

New Century Mtge. Corp. v Bosman

2019 NY Slip Op 31242(U)

April 30, 2019

Supreme Court, Suffolk County

Docket Number: 01040/2007

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY**PRESENT:****WILLIAM B. REBOLINI**
Justice

New Century Mortgage Corporation,

Plaintiff,

-against-

John A. Bosman, Jr. and Doreen L. Bosman,

Defendants.

Index No.: 01040/2007Motion Sequence No.: 004; MOTDMotion Date: 1/31/18Submitted: 4/11/18Motion Sequence No.: 005; MDMotion Date: 3/7/18Submitted: 4/11/18Clerk of the CourtAttorney for Plaintiff:Shapiro, DiCaro & Barak, LLC
175 Mile Crossing Boulevard
Rochester, NY 14624Attorney for Defendants:Grausso & Foy, LLP
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Upon the following papers read on this application by plaintiff for an order vacating the Judgment of Foreclosure and Sale dated October 16, 2007 and Order of Reference dated April 25, 2007 and issuing a new Order of Reference, amending the caption, and deeming the notice of pendency filed on December 15, 2017 as if it had been filed on January 2, 2010 and upon the cross-motion of defendant John A. Bosman for an order dismissing plaintiff's complaint, vacating the default, granting defendant summary judgment; Notice of Motion dated December 12, 2017 and supporting papers; Notice of Cross-Motion dated February 21, 2018 and supporting papers; Affirmation in Opposition to Cross-Motion dated March 28, 2018; it is

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ORDERED that plaintiff's motion to vacate the Judgment of Foreclosure and Sale dated October 16, 2007 and Order of Reference dated April 25, 2007 is denied; and it is further

ORDERED that plaintiff's request for a *nunc pro tunc* filing of the notice of pendency is denied as academic, inasmuch as a notice of pendency was in effect at the time of the issuance of the judgment of foreclosure and sale dated October 16, 2007 and a subsequent notice of pendency was filed on December 15, 2017, which is still valid; and it is further

ORDERED that the caption is amended in accordance with the assignment of mortgage recorded on the subject property as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
U.S. Bank National Association, as Trustee for
Residential Asset Mortgage Products, Inc.,
Mortgage Asset-Backed Pass-Through
Certificates, Series 2006-NC3,

Plaintiff,

-against-

John A. Bosman, Jr., Doreen L. Bosman,
Bessie Kushner, Jonathan Bosman, and
Thomas Bosman,

Defendants

-----X

and it is further

ORDERED that defendant's cross-motion to vacate his default, dismiss the complaint, and award him summary judgment is denied.

This is an action to foreclose on property located at 81 Somerset Avenue, Mastic, New York 11950. The action was commenced by the filing of a summons, complaint, and notice of pendency on January 2, 2007. An order of reference was granted on April 25, 2007 and a judgment of foreclosure and sale was granted on October 16, 2007. By order dated January 31, 2017, the Clerk of the County of Suffolk was directed to record an assignment of mortgage on the subject property from New Century Mortgage Corp. to U.S. Bank National Association, as Trustee For Residential Asset Mortgage Products, Inc., Mortgage Asset-Backed Pass-Through Certificates, Series 2006-NC3.

Accordingly, plaintiff is entitled to amend the caption to name U.S. Bank National Association as the proper party plaintiff by virtue of the prior order of the court.

Addressing first defendant's cross-motion, it is well established that in order to vacate a judgment of foreclosure and sale pursuant to CPLR 5015 [a][3], the movant must show: (1) a justifiable reason for the default; and (2) demonstrate that there is a meritorious defense to the action (*Chase Home Finance, LLC v. Minott*, 115 AD3d 634, 981 NYS2d 757, 758 [2d Dept. 2014]; *Wells Fargo Bank v. Malave*, 107 AD3d 880, 968 NYS2d 127 [2d Dept. 2013]; *Citimortgage, Inc. v. Brown*, 83 AD3d 644, 919 NYS2d 894 [2nd Dept 2011]; citing CPLR Rule 5015 [a] [1]; *Development Strategies Co., LLC, Profit Sharing Plan v Astoria Equities, Inc.*, 71 AD3d 628 [2nd Dept 2010]; *U.S. Bank N.A. v Slavinski*, 78 AD3d 1167 [2nd Dept 2010]); *Clarke v. Clarke*, 75 A.D.2d 836, 427 N.Y.S.2d 871 [App. Div. 2nd Dept. 1980]; *393 Lefferts Partner, LLC v. New York Avenue at Lefferts, LLC*, 68 A.D.3d 976 [2nd Dept. 2009]; *Wade v. Village of Whitehall*, 46 A.D.3d 1302 [3rd Dept. 2007]). The determination of what constitutes a reasonable excuse for the default in answering is left to the sound discretion of the court (see *Scott v. Ward*, 130 AD3d 903 [2d Dept. 2015]; *Sganga v. Sganga*, 95 A.D.3d 872, 942 N.Y.S.2d 886 [2nd Dept 2012]; *Rogers v. Rogers*, 65 A.D.3d 1029, 886 N.Y.S.2d 44 [2nd Dept. 2009]). In order to demonstrate a meritorious defense, the defendant must do more than merely make conclusory allegations or vague assertions (*Peacock v. Kalikow*, 239 A.D.2d 188, 658 N.Y.S.2d 7 [1st Dept. 1997]; *M. Cooper Motor Leasing Ltd. V. Data Discount Center*, 125 A.D.2d 454 [2nd Dept. 1986]). If the court determines that a reasonable excuse of the default was not proffered, then it need not consider the existence of a meritorious defense (*Cuzzo v. Cuzzo*, 65 A.D.3d 1274, 885 N.Y.S.2d 619 [2nd Dept. 2009]).

Here, defendant provides no basis upon which to grant his cross-motion to vacate his default. Defendant makes this application over ten (10) years after the issuance of a judgment of foreclosure and sale and furthermore, provides no basis for to vacate his default other than to state in conclusory fashion that he was never served with the summons and complaint. Such conclusory statements are insufficient to vacate a default judgment (see *Wells Fargo Bank, N.A. v. Gioia*, 114 AD3d 766, 980 NYS2d 535 [2d Dept. 2014]). Defendant further states that the description in the affidavit of service does not match the description at the time of the alleged service nor his New York State driver's licence. In particular, the affidavit of service indicates defendant to be a white male with brown hair and a mustache, approximately 50-59 years of age, 5 feet 8 inches to 5 feet 11 inches tall, and weighing approximately 175 to 199 pounds. Defendant states in his affidavit that he is fifty years old, weighs 180 pounds, is 5 feet 6 inches tall, and does not have brown hair. Defendant provides a black and white copy of his New York State driver's license issued on July 17, 2017. However, defendant does not indicate in his affidavit the actual color of his hair or facial hair nor does he deny that he had a mustache on the date of the alleged service. It is well established that minor inconsistencies in some physical description of the party served are not sufficient to warrant a traverse hearing (*JP Morgan Chase Bank v. Daar*, 161 AD3d 835, 76 NYS3d 603 [2d Dept. 2018]; *JP Morgan Trust Bank, N.A. v. Hoffman*, 154 AD3d 699, 60 NYS3d 842 [2d Dept. 2017]). When considered in their totality, the description of the moving defendant, as contained in the affidavit of service, cannot be said to be inaccurate to rebut the presumption of proper service (see *JP Morgan Chase Bank v. Daar*, *supra* (claimed discrepancies between appearance and process server's affidavit were too

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minor to warrant a traverse hearing); *JP Morgan Trust Bank, N.A. v. Hoffman*, *supra* (same); *Citimortgage, Inc. v. Baser*, 137 AD3d 735, 26 NYS3d 352 [2d Dept. 2016]; *Indymac Fed. Bank, FSB v. Hyman*, 74 AD3d 751, 901 NYS2d 545 [2d Dept. 2010]; *Wells Fargo Bank, N.A. v. McGloster*, 48 AD3d 457, 849 NYS2d 784 [2d Dept. 2008]).


