

Deutsche Bank Natl. Trust Co. v Lazar
2021 NY Slip Op 30142(U)
January 6, 2021
Supreme Court, Suffolk County
Docket Number: 32556/2009
Judge: Denise F. Molia
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Index No.: 32556/2009

**SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY**

PRESENT:

Hon. DENISE F. MOLIA
Justice

DEUTSCHE BANK NATIONAL
TRUST COMPANY, AS TRUSTEE OF THE
INDYMAC INDB MORTGAGE LOAN TRUST
2005-1, MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 205-1, UNDER THE
POOLING AND SERVICING AGREEMENT
DATED SEPTEMBER 1, 2005,

Plaintiff,

-against-

JASON LAZAR, FIN FUNDING SERVICES, LLC,
MERS, INC.,

Defendants.

CASE DISPOSED: **YES**
MOTION R/D: **1/24/2020**
SUBMISSION DATE: **6/5/2020**
MOTION SEQUENCE NO.: **006; MD**

ATTORNEY FOR PLAINTIFF:

Duane Morris LLP
1540 Broadway
New York, New York 10036-4086

Farr & Bass
3100 Veterans Memorial Highway
Bohemia, New York 11716

ATTORNEY FOR DEFENDANTS:

Grausso & Foy, LLP
131 West Main Street
Riverhead, New York 11901

Upon the following papers read on the application of movant Enzie Rollins for an order vacating the judgment of foreclosure and sale and staying the warrant of eviction: Order to Show Cause dated January 24, 2020, Affirmation in Support dated January 6, 2020, Affidavit dated January 6, 2020 with Exhibits A through K annexed thereto; Affirmation in Opposition dated February 27, 2020 with Exhibits A through Z annexed thereto; it is

ORDERED that the motion by Enzie Rollins for an order vacating her default and the judgment of foreclosure and sale pursuant to CPLR 5015 [a], granting her leave to file late opposition papers to plaintiff's motion for summary judgment pursuant to CPLR 2004, 2005 and 3012 (d), and staying the warrant of eviction and 72-hour notice, is **DENIED** for the reasons set forth herein (CPLR 5015 [a]).

This is an action to foreclose a mortgage on property located at 217 Oak Avenue, Riverhead, New York 11901 (the "subject property") commenced by the filing of a summons

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and verified complaint on August 14, 2009. A judgment of foreclosure and sale was granted on January 23, 2017. A foreclosure sale was held on September 27, 2017, at which time plaintiff was the highest bidder and subsequent thereto, a referee's deed dated October 11, 2017 was issued to plaintiff. On July 20, 2018, the subject property was sold and transferred from plaintiff to Insource East Properties, Inc. ("Insource")¹ by deed recorded on December 11, 2018. Insource then commenced an eviction proceeding on August 17, 2018 in Southampton Court, County of Suffolk (the "eviction action"). The eviction action was commenced against defendants Pamela Rollins, the daughter of movant Enzie Rollins, Daren L. Jefferson, and Tanaisha M. Jefferson (collectively referred to herein as "the tenants"). In the eviction action, Pamela Rollins consented to a judgment of possession and issuance of a warrant of eviction, which was so-ordered on October 5, 2018. On November 1, 2018, a warrant to remove the tenants from the subject premises was issued by the Southampton Court. Thereafter, movant Enzie Rollins, who resides at 15 Grove Street, Riverhead, New York (the "Rollins property"), presented herein an order to show cause requesting an order staying the enforcement of the warrant of eviction and 72-hour notice, granting her leave to intervene in this action, and vacating the judgment of foreclosure and sale and/or dismissing the action upon allegations that defendant Jason Lazar fraudulently induced her to sell the subject property on July 29, 2000 under the guise that she was refinancing her home. On February 22, 2019, the Court issued an order (the "2019 order"), which granted Rollins a stay of the eviction and enforcement of the 72-hour notice, leave to intervene pursuant to CPLR 1012 (a), and pursuant thereto directed Rollins to serve an answer within twenty days from the date of the order. On April 9, 2019, the Court issued an order that due to the failure of Enzie Rollins to serve an answer and appear for a compliance conference on April 2, 2019, Enzie Rollins was found to be in default and the stay of eviction and the 72-hour notice on the subject property was vacated. On September 20, 2019, the Court issued a further order, clarifying the 2019 order, directing the date by which Enzie Rollins was to serve an answer, and based upon such clarification, the answer was deemed untimely served. Enzie Rollins now moves by order to show cause seeking to stay the enforcement of the warrant of eviction and 72-hour notice on the subject property. The court notes that although the order to show cause does not seek any further specific relief, it appears from the affirmation of counsel for movant Enzie Rollins that she also is requesting an order vacating her default pursuant to CPLR 5015 (a) and granting her leave to file late opposition papers to plaintiff's motion for summary judgment pursuant to CPLR 2004, 2005 and 3012 (d). Plaintiff opposes the motion.

