

HSBC Bank USA v Rodriguez
2015 NY Slip Op 32495(U)
December 21, 2015
Supreme Court, Suffolk County
Docket Number: 23008-10
Judge: Thomas F. Whelan
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 9/23/15
SUBMIT DATE: 12/4/15
Mot. Seq. #002 - MOTD
Mot. Seq. #003 - XMD
CDISP: NO

-----X
HSBC BANK USA, NATIONAL ASSOCIATION :
as Trustee for Wells Fargo Asset Securities :
Corporation, Mortgage Asset-Backed Pass-Through :
Certificates Series 2007-PA2, :

Plaintiff, :

-against- :

MARIA RODRIGUEZ, SANTIAGO RODRIGUEZ, :
ARNOLD SHERMAN, ASSET ACCEPTANCE, :
LLC, as assignee of Citibank USA NA, ASSET :
ACCEPTANCE, LLC as successor in interest to :
WFNNB Express, BROOKHAVEN MEMORIAL :
HOSPITAL, CACH LLC, CAPITAL ONE BANK, :
CAPITAL ONE BANK USA NA, CAPITAL ONE :
FSB, CITIBANK (SOUTH DAKOTA) NA, :
CLERK OF SUFFOLK COUNTY DISTRICT :
COURT, DANIEL AHEARN, EAST ISLAND :
CHECK CASHING CORP., ERIN CAPITAL :
MANAGEMENT LLC, GLOBAL HOLDING AND :
INVESTMENT CO., LLC, GOOD SAMARITAN :
HOSPITAL MEDICAL CENTER, HUNTINGTON :
HOSPITAL, JOHN T. MATHER MEMORIAL :
HOSPITAL, JOHN T. MATHER MEMORIAL :
HOSPITAL OF PORT JEFFERSON, INC., JORGE :
VALERO, LINCOLN VILLAGE, LLC, LR :
CREDIT 11, LLC, LVNV FUNDING LLC, :
MANDEE SHOPS, a division of Big M. Inc., :
MIDLAND FUNDING, LLC, MIDLAND :
FUNDING LLC doing business in New York as :
Midland Funding of Delaware, LLC, MIDLAND :
FUNDING NCC 2 CORP., MKM ACQUISITIONS :
LLC, assignee of Fleet Bank, NEW YORK STATE :
DEPARTMENT OF TAXATION AND FINANCE, :

KOZENY, McCUBBIN & KATZ
Attys. For Plaintiff
40 Marcus Dr. - Ste. 200
Melville, NY 11747

CHARLES H. WALLSHEIN, ESQ.
Atty. For Defendants Rodriguez
115 Broadhollow Rd. - Ste. 350
Melville, NY 11747

ARNOLD SHERMAN
Defendant
190 Kent Blvd.
Island Park, NY 11558

PUSHPA, PIYATISSA, ESQ.
Attys. For Def. Erin Capital
140 Broadway
New York, NY 10005

RUBIN & ROTHMAN, LLC
Attys. For Defs. Good Sam Hosp. &
John T. Mather Mem. Hosp.
1787 Veterans Hwy.
Islandia, NY 11749

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NORTH SHORE UNIVERSITY HOSPITAL :
 CLINICAL PRACTICE PLAN, NY FINANCIAL :
 SERVICES, LLC, PALISADES COLLECTION, :
 LLC, PALISADES COLLECTION LLC AO :
 FINGERHUT, PEOPLE OF THE STATE OF :
 NEW YORK, PORT RECOVERY SERVICES, :
 INC., assignee of Household Finance Corporation, :
 PORTFOLIO RECOVERY ASSOCIATES, LLC, :
 RAB PERFORMANCE RECOVERIES, LLC, :
 SOUTH BY ANESTHESIA ASSOCIATES, :
 SOUTHSIDE HOSPITAL, SOVEREIGN BANK, :
 STATE OF NEW YORK on behalf of University :
 Hospital I/P, SUFFOLK COUNTY DEPARTMENT :
 OF SOCIAL SERVICES, TEACHERS FEDERAL :
 CREDIT UNION, UNIFUND CCR PARTNERS :
 as assignee of Provident National Bank, UNITED :
 STATES OF AMERICA acting through the IRS, :
 WEST ISLIP ORTHOPEDIC, LLP 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