Where, as here, no reasonable excuse for defendant's default has been shown, it is unnecessary to determine whether there is a potentially meritorious defense to the action (*JP Morgan Chase Bank v. Daar*, 161 AD3d 835, 837, 76 NYS3d 603 [2d Dept. 2018]). Moreover, "a judgment of foreclosure and sale entered against a defendant is final as to all questions at issue between the parties and concludes all matters of defense which were or might have been litigation in the foreclosure action" (*see U.S. Bank, N.A. v. Castillo*, 38 Misc.3d 1228, 967 NYS2d 870 [Suffolk Cty. 2013]). Notwithstanding, defendant's assertion that this action is barred by the statute of limitations is without merit, being that the subject mortgage and note were executed on or about January 20, 2006 and the instant foreclosure action was commenced less than a year thereafter. As to the issue of plaintiff's standing, the submissions provided by plaintiff demonstrate that it was the entity in possession of the original note at the time of the commencement of the action, as the note was attached to the complaint. That being the case, plaintiff has established its standing (*see JP Morgan Chase Bank, N.A. v. Weinberger*, 142 AD3d 643 [2d Dept. 2016]; *JPMorgan Chase Bank, N.A. v. Roseman*, 137 AD3d 1222, 29 NYS3d 380 [2d Dept. 2016]; *Deutsche Bank Natl. Trust v. Leigh*, 137 AD3d 841, 28 NYS3d 86 [2d Dept. 2016]; *Nationstar Mtge., LLC v. Catizone*, 127 AD3d 1151, 9 NYS3d 315 [2d Dept. 2015]; *Bank of N.Y. Mellon Trust Co., NA v. Sachar*, 95 AD3d 695, 943 NYS2d 893 [2d Dept. 2012]; *see also Aurora Loan Services, LLC v. Taylor*, 114 AD3d 627, 980 NYS2d 475 [2d Dept. 2014] *aff'd* 25 NY3d 355 [2015]; *U.S. Bank N.A. v. Akande*, 136 AD3d 887, 26 NYS3d 164 [2d Dept. 2016]; *Emigrant Bank v. Larizza*, 129 AD3d 904, 13 NYS23d 129 [2d Dept. 2015]). The court has considered defendant's remaining contentions and finds them to be without merit (*see HSBC Bank USA, N.A. v. Taher*, 104 AD3d 815, 962 NYS2d 301 [2d Dept. 2013]; *HSBC Bank, USA v. Dammond*, 59 AD3d 679, 875 NYS2d 490 [2d Dept. 2009]). Based upon the foregoing, defendant's cross-motion is denied.

The judgment of foreclosure and sale is hereby validated in all respects except that the official publication of the notice of sale, according to law and the practice of this court, shall appear in The Brookhaven Review, 27 W. Main Street, Smithtown, New York, inasmuch as the publication listed in the judgment of foreclosure and sale dated October 16, 2007 is no longer in operation nor on the court-approved publication list, and the Referee appointed herein shall deposit any surplus monies with the Suffolk County Comptroller. The ninety (90) day period pursuant to the judgment of foreclosure and sale and imposed upon RPAPL §1351 is hereby extended to ninety (90) days from the date of entry of this order and any foreclosure sale of the subject property which is conducted within the time period prescribed herein will be deemed timely and valid, provided plaintiff files the affidavit as required by the Office of Court Administrations' Memorandum, dated October 20, 2010, as supplemented, five (5) days before the scheduled sale date and otherwise complies with the terms of the judgment of foreclosure and sale dated October 16, 2017 and applicable law.

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The foregoing constitutes the *Decision* and *Order* of the Court.

Dated: 4/30/2019


HON. WILLIAM B. REBOLINI, J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION