Penny Mac Corp v Gutman
2023 NY Slip Op 30370(U)
February 6, 2023
Supreme Court, Kings County
Docket Number: Index No. 13490/09
Judge: Lawrence Knipel
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At an IAS Term, FRP 3 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 16th day of February, 2023

PRESENT:

HON. LAWRENCE KNIPEL,

Justice.

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PENNY MAC CORP,

Plaintiff,

- against -

MICHAEL GUTMAN, DOV SCHWARTZ, et. al.

Defendants.

- and -

RACHEL LEV,

Intervenor-Defendant.

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DECISION AND ORDER

Index #: 13490/09

In Motion Sequence 7, successor counsel for plaintiff moved by order to show cause to hold the Intervenor, Rachel Lev, in default, to forfeit her down payment, and to conduct another sale, or, in the alternative, to order the Intervenor to close "within ten days" and to hold the Intevenor responsible for per diem interest and taxes (Falasco Affirmation par. 2). Plaintiff argues that the purchaser "was required to close on or before December 2, 2017." Successor Plaintiff acknowledged that the named mortgagors filed motions and appeals, which were ultimately denied or dismissed.

On or about September 9, 2019, successor counsel purportedly sent a letter demanding that the purchaser close pursuant to the "conditions of the Terms of Sale" and declaring that unless purchaser closes within five days of the date of the notice plaintiff would move to hold purchaser in default.

In Motion Sequence 8, counsel for the Purchaser stated that Purchaser desired to close title and promptly applied for financing. The lender advised her to add her daughter as a co-purchaser. Purchaser, through counsel, requested permission "[m]any months ago" and was told the matter was under consideration. Rather than giving permission and having a prompt closing, plaintiff never got back to purchaser and, instead, moved to hold purchaser in default. Purchaser, it is contended, is not requesting to assign her interest, but making a reasonable request to add her daughter as a purchaser so that the closing could take place and finally resolve this matter. By not promptly granting permission to add the daughter as purchaser, it is contended, it would be unfair to hold purchaser in default and to forefeit her down payment of $90,500.

By short form order dated October 25, 2022, this court granted plaintiff's motion to hold the Intervenor in default, and denied the Intervenor's cross motion to add the Intervenor's daughter, Tamara Lev, as a purchaser and to set a date for the closing.

In Motion Sequence 9, Intervenor moves for leave to reargue and/or renew the prior motions. Intervenor argues that the motion papers do not support the statement in the October 25, 2022 short form order that the successful bidder was unable/unwilling to close for five years, and do not serve

as the basis for holding the Purchaser in default. On the contrary, it is urged, the Purchaser was always diligently trying to close, but was unable to close for reasons beyond her control. Although the auction took place in 2017, appeals and motions by and concerning the named defendants were brought, seeking to vacate the Judgment of Foreclosure and Sale and stay the auction or transfer of deed.

It is further argued that reliance on the letter allegedly sent on or about September 9, 2019 to Purchaser's counsel is misplaced, and it, too, cannot serve as the basis for holding Purchaser in default. That letter stated that Purchaser was in default for not closing in 2017 and gave five days from the date of the letter to close or plaintiff would move to have Purchaser declared in default. However, it is urged, neither counsel nor the Intervenor received the letter purporting to make time of the essence, or had any knowledge of any time limitation. In fact, in all the communications with plaintiff and its representatives, no mention was made of the letter or any time limitation. Counsel represents further that the first time he saw the purported letter was when the papers were filed with the County Clerk's office on October 31, 2022, six days after the October 25, 2022 order was issued.

Moreover, it is argued, five days is inherently too short a time to set up a closing, and a time of the essence letter which does not give a reasonable time to perform is a nullity and cannot form the basis for holding the successful bidder in default.

In a supporting affirmation, the Intervenor stated she lived in the property for 10 years with

her three children, that she worked very had to get the deposit of $90,500, and that after the stays were lifted she worked diligently to obtain the balance of the financing. The mortgage broker advised her to add her daughter to the deed, and she asked her attorney to reach out to the bank to get their consent to add Tamara and to arrange a closing. The bank changed attorneys several times, and never gave a definitive answer, forcing her to make a motion to add her daughter to the deed and to close. She further avers she never know anything about a time of the essence letter, and the bank never mentioned it. She could not understand how the bank could declare her in default when it was the bank that stalled and delayed giving an answer about adding Tamara. Finally she states she would be extremely prejudiced and would suffer a huge financial loss if denied the opportunity to close on the house. She avers she acted in absolute good faith, she has been ready, willing and able to close since the auction date, and that the bank's alleging a breach on her part was merely hiding their breach to negotiate a closing in good faith.

In opposition, successor bank's current attorney says the motion "lacks merit and the equities do not tip in the Defendants' favor."

