

AJ Partners Lending LLC v 194 29th St. LLC

2020 NY Slip Op 30680(U)

March 2, 2020

Supreme Court, Kings County

Docket Number: 501953/19

Judge: Lawrence S. Knipel

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At an IAS Term, Commercial Part 6 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2nd day of March, 2020.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

-----X
AJ PARTNERS LENDING LLC,
Plaintiff,

- against -

194 29TH STREET LLC, et al.,
Defendants.
-----X

DECISION AND ORDER

Index No. 501953/19

Mot. Seq. No. 1-2

The following e-filed papers read herein:

NYSCEF No.

Order to Show Cause/Notice of Motion, Affirmations,
and Exhibits Annexed _____
Affirmations in Opposition and Exhibits Annexed _____
Proposed Intervenor's Letter to the Court and Exhibit Annexed _____
Defense Counsel's Letters to the Court _____

50-64, 67; 71-74
75-79
80
81-82

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In this action to foreclose two mortgages held by the same lender on residential real property located at 194 29th Street in Brooklyn, New York (Block 669, Lot 18) (the subject property), which was owned by defendant 194 29th Street LLC (defendant), the following motions have been consolidated for disposition. In Seq. No. 1, defendant moves, by order to show cause, dated Nov. 22, 2019, for an order: (1) pursuant to CPLR 317, 5015 (a) (1), 5015 (a) (4), and the inherent powers of the court, vacating the default judgment of foreclosure and sale, dated Sept. 4, 2019; (2) pursuant to CPLR 5240 and the inherent powers of the court, staying the enforcement of the judgment of foreclosure and sale; (3) restoring this matter to the active calendar; (4) invalidating and declaring void the foreclosure auction and sale of the subject property by Referee Michael D. Benjamin, Esq. (the referee), to nonparty 194 Mazal 29 IGB LLC (Mazal); (5) directing the referee to refund to Mazal all sums paid on account of the auction purchase price of the subject property; (6) permitting defendant to cure its default under plaintiff's mortgage notes secured by the subject property and to satisfy the judgment lien thereon; (7) pursuant to CPLR 5519 (a) (6), CPLR 2201, and the inherent powers of the court, declaring the amount and terms of defendant's undertaking;

the inherent powers of the court, declaring the amount and terms of defendant's undertaking; (8) staying the transfer of the title to, and the delivery of the deed for, the subject property to Mazal; (9) pursuant to CPLR 2201 and the inherent powers of the court, staying all further proceedings in this action pending a final determination of the relief requested by defendant; (10) requiring plaintiff to properly effect service of process on defendant; and (11) pursuant to CPLR 3012 (d), granting defendant leave to interpose an answer to the summons and complaint, as well as to present such meritorious defenses as it may have in this action.

In Seq. No. 2, nonparty Mazal moves for an order: (1) pursuant to CPLR 1012 (a) (3), for leave to intervene in this action; (2) directing that the referee convey the title to, and deliver the deed for, the subject property to Mazal; and (3) expunging as invalid and ineffective any deeds and mortgages which were recorded in the chain of title for the subject property following the foreclosure sale.

Background

Plaintiff AJ Partners Lending LLC (plaintiff) commenced this action to foreclose two liens secured by the mortgage notes by filing a summons and complaint, dated Jan. 25, 2019. Plaintiff effected service on defendant, a limited liability company, by delivering copies of the summons and complaint to the Secretary of State. Defendant failed to appear or answer the complaint. Thereafter, on plaintiff's unopposed motion, the Court (Vaughan, J.) entered a judgment of foreclosure and sale, dated Sept. 4, 2019, which, among other things, directed the auction and sale of the subject property. Nonparty Mazal purchased the subject property at auction on Nov. 7, 2019. On Nov. 22, 2019, defendant served the instant motion for an order, among other things, pursuant to CPLR 317, 5015 (a) (1), 5015 (a) (4), and the inherent powers of the court, to vacate the judgment of foreclosure and sale, and to set aside the subsequent foreclosure sale. Nonparty Mazal moved for, among other things, leave to intervene and to compel the referee to close the sale of the subject property.

Disposition of Defendant's Motion

“Where, as here, a defendant seeking to vacate a default judgment raises a jurisdictional objection pursuant to CPLR 5015 (a) (4), and seeks a discretionary vacatur pursuant to CPLR 5015 (a) (1) [and/or CPLR 317], a court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5015 (a) (1) [and/or CPLR 317]” (*HSBC Bank USA, N.A. v Daniels*, 163 AD3d 639, 640 [2d Dept 2018]). Plaintiff has established, without contradiction from defendant, that it effected service on defendant by delivering copies of the summons and complaint to the Secretary of State (*see* CPLR 311-a [a]; Limited Liability Company Law § 303). Defendant’s mere denial of receipt, in opposition, is insufficient to rebut the presumption of proper service created by service on the Secretary of State (*see NYCTL 2013-A Trust v Heights Houses Corp.*, 172 AD3d 1078, 1079 [2d Dept 2019]).

A potentially meritorious defense is required for vacatur under either CPLR 5015 (a) (1) or CPLR 317 (*see Vengrenyuk v Exxonmobil Oil Corp.*, 144 AD3d 670, 671 [2d Dept 2016]). Defendant’s contention that it “has the means and the desire to satisfy the judgment lien on the subject [p]roperty”¹ does not constitute a meritorious defense (*see NYCTL 2015-A Trust v 731 Bergen, LLC*, 172 AD3d 1391, 1392 [2d Dept 2019]; *Ameritek Constr. Corp. v Gas, Wash & Go, Inc.*, 247 AD2d 418, 419-420 [2d Dept 1998]).

Defendant’s *post-sale* agreement with plaintiff to cure the default under the mortgage notes cannot reinstate its equity of redemption which was previously extinguished by the foreclosure sale (*see NYCTL 1999-1 Trust v 573 Jackson Ave. Realty Corp.*, 13 NY3d 573, 579 [2009] [“The equity of redemption . . . allows property owners to redeem their property by tendering the full sum at any point *before* the property is actually sold at a foreclosure sale.”] [emphasis added]; *Kolkunova v Guaranteed Home Mtge. Co.*, 43 AD3d 878, 878

¹ Steven Przybyl Aff., dated Nov. 21, 2019, ¶ 10.

[2d Dept 2007] [“The right to redeem is extinguished as a matter of law upon the foreclosure sale, *whether or not the deed has been delivered.*”] [emphasis added]; *Norwest Mtge., Inc. v Brown*, 35 AD3d 682, 684 [2d Dept 2006] [“Once the right to redeem is lost, it cannot be revived, even by court order.”]). Further, defendant’s agreement to cure the default under the mortgage notes is not tantamount to an unconditional tender of the full amount due and thus does not qualify as a stated intention to redeem the mortgages (*see LIC Assets, LLC v Chriker Realty, LLC*, 131 AD3d 946, 947 [2d Dept 2015]).

“In addition to the grounds set forth in [CPLR] 5015 (a), a court may vacate its own judgment for sufficient reason and in the interests of substantial justice” (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]). “The decision as to the setting aside of a default in answering is generally left to the sound discretion of the Supreme Court, the exercise of which will generally not be disturbed if there is support in the record therefor” (*MacMarty v Scheller*, 201 AD2d 706, 707 [2d Dept 1994]). The Court, in its discretion, declines to vacate the foreclosure judgment on equitable grounds, as the equities here do not favor defendant (*see NYCTL 2005-A Trust v 2137-2153 Nostrand Ave. Assoc., L.P.*, 69 AD3d 697, 698 [2d Dept 2010]).²

Contrary to defendant’s contention, the sale price does not warrant setting aside the foreclosure sale. “In most instances, the fair market value of a mortgaged property will exceed the winning bid on that property at a foreclosure sale” (*Chase Manhattan Bank v Nath*, 162 AD3d 978, 980 [2d Dept 2018]). Defendant has failed to submit sufficient evidence as to the market value of the subject property. That defendant’s listing of the

² *Cf. Hudson City Sav. Bank v Cohen*, 120 AD3d 1304, 1305-1306 (2d Dept 2014) (“Under the unique circumstances of this case, the Supreme Court providently exercised its discretion in vacating the judgment of foreclosure and sale entered on the default of the . . . defendants in the interests of substantial justice. The documentary evidence submitted in support of the motion raises issues including, among others, *whether the plaintiff had knowledge of facts that would lead a reasonable, prudent lender to make inquiries of the circumstances of the transaction at issue.*”) (internal quotation marks and citations omitted; emphasis added).

subject property at \$1,425,000 was “saved” 31 times by anonymous internet users of Web site Zillow, is not indicative of its market value (NYSCEF #80-81). Even assuming that the value of the subject property is what defendant alleges (*i.e.*, \$1,425,000), the sale price of \$1,090,000 for the subject property – a semi-detached, two-story, three-family brick house in the Greenwood section of Brooklyn – is not so inadequate as to shock the Court’s conscience (*see e.g. Polish Natl. Alliance of Brooklyn, U.S.A. v White Eagle Hall Co.*, 98 AD2d 400, 408 [2d Dept 1983] [a winning bid of \$97,017.33 at the foreclosure sale “does not shock the conscience when compared to an alleged actual value of \$260,000 for the property”]).

Disposition of Mazal’s Motion

It is undisputed that on Nov. 7, 2019, Mazal was the successful auction bidder at the foreclosure sale of the subject property. Because Mazal has interest in the subject property, it may intervene as of right pursuant to CPLR 1012 (a) (3) (*see JP Morgan Chase Bank, Natl. Assoc. v Kalpakis*, 91 AD3d 722, 723 [2d Dept 2012]).

As the successful auction bidder, Mazal is entitled under the Terms of Sale and the Memorandum of Sale to close the sale of the subject property and pay the balance due, as more fully set forth in the decretal paragraphs below.

Conclusion

Based upon the foregoing and after oral argument, it is

ORDERED that defendant’s motion is *denied in its entirety*; and it is further

ORDERED that Mazal’s motion is *granted to the extent* that (1) pursuant to CPLR 1012 (a) (3), Mazal is permitted to intervene in this action; and (2) the referee is directed to convey the title to, and to deliver the deed for, the subject property to Mazal in accordance with the Terms of Sale and the Memorandum of Sale, dated Nov. 7, 2019; and the remainder of its motion which is for expungement of any intervening deeds and mortgages following the foreclosure sale is denied; and it is further

