

Deutsche Bank Trust Co. v Bullen
2017 NY Slip Op 31014(U)
March 24, 2017
Supreme Court, Suffolk County
Docket Number: 36964/2007
Judge: Howard H. Heckman, Jr.
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SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

PRESENT:

HON. HOWARD H. HECKMAN, JR., J.S.C.

INDEX NO.: 36964/2007

MOTION DATE: 03/14/2017

MOTION SEQ. NO.: 005 MD

006 MD

-----X
DEUTSCHE BANK TRUST CO.,

Plaintiffs,

-against-

DOREEN BULLEN,

Defendants.
-----X

PLAINTIFFS' ATTORNEY:

HENRY DISTEFANO

LEOPOLD & ASSOCIATES, P.C.

80 BUSINESS PARK DR., STE. 110

ARMONK, NY 10504

DEFENDANTS' ATTORNEYS:

PETER KAMRAN

LESTER & ASSOCIATES, P.C.

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GARDEN CITY, NY 11530

ATTORNEY FOR THIRD PARTY:

JAY A. MARSHALL, ESQ.

666 OLD COUNTRY RD., STE. 412

GARDEN CITY, NY 11530

Upon the following papers numbered 1 to 32 read on this motion _____; Notice of Motion/ Order to Show Cause and supporting papers 1-10 ; Notice of Cross Motion and supporting papers 11-20 ; Answering Affidavits and supporting papers 21-23 ; Replying Affidavits and supporting papers 24-30 ; Other 31-32 ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that these motions by defendant Doreen Bullen brought on by Order to Show Cause (Ford, J.) dated April 27, 2016 seeking an order pursuant to CPLR 6301 & Judiciary Law 753: 1) adjudging plaintiff Deutsche Bank Trust Company in contempt for failure to comply with the Order (Pines, J.) dated December 26, 2014 staying the foreclosure sale scheduled for December 30, 2014; 2) vacating the referee's deed dated December 30, 2014 conveying title to the plaintiff; and 3) enjoining a Landlord/Tenant eviction proceeding entitled *NMB Realty Holding LLC v. Deborah A. Thomas, et al.* (#LT-256-16/BA & 257-16/BA) and by Order to Show Cause dated February 28, 2017 seeking an order pursuant to CPLR 6301 enjoining non-party NMD Realty from prosecuting its Petition to Recover Real Property in the Suffolk County, Second District Court (#LT 196/17BA & LT 197/17BA) pending the determination of defendant's prior motion are denied.

Plaintiff Deutsche Bank National Trust Company's action seeks to foreclose a mortgage in the sum of \$400,000.00 executed by the defendant Doreen Bullen on July 10, 2006. Defendant executed a promissory note on the same date promising to re-pay the entire amount of the indebtedness to the mortgage lender. Plaintiff claims that the defendant has defaulted in making timely monthly mortgage payments since December 1, 2006. By Order (Blydenburgh, J.) dated July 24, 2008 plaintiff's motion for an order granting a default judgment and for the appointment of a referee was granted. A Judgment of Foreclosure and Sale (Gazzillo, J.) was granted on October 21, 2014.

A foreclosure sale was scheduled for December 30, 2014. Four days before the scheduled sale, on December 26, 2014, the defendant presented an Order to Show Cause seeking to stay the foreclosure sale and to vacate the Judgment of Foreclosure and Sale. Counsel for the parties participated in an oral argument and the Court (Pines, J.) granted a temporary stay of the foreclosure sale. The December 26 Order to Show Cause (Pines, J.) in pertinent part provided:

“IT IS ORDERED that the scheduled sale of the premises pursuant to the judgment of foreclosure is stayed temporarily pending the hearing of defendant’s application, and it is further

ORDERED that Defendant’s (sic) counsel may serve papers in opposition upon plaintiff’s (sic) counsel by facsimile or email transmission on or before January 5, 2015; and it is further

ORDERED that a copy of this order together with the papers upon which it was granted be served upon LEONARD & ASSOCIATES, PLLC, the attorneys for the plaintiff, at their offices located at 80 Business Park Drive, Suite 110, Armonk, New York 10504, Monet Binder, Esq., the Referee appointed herein, at her offices located at 85-12 126th Street, Kew Gardens, New York 11415, and all other parties entitled to such notice, by regular mail with certificate of mailing and/or certified mail and/or overnight mail, on or before the 2nd day of January, 2015, be deemed good and sufficient service.”

The foreclosure sale took place on December 30, 2014. A referee’s deed conveying the premises to the plaintiff was signed on the same date. Defendant’s motion was made originally returnable on January 9, 2015 and was thereafter adjourned until January 15, 2015 and finally submitted on May 5, 2015. By short form Order (Gazzillo, J.) dated August 28, 2015 defendant’s motion seeking to vacate the default judgment and to stay the enforcement of the judgment of foreclosure and sale was denied. By bargain and sale deed dated January 29, 2016, plaintiff Deutsche Bank conveyed title to the mortgaged premises to NMD Realty Holding LLC. The deed reflects that NMD Realty paid to plaintiff the sum of \$215,569.00.

