

Countrywide Home Loans, Inc. v DBR Holdings, LLC
2013 NY Slip Op 32931(U)
November 19, 2013
Sup Ct, Albany County
Docket Number: 6033/07
Judge: Joseph C. Teresi
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

COUNTRYWIDE HOME LOANS, INC.,

Plaintiff,

DECISION and ORDER

RJI NO. 1-08-092495

INDEX NO. 6033-07

-against-

DBR HOLDINGS, LLC; DONOVAN B. RHODEN; ALICIA KRATT; GAFFKEN AND BARRIGER FUND, LLC; THE UNITED STATES OF AMERICA; SCAGNELLI LAW FIRM; ERIC S. MORANG; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; UWEM UMOH; INYANG UMOH; DAIMLERCHRYSLER FINANCIAL SERVICES AMERICAS, LLC; M E M FINANCIAL SOLUTIONS, INC.; MARK E. MCLEOD; TRUSTCO BANK; FORD MOTOR CREDIT CO.,

Defendants.

Supreme Court Albany County All Purpose Term, November 5, 2013
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Berkman, Henoch, Peterson & Peddy, PC
Matthew Burrows, Esq.
Attorneys for Plaintiff
100 Garden City Plaza
Garden City, New York 11530

Chenel Myers, LLP
Michael Chenel, Esq.
Attorneys for Defendants Donovan B. Rhoden and Alicia Kratt
11 Computer Drive West
Suite 212
Albany, New York 12205

TERESI, J.:

Plaintiff commenced this action to foreclose the mortgage Donovan B. Rhoden and Alicia

Kratt executed on September 13, 2002.¹ Upon Defendants' default in answering, this Court granted both Plaintiff's motion for the appointment of a referee and for a Judgment of Foreclosure and Sale (hereinafter "Judgment"). No sale has yet occurred.

Plaintiff now moves to ratify and confirm the Judgment. Defendants oppose the motion. They also move to vacate the Judgment, pursuant to CPLR §5015, and to dismiss the complaint for Plaintiff's lack of standing. Plaintiff opposes Defendants' motion.² Because neither Plaintiff nor Defendants established their entitlement to the relief they seek, their motions are denied.

Considering Defendants' motion first, "[a] party seeking to vacate a default judgment must demonstrate a reasonable excuse for default and a meritorious defense." (Cotter v Dukharan, 110 AD3d 1331 [3d Dept 2013], quoting Capital Compost & Waste Reduction Services, LLC v MacDonald, 73 AD3d 1311 [3d Dept 2010] ; Washington Mut. Bank v Fisette, 66 AD3d 1287 [3d Dept 2009]).

Here, Defendants proffered no reasonable excuse for their default. Both Mr. Donovan and Ms. Kratt offered affidavits, in which they acknowledged proper service of process. They also both conceded their failure to "respond to the summons and complaint." Now, six years later, Mr. Donovan's single excuse for his failure to appear or plead rests upon his prior bankruptcy filing. Ms. Kratt too attempts to excuse her default with Mr. Donovan's bankruptcy filing. The mere act of filing for bankruptcy, left wholly unsupported and unexplained, provides

¹ While the mortgage secures a note of the same date, Ms. Kratt executed only the mortgage. Mr. Donovan and Ms. Kratt will be referred to collectively as "Defendants."

² Contrary to Plaintiff's assertions, Defendants' motion was timely made (CPLR §2211) within the parties' agreed upon "due" date. Moreover, even if Defendants' opposition papers were late (at most a delay of one day), any untimeliness was cured when Defendants consented to Plaintiff's subsequent adjournment request.

no reasonable excuse for Defendants' default. (Christiana Bank & Trust Co. v Eichler, 94 AD3d 1170 [3d Dept 2012]; Hoosack Valley Farmer's Exchange v Lewis, 117 AD2d 859 [1986]). Nor does Defendants' claimed "[f]ailure to understand the need to defend." (Kranenburg v Butwell, 34 AD3d 1005, 1006 [3d Dept 2006], quoting Stoltz v Playquest Theater Co., 257 AD2d 758 [3d Dept 1999]). Moreover, contrary to Defendants' assertions, a Plaintiff's alleged lack of standing requires neither vacatur of a default judgment nor dismissal of the complaint. (HSBC Bank USA, N.A. v Ashley, 104 AD3d 975, 976 [3d Dept 2013] lv to appeal dismissed, 21 NY3d 956 [2013]; CitiMortgage, Inc. v Rosenthal, 88 AD3d 759 [2d Dept 2011]).

"Given the insufficiency of [Defendants'] submission concerning a reasonable excuse for the[ir] default, it is not necessary to address whether defendant[s have] a meritorious defense to the action." (Kranenburg v Butwell, 34 AD3d 1005, 1006 [3d Dept 2006], Weber v Peller, 82 AD3d 1331[3d Dept 2011]).

Accordingly, Defendants' motion is denied.

Turning to Plaintiff's motion, it failed to establish its entitlement to ratify and confirm the Judgment.

After entry of the Judgment, the Chief Administrative Judge of the Courts issued Administrative Order 548-10, which has now been amended twice (AO/431/11 and AO/208/13). Applicable here, the amended Administrative Order requires Plaintiff's counsel to submit an affirmation to the court attesting to "the factual accuracy of the allegations set forth in... any supporting affidavits or affirmations filed with the Court."

Plaintiff makes this motion to comply with the amended Administrative Order, but failed to establish its entitlement to the correction it deems necessary for compliance. Plaintiff submits

the affidavit of Mr. Bluemle, an assistant vice president of its servicer (Bank of America, NA). Such affidavit is submitted to replace the “Deposition” of Renee Hertzler, which Plaintiff had submitted in support of the Judgment. The substitution is necessary because Plaintiff’s counsel can attest to the accuracy of Mr. Bluemle’s affidavit, but not to the accuracy of Ms. Hertzler’s Deposition. This type of substitution is only permissible, pursuant to CPLR §§ 2001 and 5019(a), where the old and new affidavits “list the *same* amounts due and owing.” (U.S. Bank Nat. Ass'n v Eaddy, 109 AD3d 908, 910 [2d Dept 2013]). The “corrections [can]not affect a substantial right of the parties.” (Id.). Here, although Mr. Bluemle’s affidavit contains the same default date and “principal balance due” as Ms. Hertzler’s Deposition, there are significant variations between the two. Ms. Hertzler’s Deposition attached a Calculation Schedule to it, which included an “Inspection” and a “BPO” charge. While Mr. Bluemle’s affidavit attached an Account Information Statement, it included neither an “Inspection” nor a “BPO” charge. In addition, the amount of “Late Charges” included in Ms. Hertzler’s Schedule was different than Mr. Bluemle’s Statement’s “Late Charges.” Mr. Bluemle’s Statement also included a partial payment adjustment not included in Ms. Hertzler’s Schedule. Most importantly however, was the difference between the Schedule’s “Total Advances” and the Statement’s “Advances Total.” Whereas Ms. Hertzler’s Schedule included “Total Advances” of \$9,044.02, Mr. Bluemle’s Statement’s “Advances Total” was \$72,990.73. Because of these clearly substantial and unexplained differences, on this record Plaintiff failed to demonstrate its entitlement to replace Ms. Hertzler’s Deposition with Mr. Bluemle’s affidavit.

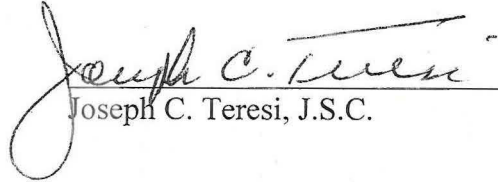
Accordingly, Plaintiff’s motion to ratify and confirm the Judgment is denied.

This Decision and Order is being returned to the attorneys for Plaintiff. A copy of this

Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
November 19, 2013


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated July 31, 2013; Affirmation of Matthew Burrows, dated July 31, 2013; Affidavit of James Bluemle, dated July 3, 2013, with attached Exhibits A-D; Affirmation of Matthew Burrows, dated July 31, 2013.
2. Notice of Motion, dated September 30, 2013; Affirmation of Michael Chenel, dated September 30, 2013, with attached Exhibits A-C; Affidavit of Alicia Kratt, dated September 30, 2013; Affidavit of Donovan Rhoden, dated September 30, 2013.
3. Affirmation of Katlyn Costello, unsigned, with attached Exhibits A-F.