Tribeca Lending Corp. v Bartlett
2013 NY Slip Op 33430(U)
December 4, 2013
Supreme Court, New York County
Docket Number: 105275/2007
Judge: Saliann Scarpulla

[* 1]

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

PRESENT: HON. SALIANN SCARPULLA PART 19

Justice

Tribeca Lending Corp.

INDEX NO. 105275/07

MOTION DATE

- v -

MOTION SEQ. NO. 20

Gregory M. Bartlett, Et Al.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
DEC 04 2013
NEW YORK
COUNTY CLERK'S OFFICE

motion and cross-motion are decided in accordance with accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 12/4/13

HON. SALIANN SCARPULLA J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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TRIBECA LENDING CORPORATION,

Plaintiff,

-against-

GREGORY M. BARTLETT F/K/A GREGORY HILL, NYS DEPARTMENT OF TAXATION & FINANCE, NYC PARKING VIOLATIONS BUREAU, and NYC ENVIRONMENTAL CONTROL BOARD,

Defendants.

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Index No.: 105275/2007
Submission Date: 8/07/13

DECISION AND ORDER

For Plaintiff:
Jill C. Lesser, Esq.
110 East 59th Street, 22nd Floor
New York, NY 10022

For Defendant:
The Law Office of David Stein
1400 East 21st Street
Brooklyn, NY 11210

Papers considered in review of this motion to vacate foreclosure judgment:

Order to Show Cause 1
Aff in Support 2
Aff in Opp 3
Reply Aff 5

HON. SALIANN SCARPULLA, J.:

In this mortgage foreclosure action, defendant Gregory M. Bartlett ("Bartlett") moves pursuant to CPLR 5015(a)(2) and (4) to overturn the judgment of foreclosure and sale entered by the Court, or alternately granting leave to renew pursuant to CPLR 2221(e) this court's decision and order dated February 10, 2009 (Lehner, J.) denying the motion to vacate the judgment of foreclosure and sale, and upon such renewal to vacate the judgment of foreclosure.

This mortgage foreclosure action relates to a promissory note to Bartlett in the amount of $1,040,000 dated March 31, 2006, secured by a mortgage on real property located at 16 West 130th Street, New York, New York. The judgment of foreclosure was issued on or about July 25, 2008 (Payne, J.), and Bartlett was served with a copy of the judgment on September 23, 2008. Bartlett first moved to vacate the judgement of foreclosure by motion dated December 18, 2008. That motion was denied by this Court (Lehner, J.) on the ground that Bartlett had not shown a meritorious defense to the foreclosure action.

Bartlett then made a motion to reargue his previous motion to vacate the foreclosure judgment in August 2009. The Court (Lehner, J.) granted reargument, but on reargument adhered to the earlier decision to deny vacatur of the foreclosure judgment, again on the ground that Bartlett failed to demonstrate a meritorious defense. This decision was affirmed by the Appellate Division, First Department. *See Tribeca Lending Corp. v Bartlett*, 84 A.D.3d 496 (1st Dep't 2011).

About a year and a half after his second attempt, Bartlett moved a third time to vacate the foreclosure judgment, moving to reargue and renew, and arguing that plaintiff Tribeca Lending Corporation ("Tribeca") relied on a "fraudulent" appraisal to lend him the $1,040,000. The Court, in a decision and order dated April 11, 2011, denied the motion to reargue, finding that the time for making a motion to reargue the foreclosure judgment had long since passed, and that Bartlett failed to show that the Court overlooked

any relevant fact or principle of law before it at the time the Court granted the foreclosure judgment in 2008.

As to the motion to renew, Bartlett argued that his new evidence, a copy of the appraisal used in connection with the loan, was fraudulent, and that the loan was predatory. The Court denied the motion to renew, holding that it was not Tribeca who issued the appraisal, but a third party appraisal company, and Bartlett failed to allege or show any facts to support a claim that Tribeca knew or had any reason to suspect that the appraisal was fraudulent, or that any alleged fraud could be attributed to Tribeca. In addition, Bartlett specifically acknowledged in his loan application that Tribeca had not made any representation as to the value of the property, and he was unable to show that Tribeca tricked him into entering into the loan and mortgage, nor could he avoid the consequences of the agreements he signed by claiming that he has not read them. This decision was affirmed by the Appellate Division, First Department, finding there was no evidence to attribute any possible fraud by the appraiser to Tribeca. *See Tribeca Lending Corp. v. Bartlett*, 103 A.D.3d 516 (1st Dep't 2013).

Bartlett then moved by order to show cause for an order vacating the April 11, 2011 decision and order, pursuant to CPLR 5015(a)(2), claiming newly discovered evidence. This Court denied the motion in an order dated December 15, 2011, noting that the time for making a motion to reargue the underlying judgement of foreclosure had passed. In addition, the order stated that "as the time for making a motion to reargue the

underlying foreclosure judgment has long since passed, the Court will not entertain any additional motions seeking to revisit the judgment."

Bartlett attempted to again vacate the foreclosure judgment, but on March 1, 2012, the Court declined to sign the order to show cause.

In October 2012, Bartlett tried yet again to vacate the foreclosure judgment, and the Court again declined to sign the order to show cause. In a decision dated October 3, 2012, the Court stated that three judges of this court "have reviewed Mr. Bartlett's claims and found them to be without merit. There is no basis to stay the foreclosure." However, about one week later, Bartlett tried to file yet another order to show cause to vacate the foreclosure. In an order dated October 11, 2012, the Court said "I once again decline to sign this [order to show cause]. Defendant's remedy lies in appeal at this point, not in continuous, repetitive orders to show cause submitted to this court."

The next month, in an order dated November 13, 2012, I denied defendant's motion to recuse myself.

Then, on January 23, 2013, the Court denied Bartlett's application for a mandatory settlement conference.

Bartlett again moved to vacate the default, which was denied by this Court in an order dated March 6, 2013, which states: "[d]efendant has been up to the [Appellate Division] twice, which [Appellate Division] has twice affirmed the judgment. Defendant

has failed to show an excusable reason for failing to show, and failed to show a meritorious defense."

In a decision on the record on May 1, 2013, the Court denied Bartlett's motion to vacate the default which denied his motion to have mandatory settlement conference with Tribeca. On the record, the Court explained that it would not vacate the default because Bartlett's loan does not qualify for a mandatory settlement conference under CPLR 3408, because the judgment of foreclosure had already been entered, the loan was not a high cost loan, and moreover any settlement conference would be futile as Tribeca stated it was not interested in entertaining a discussion to modify the loan. The Court also granted Tribeca's cross-motion, lifting the stay of the judgement of foreclosure.

In an order dated May 29, 2013, the Court again declined to sign another order to show cause, stating that "[t]he case has concluded, and defendant's options now lie in appellate review."

Less than a week later, in an order dated June 4, 29013, the Court again declined to sign an order to show cause for Bartlett. The decision provides, "[a]s I have repeatedly stated, this action is concluded. Defendant's remedy lies in appellate review. I note that this is Mr. Bartlett's 19th motion. I have reviewed this action many times, as has the Appellate Division, First Department. This is a 2007 mortgage foreclosure." (Emphasis in original.)

Two months later, Bartlett, represented by new counsel, made this motion to vacate the judgment of foreclosure, or in the alternative to renew the Court's February 10, 2009 decision denying the motion to vacate the judgment of foreclosure.[1] Bartlett argues that his motion should be granted because (1) the referee's deed, dated March 3, 2010, transfers the property to Franklin Asset Mortgage Trust 2009-A, and that such transfer is a nullity because the closing date for the trust was March 31, 2009; (2) Tribeca did not have standing after the transfer of the mortgage from Tribeca to Franklin Asset Mortgage Trust 2009-A in March 2009; (3) the affidavit of merit was not valid; and (4) Tribeca has failed to comply with RPAPL 1331 requiring a valid notice of pendency 20 days prior to judgment. Bartlett also asserts that "the balance of equities lies in Defendants [sic] favor." Bartlett maintains that the "prior applications made by defendant as a pro se litigant should not be a factor in the determination of this motion."

In opposition, Tribeca argues that Bartlett fails to address the legal standard for vacatur or renewal, namely newly discovered evidence which should have produced a different result below and which could not, despite due diligence, have been discovered earlier. Tribeca also asserts that a motion for the same relief was previously made by Bartlett's prior counsel, Keith S. Barnett, Esq., and was denied by the August 12, 2009 decision and order. Tribeca also argues that the evidence proffered on this motion would

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[1] Interestingly, the procedural history presented in counsel's affirmation in support of this motion mentions only the decision granting the judgment of foreclosure, and the February 10, 2009 decision and order denying the motion to vacate it.

not have changed the result on the underlying motion, and that it would not be equitable to start this process over. In addition, Tribeca requests sanctions and that costs be assessed against Bartlett and his counsel.

Discussion

To vacate a default, the moving party must show (1) an excuse for the default and (2) an affidavit of merits, completed by the party, in which defendant must offer a meritorious defense to the satisfaction of the parties. *See* CPLR 5015(a); Siegel, New York Practice, sec. 108 (4th ed. 2005), *citing Benado v Antonio*, 10 A.D.2d 40 (1960).

A motion to renew must present either new facts not offered on the prior motion or a change in the law that would alter the prior determination. CPLR § 2221(e). A motion to renew must also contain reasonable justification for the failure to present such facts on the prior motion. *Henry v. Peguero*, 72 A.D.3d 600, 602 (1st Dep't 2010).

Bartlett offers no excuse for his default, and as such the motion to vacate the default must be denied. *Federal Ins. Co. v. Continental Ins. Co.*, 223 A.D.2d 462 (1st Dep't 1996) (because defendant failed to demonstrate a reasonable excuse for its default, motion to vacate the default was properly denied). Moreover, as this Court has repeatedly found, Bartlett has not shown a meritorious defense to the foreclosure action. *See Vierya v. Briggs & Stratton Corp.*, 166 A.D.2d 645, 646 (2d Dep't 1990) ("absence of facts establishing a meritorious defense is fatal to a motion to vacate").

In addition, Bartlett is merely attempting to repackage the same motion he made many times before. Bartlett contends that "no prior request has been made to this or any other court for the relief requested herein to overturn the sale, cancel the notice of sale, return the defendant to possession of the property and to dismiss the complaint. Prior requests however appear to have been made to vacate the judgment of foreclosure and sale." However, this is disingenuous, and an attempt to create a difference where there is none. Bartlett acknowledges elsewhere in his moving papers that he is again seeking to vacate the judgment and nullify the sale.[2]

Even if the Court were to ignore the attempts made by Bartlett over the past four years to avoid the judgment of foreclosure entered against him and view this as a new type of motion, it must be denied. Bartlett's papers are devoid of any excuse for his default. He also fails to offer a meritorious defense. In fact, never in the entire history of this litigation has Bartlett suggested that he made the payments under the loan. Instead, he now argues that the sale should be void because of the transfer of the mortgage and loan in March 2009, which was after the judgment was entered in September 2008. Had there been a transfer of the mortgage and loan, which Tribeca maintains there was not, by Bartlett's own assertion it would have taken place after the entry of the judgment of

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[2] Paragraph 40 of counsel's affirmation in support states, "The prior applications made by defendant as a pro se litigant should not be a factor in the determination of this motion. Defendant in this motion has laid out a clear basis *for vacating the judgment and nullifying the sale.*" (Emphasis added.)

foreclosure. Bartlett also argues that Tribeca lacks standing because there is "an indication" that Bartlett's mortgage was one of a number of mortgages transferred from Tribeca to Franklin Credit Management Corporation in 2009, and "[i]f in fact the mortgage was transferred," then Tribeca would not have standing to proceed with the foreclosure. Again, even assuming for purposes of this motion that this allegation were true (and Bartlett submits no documentary evidence to support that it is), the contention that Tribeca *might* have transferred the loan at some point *after* the judgment of foreclosure was entered would not affect Tribeca's standing nor would it make the transfer a nullity.