By Order to Show Cause (Ford, J.) dated April 27, 2016, defendant Bullen made application to adjudge plaintiff Deutsche Bank in contempt for selling the premises in violation of Justice Pine’s December 26, 2014 Order and sought an order vacating the December 30, 2014 referee’s deed and preventing the non-party owner, NMD Realty, from seeking to evict the tenants residing at the mortgaged premises. The next day (April 28, 2016) defendant Bullen filed a Chapter 13 bankruptcy petition in the U.S. Bankruptcy Court which was dismissed on August 13, 2016. On September 6, 2016 defendant Bullen filed a Chapter 7 bankruptcy petition in the U.S Bankruptcy Court which was later dismissed. Defendant Bullen’s motion was restored in December, 2016, and submitted on this Court’s motion calendar on March 14, 2017.

By Order to Show Cause dated February 28, 2017, incoming counsel for defendant Bullen made a second application seeking a restraining order preventing the non-party owner, NMD Realty, from attempting to evict the tenants residing at the mortgaged premises pending the court’s determination of the April 17, 2016 Order to Show Cause. Non-party NMD Realty’s original

summary petitions seeking to evict the tenants from the two dwellings located on the parcel had been dismissed in January, 2017. NMD Realty re-filed petitions in the District Court (Docket #'s LT-196-17/BA & LT-197-17/BA) seeking again to evict the tenants currently residing on the premises.

In support of both applications, defendant submits an affidavit together with an affidavit from Bullen's niece and three attorney affirmations and claims that plaintiff must be adjudged to be in contempt based upon the bank's actions in knowingly violating a court order and thereafter compounding its alleged contemptuous conduct by selling the premises to a third party. Defendant claims that the language set forth in the December 26, 2014 Order to Show Cause (Pines, J.) clearly stated that the foreclosure sale was stayed pending the hearing of the motion and the motion was made returnable ten days after the scheduled sale. Defendant contends that the December 30, 2014 sale was in violation of Justice Pines' order and therefore the referee's deed dated the same day conveying title of the premises to the plaintiff must be vacated. Defendant also claims that the pending landlord/tenant proceedings must be permanently enjoined because the non-party owner, NMD Realty, knew or should have known that the December 30, 2014 foreclosure sale was invalid and therefore legal title to the property could not have been conveyed to NMD. It is defendant's position therefore that NMD Realty has no standing to maintain the summary proceeding in District Court.

In opposition to the motions, plaintiff submits an attorney's affirmation and non-party NMD Realty submits an affidavit from its sole member together with an attorney's affirmation. Plaintiff claims that law office failure was responsible for the bank's inadvertent omission to communicate to its foreclosure sales department the issuance of the stay imposed by Justice Pines' December 26, 2014 Order. Plaintiff argues that there was never an intent to defy the court order and also describes the terms imposing the stay as imprecise, particularly since the service provision required service upon the referee be made by January 2nd which was three days after the scheduled sale date. Plaintiff's counsel asserts that negotiations with defense counsel were begun on August 6, 2015 in which the bank would agree to expunge the referee's deed and to advise the court that the parties were engaged in loss mitigation negotiations. Plaintiff claims that the defendant refused to sign a proposed stipulation (which included terms to expunge the December 30, 2014 deed) and the bank elected to sell the premises to NMD Realty. Plaintiff argues that Deutsche Bank cannot be adjudged to be held in contempt since defendant cannot prove any prejudice to its rights in this foreclosure litigation as a result of violating the stay since Bullen has provided no evidence to show it had a defense to the underlying complaint or to prove that the defaulting mortgagor, who has failed to make a mortgage payment for more than ten years, was actually harmed by the results of the sale. Plaintiff claims that its violation was inadvertent and, even if the court were to grant the defendant's application, the award of damages should be limited to reasonable attorneys' fees and costs.

The non-party defendant NMD Realty claims that defendant is not entitled to injunctive relief since Bullen cannot demonstrate irreparable injury, a balancing of the equities in her favor or a likelihood of success on the merits. NMD Realty claims that it is a bona-fide purchaser for value having purchased the premises by submitting the highest bid during an on-line auction. NMD Realty contends that Bullen will not suffer irreparable injury absent an injunction preventing the landlord from evicting the tenants residing on the premises since the defendant does not reside on the premises (claiming Bullen collects rent from tenants residing in two dwellings located on the premises) and has not made any payments with respect to the mortgage including payments for real estate taxes and insurance. NMD Realty claims it has been making payments for taxes and insurance

since acquiring title and claims that under the circumstances the balancing of the equities weighs heavily in its favor. NMD Realty also contends that there is little likelihood of success in favor of Bullen since the defendant failed to timely appeal the judgment of foreclosure and sale and the August 28, 2015 Order (Gazzillo, J.) denying defendant's motion seeking to vacate her default in appearing in this action.

A court may punish for civil contempt any disobedience of a lawful judicial mandate (*see Matter of McCormick v. Axelrod*, 59 NY2d 574, 583, 466 NYS2d 279 (1983)). To find a party in civil contempt, the movant must demonstrate by clear and convincing evidence: 1) that a lawful order of the court was in effect, clearly expressing an unequivocal mandate; 2) the appearance, with reasonable certainty, that the order was disobeyed; 3) that the party to be held in contempt had knowledge of the court's order; and 4) prejudice to the right of a party to the litigation (*El-Dehdan v. El-Dehdan*, 26 NY3d 19, 26 NY3d 19 (2015); *Matter of Fitzgerald v. Rahmanan*, 144 AD3d 906, 41 NYS3d 271 (2nd Dept., 2016); *Matter of Savas v. Bruen*, 139 AD3d 736 30 NYS3d 673 (2nd Dept., 2016)).

In this case, there is no issue concerning the first three elements required to be proven by the defendant since there was a lawful order that was disobeyed by the bank and clearly the bank had knowledge of the order, since plaintiff's counsel took part in the application seeking to stay the sale. However, based upon this record, the element of prejudice to the defendant has not been proven by clear and convincing evidence. The facts reveal that defendant defaulted in making any payments under the terms of the parties original agreement since December 1, 2006 and never contested the bank's right to foreclose until four days prior to the scheduled sale. While the court did impose a temporary stay of the scheduled sale as a result of defendant's motion, the August 28, 2015 Order (Gazzillo, J.) determined that the defendant was not entitled to a stay and, more importantly, was not entitled to vacate her default in appearing in the action having failed to provide a reasonable excuse for her default and an arguably meritorious defense to this action. Defendant never appealed that decision and has failed to submit any relevant, admissible documentary evidence to show that Bullen had sufficient income, assets, funds or any ability to abide by the agreement she had signed more than nine years earlier or the wherewithal to enter into a loan modification. The foreclosure sale thus became inevitable. Moreover, by conducting the sale, the bank terminated the amount of interest accruing as a result of defendant's default which would have continued to accrue upon a re-sale of the premises. The record shows therefore that the bank's subsequent conveyance of title of the premises to NMB Realty did not prejudice the defaulting mortgagor's rights to remain owner of the premises, since the defendant has provided no proof to show that she had the ability to defend against the claims asserted by the mortgagee. Defendant's motion for an order adjudging the plaintiff in contempt and vacating the referee's deed dated December 30, 2014 must therefore be denied.

With respect to defendant's remaining claim for injunctive relief enjoining prosecution of two pending landlord/tenant proceedings in Suffolk County District Court, the law is clear that in order to obtain a preliminary injunction the moving party must establish by clear and convincing evidence: 1) a likelihood of success on the merits; 2) irreparable injury absent a preliminary injunction; and 3) that the equities balance in her favor (*Chase Home Finance, LLC v. Cartelli*, 140 AD3d 911, 32 NYS3d 515 (2nd Dept., 2016); *Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 NY3d 839, 800 NYS2d 48 (2005); *Chase Home Finance, LLC v. Cartelli*, 140 AD3d 911, 32 NYS3d 515 (2nd Dept., 2016); *Zoller v. HSBC Mortgage Corp.*, 135 AD3d 932, 24 NYS3d 168 (2nd

Dept., 2016); *M.H. Mandelbaum Orthotic & Prosthetic Services, Inc. v. Werner*, 126 AD3d 859, 5 NYS3d 517 (2nd Dept., 2015)). The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court (see *Matter of Armanida Realty Corp., v. Town of Oyster Bay*, 126 AD3d 894, 3 NYS3d 612 (2nd Dept., 2015)).

No legal basis exists to enjoin the title owner of the premises (NMD Realty) from prosecuting the pending eviction proceedings in the District Court. Defendant has wholly failed to demonstrate by clear and convincing evidence the three elements required to obtain injunctive relief. Defendant Bullen has conceded that she does not reside in the premises and will not sustain irreparable injury. Moreover, defendant has no likelihood of success on the merits given her default in appearing in this foreclosure action and clearly the equities balance in the favor of the mortgage lender and non-party purchaser of the premises, given the fact that the defendant has defaulted in making any payments due under the terms of the original agreement for the past 10 year and 3 months, and presumably has been collecting rent payments from the tenants residing in the two dwellings located on the premises during these years. Based upon these circumstances defendants' motions are denied in their entirety.

Dated: March 24, 2017



J.S.C.