

3331 102 St LLC v Newport Beach Holdings, LLC

2021 NY Slip Op 30536(U)

February 26, 2021

Supreme Court, New York County

Docket Number: 156870/2018

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12

Justice

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3331 102 ST LLC,

Plaintiff,

- v -

NEWPORT BEACH HOLDINGS, LLC,

Defendant.

-----X

INDEX NO. 156870/2018
MOTION DATE _____
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22-39 were read on this motion to vacate judgment.

Upon the foregoing documents, it is

By notice of motion, non-party Wilmington PT Corporation moves pursuant to CPLR 1021 for an order granting it substitution in this action on the ground that it is defendant’s successor-in-interest, and upon such intervention, pursuant to CPLR 5015(1) for an order vacating the default judgment granted against defendant. Plaintiff opposes.

I. PROCEDURAL BACKGROUND

A. Complaint (NYSCEF 2)

In July 2018, plaintiff commenced the action, alleging that since August 12, 2015, it or its affiliate 33-31 102 St. Corp. (affiliate) has been the record owner of property located at 33-31 102nd Street in Queens, New York. On November 8, 2017, affiliate executed a deed and transferred ownership of the property to plaintiff, which deed was recorded on November 28, 2017 with the Office of the New York City Register.

According to plaintiff, on or about August 31, 2006, Mortgage Lenders Network USA,

Inc. (MLN), the predecessor-in-interest to defendant Newport Beach Holdings, LLC (Newport) as mortgagee, loaned \$150,000 to Jamie Ciro, the property's then-owner, pursuant to a second mortgage loan between MLN and Ciro. On or about September 27, 2006, a second mortgage was recorded against the property in the name of Mortgage Electronic Registration Systems, Inc. (MERS), in its capacity as MLN's mortgage recording nominee (MERS/MLN).

In 2009, the owner and holder of the first mortgage on the property, US National Bank National Association as Trustee for RASC 2007EMXI (first mortgagee), commenced a mortgage foreclosure action based on Ciro's failure to make required mortgage payments. As part of its complaint, the first mortgagee accelerated the entire outstanding principal balance of the mortgage debt and sought a judgment on the merits terminating the lien of the subordinate second mortgage. MERS/MLN, as the recorded owner of the second mortgage, was served with process and defaulted in answering or appearing. On or about May 24, 2012, the 2009 foreclosure action was discontinued without prejudice.

Plaintiff alleges, on information and belief, that MLN and/or MERS/MLN accelerated the entire outstanding principal balance of the second mortgage debt in connection with or related to the 2009 foreclosure action.

Later that year, pursuant to the prior acceleration of the first mortgage debt, the first mortgagee commenced a new foreclosure action, and sought the same relief as in the 2009 action; MERS/MLN was again served and defaulted. In October 2017, the first mortgage debt was satisfied in its entirety and the first mortgage lien was terminated; a release and satisfaction of mortgage was recorded on October 6, 2017.

On December 19, 2016, an assignment of the second mortgage was recorded against the property, listing Newport as the successor-in-interest to MERS/MLN. According to plaintiff,

between 2009 and 2015, during the six-year statutory limitations period governing the enforcement of the second mortgage, neither MLN nor MERS/MLN took an open and unequivocal action to revoke the prior acceleration of the second mortgage, nor did they request payment from the mortgagor. Thus, by no later than January 1, 2016, the limitations period for enforcing the second mortgage had expired.

Plaintiff thus seeks a judgment declaring that it has quiet title to the property, and a permanent injunction discharging Newport's second mortgage as legally unenforceable and/or time-barred.

B. Procedural history

Plaintiff served Newport with its pleadings on July 25, 2018 by in-hand delivery to its registered agent in Nevada. (NYSCEF 3).

After Newport failed to answer or appear, plaintiff moved for a default judgment, which was granted on July 31, 2019. (NYSCEF 18). On October 2, 2019, a judgment was entered by which Newport's second mortgage was discharged. (NYSCEF 21).

On March 5, 2020, Wilmington filed the instant motion.

II. MOTION TO VACATE DEFAULT JUDGMENT

Pursuant to CPLR 5015(a)(1), the court may vacate a judgment or order on the ground of excusable default, if the motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, and pursuant to CPLR 5015(a)(3) on the ground of the adversary's fraud, misconduct, or misrepresentation.

Absent proof that plaintiff served a copy of the default order or judgment with notice of entry on Newport, the time to move to vacate the default judgment under CPLR 5015(a)(1) never began to run, and thus, the instant motion is timely. (*Gottlieb v Northriver Trading Co. LLC*, 106

AD3d 580 [1st Dept 2013]).

Wilmington submits no affidavit from Newport or any other evidence based on personal knowledge related to service of the pleadings on Newport and its failure to appear or answer. At the time of service, Newport was still the assignee of the mortgage, and thus it was incumbent on it to appear or answer, or explain its failure to do so. Wilmington thus fails to establish a reasonable excuse for Newport's default.

And, absent a reasonable excuse, the merits of the defense are not considered. (*Luciano v Felix*, 185 AD3d 469 [1st Dept 2020] [absent reasonable excuse for default, no need to consider merits of claim]). In any event, Wilmington's vice president fails in his affidavit to establish a sufficient basis for his statements about the mortgage and Newport's actions or inactions related to it. For example, the vice president states that his knowledge is based on his review of Wilmington's records without identifying or providing the records. (*Wells Fargo Bank, N.A. v Sesev*, 183 AD3d 780 [2d Dept 2020] [mere review of records maintained in normal course of business does not give affiant personal knowledge of contents; affiant's assertion as to contents hearsay, unsupported]). Such information is especially relevant as the mortgage was owned by MERS/MLN during the relevant time period, with Newport only being assigned it in 2016. Thus, the pertinent records would presumably be those of MERS/MLN, not only of Newport, and Wilmington is now the mortgage's fourth assignee.

Wilmington's allegations that plaintiff misrepresented whether Newport had accelerated the debt and failed to submit supporting evidence is not the type of fraud or misrepresentation contemplated by CPLR 5015(a)(3), as that section pertains to fraud extrinsic to the action. (*See OneWest Bank, FSB v Galloway*, 148 AD3d 818 [2d Dept 2017] [as defendant's allegation that plaintiff obtained default judgment by making false allegations in complaint as to plaintiff's

standing to commence action constituted intrinsic rather than extrinsic fraud, defendant required to establish reasonable excuse for default and meritorious defense in seeking vacatur of default judgment]).

Nor do the interests of justice warrant vacatur. (See Wells Fargo Bank, N.A. v Abakporo, 186 AD3d 652 [2d Dept 2020] [no evidence of fraud, mistake, inadvertence, surprise or excusable neglect so as to vacate default in interest of justice]).

III. MOTION FOR SUBSTITUTION

Given the result above, there is no need to address the motion for substitution.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion is denied in its entirety.

Handwritten signature of Barbara Jaffe, J.S.C. with a long horizontal line underneath. Above the signature is a long alphanumeric string: 20210226130548B1AFFECC10980D732EA4012B20DC6BEF7960ABE

2/26/2021
DATE

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT REFERENCE