defendants served with process. However, defendant Galizio forthwith filed a petition under Chapter 13 of Title 11 of the Bankruptcy Act thereby causing a halt of the prosecution of this action due to the automatic stay that arose upon the filing of such petition. It appears from the record that defendant Galizio was not discharged by the Bankruptcy Court from personal liability under the note he gave to the plaintiff, although the final adjudication of such proceeding is not before the court.

In April of 2011, the plaintiff moved for an order lifting the automatic stay due to defendant Galizio’s failure to make post petition payments due under the subject note and mortgage. The motion was granted in or about June of 2011. During the bankruptcy proceeding, defendant Galizio allegedly

offered to give the mortgaged premises to the plaintiff although he was not the title holder at that time. The plaintiff, however, declined the offer.

In 2012, the property suffered flooding during Hurricane Sandy. Following the conveyance to East Point Realty Management, Corp. in March of 2013, the plaintiff conducted a HAMP review of the file but was stymied in attempts to modify the loan due to its inability to determine the correct party to contact (*see* affidavit of Vikita Bernard, plaintiff's vice president dated August 13, 2013 attached to the moving and cross moving papers). In February of 2014, the action was assigned to the specialized mortgage foreclosure part of this court and a conference was first scheduled for the date of May 5, 2014. Defendant Galizio appeared by counsel other than his current counsel. The matter was adjourned to July 18, 2014 in an attempt to garner a settlement between the plaintiff, the current owner and defendant Galizio (*see* affidavit of defendant Galizio in support of cross motion). The matter was once more adjourned to September 18, 2014, at which time, it was marked "ineligible" upon a determination that the mortgaged premises were rented and not occupied by the borrower.

Within sixty days after the release of the action from the specialized conference part, the plaintiff moved (#001) for an order of reference on default and for incidental relief regarding the identification and deletion of certain unknown party defendants pursuant to CPLR 1024 and 1003 and an amendment of the caption to reflect same by notice of motion and supporting papers returnable January 8, 2015. The motion was adjourned to February 13, 2015 for reasons not apparent in the record and was granted without opposition on February 22, 2015 in an order of reference issued on that date. Shortly thereafter, counsel for the plaintiff and counsel for defendant Galizio stipulated to vacate the February 22, 2015 order of reference and to restore the plaintiff's motion to a future date, as counsel had previously stipulated to adjourn the plaintiff's motion but failed to advise the court on or before the February 13, 2015 submission date thereof. An order vacating the order of reference and restoring the plaintiff's motion to the April 3, 2015 motion calendar of this court issued from this court on March 10, 2015.

The plaintiff's motion (#001) was thus restored to the motion calendar of this court on April 3, 2015. Defendant Galizio opposed it by the interposition of cross moving papers (#002) in which he seeks an extension of time to answer and a "dismissal" of the plaintiff's motion. The plaintiff opposes the defendant's cross motion in papers that further serve as a reply to the plaintiff's motion-in-chief. For the reasons stated, the plaintiff's motion-in-chief is granted while the cross motion by defendant Galizio is denied.

First considered is the defendant's cross motion (#002) for leave to serve a late answer as the court's determination thereof may render the plaintiff's motion-in-chief, academic. "A defendant who has failed to appear or answer the complaint must generally provide a reasonable excuse for the default and demonstrate a potentially meritorious defense to the action to avoid the entering of a default judgment or to extend the time to answer" (*Mellon v Izmirligil*, 88 AD3d 930, 931 NYS2d 667 [2d Dept 2011], *quoting*, *Wells Fargo Bank, N.A. v Cervini*, 84 AD3d 789, 921 NYS2d 643 [2d Dept 2011]; *see Mannino Dev., Inc. v Linares*, 117 AD3d 995, 986 NYS2d 578 [2d Dept 2014]; *HSBC*

*Bank USA, N.A. v Lafazan*, 115 AD3d 647, 983 NYS2d 32 [2d Dept 2014]; *JP Morgan Chase Bank v Palma*, 114 AD3d 645, 979 NYS2d 832 [2d Dept 2014]; *Diederich v Wetzel*, 112 AD3d 883, 979 NYS2d 605 [2d Dept 2013]; *Community Preserv. Corp. v Bridgewater Condominiums, LLC*, 89 AD3d 784, 785, 932 NYS2d 378 [2d Dept 2011]; *Maspeth Fed. Sav. & Loan Assn. v McGown*, 77 AD3d 889, 890, 909 NYS2d 403 [2d Dept 2010]; *HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]; *Equicredit Corp. of Am. v Campbell*, 73 AD3d 1119, 1120, 900 NYS2d 907 [2d Dept 2010]). A party in default may thus not appear in the action and contest the plaintiff's right to relief unless the defaulter can establish an entitlement to vacatur of the default on mandatory grounds, which are usually jurisdictional in nature, or discretionary grounds of the type contemplated by CPLR 3102(d), 317 or CPLR 5015(a)(1) (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]; *Schwartz v Reisman*, 112 AD3d 909, 976 NYS2d 883 [2d Dept 2013]; *U.S. Bank N.A. v Gonzalez*, 99 AD3d 694, 694–695, 952 NYS2d 59 [2d Dept 2012]; *McGee v Dunn*, 75 AD3d 624, 625, 906 NYS2d 74 [2d Dept 2010]).

Here, the only excuse advanced in the cross moving papers of defendant Galizio and the non-party owner of the premises, East Point Realty Management Corp., is that the plaintiff breached an alleged agreement during the pendency of the bankruptcy proceeding to proceed with the action in exchange for Galizio's consent to lift the automatic stay. Defendant Galizio further contends that he has a meritorious defense to the action "in that defendant Galizio offered the property back to the plaintiff in bankruptcy and attempted to do so again in the foreclosure part" (see ¶ 2 of the affirmation of defense counsel in support of cross motion and the affidavit of defendant Galizio ¶¶ 6-7).

However, the court concludes that neither the proffered excuse or the proffered defense meets the reasonable and meritorious thresholds imposed upon them, respectively. The defendant's nuanced claim that the plaintiff failed to negotiate a settlement in good faith is rejected as lacking in merit. The plaintiff was under no obligation to take the property back or even negotiate with the defendant, since the premises were not owner or borrower occupied, but instead, illegally rented to others thereby nullifying the requirement for CPLR 3408 conferences. Even if it were otherwise, the failure to negotiate in good faith is not a defense to a foreclosure action as it does not nullify the mortgage or the debt nor abrogate the remedy of foreclosure and sale which the defendant willingly conferred upon the plaintiff in exchange for the advancement of the mortgage funds. Rather, bad faith conduct in the settlement process mandated by CPLR 3408 by either side, merely gives rise to the possible imposition of a sanction against the party engaging in such conduct (see *Citibank, N.A. v Barclay*, 124 AD3d 174, 999 NYS2d 375 [1st Dept 2014]; *U.S. Bank N.A. v Smith*, 123 AD3d 914, 999 NYS2d 468 [2d Dept 2014]; *US Bank N.A. v Williams*, 121 AD3d 1098, 995 NYS2d 172 [2d Dept 2014]; *U.S. Bank N.A. v Sarmiento*, 121 AD3d 187, 991 NYS2d 68 [2d Dept 2014]).

The defendant's belatedly asserted and unsubstantiated claim of a breach in an agreement to move forward with the action that was allegedly struck during the bankruptcy proceeding is unsubstantiated and not supported by due proof. What is apparent from the record is that the delay

