

Citimortgage, Inc. v Scarpinato
2018 NY Slip Op 32705(U)
October 16, 2018
Supreme Court, Suffolk County
Docket Number: 018901/2009
Judge: James Hudson
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Supreme Court of the County of Suffolk State of New York - Part XL

PRESENT:

HON. JAMES HUDSON

Acting Justice of the Supreme Court

x-----x

CITIMORTGAGE, INC.,

Plaintiff,

-against-

NICHOLAS SCARPINATO,
KIMBERLY SCARPINATO,
NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE,

Defendants.

x-----x

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**MOT. SEQ. NO.:005-Mot D
006-MD**

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Upon the following papers numbered 1 to 21 read on this Motion/Order to Show Cause to Appoint a Referee and Cross Motion to Dismiss; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (seq. no.:005) of Plaintiff requesting the appointment of a referee to compute and report pursuant to RPAPL §1321 is granted and that the additional requests that all defendants be held in default and that the caption be amended are denied as unnecessary, same having being previously ordered on December 15, 2105 by Justice Baisley and it is further

ORDERED that the cross motion (seq. no.:006) of Defendant requesting denial of Plaintiff's motion to appoint and referee, and dismissal of the case, is denied in its entirety.

Preliminary Statement

It is noted that the subject mortgage was executed in July, 2008.

Defendant/Mortgagor Nicholas Scarpinato ("Defendant") defaulted in December.

2008, having made four (4) mortgage payments on his mortgage. The case record reflects that during the nine year term of this foreclosure case the Defendant has not averred that he has changed his address on his drivers license, voter registration, nor other indicia of residence.

It is noted that Defendant denied receipt of service of process; and that service was found to have been properly made upon Defendant (seq. no.:002, decided 03/07/2013).

The record reflects that Defendant failed to appear at two (2) scheduled CPLR Rule 3408 mandatory settlement conferences.

Defendant engaged Counsel by an undated notice of appearance. It is noted that same counsel represented Defendant during his unsuccessful 2012 motion which sought dismissal pursuant to CPLR Rule 3211(a) (8), (seq. no.:002). Same Counsel continues to represent Defendant in the instant cross motion, (seq. no.:006).

Defendant unsuccessfully sought to vacate his default and his motion to renew and reargue was denied (seq. no.:004).

Plaintiff filed the instant motion for an order to appoint a referee and ascertain and compute the amount due Plaintiff pursuant to RPAPL §1321 (seq. no.:005).

Defendant is in default. Defendant has tried and failed in his efforts to vacate his default.

Defendant now cross-moves for relief while in default and without a request to vacate his default, moving to dismiss the action without reference to any section of the CPLR, and asserting a failure of Plaintiff to comply with New York State Tax Law § 258 (seq. no.:007).

Defendant In Default Precludes Consideration of Defendant's Cross Motion

Absent a "viable jurisdictional claim," a party in default may not move for affirmative relief without an order relieving such defendant from his or her default in place at the time affirmative relief is demanded (*see U.S. Bank Natl Assn. v. Gonzalez*, 99 AD3d 692, 952 NYS2d 59 [2d Dept 2012]; *Holubar v. Holubar*, 89 AD3d 802, 934 NYS2d 710 [2d Dept 2011]; *McGee v. Dunn*, 75 AD3d 624, 906 NYS2d 74 [2d Dept 2011]).

"That a party in default may not move for affirmative relief of a non-jurisdictional nature, such as dismissal of a complaint pursuant to CPLR 3211, or otherwise, without

successfully moving to vacate his or her default, is clear” (*US Bank N.A. v. Orellana*, 40 Misc3d 1204 (a), 975 NYS2d 370 (Table), 2013 WL 3336823 [Sup Ct Suffolk County 2013]; see *HSBC Mte. Corp. v. Morocho*, 106 AD3d 875, 965 NYS2d 570 [2d Dept 2013]; *Gonzalez, supra.*; *Deutsche Bank Trust Co. Am. v. Stathakis*, 90 AD3d 983, 935 NYS2d 651 [2d Dept 2011]; *Holubar, supra.*; *McGee, supra.*; *US Bank Natl Assn. v. Vardales*, 39 Misc3d 12119A), 2013 WL 1490658 [Sup Ct Suffolk County 2013]; *Deutsche Bank Natl Trust Co. v. Young*, 2012 WL 6019543 [Sup Ct Suffolk County 2012]).

A defaulting defendant is deemed to have admitted all the allegations in the complaint (*HSBC Bank USA, National Association v. Simms*, 163 AD3d 930, 81 NYS3d 517 [2d Dept 2018]).

Absent a vacatur of his default, a defendant is without authority to oppose or otherwise seek affirmative relief of a non-jurisdictional nature (see *Morocho*, 106 AD3d 875, 965 NYS2d 570 [2d Dept 2013]).

As there is no motion to vacate defendant’s default, the court will not consider the claims raised by defendant’s opposition (*The Money Source, Inc. v. Dell’Aquila*, 60 Misc3d 1232 (A), 2018 WL 4355087 (Table) [Sup Ct, Suffolk County 2018]).

Defendant is in default. That fact would preclude further consideration of his cross-motion by the Court, but for his plea of Plaintiff’s substantive failure due to lack of standing to bring suit through non-compliance with Tax Law §258.

The Court will therefore examine Defendant’s request for dismissal due to lack of Plaintiff’s standing to foreclose upon the subject mortgage by non-compliance with NY Tax Law § 258.

Defendant’s Cross-Motion Alleging Plaintiff’s Lack of Standing Pursuant to NY Tax Law §258

Tax Law §258. Effect of nonpayment of taxes provides, in pertinent part:

“1. No mortgage of real property tax shall be recorded by any county clerk or register, unless there shall be paid the taxes imposed by and as in this article provided. No mortgage of real property which is subject to the taxes imposed by this article shall be released, discharged of record or received in evidence in any action or proceeding, nor shall any assignment of or agreement extending any such mortgage be recorded unless the

taxes imposed thereon by this article shall have been paid as provided in this article..." McKinney's Tax Law §258 [2018].

NYTL Article 11 provides for a tax on recorded mortgages of real property situated within the state. The tax is an excise tax, imposed for exercising the privilege of recording a mortgage, and not a property tax...Liability for the tax is created by the *recording*, not the mere execution, delivery or holding of a mortgage (35 N.Y.Prac., Mortgage Liens in New York §9 [2d ed.]).

"In construing Tax Law §258, this court stated in *Matter of Downtown Athletic Club of NYC v. State Tax Commn.*, 280 AD363, 113 NYS2d 485 [3d Dept 1952], that the tax imposed referred to in the statute is a 'recording tax' and not a tax on the mortgage, for otherwise the tax would be unconstitutional as a direct tax on intangible personal property, i.e., the mortgage instrument itself [*Id.* at 365, 113 NYS2d 485, *see* N.Y.Const., art. XVI, §3; *Franklin Socy. v. Bennett*, 282 NY 79, 24 NE2d 854, *appeal dismissed* 309 U.S. 640, 60 S.Ct. 894, 84 L.Ed. 995 [1940]" *Rathe v. Adirondack Concepts, Inc.*, 131 AD2d 81,85, 520 NYS2d 82 [3d Dept 1987]).

"Specifically, Defendants' argument to Supreme Court was in the form of a motion to dismiss for failure of Plaintiffs to comply with the provisions of Tax Law §258...defendant's contention on this issue must be rejected" (*Id.*).

The consequences for not paying the loan taxes does not render the contract between the parties void, but rather justifies the County Clerk "...in refusing to cancel such mortgage, notwithstanding a proper satisfaction piece is tendered to him, until the full amount of such tax is paid" (*Bank of New York Mellon v. Samuels*, 55 Misc3d 704, 706, 46 NYS3d 851, 853 [Sup Ct. Orange County 2017], *quoting* *People ex. re. Tit. Guar. & Trust Co. v. Ruoff*, 159 AD 819, 820, 145 NYS 80 [2d Dept 1913]).

Defendant's assertion and reliance upon Tax Law § 258 to demonstrate a lack of standing by Plaintiff is misplaced. That assertion constitutes the basis and claim of Defendant's cross-motion (seq. no.:006). Defendant cross-moves in reliance thereon to avoid the issue of his default.

For the reasons stated herein, Defendant's attempt to dismiss the case regardless of his default fails.

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As Plaintiff correctly contends in his opposition to Defendant's cross-motion, Defendant's application must be denied.

Defendant's remaining arguments have been considered and are rejected.

The relief requested in Defendant's cross-motion is denied in its entirety.

The relief requested by Plaintiff in its motion (seq. no.:005), to appoint a referee to compute the sums due and owing to Plaintiff pursuant to RPAPL §1321 and report to this Court is granted.

It is noted that the additional relief requested by Plaintiff, to amend the caption, was previously granted to Plaintiff by Justice Baisley in his December 15th, 2015 Order. Plaintiff will note that the caption on this Decision and Order reflect that amendment. Additionally in that same Order, Justice Baisley granted Plaintiff's request that all Defendants be held in default for failure to appear or answer within the time prescribed by law.

The Order Appointing Referee to Compute will be signed simultaneously with this Order.

The foregoing decision constitutes the Order of the Court.

DATED: OCTOBER 16th, 2018
RIVERHEAD, NY



HON. JAMES HUDSON
Acting Justice of the Supreme Court