SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR STRUCTURED ASSET INVESTMENT LOAN TRUST MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-10,

Plaintiff,

-against-

VALERIE TAIT; ENVIRONMENTAL CONTROL BOARD; NEW YORK CITY PARKING VIOLATIONS BUREAU; EMILY SMITH; JOE WILLIAMS,

Defendants.

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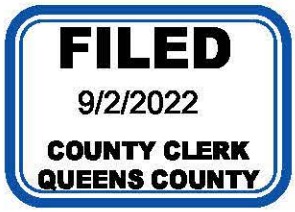
Index No. 701967/2014

Part 6

Motion Date: July 11, 2022.

Calendar No. 43

Sequence No. 7



The following papers numbered 1 to 13 read on this motion by non-party Innovation Two Inc. pursuant to CPLR §5015(a) vacating the Judgment of Foreclosure and Sale dated November 17, 2016 and entered on November 29, 2016, and this cross-motion by plaintiff for an injunction against non-party Innovation Two Inc. and for fees and costs pursuant to 22 NYCRR §130.

	Papers Numbered
Notice of Motion, Affirmation, Exhibits	1-4
Notice of Cross-Motion, Affirmation, Exhibits	5-8
Affirmation in Opposition to Cross-Motion, Exhibits	9-11
Innovation's Reply Affirmation	12-13

Upon the foregoing papers, it is ordered that these motions are determined as follows:

Non-party Innovation Two Inc.'s motion pursuant to CPLR §5015(a) vacating the Judgment of Foreclosure and Sale dated November 17, 2016, and entered on November 29, 2016, is denied. (*See Bank of N.Y. Mellon Trust Co. N.A. v. Hsu*, 204 A.D.3d 874 [2d Dept. 4/20/2022].) Plaintiff's cross-motion for an injunction against non-party Innovation Two Inc. and for fees and costs pursuant to 22 NYCRR §130 is granted solely as indicated below.

Plaintiff commenced this action to foreclose on a note and mortgage secured by real property located at 222-05 138th Road in Laurelton, New York. Plaintiff filed the Summons and Complaint with the certificate of merit and notice of pendency on March 25, 2014. Non-party Innovation Two Inc. (hereinafter referred to as "Innovation") purchased the mortgaged premises from defendant Valerie Tait on June 17, 2014. On March 25, 2015, the Court granted plaintiff Default Judgment and Order of Reference. On June 15, 2016 the Court granted plaintiff Judgment of Foreclosure and Sale. A foreclosure sale was subsequently scheduled for April 22, 2022. On April 19, 2022 – three days prior to the scheduled sale – Innovation brought its first Order to Show Cause to vacate the Judgment of Foreclosure and Sale, which was presented to the Honorable Lance Evans. Justice Evans declined to sign, writing "this applicant is a non-party non-intervenor who lacks standing. This is a meritless and dilatory application." On April 22, 2022 Innovation brought a second Order to Show Cause seeking essentially the same relief that was also denied by Justice Evans on the same basis. Innovation appealed the first Order to Show Cause that was denied by Justice Evans, and the Appellate Division Second Department denied Innovation's application. Despite having been denied the applications to vacate the judgment of foreclosure, Innovation again seeks the same relief sought in the Orders to Show Cause but filed the request as a motion on notice.

Innovation argues the Judgment of Foreclosure and Sale must be vacated because Innovation was not served with Notice of Entry of the Order of Reference and therefore suffered substantial prejudice. Innovation presented the pleadings, prior Court Orders, the Referee's report, the deed to the mortgaged premises, and multiple affidavits. Innovation argues the deed was conveyed to it from defendant Tait on June 17, 2014, and recorded on July 7, 2014. Innovation further argues the deed gives it the right of equitable redemption, which entitled it to service of Notice of Entry of the Order of Reference. Innovation further argues had it been aware of the Order of Reference, it would have appeared at a hearing related to damages. Innovation further argues the Referee's report is not substantially supported by the record because the affidavit of merit the Referee relied upon constituted inadmissible hearsay not supported by the business records relied upon in the affidavit. Finally, Innovation argues it has standing to seek vacatur of the Judgment of Foreclosure and Sale pursuant to CPLR §1018 because it is defendant Tait's successor-in-interest by virtue of the deed that transferred the mortgaged premises from defendant Tait to Innovation. Innovation further argues that as a successor-in-interest, it is not a non-party and did not need to seek intervention. Innovation presented an affidavit of merit from Constantine Giannakos, who indicated that he was involved in the deed transfer of the mortgaged premises. Mr. Giannakos further articulated he submitted the deed to the City Registrar on June 27, 2014 and the check for the $177.00 recording fee was paid on July 7, 2014. Innovation also presented an affidavit of merit from Saidur Khan to further demonstrate that Innovation never received Notice of Entry for the Order of Reference and that the deed transferred title to Innovation.

Plaintiff argues the Judgment of Foreclosure and Sale should not be vacated because as a

non-party, Innovation has no standing, the motion is untimely, and the motion is barred by the doctrines of case of the law, laches, and lis pendens. Plaintiff presented Innovation's prior Orders to Show Cause and the Appellate Order denying Innovation's applications seeking the same relief. Plaintiff argues Innovation's motion is barred pursuant to law of the case doctrine because Innovation's prior Orders to Show Cause and appeal seeking the same relief were denied. Plaintiff further argues Innovation lacks standing as a non-party and as a non-party that fails to seek intervention, it lacks standing to challenge any orders or judgments in an action. Plaintiff also stated Innovation waited eight years to appear – and only days before the scheduled sale. Plaintiff further argues that pursuant to plaintiff's lis pendens, even had Innovation properly sought intervention, Innovation's application would still be denied because it acquired interest in the mortgaged premises pursuant to an unrecorded deed that was subject to plaintiff's Notice of Pendency recorded three months prior. Additionally, plaintiff argues that a party seeking to vacate a judgment pursuant to CPLR §5015 must do so within a reasonable time and that Innovation failed to do so. Finally, plaintiff argues that had Innovation timely moved to vacate, the application should still be denied because there was no fraud, mistake, surprise, or excusable neglect sufficient to warrant vacatur.

The instant application is denied, as non-party Innovation failed to move for leave to intervene pursuant to CPLR §1012, or include a proposed Answer to plaintiff's Complaint pursuant to CPLR §1014. (*See New Hope Missionary Baptist Church, Inc. v. 466 Lafayette Ltd.*, 169 A.D.3d 811 [2d Dept. 2019].) Innovation's argues that it has standing to seek vacatur under CPLR §1018, and that it did not need to seek leave to intervene. However, Judge Evans determined in his Orders in which he declined to sign Innovation's applications that Innovation "is a non-party non-intervenor who lacks standing. This is a meritless and dilatory application." Based upon Judge Evans' Orders, there is substantial evidence that Innovation should have moved for leave to intervene before seeking to vacate the judgment of foreclosure. Further, Innovation's argument that as the successor-in-interest it takes the place of defendant Tait does not benefit Innovation, as defendant Tait was found to be in default in this action.

Even assuming Innovation was entitled to seek vacatur as the successor-in-interest to defendant Tait, Innovation's motion to vacate the Judgment of Foreclosure and Sale is denied, as Innovation failed to present a reasonable excuse for the delay in moving and failed to present sufficient grounds to vacate the judgment in the interests of justice. (*See Hudson Val. Bank, N.A. v. Eagle Trading*, 2022 NY Slip Op. 04956 [2d Dept. 8/17/2022].) Pursuant to CPLR §5015, an interested person seeking vacatur of a Judgment via motion may do so on the grounds of excusable default within one year, newly discovered evidence that would have probably produced a different result, fraud, lack of jurisdiction, or reversal of a prior judgment upon which it is based. (*See CPLR §5015.*)

Innovation's argument that it did not know about the action and therefore could not make

the application earlier is without merit. It is noted that plaintiff filed the Notice of Pendency in the instant action in March 2014 prior to Innovation acquiring the mortgaged premises in June 2014. Therefore, Innovation acquired the mortgaged premises subject to the Notice of Pendency and was on constructive notice of it. Further, the Judgment of Foreclosure and Sale was entered in 2016, yet Innovation made the instant application in April 2022 – six years later, and only days before the scheduled sale. Innovation's argument that it was not served with the Order with Notice of Entry does not establish a reasonable excuse for the delay in seeking to vacate the judgment, as Innovation failed to demonstrate it was not on notice of the proceedings until April 2022 when it finally moved for relief. Innovation has had years to timely move to seek intervention and challenge the referee report, but presented no competent, admissible evidence explaining its failure to do so. As Innovation failed to present a reasonable excuse for the delay, and failed to present competent, admissible evidence that there is newly discovered evidence, fraud, lack of jurisdiction, or reversal of a prior judgment upon which the vacatur Judgment of Foreclosure and Sale should be granted, Innovation's motion is denied.

Plaintiff's cross-motion to enjoin Innovation from filing a further application and for fees and costs for defending against the instant application is granted, solely to the extent that Innovation may not file a duplicative motion or Order to Show Cause seeking the same relief. The definition of frivolous conduct is conduct that is undertaken primarily to harass or maliciously injure another. (*See Telemark Constr. v. Francis Fleetwood & Assocs.*, 236 A.D.2d 462 [2d Dept. 1997].) Plaintiff failed to demonstrate Innovation's motion was undertaken primarily to harass or maliciously injure plaintiff, and therefore fees and costs are not warranted. However, plaintiff demonstrated that Innovation has filed multiple applications seeking the same relief, which is now denied on the merits. Therefore, plaintiff's motion to enjoin Innovation from filing a further application and for fees and costs for defendant against the instant application is granted, solely to the extent that should plaintiff file a motion on notice or Order to Show Cause seeking exactly the same relief as in the prior Orders to Show Cause and the current motion, plaintiff may move for sanctions.

Accordingly, Innovation's motion pursuant to CPLR §5015(a) vacating the Judgment of Foreclosure and Sale dated November 17, 2016, and entered on November 29, 2016, is denied, and plaintiff's cross-motion for an injunction against Innovation and for plaintiff fees and costs pursuant to 22 NYCRR §130 is also denied.

This constitutes the decision and Order of the Court.

Dated: August 29, 2022

Tracy Catapano-Fox

Hon. Tracy Catapano-Fox, J.S.C.