A motion for leave to renew shall be based upon new facts not offered on the prior motion that would change the prior determination, and shall contain reasonable justification for the failure to present such facts on the prior motion. The requirement that a motion for renewal be based on new facts is a flexible one, and it is within the court' discretion to grant renewal upon facts known to the

moving party at the time of the original motion if the movant offers a reasonable excuse for the failure to present those facts on the prior motion (see *Matter of Defendini*, 142 AD3d 500 [2d Dept. 2016][Renewal should have been granted since appellants provided a reasonable justification for their failure to present the new facts in opposition to the prior motion]; *Gonzalez v Vigo Construction Corp.*, 69 AD3d 565 [2d Dept 2010][Supreme Court providently exercised its discretion granting leave to renew where plaintiff offered a reasonable excuse for not including an affidavit in the original motion]).

Here, counsel for Purchaser and the Purchaser herself affirm they did not see the alleged time of the essence letter before the motion was argued and could not have effectively defended Intervenor from the implications flowing therefrom. Moreover, counsel affirms he did not receive the motion papers for Motion Sequence 7, although he asked for them from plaintiff several times over the succeeding adjourned dates without success. Accordingly, in light of the importance of the motions, the representation of not being aware of key elements underlying the motion, leave to renew/reargue is granted and the Court will consider Motion Sequence 7 and 8 on their merits.

In Paragraph 14 on pages 5 and 6 of the Spirgel Affirmation in Support of the Motion to Renew and Reargue, counsel for Intervenor presents chapter and verse of the motions, applications and appeals to vacate the judgment of foreclosure and sale and auction, and/or to stay transfer of the deed, that were undertaken by named defendants. Included in this list is the short form order of this

Court dated January 10 2018, denying the "motions to vacate JFS and sale" without prejudice to further motion based on the alleged death of party Michal Gutman. By order dated October 5, 2018, this court held the death of Gutman does not affect the merits in this case and the motion by order to show cause to cancel the sale was denied. Defendant Schwartz thereupon filed a notice of appeal of the order denying the motion to vacate the judgment and cancel the sale.

Plaintiff changed counsel once again, and it was the then new counsel, Frankel Lambert, that prepared the letter accusing Intervenor of not closing on time according to the terms of the sale (i.e. by December 2017), and giving Intervenor five days to close or they would file an order to show cause to hold her in default.

Counsel for Intervenor strongly denies receiving this letter, and claims that neither he nor the Intervenor had seen the letter before the motion to reargue/renew, nor did they know of its contents. Plaintiff does not present an affidavit from someone who avers sending the letter or explaining how it was sent, if at all. Moreover, an analysis of the letter shows it cannot serve as a valid basis for holding Intervenor in default. The letter faults successful bidder for not closing according to the terms of the sale, by December 2017. This ignores all the motions, appeals, and stays in effect by the named defendants (not the successful bidder) that prevented closing by December 2017, as is evident from the January 10, 2018 order of this Court providing, *inter alia*, "stays lifted", and even then there were more motions and applications preventing a closing.

To the extent that the provision of the letter giving five days to close is interpreted as a time of the essence clause, that provision is not only of dubious validity because of the strong denial of receipt and therefore knowledge of the new condition, but it is also fatally flawed on the law. A time of the essence letter calling for a five day closing is virtually impossible to fulfill and cannot serve as a basis for a default. When requiring performance on a specific date with time of the essence, the purchaser must be given sufficient time to perform, and if reasonable time is not given, the time of the essence letter is a nullity (see *ADC Orange, Inc. v Coyote Acres, Inc.*, 7 NY3d 484 [2006]; *Revital Realty Group LLC v Uiano Corp.*, 112 AD3d 902 [2d Dept. 2013]; *Ianucci v 70 Wash. Partners LLC*, 51 AD3d 869, 871-872 [2d Dept. 2008]). Clearly, under the facts of this case, five days to close, even if it was sent and counsel received it, is neither realistic nor practicable, and cannot serve as the basis for a default.

As for Motion Sequence 8, plaintiff has not presented any reason not to allow Tamara Lev as a co-purchaser, and has not provided any explanation why a definitive answer was not given that would have allowed the closing to have taken place many months ago.

In sum, leave to renew and/or reargue is granted. Upon reconsideration, Motion Sequence 7 seeking to hold Intervenor in default and to forfeit the down payment, is denied. Motion Sequence 8 is granted, Tamara Lev may be added as a co-purchaser, and the Intervenor is directed to close within 60 days of the date of this order. The order of this Court dated October 22, 2022 is vacated.

In addition, on the Court's own motion, the Referee who has the down payment has been elected to the Supreme Court and must be replaced. Accordingly, it is ordered that Jeffrey Miller, Miller Leiby Rassul, 32 Broadway FL 13 NY, NY 10004 212 227-4200 is hereby appointed Substitute Referee and will take the place of the appointed Referee.

The foregoing constitutes the decision and order of this Court.

ENTER

J. S. C.

HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE