

Wells Fargo Bank, N.A. v Fattizzo

2017 NY Slip Op 31827(U)

August 10, 2017

Supreme Court, Suffolk County

Docket Number: 19736/2011

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.: 19736/2011
MOTION DATE: 04/25/2017
MOTION SEQ. NO.: 004 MD

COPY

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WELLS FARGO BANK, N.A.,

Plaintiffs,

-against-

ANTONIO FATTIZZO,

Defendants.
-----X

PLAINTIFF'S ATTORNEY:
ROSICKI, ROSICKI & ASSOCIATES, P.C.
2 SUMMIT COURT, STE. 301
FISHKILL, NY 12524

DEFENDANT'S ATTORNEY:
THE RANALLI LAW GROUP, PLLC
742 VETERANS MEMORIAL HWY.
HAUPPAUGE, NY 11788

Upon the following papers numbered 1 to 29 read on this motion _____; Notice of Motion/ Order to Show Cause and supporting papers 1- 23; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 24-29; Replying Affidavits and supporting papers _____; Other _____; (and after hearing counsel in support and opposed to the motion) it is.

ORDERED that this motion by defendant Antonio Fattizzo brought on by Order to Show Cause (Ford, J.) dated September 6, 2016 seeking an order pursuant to CPLR 2201, 3025(b), 5015 & 6301 & RPL 282: 1) permanently enjoining the sale of the mortgaged premises; 2) vacating the Judgment of Foreclosure and Sale (Gazzillo, J.) dated May 11, 2016 and the Order (Gazzillo, J.) dated October 30, 2015 granting summary judgment against the defendant; and 3) granting leave to serve and file an amended answer is denied; and it is further

ORDERED that referee is directed to forthwith reschedule a foreclosure sale of the mortgaged premises and to notify all appropriate parties.

Plaintiff's action seeks to foreclose a mortgage in the original sum of \$417,000.00 executed by the defendant Antonio Fattizzo on January 3, 2007 in favor of Wells Fargo Bank, N.A. On that same date the defendant also executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. Defendant Fattizzo defaulted in making timely monthly mortgage payments under the terms of the original note and mortgage since November 1, 2009 and continuing to date. Plaintiff commenced this foreclosure action by filing a notice of pendency, summons and complaint in the Suffolk County's Clerk's Office on June 20, 2011. Defendant Fattizzo served an answer on June 28, 2011.

Court records indicate that plaintiff submitted a motion for summary judgment and for the appointment of a referee which was originally returnable on February 27, 2014. On August 22, 2014 defendant filed a consent to change attorney dated August 8, 2014 with the Clerk's Office substituting defendant's present counsel as his attorney. Defendant thereafter served a motion seeking leave to amend his answer made returnable October 20, 2014. Both the motions were adjourned until submission on November 20, 2014; plaintiff's motion was submitted without

opposition while defendant's motion was opposed by the plaintiff. By short form Order (Gazzillo, J.) dated December 4, 2014 both motions were referred to a hearing/settlement conference to be held on February 4, 2015. Court records reflect that a foreclosure settlement conference was held on that date and the action was marked "not settled."

By short form Order (Gazzillo, J.) dated October 30, 2015, plaintiff's unopposed summary judgment motion was granted. On the same date Acting Supreme Court Justice Gazzillo signed an Order submitted by the plaintiff appointing a referee to compute the sums due and owing to the plaintiff. Plaintiff's unopposed motion seeking an order confirming the referee's report and for a judgment of foreclosure and sale was granted by Judgment of Foreclosure and Sale (Gazzillo, J.) dated May 11, 2016. The foreclosure sale scheduled for September 7, 2016 was stayed as a result of this Order to Show Cause which was submitted the day before the scheduled sale on September 6, 2016.

