

Agai v Mihalatos

2012 NY Slip Op 32273(U)

July 31, 2012

Sup Ct, Nassau County

Docket Number: 4089/09

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

JACOB AGAI,

Plaintiff,

- against -

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 4089/09
Motion Seq. Nos.: 06, 07
Motion Dates: 04/12/12
05/17/12

DENNIS MIHALATOS, ELIZABETH MIHALATOS,
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,
INC., as nominee for ALLIANCE MORTGAGE BANKING
CORP., THE PEOPLE OF THE STATE OF NEW YORK,
UNITED STATES OF AMERICA
AND JOHN DOE # 1 through JOHN DOE #5,
the last five names being fictitious and unknown to Plaintiff,
the persons or parties intended being the tenants, occupants,
persons or corporations, if any, having or claiming an
interest in or lien upon the premises described in the
complaint,

Defendants.

The following papers have been read on these motions:

	<u>Papers Numbered</u>
<u>Notice of Motion (Seq. No. 06), Affirmation and Exhibits, Affirmation and Referee Oath and Report and Exhibits</u>	1
<u>Notice of Cross-Motion (Seq. No. 07), Affirmation and Affidavit</u>	2
<u>Affirmation in Opposition to Cross-Motion and in Further Support of Motion and Exhibits</u>	3
<u>Affirmation in Further Opposition to Motion and in Support of Cross-Motion</u>	4

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

Plaintiff moves (Seq. No. 06), pursuant to RPAPL § 1351, for an Order of Foreclosure and Sale against defendants Dennis Mihalatos and Elizabeth Mihalatos (hereinafter defendants “Mihalatos”); and moves for an order awarding him attorney’s fees in the amount of \$642,437.00.

Defendants Mihalatos oppose the motion and cross-move (Seq. No. 07), pursuant to CPLR § 5015, for an order vacating and setting aside the Referee’s computation of amounts due. Plaintiff opposes the cross-motion.

In April 2012, plaintiff moved this Court for an order granting partial summary judgment of foreclosure against defendants Mihalatos and the appointment of a Referee. In opposition, defendants Mihalatos contended that there were offsets that were to be applied to the subject mortgage and such disputes were pending before the Kings County and Richmond County Supreme Courts. This Court held plaintiff’s motion in abeyance until those matters were disposed.

Both matters were consolidated and heard in Richmond County Supreme Court. In her September 19, 2011 Decision, the Honorable Kim Dollard rejected defendants Mihalatos’ claims of an offset and issued a final judgment in the amount of \$4,856,44.10 (*sic*) on plaintiff’s counterclaim against them and \$988,118.00 in favor of plaintiff.

In October 2011, plaintiff moved this Court for an order pursuant to CPLR § 3212 and RPAPL § 1351, granting Summary Judgment for an Order of Foreclosure against defendants Mihalatos and appointment of Referee to compute the amount of indebtedness. The motion was deemed unopposed due to defendants Mihalatos’ non-appearance and this Court determined that plaintiff established his *prima facie* entitlement to judgment upon the submission of the

underlying mortgage, unpaid note and evidence of defendants Mihalatos' default.

The undisputed facts are that defendants Mihalatos and plaintiff entered into a loan agreement whereby plaintiff loaned proceeds in the amount of \$450,000.00 to defendants Mihalatos. On or about October 2005, plaintiff distributed the funds to defendants Mihalatos and defendants Mihalatos were to pay the same in full including interest of six percent (6%) per annum on October 5, 2008, pursuant to a document entitled "Mortgage Note." The mortgage, executed by defendants Mihalatos on or about June 4, 2007, and duly recorded in the Office of the Nassau County Clerk on or about July 6, 2007, was to be secured by defendants Mihalatos' improved real property located at 85 Knollwood Road West, Roslyn, New York (Section 6, Block B-01, Lot 26). Defendants Mihalatos defaulted in paying on the Mortgage Note on the agreed upon maturity date.

Plaintiff argues that defendants Mihalatos, in their cross-motion (Seq. No. 07), are trying to forestall the foreclosure process by challenging the Referee's report. Plaintiff further argues that defendants Mihalatos' claim that they are entitled to a hearing regarding the report is unsupported by the law. Additionally, defendants Mihalatos' conduct in continued misuse of the legal process, as indicated by the record, warrants sanctioning of their counsel by the Court.

Defendants Mihalatos now argue that defendant Elizabeth Mihalatos never signed the Mortgage Note and is not indebted to plaintiff. Additionally, defendants Mihalatos claim that they did not receive notice of the Referee's hearing and, not only was there no notice, but the report is defective as there is no basis for the calculations therein.

It is well settled that when a mortgagee produces the mortgage and unpaid note, together with evidence of the mortgagor's default, the mortgagee demonstrates its entitlement to a

judgment of foreclosure as a matter of law, thereby shifting the burden to the mortgagor to assert and demonstrate by competent and admissible evidence, any defense that could properly raise a question of fact to his or her default. *See United Companies Lending Corporation v. Hingus*, 283 A.D.2d 764, 724 N.Y.S.2d 134 (3d Dept. 2001); *Trustco Bank, Natl. Assn. v. Labriola*, 246 A.D.2d 735, 667 N.Y.S.2d 450 (3d Dept. 1998).

Here, this Court has already determined that plaintiff is entitled to the remedy of foreclosure. Defendants Mihalatos now attempt to invoke the provisions of CPLR § 5015 to vacate their default, which provides in relevant part:

“...[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:
.... *excusable default*, if such 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...”

In sum, CPLR § 5015(a)(1) permits the court to vacate a default judgment where there has been an “excusable default” by the party seeking vacatur. *See* CPLR § 5015(a)(1). A party seeking to vacate a default judgment bears the burden of demonstrating both a justifiable excuse for the default and a meritorious defense. *See Zino v. Joab Taxi, Inc.*, 20 A.D.3d 521, 799 N.Y.S.2d 124 (2d Dept. 2005). There is strong public policy in favor of resolving cases on the merits and a party who delays in opposing a summary judgment motion should not be deprived of his day in court where he proves the absence of an intent to abandon the action and a lack of prejudice to defendant caused by the delay.

Even assuming that defendants Mihalatos never received notice of the summary judgment proceedings, they are still required to set forth a meritorious defense to vacate the judgment. However, strangely enough, they are not seeking to vacate the judgment of

foreclosure, but only the Referee's Report. Even with such a limited scope of opposition, defendants Mihalatos have not presented any evidence nor an Affidavit of Merit to support their argument that the Referee's computations are fraught with error. As such, they have not presented a meritorious defense.

As to defendants Mihalatos' contention that they are entitled to a hearing, this Court is aware that, generally, such hearings are appropriate to settle disputed facts. *See Blueberry Investors Co. v. Ilana Realty*, 184 A.D.2d 906, 585 N.Y.S.2d 564 (3d Dept. 1992). It is undisputed though, and has been undisputed throughout this protracted litigation before several forums, that defendants Mihalatos defaulted in the payment of the mortgage in the amount of \$450,000.00 "with interest, due and owing as of the repayment date of October 5, 2008." *See* Referee's Oath Exhibit B. Accordingly, the computation ordered by Supreme Court consisted solely of determining the amount of interest due plaintiff and, therefore, a hearing was not required. *See Blueberry Investors Co. v. Ilana Realty, supra.*

The Court has considered defendants Mihalatos' remaining arguments and has determined that they are without merit.

Accordingly, defendants Mihalatos cross-motion (Seq. No. 07), pursuant to CPLR § 5015, for an order vacating and setting aside the referee's computation of amounts due is hereby **DENIED.**

In turn, the Referee's Report is **confirmed** and that portion of plaintiff's motion (Seq. No. 06), pursuant to RPAPL § 1351, for an Order of Foreclosure and Sale against defendants Dennis Mihalatos and Elizabeth Mihalatos (hereinafter defendants "Mihalatos") is hereby **GRANTED.**

The proposed Order, as annexed to the moving papers, shall be forwarded this date to the

Motion Support Unit of this Court and, should it be found to be consistent with the terms of this Decision and Order, it shall be executed upon completion of such review.

With respect to that portion of plaintiff's motion (Seq. No. 06) for an order awarding him attorney's fees in the amount of \$642,437.00, the matter is hereby set down for an Inquest, for an assessment of reasonable attorneys' fees, to be held before the Calendar Control Part (CCP) on the 28th day of September, 2012, at 9:30 a.m.

Plaintiff shall file a Note of Issue on or before September 13, 2012. A copy of this Order shall be served upon the County Clerk when the Note of Issue is filed. Failure to file a Note of Issue or appear as directed shall be deemed an abandonment of the claim giving rise to the Inquest. A copy of this Order shall be served upon the defendants by September 13, 2012.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
July 31, 2012

ENTERED
AUG 02 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE