

Wilmington Trust, NA v Gawlowski
2019 NY Slip Op 32174(U)
July 19, 2019
Supreme Court, Suffolk County
Docket Number: 26224/2011
Judge: Thomas F. Whelan
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COPY

SUPREME COURT - STATE OF NEW YORK
IAS PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 6/10/19
SUBMIT DATE 6/21/19
Mot. Seq. # 002 - MG
Mot. Seq. # 003 - XMD
CDISP Y N x

-----X
WILMINGTON TRUST, NA, not in its individual :
capacity but solely as Trustee for MFRA Trust :
2014-2, :
Plaintiff, :
-against- :
EDWARD W. GAWLOWSKI a/k/a EDWARD :
GAWLOWSKI and VICTORIA M. GAWLOWSKI :
a/k/a VICTORIA GAWLOWSKI, :
Defendants. :
-----X

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Upon the following papers numbered 1 to read on this motion to appoint a referee to compute and cross motion to vacate the order/judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers: 5-7; Opposing papers: 8-9; Reply papers 10-13; Other 14 (affirmation); 15 (memorandum); (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the branch of plaintiff's motion (#002) seeking vacatur of the Order of Reference and Other Relief issued by this Court on November 20, 2018 and entered in the Office of the Clerk on November 29, 2018 is granted, and said Order is hereby vacated as null and void; and it is further

ORDERED that the branches of plaintiff's motion (#002) for, among other things, default judgments and the appointment of a referee to compute, are granted; and it is further

ORDERED that upon the vacatur of the prior Order of Reference, the Court *sua sponte* amends the caption of this action to read as follows:

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Wilmington Trust, N.A., not in its Individual
Capacity, but solely as Trustee for MFRA Trust 2014-
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Plaintiff,

-against-

EDWARD GAWLOWSKI a/k/a EDWARD
GAWLOWSKI and VICTORIA M. GAWLOWSKI
a/k/a VICTORIA GAWLOWSKI,

Defendants.

and it is further

ORDERED that all future pleadings shall bear this caption; and it is further

ORDERED that the cross motion (#003) by the defendants, Edward Gawlowski and Victoria Gawlowski, for dismissal of the complaint pursuant to CPLR 3215(c) is denied in its entirety; and it is further

ORDERED that plaintiff is directed to file a notice of entry within five days of receipt of this Order pursuant to 22 NYCRR § 202.5-b(h)(2).

This is an action to foreclose a mortgage on residential property situate in Shirley. In essence, on September 10, 2007, defendants Edward Gawlowski and Victoria Gawlowski borrowed \$246,896.49 from plaintiff's predecessor-in-interest and executed a promissory note and mortgage. Defendants failed to pay the installment due on December 14, 2010 and all subsequent payments. This action was commenced by filing on August 22, 2011. The defendants appeared, through counsel, with the filing of a Notice of Appearance with the Suffolk County Clerk on October 24, 2013. The parties appeared for foreclosure settlement conferences on October 18, 2013 and January 14, 2014, at which time the matter was released from further conferences as, according to the Court's records, a loan modification had been entered into. Notably, the plaintiff asserts that the borrowers subsequently failed to make required payments pursuant to the agreement.

The plaintiff moved (#001) for default judgments against all parties and the appointment of a referee to compute. The Court granted the motion in its entirety, without opposition, by Order dated November 20, 2018.

By the instant motion (#002), the plaintiff now seeks vacatur of the November 20, 2018 Order, as it was subsequently brought to plaintiff's attention that same was signed while an automatic bankruptcy stay was in effect. Upon vacatur of that Order, the plaintiff moves for the same relief as in its initial motion. Defendants, through counsel, also seek vacatur of the November 2018 Order and cross move (#003) for an order dismissing the action pursuant to CPLR 3215(c).¹

The Court hereby grants vacatur of the November 2018 Order. The filing of a bankruptcy petition automatically stays the commencement of any action or proceeding to recover a claim against the debtor that arose before the commencement of the bankruptcy proceeding (*see* 11 USC § 363[a][1]). The stay is mandatory, applies to all state and federal courts (*see Emigrant Sav. Bank v Rappaport*, 20 AD3d 502, 799 NYS2d 533 [2d Dept 2005]), and it takes effect immediately (*see Carr v McGriff*, 8 AD3d 420, 781 NYS2d 34 [2d Dept 2004]). Thus, a bankruptcy renders any actions against a debtor void *ab initio* (*see Homeside Lending, Inc. v Watts*, 16 AD3d 551, 792 NYS2d 513 [2d Dept 2005], *citing Matter of Dominguez*, 312 BR 499, 508 [SDNY 2004]). Only the bankruptcy court has jurisdiction to grant relief from this stay (*see Carr v McGriff*, 8 AD3d 420, *supra*).

Here, the defendants concede service of plaintiff's motion (#001), bearing a return date of November 15, 2018, on or about October 11, 2018. Instead of opposing the motion, the defendants filed a bankruptcy petition, staying the instant action. As the Order was signed when the stay was in place, the order is void *ab initio* and, thus, the Court vacates same (*see Carr v McGriff*, 8 AD3d at 422, *supra*).

The Court notes that its prior Order of November 20, 2018 had directed the substitution of the plaintiff. The plaintiff's current submission does not address the resulting reversal of the caption amendment with the vacatur of the prior Order. However, the plaintiff submits with the current application the affidavit of Crystal Coburn, Foreclosure Specialist of Fay Servicing, LLC, the servicing agent of Wilmington Trust, N.A., not in its Individual Capacity, but solely as Trustee for MFRA Trust 2014-2 ("Wilmington"), who avers that Wilmington is in possession of the note. Therefore, on the Court's own motion, the Court hereby substitutes Wilmington as the plaintiff herein as indicated above (*see U.S. Bank Natl. Assn. v Akande*, 136 AD3d 887, 26 NYS3d 164 [2d Dept 2015]; *Woori Am. Bank v Global Universal Group Ltd.*, 134 AD3d 699, 20 NYS3d 597 [2d Dept 2015]; *Brighton BK, LLC v Kurbatsky*, 131 AD3d 1000, 17 NYS3d 137 [2d Dept 2015]).

¹ The Court refuses to entertain defendants' reply papers, since a reply is not permitted pursuant to CPLR 2214, 2215.

The Court will next consider the cross motion (#003) by the defendants, as determination thereof may render determination of the plaintiff's motion, academic.

CPLR 3215(c) provides that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year *after the default*, the court shall not enter judgment but shall dismiss the complaint as abandoned . . . unless sufficient cause is shown why the complaint should not be dismissed" (CPLR 3215[c] [emphasis added]; *HSBC Bank USA, N.A. v Hasis*, 154 AD3d 832, 833, 62 NYS3d 467 [2d Dept 2017], citing *Wells Fargo Bank, NA v Bonanno*, 146 AD3d 844, 45 NYS3d 173 [2d Dept 2017]). A defendant may waive the right to seek relief under CPLR 3215(c) by serving an answer or taking "any other steps which may be viewed as a formal or informal appearance" (*HSBC Bank USA, Natl. Assn. v Grella*, 145 AD3d 669, 44 NYS3d 56 [2d Dept 2016] quoting *Meyers v Slusky*, 139 AD2d 709, 527 NYS3d 464 [2d Dept 1988]; see *DeLourdes Torres v Jones*, 26 NY3d 742, 772, 27 NYS3d 468 [2016]; *HSBC Bank USA v Lugo*, 127 AD3d 502, 503, 9 NYS3d 6 [2d Dept 2015]; *Hodson v Vinnie's Farm Mkt.*, 103 AD3d 549, 959 NYS2d 440 [2d Dept 2013]; *Gilmore v Gilmore*, 286 AD2d 416, 730 NYS2d 239 [2d Dept 2001]). The Second Department recently reaffirmed the rule that a defendant may waive the right to seek relief under CPLR 3215(c) by his or her conduct (see *US Bank N.A. v Gustavia Home, LLC*, 156 AD3d 843, 844, 67 NYS3d 242 [2d Dept 2017]; *Bank of America, N.A. v Rice*, 155 AD3d 593, 63 NYS3d 486 [2d Dept 2017]).

As noted above, defendants filed a Notice of Appearance through counsel on October 24, 2013. A "defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer" (CPLR 320[a]). The defendants here waived their right to seek a dismissal pursuant to CPLR 3215(c) by filing the notice of appearance and such constituted a formal appearance in the action (see *US Bank N.A. v Gustavia Home, LLC*, 156 AD3d at 844, *supra*, citing CPLR 320[a]; *Bank of Am., NA v Rice*, 155 AD3d at 593, *supra*, *Myers v Slusky*, 139 AD2d 709, 710, 527 NYS2d 464 [2d Dept 1988]; cf. *HSBC Bank USA, N.A. v Grella*, 145 AD3d 669, 670, 44 NYS3d 56 [2d Dept 2016]).

Notwithstanding the defendants' appearance in the action, the Court finds that the doctrine of estoppel against inconsistent positions applies in this case. "The doctrine of judicial estoppel or estoppel against inconsistent positions precludes a party from taking a position in one legal proceeding which is contrary to that which he or she took in a prior proceeding, simply because his or her interests have changed" (*Davis v Citibank, N.A.*, 116 AD3d 819, 820–21, 984 NYS2d 388, 390–91 [2d Dept 2014] [citations omitted]). This doctrine "protect[s] judicial integrity by avoiding the risk of inconsistent results in two proceedings" (*id.*, citing *Bates v Long Is. R.R. Co.*, 997 F.2d 1028, 1038 [2d Cir.]). Estoppel against inconsistent positions applies where a party to an action has secured a favorable judgment "by adopting a certain position and then has sought to assume a contrary position in another action simply because his interests have changed" (*Kimco of New York*,

Inc. v Devon, 163 AD2d 573, 574–75, 558 NYS2d 630, 632 [2d Dept 1990], citing *Anonymous v Anonymous*, 137 AD2d 739, 741, 524 NYS2d 823 [2d Dept 1988]; *see also, Davis v Wakelee*, 156 U.S. 680, 689, 15 S.Ct. 555, 558, 39 L.Ed. 578 [1895]; *Neumann v Metropolitan Med. Group*, 153 AD2d 888, 889, 545 NYS2d 592 [2d Dept 1989]; *Knight v Knight*, 31 AD2d 267, 271, 296 NYS2d 1007 [2d Dept 1969]).

The defendants here noted their intention to retain the property and contest the foreclosure action as part of their bankruptcy filing. By seeking dismissal pursuant to CPLR 3215, the defendants are acting in direct contravention to the position they took in their bankruptcy case where they acknowledged the foreclosure action and attested to their intention to contest the action. Because defendants secured the bankruptcy case by adopting one position and now take a contrary position by moving for dismissal, the doctrine of estoppel against inconsistent positions bars defendants from raising any issue with regards to the secured lien and from contesting the foreclosure action (*see, Kimco of New York, Inc. v Devon*, 163 AD2d 573, 574–75, 558 NYS2d 630, 632 [2d Dept 1990] [citations omitted]).

The Court of Appeals recently relied upon the doctrine of judicial estoppel in an opinion by the late Honorable Sheila Abdus-Salaam, *Brooke S.B. v Elizabeth A.C.C.*, 28 NY3d 1, 28-29, 39 NYS3d 89 (2016), which affirmed the detailed discussion of the issue by the Second Department's determination (123 AD3d 1023, 1026, 999 NYS2d 504 [2d Dept 2014]). Here, judicial estoppel is equally determinative.

For these reasons, the Court denies the defendants' application to dismiss the complaint as abandoned pursuant to CPLR 3215(c).

In light of the above, the Court finds that the plaintiff has sufficiently demonstrated its entitlement to the remainder of relief requested on this motion (*see* CPLR 3212, 3215, 1003 and RPAPL §1321; *Wells Fargo Bank, N.A. v Ali*, 122 AD3d 726, 995 NYS2d 735 [2d Dept 2014]; *Central Mtge. Co. v McClelland*, 119 AD3d 885, 991 NYS2d NYS2d 87 [2d Dept 2014]; *Peak Fin. Partners, Inc. v Brook*, 119 AD3d 916, 987 NYS2d 916 [2d Dept 2014]; *Plaza Equities, LLC v Lamberti*, 118 AD3d 688, 986 NYS2d 843 [2d Dept 2014]; *Flagstar Bank v Bellafore*, 94 AD3d 1044, 943 NYS2d 551 [2d Dept 2012]).

The plaintiff's request for an Order vacating a certain satisfaction of mortgage is denied. Initially, the Court notes that plaintiff's Notice of Motion is silent as to this request for relief, which is in direct violation of CPLR 2214(a). Notwithstanding the deficient pleading, however, the plaintiff fails to submit due proof by an affidavit of the plaintiff and/or other person with knowledge of the erroneous or fraudulent nature of the issuance of the satisfaction piece and the absence of detrimental

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reliance on the erroneous recording by the named defendants or such others as are identifiable through a certified search of property records (*see Deutsche Bank Trust Co. v Stathakis*, 90 AD3d 883, 935 NYS2d 651[2d Dept 2011]). Indeed, an affirmation of counsel having no personal knowledge of the facts is without evidentiary value in this regard (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). As the plaintiff has failed to meet its initial burden, this branch of plaintiff's motion is denied with leave to resubmit upon proper papers.

The Court, therefore, grants plaintiff's motion (#002) in its entirety, denies defendants' cross motion (#003) in its entirety and simultaneously signs the proposed Order, as modified.

DATED: 7/19/10



THOMAS P. WHELAN, J.S.C.