Defendant's motion seeks an order permanently staying the sale, vacating the Judgment of Foreclosure and Sale and the Order granting summary judgment, and granting leave to serve an amended answer. Defendant claims that his prior counsel failed to respond to the plaintiff's summary judgment motion and failed to appear on his behalf at a September 23, 2011 CPLR 3408 court settlement conference. Defendant claims that even though his current attorney appeared for a February 4, 2015 court conference, Acting Justice Gazzillo's Orders dated October 30, 2015 granting plaintiff's summary judgment motion were never served upon counsel, nor were plaintiff's motion seeking a Judgment of Foreclosure and Sale and the notice of sale scheduling the foreclosure sale for September 7, 2016. Defendant claims that based upon plaintiff's failure to comply with the service requirements of those Orders and the Judgment of Foreclosure and Sale, each must be vacated. Defendant claims that he should be permitted to serve an amended answer to include additional affirmative defenses and a counterclaim alleging: 1) the mortgage lender's failure to serve and file statutory notices as required pursuant to RPAPL 1303, 1304 & 1306; 2) plaintiff's lack of standing and capacity to sue; 3) the pendency of a prior foreclosure action at the time this action was commenced; 4) plaintiff's predatory lending practices as the loan may constitute a "high-cost" mortgage; and 5) defendant's right to be awarded attorney's fees pursuant to RPL 282.

In opposition, the plaintiff submits an attorney's affirmation and argues that the defendant's motion must be denied in its entirety since the defendant has failed to provide any reasonable explanation for his default in opposing the initial summary judgment motion, and since no legal basis exists to permit the defendant to file an amended answer after his original answer was stricken by the October 30, 2015 Order. Plaintiff also claims that defendant has provided no excuse for delaying for more than three years in seeking leave to amend his answer (which includes proposed defenses he could have included in his June 28, 2011 answer) and for delaying in excess of two more years in seeking leave to amend his stricken answer to include additional affirmative defenses and a counterclaim not included in his proposed August 12, 2014 answer and not submitted as an exhibit to these motion papers. *1

*1- In the motion papers submitted by the defendant in support of the Order to Show Cause, defense counsel alludes to additional affirmative defenses and an RPL 282 counterclaim but does not attach a "proposed answer". The motion seeks an order granting defendant "twenty days" to file an amended answer with counterclaim. The only "proposed answer" included in his papers are a copy of his proposed August 12, 2014 answer.

Defendant's motion asserts requests for relief including staying the foreclosure sale, vacating the Judgment of Foreclosure and Sale, compelling a decision of his previously submitted motion, and granting him leave to serve an amended answer. Implicit among his requests (although not stated as part of the written application) must be the additional request for an order vacating the October 30, 2015 Order (Gazzillo, J.) granting summary judgment in favor of the plaintiff, since that Order struck defendant's answer rendering moot any request for leave to amend his answer. That summary judgment motion was submitted without opposition from the defendant on November 20, 2014, more than three months after present counsel was substituted as Fattizzo's attorney on August 8, 2014.

Based upon these circumstances the issues presented are: 1) whether the October 30, 2015 Orders granting summary judgment and appointing a referee to compute the sums due and owing to the plaintiff must be vacated; and if so 2) whether the defendant should be granted leave to serve an amended answer; and 3) whether the May 11, 2016 Judgment of Foreclosure and Sale must be vacated and the foreclosure sale be permanently stayed.

With respect to the first issue, a party seeking to vacate his default in answering a motion is required to provide a reasonable excuse for his default and to demonstrate the existence of an arguably meritorious defense (*see Eugene DiLorenzo, Inc. v. A.C. Dutton Lumber Co.*, 67 NY2d 138, 501 NYS2d 8 (1986); *Deutsche Bank National Trust Co. v. Gutierrez*, 102 AD3d 825, 958 NYS2d 472 (2nd Dept., 2013); *U.S. Bank, N.A. v. Samuel*, 138 AD3d 1105, 30 NYS3d 305 (2nd Dept., 2016)). In this case, the facts are undisputed that the defendant has no rational explanation for his failure to submit timely opposition to plaintiff's summary judgment motion. Defendant's affidavit concedes this default without any explanation or excuse for it. Defendant's affidavit states the following:

"29. Plaintiff's current counsel made a motion for summary judgment to be granted in their favor and against me, which was returnable on February 27, 2014.