On an application pursuant to CPLR 5015 (a)(3), the law is well settled that in order

¹The Court notes that Insource filed an Affirmation in Reply to the motion by Enzie Rollins. Insource, however, is not a party hereto and has not intervened in this action. Thus, the Court has not considered Insource's submissions.

to be relieved of a default judgment, a party 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 [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 [2d Dept 2010]; *U.S. Bank N.A. v Slavinski*, 78 AD3d 1167 [2d Dept 2010]); *Clarke v Clarke*, 75 A.D.2d 836, 427 N.Y.S.2d 871 [2nd Dept 1980]; *393 Lefferts Partner, LLC v New York Avenue at Lefferts, LLC*, 68 AD3d 976 [2nd Dept 2009]). 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]) and in exercising that discretion, the trial court may accept law office failure as an excuse (*see* CPLR 2005; *Parker v City of New York*, 272 AD2d 310, 707 NYS2d 199 [2d Dept 2000]). 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]).

Similarly, CPLR 3012 (d) provides that the court may extend the time for a party to appear or plead “upon such terms as may be just and upon a showing of reasonable excuse for delay or default.” Whether there is a reasonable excuse for a default is a discretionary, *sui generis* determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits (*Harczark v Drive Variety, Inc.*, 21 AD3d 876, 876-877, 800 NYS2d 613 [2d Dept 2005]). The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the trial court (*see Bardales v Blades*, 191 AD2d 667, 595 NYS2d 553 [2d Dept 1993]; *see also Martins v Yukhayev*, 63 AD3d 697, 880 NYS2d 166 [2d Dept 2009]; *see also Parker v City of New York*, 272 AD2d 310, 707 NYS2d 199 [2d Dept 2000]), and in exercising that discretion the trial court may accept law office failure as an excuse (*see* CPLR 2005; *Parker v City of New York*, 272 AD2d 310, 707 NYS2d 199 [2d Dept 2000]). It is well-established that vague, conclusory and unsubstantiated allegations of law office failure will not suffice to vacate a default (*see Wells Fargo Bank, N.A. v Cervini*, 84 AD3d 789, 921 NYS2d 643 [2d Dept 2011]).

Here, movant Enzie Rollins fails to present a reasonable excuse for her default. In that

regard, movant has repeatedly failed to file a timely answer pursuant to orders of this Court and failed to appear at the April 2, 2019 conference for which she provides no excuse for her non-appearance. As such, this Court need not consider whether movant Enzie Rollins has a meritorious defense to the action (*Wells Fargo Bank Minnesota, N.A. v Coletta*, 153 AD3d 757, 60 NYS3d 320 [2d Dept 2017]; *Wells Fargo Bank, N.A. v Mazzara*, 124 AD3d 875, 2 NYS3d 553 [2d Dept 2015]). Notwithstanding, Enzie Rollins fails to assert a meritorious defense to the action and presents only bare and conclusory allegations of purported misconduct on the part of defendant Jason Lazar and Fin Funding dating back to 2005 (see e.g., *Wells Fargo Bank, N.A. v Hornes*, 94 AD3d 755, 942 NYS2d 129 [2d Dept 2012]; *Bank of New York v Stradford*, 55 AD3d 765, 869 NYS2d 554 [2d Dept 2008]; *Bank of New York v Lagakos*, 27 AD3d 678, 810 NYS2d 923 [2d Dept 2006]). Moreover, movant Enzie Rollins does not demonstrate any allegations of fraud on the part of plaintiff or that plaintiff was on notice of any facts that would have led it to make any inquiries regarding the 2005 sale from movant Enzie Rollins to defendant Jason Lazar (see *Mathurin v Lost & Found Recovery, LLC*, 65 AD3d 617, 884 NYS2d 462 [2d Dept 2009]). Further, the Court notes that Rollins has not commenced a separate action against Jason Lazar and/or Fin Funding for fraud or otherwise. As to movant's allegations that she was not served with the summons and verified complaint, this argument is without basis, as Enzie Rollins is not an indispensable party to the foreclosure action (see RPAPL 1311; *Wells Fargo Bank, N.A. v Mazzara*, 124 AD3d 875, 2 NYS3d 553 [2d Dept 2015]; *NYCTL 1998-2 Trust v Michael Holdings, Inc.*, 77 AD3d 805, 910 NYS2d 469 [2d Dept 2010]). Indeed, movant Enzie Rollins provides no evidence that she resided at the subject property at the time the action was commenced. The evidence before the Court indicates that movant resided at the Rollins property at all times relevant hereto. Moreover, it is undisputed that movant Rollins is neither a borrower, mortgagor, or owner of record of the subject property. Thus, there is no evidence presented by movant Enzie Rollins that she has any interest at all in the subject property. Notwithstanding, even if movant Enzie Rollins was a tenant, notice pursuant to RPAPL 1303 was not required at the time this action was commenced. In 2009, only a mortgagor who occupied the premises was required to be served with RPAPL 1303 notice. The amendments to RPAPL 1303 requiring such notice to be served upon tenants of a dwelling became effective on January 14, 2010, which was after this action was commenced. Movant Enzie Rollins has presented no evidence of her status as a mortgagor occupying the premises, and thus, her argument that she should have been given RPAPL 1303 notice is without merit. Being that movant Enzie Rollins has provided no evidence of any interest in the subject premises, her request to intervene at this juncture is both unwarranted and untimely (see *Wells Fargo Bank, N.A. v Mazzara*, 124 AD3d 875, 2 NYS3d 553 [2d Dept 2015]).

Moving next to the request of movant Enzie Rollins for a stay of the eviction and 72-hour notice, it is well established that in order to prevail on a motion for a preliminary injunction, the movant must demonstrate, by clear and convincing evidence, (1) a likelihood

of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of the equities favors the movant's position (*see* CPLR 6301; *Aetna Ins. Co. v Capasso*, 75 NY2d 860, 552 NYS2d 918 [1990]; *Blinds and Carpet Gallery, Inc. v E.E.M. Realty, Inc.*, 82 AD3d 691, 692, 917 NYS2d 680 [2d Dept 2011]; *Dixon v Malouf*, 61 AD3d 630, 875 NYS2d 918 [2d Dept 2009]; *Coinmach Corp. v Alley Pond Owners Corp.*, 25 AD3d 642, 808 NYS2d 418 [2d Dept 2006]; *Ginsberg v Ock-A-Bock Cmty. Ass'n, Inc.*, 34 AD3d 637 (2d Dept 2006). The decision to grant or deny a preliminary injunction rests in the sound discretion of the Court (*see Dixon v Malouf, supra*). Further, preliminary injunctive relief is a drastic remedy that will not be granted unless the movant establishes a clear right to such relief which is plain from the undisputed facts (*Blueberries Gourmet v Aris Realty Corp.*, 255 AD2d 348, 680 NYS2d 557 [2d Dept 1998]; *see also Hoeffner v John F. Frank, Inc.*, 302 AD2d 428, 756 NYS2d 63 [2d Dept 2000]; *Peterson v Corbin*, 275 AD2d 35, 713 NYS2d 361 [2d Dept 2000]; *Nalitt v City of New York*, 138 AD2d 580, 526 NYS2d 162 [2d Dept 1988]). Failing to establish even one required element of a preliminary injunction mandates denial of the relief requested (*Schweizer v Town of Smithtown*, 19 AD3d 682, 798 NYS2d 99 (2d Dept 2005)).

Here, a stay of the eviction and 72-hour notice is unwarranted, inasmuch as there is no basis upon which to vacate the judgment of foreclosure and sale (*see HSBC Bank USA v Desrouilleres*, 128 AD3d 1013, 11 NYS3d 93 [2d Dept 2015]; *Getz v Stuyvesant Manor, Inc.*, 194 AD2d 589, 599 NYS2d 988 [2d Dept 1993]; *M & T Bank v Romero*, 40 Misc.3d 1210, 977 NYS2d 667 [Suffolk Cty. 2013]; *see also U.S. Bank N.A. v Quinones*, 164 AD3d 938, 83 NYS3d 176 [2d Dept 2018]; *Home Sav of America, FSB v Isaacson*, 240 AD2d 633, 659 NYS2d 94 [2d Dept 1997]). The court has considered the remaining contentions of movant Enzie Rollins and finds that they lack 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]).

Accordingly, the motion by Enzie Rollins for an order vacating her default and the judgment of foreclosure and sale pursuant to CPLR 5015 [a], granting her leave to file late opposition papers to plaintiff's motion for summary judgment pursuant to CPLR 2004, 2005 and 3012 (d), and staying the warrant of eviction and 72-hour notice is **DENIED**.

The foregoing constitutes the decision and Order of this Court.

Dated: January 6, 2021


HON. DENISE F. MOLIA A.J.S.C.