Upon the following papers numbered 1 to 11 read on this motion by the plaintiff for a default judgments
, party deletion and the appointment of a referee to compute and cross motion by the Rodriguez defendants dismiss the
plaintiff's complaint and other alternative relief ; Notice of Motion/Order to Show Cause and supporting papers:
1 - 5 ; Notice of Cross Motion and supporting papers 6-9 ; Answering/reply papers 10-11 ; Other ; (and
 after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (#002) by the plaintiff for the identification of the names of six
 persons served as unknown defendants and an amendment of the caption to reflect same, an order
 fixing the defaults in answering of all defendants served with process and an order appointing a
 referee to compute amounts due under the subject note and mortgage is considered under CPLR
 1024, 3215 and RPAPL § 1321 and is granted only with respect to the First cause of action set forth
 in the complaint; and it is further

ORDERED that the Second cause of action set forth in the complaint for declaratory relief
 extinguishing the liens of defendant, Arnold Sherman, and the corporate and municipal defendants
 listed in the caption is severed from the First cause of action, which alone shall continue herein, and
 any final judgment of foreclosure and sale entered on the First cause action shall reflect the severance
 of the Second and Third causes of action directed herein; and it is further

ORDERED that the cross motion (#003) by the Rodriguez defendants to dismiss the complaint upon grounds that the plaintiff discontinued the action under a stipulation of discontinuance for which judicial enforcement is sought or that the plaintiff abandoned the action, is considered under CPLR 3215(c) and 3217 and is denied.

In June of 2010, the plaintiff commenced this action to foreclose the lien of mortgage dated March 7, 2007 executed by defendant Maria Rodriguez on March 7, 2007 to secure a mortgage in the principal amount of \$595,000.00 of the same date given by her and co-owner of the subject premises, defendant Santiago Rodriguez. According to the complaint filed herein, the loan went into default in December of 2009 and such default remained without cure. In a second cause of action set forth in the complaint, the plaintiff seeks a judicial declaration extinguishing the prior, in date and presumptively superior, liens of all the remaining known defendants listed in the caption pursuant to RPAPL § 1501, *et. seq.*, due to "adversity".

Following service of the plaintiff's summons and complaint, all defendants so served defaulted in appearing herein by answer. By motion returnable October 8, 2010, the plaintiff moved for an order of reference on default and party identification pursuant to CPLR 1024. That motion was, however, withdrawn by correspondence dated November 17, 2010, from the plaintiff's counsel and marked as such on December 2, 2010. Thereafter, the action was assigned to the specialized mortgage foreclosure conference part of this court, although the matters raised by the complaint were not resolved.

By the instant motion (#002), the plaintiff again seeks an order of reference upon the default of those served with process including those served as unknown defendants and an order identifying those six individuals by name. The motion is opposed by the Rodriguez defendants in cross moving papers in which they seek dismissal of the plaintiff's complaint on two separate grounds, that is abandonment and discontinuance. The plaintiff opposes the cross motion in papers that further serve as a reply to the defendants' opposition.

The court first considers the defendants' cross motion as the court's determination thereof may render the plaintiff's motion, academic. As indicated above, the defendants seek dismissal of the plaintiff's complaint on grounds that the plaintiff discontinued the action by the forwarding of a stipulation of discontinuance and stipulation to cancel the notice of pendency to defendant Maria Rodriguez in February of 2015. Defendant Maria Rodriguez allegedly executed the stipulations, which were not signed by plaintiff's counsel nor by any of the defendants who appeared herein other than by answer, at a time when the parties were engaged in loan modification discussions. The defendants urge the court to consider the action discontinued by virtue of these circumstances. However, the court finds that the Rodriguez defendants are not entitled to a dismissal of the complaint upon the grounds that the action was or should be deemed discontinued.

Contrary to the contentions of counsel, CPLR 3217(a)(2) governs this application, not CPLR 3217(a)(1), since there was no notice of discontinuance served and filed within the twenty day time period set forth in this latter provision. Pursuant to CPLR 3217(a)(2), a discontinuance occurs upon

“the filing with the clerk of the court before the case has been submitted to the court or jury a stipulation signed by the attorneys of record for all appearing parties, provided no party is an infant, incompetent person for whom a committee has been appointed or conservatee and no person not a party has interest in the subject matter of the action”. Since none of these requisites were satisfied, the complaint is not subject to dismissal by virtue of its purported discontinuance pursuant to CPLR 3217(a)(2). Nor are the cross moving defendants entitled to a declaration deeming the action discontinued due to the conduct of the plaintiff’s counsel in mailing the stipulations at issue. Those portions of the cross motion wherein the Rodriguez defendants seek dismissal of this action on the grounds that it was discontinued or should be deemed discontinued are denied.

The remaining portions of the defendants’ cross motion (#003) wherein they seek dismissal of the complaint as abandoned pursuant to CPLR 3215(c) are also denied. CPLR 3215(c) requires that a plaintiff commence proceedings for the entry of a default judgment within one year after the default or demonstrate sufficient cause why the complaint should not be dismissed. Where the plaintiff has made an application to the court for the entry of a default judgment within one year of the defendant’s default, even if unsuccessful, the court may not later dismiss the complaint as abandoned pursuant to CPLR 3215(c) (see *GMAC Mtge. LLC v Todaro*, 129 AD3d 666, 9 NYS3d 588 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Combs*, 128 AD3d 812, 2015 WL 2214013 [2d Dept 2015]; *HSBC Bank, USA, N.A. v Alexander*, 124 AD3d 839, 4 NY3d 47 [2d Dept 2015]; *Mortgage Elec. Registration Sys., Inc. v Smith*, 111 AD3d 804, 975 NYS2d 121 [2d Dept 2013]; *Jones v Fuentes*, 103 AD3d 853, 962 NYS2d 263 [2d Dept 2013]; *Norwest Bank Minnesota, N.A. v Sabloff*, 297 AD2d 722, 747 NYS2d 559 [2d Dept 2002]; *Brown v Rosedale Nurseries, Inc.*, 259 AD2d 256, 686 NYS2d 22 [1st Dept 1999]; *Home Sav. of Am., F.A. v Gkanios*, 230 AD2d 770, 646 NYS2d 530 [2d Dept 1996]).

In the mortgage foreclosure arena, it is well settled law that mortgage foreclosure plaintiffs may not be deemed to have abandoned their foreclosure action under CPLR 3215(c) when they take “the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order an order of reference” under RPAPL 1321[1] within one year of the defendant’s default (*Klein v Cyprian Prop., Inc.*, 100 AD3d 711, 954 NYS2d 170 [2d Dept 2012]; see *Wells Fargo Bank, N.A. v Combs*, 128 AD3d 812, 10 NYS3d 121 [2d Dept 2015]; *HSBC Bank, USA, N.A. v Alexander*, 124 AD3d 839, 4 NYS3d 47 [2d Dept 2015]; *Home Sav. of Am., F.A. v Gkanios*, 230 AD2d 770, *supra*). “It is not necessary for a plaintiff to actually obtain a default judgment within one year of the default in order to avoid dismissal pursuant to CPLR 3215(c)” (*US Bank Natl. Ass’n v Dorestant*, 131 AD3d 467, 15 NYS3d 142 [2d Dept 2015]; see *Wells Fargo Bank, N.A. v Combs*, 128 AD3d 812, *supra*). “Where application is made to the court for the entry of a default judgment within one year of the defendant’s default, the court may not refuse to enter judgment or dismiss the complaint as abandoned pursuant to CPLR 3215(c)” (*Nowicki v Sports World Promotions*, 48 AD3d 435, 851 NYS2d 270 [2d Dept 2008]). The outcome of such application is thus irrelevant because it is the mere interposition of an application for a default judgment within one year of the default that suffices for purposes of CPLR 3215(c) (see *HSBC Bank USA, N.A. v Alexander*, 124 AD3d 838, *supra*; *Brown v Rosedale Nurseries, Inc.*, 259 AD2d 256, 257, *supra*; *Home Sav. of America, F.A. v Gkanios*, 230 AD2d 770, *supra*).