in the prosecution of this action is attributable to conduct of persons and circumstances not within control of the plaintiff and that the plaintiff prosecuted its claim notwithstanding such conduct and circumstances. The plaintiff moved to lift the bankruptcy stay shortly after the defendant's filing of petition under Chapter 13 in 2011, which filing occurred shortly after the action was commenced. The plaintiff undertook a Hamp review in 2013 after the property had been flooded by Hurricane Sandy and all FEMA stays had been removed, which review was hampered by an inability to reach a contact person. The plaintiff and defendant Galizio, without objection, then participated in the CPLR 3408 settlement conferences conducted by quasi-judicial personnel assigned to the specialized mortgage foreclosure part, even though the action was not subject to conferences and those conferences were extended at the request defendant Galizio. Finally, the plaintiff interposed its motion-in-chief within 60 days after the release of the action from the specialized mortgage foreclosure part and it filed successive notices of pendency and made payments of insurance and real estate taxes to those entitled thereto since the loan went into default, all evincing an intention to diligently prosecute its claims.

Nor is there any merit in the defendant's claim that the plaintiff had the obligation to maintain the premises thereby removing such obligation from defendant Galizio or his subsequent transferees. Under certain common law principles of this state, a foreclosing plaintiff is a mere lien holder and as such, is without any obligation to maintain the mortgaged premises although it is generally authorized under most mortgage indentures to pay, at its election, assessments, taxes and insurance and other items in its effort to preserve the property during the course of a foreclosure proceeding, so as to bring in a reasonable sale price at the public auction. While recent legislative enactments impose, under certain circumstances, the obligation of maintaining the premises upon a foreclosing plaintiff from the entry of the judgment and until the sale (*see* RPAPL § 1307), such enactments do not support the defendant's claim as no judgment has yet been entered herein.

Finally, the court notes that the request for relief by East Point Realty Management Corp. is procedurally improper as it is not a party to this action. For these reasons and those set forth above, the cross motion by defendant Galizio and East Point Realty Corp. for relief pursuant to CPLR 3012(d) and the other relief demanded in the cross moving papers is denied.

Next considered is the plaintiff's motion-in-chief (#001) for an order of reference upon default and the relief incidental thereto described above. A party moving for a default judgment must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to answer or appear (*see* CPLR 3215[f]; *Todd v Green*, 122 AD3d 831, 997 NYS2d 155 [2d Dept 2014]; *U.S. Bank Natl. Assn. v Razon*, 115 AD3d 739, 981 NYS2d 571, 572 [2d Dept 2014]; *Diederich v Wetzel*, 112 AD3d 883, 979 NYS2d 605 [2d Dept 2013]; *Loaiza v Guzman*, 111 AD3d 608, 609, 974 NYS2d 282 [2d Dept 2013]; *Green Tree Serv., LLC v Cary*, 106 AD3d 691, 692, 965 NYS2d 511 [2d Dept 2013]; *Dupps v Betancourt*, 99 AD3d 855, 952 NYS2d 585 [2d Dept 2012]). Here, the moving papers sufficiently established the plaintiff's entitlement to an order of reference upon default as it included due proof of service of the summons and complaint, defaults in answering on the part of the mortgagor defendants and all other defendants joined herein by service of the summons and complaint and the existence of facts that constitute the plaintiff's possession of viable

Wells Fargo Bank v Galizio  
Index No. 5584-11  
Page 6

claims for foreclosure and sale as required by RPAPL § 1321 and CPLR 3215(f) (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71, 760 NYS2d 727 [2003]; *U.S. Bank Natl. Ass'n v Poku*, 118 AD3d 980, 989 NYS2d 75 [2d Dept 2014]; *U.S. Bank Natl. Ass'n v Razon*, 115 AD3d 739, *supra*; *Green Tree Serv., LLC v Cary*, 106 AD3d 691, *supra*; *King v King*, 99 AD3d 672, 951 NYS2d 565 [2d Dept 2012]; *Integon Natl. Ins. Co. v Noterile*, 88 AD3d 654, 930 NYS2d 260 [2d Dept 2011]). The opposing papers of the defendant failed to demonstrate that the relief demanded is not warranted.

In view of the foregoing, the plaintiff's motion is granted. The proposed order of reference attached to the moving papers has been marked signed, as modified by the court to reflect the terms of this memo decision and order.

Dated: April 27, 2015

  
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THOMAS F. WHELAN, J.S.C.