

Comrie v Central Mtge. Co.

2017 NY Slip Op 31924(U)

August 7, 2017

Supreme Court, Queens County

Docket Number: 711642/16

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. ROBERT J. McDONALD IAS PART 34
Justice

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KURT COMRIE, Index No.: 711642/16
Plaintiff(s), Motion Date: 7/19/17
- against - Motion No.: 30

CENTRAL MORTGAGE COMPANY, MORTGAGE Motion Seq.: 1
ELECTRONIC REGISTRATION SYSTEMS, LEND
AMERICA, DARLENE BARONE, MARSHALL
DARLENE BARONE #26, ALL PERSONS
CLAIMING ANY LEGAL OR EQUITABLE RIGHT,
TITLE, ESTATE, LIEN OR INTEREST IN THE
PROPERTY DESCRIBED IN THE COMPLAINT
ADVERSE TO PLAINTIFF'S TITLE, OR ANY
CLOUD ON PLAINTIFF'S TITLE THERETO
AND, JOHN DOE 1-20, JANE DOE 1-20,
INCLUSIVE,
Defendant(s).

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FILED
AUG 16 2017
COUNTY CLERK
QUEENS COUNTY

The following EF papers numbered 11-23 on this motion:

	<u>Papers Numbered</u>
Notice of Motion-Affirmation- Affidavit(s)-Service-Exhibit(s)	EF DOCS 11-23

Defendants, Central Mortgage Company (CMC) and Mortgage Electronic Registration Systems (MERS), by notice of motion, seek an order of the Court, pursuant to CPLR § 3211(a)(5)(7) and (8), dismissing plaintiff's complaint with prejudice and cancelling the notice of pendency; imposing sanctions against plaintiff; and, an award of costs and attorney's fees.

No opposition has been filed by plaintiff.

The underlying action in this matter arises from a

foreclosure action entitled Central Mortgage Company v. Kurt Comrie, Dianne Graham, et al., Index No. 13621/09. CMC commenced an action to foreclose a mortgage against real property known as 111-24 178th Street, Addisleigh Park, NY 11433, Block 10294, Lot 17, given by Kurt Comrie and Dianne Graham to secure a note evidencing a loan in the principal amount of \$429,600 on September 29, 2006. Defendants Comrie and Graham defaulted in appearing in the foreclosure action and a referee was appointed on November 5, 2009. Pursuant to a motion by CMC, an order was granted confirming the referee's report and for a judgment of foreclosure and sale. Thereafter, defendant Comrie and Graham appeared pro se, opposing the motion, indicating that they had served an answer with counterclaims and maintained that the court lacked subject matter jurisdiction and personal jurisdiction, and sought to compel the plaintiff to accept their answer.

Pursuant to the order of the Hon. Darrell L. Gavrin dated January 30, 2012, entered February 3, 2012, the Court determined it did have had both subject matter jurisdiction and personal jurisdiction over Mr. Comrie and Ms. Graham and that defendants had failed to offer a reasonable excuse for their delay in answering the complaint. Justice Gavrin confirmed the referee's report and granted plaintiff a default judgment against defendants Comrie and Graham and a judgment of foreclosure and sale.

The property was sold at a foreclosure sale on June 15, 2012. Thereafter, Mr. Comrie and Ms. Graham moved to vacate the judgment of foreclosure and sale, and void the sale of the property.

In an order dated December 6, 2012, entered December 19, 2012, Justice Gavrin denied defendants order to show cause to vacate the sale, finding that the defendants "failed to establish any fraud, collusion, mistake or misconduct herein. Furthermore, defendants' claims that plaintiff lacks standing, and committed fraud and misconduct have been previously litigated in defendants opposition to plaintiff's motion for foreclosure and sale."

Justice Gavrin further stated that "[d]efendants contend that they were never served with notice of the foreclosure sale. Plaintiff submitted documentation that they notified defendants of the foreclosure sale by serving a copy of the notice of sale upon defendants by mail on May 7, 2012. Plaintiff also published notice of the time and place of the sale, containing a description of the property sold, in the Queens Tribune once every four weeks prior to the sale, fully complying with RPAPL 231."

Defendants Kurt Comrie and Dianne Graham, pro se commenced an action under Index No. 5235/13 on March 19, 2013 and filed a notice of pendency. Plaintiff contended that action was to determine a claim of real property pursuant to RPAPL 1515 and to set aside the sale of the mortgaged premises pursuant to RPAPL 1503.

Pursuant to an order by the Hon. Thomas D. Raffaele, dated July 30, 2013, entered August 5, 2013, the complaint under Index No. 5235/13 raised identical issues of lack of standing, misconduct, fraud and lack of proper notice of the sale of the mortgaged property, raised previously in the foreclosure action. Additionally, plaintiffs alleged a claim for slander of credit due to the foreclosure action and intentional or negligent infliction of emotional distress pursuant to the attempted service and service of the notices of eviction.

Defendant CMC moved to dismiss the complaint on the grounds of res judicata and failure to state a cause of action which was granted by Justice Raffaele.

Under the doctrine of res judicata, or claim preclusion, a final judgment bars future actions between the same parties on the same cause of action (see Landau, P.C. v LaRossa, Mitchell & Ross, 11 NY3d 8 [2008]; Parker v Blauvelt Volunteer Fire Co., 93 NY2d 343 [1999]). Res judicata applies, generally, when there is a final, prior adjudication on the merits, that involved parties in the current case, or those in privity with them, and the claims involved in the current case were raised or could have been raised in the prior case (see Landau, P.C. v LaRossa, Mitchell & Ross, 11 NY3d 8 [2008]; Abraham v Hermitage Ins. Co., 47 AD3d 855 [2d Dept. 2008]; Sabatino v Capco Trading, Inc., 27 AD3d 1019 [2d Dept. 2006]). Here, plaintiff has raised essentially the same issues asserted herein in his opposition to the judgment of foreclosure and sale and his complaint under 5235/13 which was dismissed under the doctrine of res judicata. Moreover, defendant has failed to demonstrate the absence of a full and fair opportunity to contest the prior determinations (see Buechel v Bain, 97 NY2d 295 [2001]; D'Arata v New York Cent. Mut. Fire Ins. Co., 76 NY2d 659 [1990]; Mahler v Campagna, 60 AD3d 1009 [2d Dept. 2009]). As such, he is not entitled to raise the same issues again for a third time.

Accordingly, defendants, Central Mortgage Company and Mortgage Electronic Registration Systems' motion is granted without opposition to the extent that the complaint is dismissed with prejudice.

The County Clerk of Queens County is directed, upon payment of the proper fees, if any, to cancel and discharge a certain Notice of Pendency filed in this action on September 28, 2016, against property known as BLOCK 10294, LOT 17 and said Clerk is hereby directed to enter upon the margin of the record of same, a Notice of Cancellation referring to this Order.

The branch of defendants' motion imposing sanctions against plaintiff and, an award of costs and attorney's fees is denied.

Dated: Long Island City, N.Y.

Aug 7, 2017



ROBERT J. McDONALD
J.S.C.

FILED
AUG 16 2017
COUNTY CLERK
QUEENS COUNTY