Here, the record reflects that the moving defendants were served with process in June of 2010 and that his time to answer or appear expired in July of 2010. The record further reflects that the plaintiff moved for an order of reference in September of 2010 by motion returnable on October 8, 2010 and marked submitted on October 28, 2010. The plaintiff's motion was thereafter denied on December 2, 2010 due to its withdrawal by the plaintiff pursuant to the correspondence dated November 17, 2010. By virtue of the interposition of that motion, the plaintiff complied with the requirements of CPLR 3215(c) and a finding of abandonment may not issue under the appellate case authorities cited above. Accordingly, the remaining portions of the defendants' cross motion (#003) for a dismissal of the complaint pursuant to CPLR 3215(c) are thus denied.

Next considered is the plaintiff's motion-in-chief wherein it seeks an order of reference on the default of all those served with process including six persons served as unknown defendants and an order identifying the names of those six persons together with a caption amendment to reflect their identities pursuant to CPLR 1024. In support thereof, the plaintiff submits an affirmation of counsel who therein asserts the factual allegations regarding the execution of the loan documents attached as exhibits to the moving papers, the default in payment, the subsequent commencement of the action, and the service of the summons and complaint as evidenced by the affidavits of service attached as exhibits and averments as to the defaults in answering by all defendants served with process. Also attached is an affidavit of merit by an employee of the plaintiff's loan servicer attesting to the details of the loan transaction including execution of the note and mortgage and, among other things, the default in payment that occurred on December 1, 2009 and the amounts owed as of the date of the affidavit.

To succeed on a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing (*see Todd v Green*, 122 AD3d 831, 997 NYS2d 155 [2d Dept 2014]; *U.S. Bank, Natl. Ass'n v Razon*, 115 AD3d 739, 981 NYS2d 571 [2d Dept 2014]; *Green Tree Serv., LLC v Cary*, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; *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]; *Dupps v Betancourt*, 99 AD3d 855, 952 NYS2d 585 [2d Dept 2012]). While the "proof" required on an application for a default judgment is not as exacting as that required for a successful summary judgment motion, a plaintiff must establish "enough facts to enable a court to determine that a viable cause of action exists" by some "first hand confirmation" of the facts constituting the plaintiff's claims against the defaulting defendants (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 760 NYS2d [2d Dept 2012]; *Cohen v Schupler* 51 AD3d 706, 856 NYS2d 870 [2d Dept 2008]). Where these elements are established, a motion for entry of a default judgment should be granted (*see Todd v Green*, 122 AD3d 831, *supra*; *U.S. Bank, Natl. Assn. v Razon*, 115 AD3d 739, *supra*; *Green Tree Serv., LLC v Cary*, 106 AD3d 691, *supra*). In the mortgage foreclosure cases, a claim for foreclosure is further governed by RPAPL § 1321 and appellate case authorities interpreting it. Pursuant thereto, the claim is established by the plaintiff's production of the note and mortgage together with evidence of default in payment or a default in other obligations giving right to the

remedy of foreclosure and sale which the mortgagor willingly conferred upon the lender in exchange for the advancement of the mortgage loan monies (*see* CPLR 3215[f]; *Wells Fargo Bank, NA v Ambrosio*, 120 AD3d 1225, 993 NYS2d 322 [2d Dept 2014]; *Todd v Green*, 122 AD3d 831, *supra*; *U.S. Bank Natl. Assn. v Razon*, 115 AD3d 739, *supra*).

Here, the plaintiff's moving papers established its possession of cognizable claims for a judgment of foreclosure and sale against the mortgagor defendants and against the six unknown defendants served herein as John Doe, all of whom were joined herein as necessary parties to the plaintiff's First cause of action wherein it demands such relief. The moving papers also established a default in answering on the part of these defendants. The plaintiff thus demonstrated its entitlement to an order fixing the defaults of all defendants joined herein as necessary party defendants to the plaintiff's First cause of action for foreclosure and sale, including those served as unknown John Does together with an amendment of the caption to reflect their true identities pursuant to CPLR 1024. The plaintiff is further entitled to an order identifying the names of the six persons served as unknown defendants, a caption amendment to reflect same and the appointing a referee to compute since the plaintiff's claims for foreclosure and sale have been resolved in its favor and against all defendants joined as party defendants to the plaintiff's first cause of action for such relief (*see* RPAPL § 1321).

The plaintiff is not, however, entitled to accelerated judgments against any of the defendants who were joined in this action by virtue of the plaintiff's assertion of its Second cause of action for declaratory relief. As indicated above, this claim is aimed at extinguishing, by judicial declaration, the superior and prior liens of defendants, pursuant to RPAPL § 1501.

Claims for declaratory relief of the type advanced in the plaintiff's Second cause of action, which sound in quiet title or adverse claim determination, are governed by RPAPL Article 15. Declaratory relief aimed at removing clouds on title to real property or to determine adverse claims to such property is available under the provisions of Article 15 of the Real Property Actions and Proceedings Law and provision is made therein for the extinguishment of mortgages where the statute of limitations applicable to a foreclosure action has expired (*see* RPAPL § 1501[4]). In addition, common law relief in the form of a judgment quieting title is available under RPAPL Article 15 to remove clouds on property which serve as an apparent title such as a deed or other instrument that is actually invalid or inoperative (*see Acocella v Bank of New York Mellon*, 127 AD3d 891, 9 NYS3d 67 [2d Dept 2015]). Due to the in rem nature of these actions, specific pleading and party joinder requirements are imposed by RPAPL Article 15 and plaintiffs are required to state their interests in the premises, the source of such interest and its nature and the existence of a removable cloud on the property arising from an invalid or inoperative instrument (*id*; *Piedra v Vanover*, 174 AD2d 191, 579 NYS2d 675, 678 [2d Dept 1992]). In addition, RPAPL Article 15 plaintiffs must identify and join all persons having interests in the premises which may be adversely affected by the granting of the relief and state whether such persons are known and/or unknown and, if known, whether they suffer from any of the legal disabilities described in RPAPL § 1515.

These specific pleading and joinder requirements reflect the elements of a viable claim for relief under RPAPL Article 15. They are derived from the statutory mandate that a judgment issued pursuant to RPAPL Article 15 must “declare the validity of any claim ... established by any party,” and may direct that an instrument purporting to create an interest deemed invalid be cancelled or reformed (RPAPL § 1521[1]; *see also* **TEG N.Y. LLC v Ardenwood Estates, Inc.**, 2004 WL 626802, at *4 [E.D.N.Y. 2004]). The judgment must “also declare that any party whose claim to an estate or interest in the property has been judged invalid, and every person claiming under him ... be forever barred from asserting such claim....” (RPAPL § [1]; *see also* **O'Brien v Town of Huntington**, 66 AD3d 160, 884 NYS2d 446, 451 [2009]).

Here, the moving papers of the plaintiff failed to address, let alone establish, the plaintiff's possession of cognizable claims for such relief pursuant to RPAPL Article § 1501 against any of the defendants joined as party defendants to this Second cause of action (*see* CPLR 3215[f]; RPAPL §§ 1515; 1519). The claim is based upon allegations that the prior liens of defendant, Arnold Sherman and the corporate and municipal defendant listed in the caption and on riders “b” & “c” of the complaint, are “adverse” to plaintiff's subsequent and subordinate mortgage lien. However, the liens of these targeted defendants are prior in time and thus are so in priority to the plaintiff's subsequent lien. No facts are alleged in either the complaint or the supporting motion papers from which a plausible claim for the extinguishment of the prior lien pursuant to RPAPL Article 15 is discernable. Nor does the complaint adequately identify and name as party defendants all persons having recorded claims and interests that might be affected by the granting of such relief or allege that no such persons exist and the basis for such allegations (*see* RPAPL § 1511).

The Second cause of action is thus severed from the First cause of action, which alone, shall continue herein. Any final judgment of foreclosure and sale entered on the First cause action shall reflect the severance of the Second cause of action directed herein and the dismissal of the Third and Fourth causes of action under the terms of this memorandum decision and order.

Proposed Order of Reference, as modified by the court to reflect the terms of this order, has issued with this decision.

DATED: 12/21/15


THOMAS F. WHELAN, J.S.C.