Similarly, Bartlett's argument that the affidavit of merit in the original foreclosure motion was invalid is baseless. Bartlett asserts that the affidavit lacks a certificate of conformity, and is therefore invalid. Tribeca maintains that the affidavit contains a certificate of conformity. Even if it did not, the argument lacks merit because "[t]he absence of such a certificate is a mere irregularity, and not a fatal defect." *Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 A.D.3d 672, 673 (1st Dept 2009). *See also Mack-Cali Realty, L.P. v Everfoam Insulation Sys., Inc.*, 972 N.Y.S.2d 310, 312 (2d Dep't 2013).

Bartlett's argument that Tribeca failed to comply with RPAL 1331 which requires a valid notice of pendency 20 days prior to judgment also lacks merit. Bartlett asserts that the notice of pendency filed April 19, 2007 along with the summons and complaint, is

invalid because it did not comply with CPLR 6512 which provides that a notice of pendency is valid only if a summons is served upon defendant within thirty days of filing the notice of pendency. Bartlett maintains that the affidavit of service was filed on May 17, 2007, and therefore service was not complete until ten days later on May 27, 2007, more than thirty days after filing of the notice of pendency on April 19, 2007. However, as Tribeca asserts in opposition, even if the proof of service was filed late, that does not establish a basis to vacate a notice of pendency. *See Varon v. Ciervo*, 170 A.D.2d 446 (2d Dep't 1991) (filing proof of service is "ministerial and never affects the validity of service").

In the alternative, Bartlett's motion to renew must also be denied. Even assuming that Bartlett presents new facts which might have caused a different outcome in the underlying decision, Bartlett does not offer any explanation for his delay in offering these "newly discovered" facts. Bartlett's allegations that the transfer makes the foreclosure judgment invalid stems from an alleged transfer in 2009. Bartlett does not explain why it has taken four (4) years to "discover" these facts, or why he failed to make these allegations in any of his previous motions to this Court over the last four (4) years. His allegation that as a *pro se* litigant, Bartlett did not know what to do, is unavailing. Moreover, the allegations that the affidavit of merit was not valid and that Tribeca failed to comply with RPAL 1331 regarding a valid notice of pendency cannot possibly be construed as newly discovered facts, as the affidavit was submitted in 2008 and the notice

of pendency filed in 2007. Both were part of the record in this action and cannot be considered "new." As explained above, Bartlett has not offered a reasonable justification for the failure to present these facts on the underlying motion. Additionally, for the reasons stated above, even accepting Bartlett's allegations for purposes of this motion, they would not have changed the outcome of the underlying foreclosure action.

I have reviewed Bartlett's remaining arguments, and find them without merit.

In opposition to this motion, Tribeca requests sanctions and costs. Pursuant to 22 NYCRR §130-1.1, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct. *See also Llantin v. Doe*, 30 A.D.3d 292 (1st Dept. 2006). Sanctions are within the sound discretion of the trial court and are reserved for serious transgressions. While Bartlett has made numerous motions in his attempt to vacate the judgment of foreclosure, there is no showing here that he pursued this action in bad faith. As such, no sanctions are appropriate. However, I will remind Mr. Bartlett and his counsel that the time to revisit the underlying judgment has long since passed, and any remedy he seeks should be addressed through appellate review.

In accordance with the foregoing, it is

ORDERED that defendant Gregory M. Bartlett's motion pursuant to CPLR 5015(a)(2) and (4) to overturn the judgment of foreclosure and sale entered by the Court, or alternately for leave to renew pursuant to CPLR 2221(e) this Court's decision and

order dated February 10, 2009 (Lehner, J.) denying the motion to vacate the judgment of foreclosure and sale, and upon such renewal to vacate the judgment of foreclosure is denied; and it is further

ORDERED that plaintiff Tribeca Lending Corporation's request for sanctions is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
December 4, 2013

ENTER:

Saliann Scarpulla, J.S.C.

FILED
DEC 04 2013
NEW YORK
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