31. Because a copy of that motion was mailed to my home, I contacted Adam Gomeran, Esq. about it shortly after receipt of same.

32. Adam Gomeran, Esq. advised me that he would take care of everything and that I should not worry.

36. My current attorney [*prior to his undertaking to represent me*](*italics added*) retrieved a copy of my filed answers in the two respective foreclosure cases.

38. Upon further investigation, I became aware of the fact that contrary to the assertion of Adam Gomeran, Esq. "that he would take care of things on my case" that he failed to respond at all to the plaintiff's motion seeking summary judgment in their favor and against me.

39. I *then (italics added)* retained current counsel to represent me in this case."

Based upon this sworn admission incoming counsel was, in fact, retained by defendant Fattizzo for the express purpose of opposing plaintiff's summary judgment motion which the record shows that he failed to do. There is no rational explanation for this default, given these undisputable

facts, together with defendant's further testimony of defense counsel's countless hours of exhaustive investigation and research devoted to this foreclosure action, coupled with the additional fact that counsel did submit a motion seeking leave to amend his client's answer during this 3+ month long period. Under these circumstances no legal grounds exist to vacate Acting Supreme Court Justice Gazzillo's October 30, 2015 Orders. The claimed failure to timely serve those orders on defense counsel may toll the period within which defendant is permitted to appeal the orders, but absent a showing of significant prejudice does not provide independent grounds to vacate those orders. Moreover, since there has been no showing of any legitimate excuse for defendant's default in serving timely opposition papers, the issue of whether defendant has demonstrated an arguably meritorious defense is irrelevant (*Deutsche Bank National Trust Co. v. Rudman*, 80 AD3d 651, 914 NYS2d 672 (2nd Dept., 2011); *Deutsche Bank National Trust Co. v. Gutierrez*, 102 AD3d 825, 958 NYS2d 478 (2nd Dept., 2013); *Deutsche Bank National Trust Co. v. Pietranico*, 102 AD3d 724, 957 NYS2d 868 (2nd Dept., 2013); *Wells Fargo Bank, N.A. v. Russell*, 101 AD3d 860, 955 NYS2d 654 (2nd Dept., 2012)). As to the mortgagor's application seeking leave to serve an amended answer, defendant Fattizzo's motion has been rendered moot based upon defendant's prior answer having been stricken as a result of the October 30, 2015 Order granting summary judgment in favor of the plaintiff.

With respect defendant's application to vacate the Judgment of Foreclosure and Sale, defense counsel merely recites the statute (CPLR 5015(a)(1),(2),(3)&(4)) as the legal foundation to vacate the judgment (see paragraph 70). Those statutory grounds include: "excusable default"(1); "newly discovered evidence" (2); "fraud, misrepresentation or other misconduct" (3); and "lack of jurisdiction"(4). Defendant does not, however, provide any admissible factual evidence in support to show that the defendant is entitled to such relief based upon any of these statutory grounds. *2 However, defendant does make a subsequent argument that the judgment must be vacated based upon plaintiff's alleged failure to prove that statutory pre-foreclosure default notices were served and filed as required pursuant to RPAPL 1303, 1304 & 1306. Defendant claims that the Appellate Division, Second Department has determined that RPAPL 1303 & 1304 defenses may be raised at any time, "even if the defendant defaulted in answering the complaint".

Defense counsel's oft-repeated phrase (twice repeated in his affirmation) (cited initially in *First National Bank of Chicago v. Silver*, 73 AD3d 162, 163, 899 NYS2d 256 (2nd Dept., 2010) and subsequently in *Aurora Loan Services v. Weisblum*, 85 AD3d 95, 923 NYS2d 609 (2nd Dept., 2011) & *CitiMortgage, Inc. v. Espinal*, 134 AD3d 876, 879, 23 NYS3d 251 (2nd Dept., 2015), that an RPAPL 1303 & 1304 defense can be "raised at any time" is not an accurate statement of state law. Although the phrase's usage has become common-place among "strict compliance" advocates, its application has restrictions limiting its applicability based upon the procedural status of the foreclosure action. For example, a foreclosure defendant cannot raise either defense for the first time on appeal (see *PHH Mortgage Corp. v. Celestin*, 130 AD3d 703, 11 NYS3d 871 (2nd Dept., 2015); *Bank of America v. Barton*, 149 AD3d 676, 50 NYS3d 546 (2nd Dept., 2017); *FNMA v. Cappelli*, 120 AD3d 621, 990 NYS2d 856 (2nd Dept., 2014)), nor can a defendant assert such defense in opposition to a motion seeking a judgment of foreclosure and sale, where the defendant has *2- Plaintiff concedes that it failed to serve defendant's counsel with a copy of the motion seeking an order confirming the referee's report and for a judgment of foreclosure and sale. Given the fact that the defendant has, by submission of this motion, been given an opportunity to raise all defenses to such motion in this application, the omission to serve shall deemed harmless (CPLR 2001).

defaulted and has failed to provide a reasonable excuse for his default. In such cases courts require a showing of a reasonable explanation for the defendant's default and even if the defendant's newly asserted RPAPL 1303 & 1304 defenses were deemed meritorious, they will not be considered absent a showing of a reasonable excuse (*see Bank of America v. Agarwal*, 150 AD3d 651, 2017 NY Slip Op 03467 (2nd Dept., 2017)). Clearly, therefore, the RPAPL 1303, 1304 & 1306 defenses are not "jurisdictional" defenses which in and of themselves, can be used to vacate a judgment (*see U.S. Bank, N.A. v. Carey*, 137 AD3d 894, 28 NYS3d 68 (2nd Dept., 2016); *Pritchard v. Curtis*, 101 AD3d 1502, 957 NYS2d 440 (3rd Dept., 2012)).

In this case, Acting Justice Gazzillo's Order granting summary judgment struck defendant's answer after the defendant failed to submit any opposition to the plaintiff's motion. The striking of defendant's answer is the equivalent of a default in answering. Having failed to submit any opposition to the motion and his answer having been stricken, the defendant now in default, cannot seek to assert these statutory affirmative defenses for the first time in this motion seeking to vacate the foreclosure judgment, particularly in view of the fact he never asserted such defenses in his original answer and that upon his default in opposing the motion, all defenses asserted in his answer were stricken. Defendant's motion to vacate the Judgment of Foreclosure and Sale (Gazzillo, J.) dated May 11, 2016 must therefore be denied (*see Bank of America v. Agarwal, supra; HSBC Bank USA, N.A. v. Clayton*, 146 AD3d 942, 45 NYS3d 543 (2nd Dept., 2017)).

Finally, with respect to defendant's request for injunctive relief, the law is clear that 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 injunctive relief; and 3) the equities balance in the defendant's favor (*Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 NY3d 839, 800 NYKS2d 48 (2005); *Zoller v. HSBC Mortgage Corp (USA)*, 135 AD3d 932, 24 NYS3d 168 (2nd Dept., 2016); *Chase Home Finance, LLC v. Cartelli*, 140 AD3d 911, 32 NYS3d 35 (2nd Dept., 2016)). It is clear that the defendant has been afforded temporary injunctive relief as a result of the stay imposed by the Order to Show Cause which has delayed the sale of the premises in excess of a year. No basis exists to further delay the sale based upon the defendant's continuing default in making mortgage payments for nearly the past eight years and since there has been no showing by clear and convincing evidence of the defendant's entitlement to continuing injunctive relief.

Accordingly defendant's motion is denied in its entirety. The referee is directed to forthwith reschedule the sale and to notify all appropriate parties.

Dated: August 10, 2017

HON. HOWARD W. BECKMAN, JR.

J.S.C.