Wells Fargo Bank, NA v Gerasimou
2016 NY Slip Op 30363(U)
February 29, 2016
Supreme Court, Queens County
Docket Number: 705945/2013
Judge: David Elliot

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

WELLS FARGO BANK, NA,
Plaintiff(s),

- against -

EVANGELOS GERASIMOU, et al.,
Defendant(s).

Index
No. 705945 2013

Motion
Date January 14, 2016

Motion
Cal No. 159

Motion
Seq. No. 2

The following papers read on this motion by plaintiff for an order awarding it a default judgment against defendants, appointing a referee to compute, and amending the caption by deleting "John Doe #1" through "John Doe #10"; and on this cross motion by defendant Annamaria Gerasimou (Mrs. Gerasimou) for an order vacating her default pursuant to CPLR 5015 and deeming her verified answer to the original complaint as the verified answer to the amended complaint, *nunc pro tunc*.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	EF56-62
Notice of Cross Motion - Affirmation - Exhibits.....	EF63
Answering Affirmation - Exhibits.....	EF64-66
Reply.....	EF67

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff commenced this action to foreclose a mortgage against real property known as 57-25 East Hampton Boulevard, Bayside, New York. Defendant Evangelos Gerasimou

(Mr. Gerasimou) executed a note in the amount of $417,000.00 in favor of Wachovia Mortgage, FSB, on June 24, 2008. As security for the payment of said indebtedness, Mr. and Mrs. Gerasimou executed a corresponding mortgage on that same date. Pursuant to its complaint, electronically filed on December 17, 2013, plaintiff alleges that it is both the holder of the note and mortgage, that Mr. Gerasimou failed to comply with the terms and conditions contained in the loan documents by defaulting in payment commencing on November 1, 2009 and continuing thereafter and that, as a result, plaintiff elected to accelerate the debt.

All named defendants were served with the summons and complaint and none answered except for Mrs. Gerasimou, who served her verified answer on April 1, 2014, pursuant to stipulation of the parties dated March 6, 2014, which extended her time to answer until April 3, 2014. Defendant Hamilton Equity Group LLC served a Notice of Appearance, as did New York State Department of Taxation, the entity served as "John Doe #1."

Thereafter, plaintiff moved for an order granting it leave to serve a supplemental summons and amended complaint for the purpose of adding FTZ Realty Corp. (FTZ) as a defendant herein and adding a cause of action against it. By order dated May 5, 2015, the motion was granted without opposition to the extent that plaintiff was given leave to serve and file a supplemental summons and amended complaint, and amended notice of pendency, in the form annexed to the moving papers, along with a copy of the order with notice of entry, within 30 days of the entry date of the order. Further, the supplemental summons and amended complaint and amended notice of pendency were deemed served upon those parties served with the instant motion, with the exception of those parties who may have demanded service of amended pleadings. The supplemental summons and amended complaint were e-filed on May 14, 2015, and on May 15, 2015, all parties were served therewith by certified mail, as per the affidavit of service of Danielle Mintzer, sworn to on May 15, 2015.

To the extent plaintiff seeks a judgment by default against defendants herein, same is denied, inasmuch as plaintiff has not demonstrated that defendant FTZ was properly served with process. It does appear that FTZ was served with the May 5, 2015 order together with supplemental summons and amended complaint by certified mail, as the other defendants herein were; however, plaintiff has not established that it obtained personal jurisdiction over FTZ in the first instance (CPLR § 311). Failure to do so, particularly in light of the relief plaintiff seeks against it in its third cause of action and how it relates to the relief plaintiff otherwise seeks – to wit: foreclosure of its mortgage – warrants denial of the motion. It should further be noted that plaintiff has not, on its cause of action against FTZ, submitted "proof of the facts constituting the claim" (CPLR § 3215 [f]).

To the extent plaintiff seeks an amendment of the caption to delete the John Does as necessary parties, same is granted.[1]

Turning to Mrs. Gerasimou's cross motion, it is initially noted that, to the extent she avers that plaintiff "has no right to declare a default against" her, citing the fact that plaintiff's motion to amend the complaint "had nothing to do with defendant's denial of the claims of plaintiff," same is without merit. CPLR 3025 (d) states the following: "Except where otherwise prescribed by law or order of the court, there shall be an answer or reply to an amended or supplemental pleading if an answer or reply is required to the pleading being amended or supplemented. Service of such an answer or reply shall be made within twenty days after service of the amended or supplemental pleading to which it responds." In this instance, since an amended complaint was served and same is one that would have required a responsive pleading if originally served (CPLR 3011), it requires a "fresh answer" (Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3025:21; *see generally Aeromar C. Por A. v Port Auth. of N.Y. and N.J.*, 145 AD2d 584 [1988]). Thus, Mrs. Gerasimou was required to serve a responsive pleading to the amended complaint, at the very latest, by June 8, 2015 (20 days after plaintiff's service upon her counsel of the court's prior order together with the amended pleading, served on May 14, 2015, plus a five-day addition pursuant to CPLR 2103 [b] [2]).

As another preliminary matter, Mrs. Gerasimou has not demonstrated that she is entitled to another foreclosure settlement conference, one having been scheduled on April 22, 2014, and released from the Foreclosure Conference Part on that date due to Mrs. Gerasimou's default in appearance, inasmuch as she admits in her affidavit in support of the cross motion that her residence is elsewhere, same being where she was served with process,

---

1. Plaintiff's counsel is again reminded that, though he continues to refer to New York State Department of Taxation and Finance as a defendant herein, same is not, in fact, the case. Though this entity was indeed served with process as "John Doe #1," as evidenced by he affidavit of service of Paul J. Santspree Sr., sworn to on February 10, 2014, plaintiff has not sought, either by way of this motion, or by way of its prior motion, to substitute New York State Department of Taxation and Finance in the place and stead of "John Doe #1." Plaintiff was advised of this issue by virtue of the court's prior order of May 5, 2015; however, plaintiff, by this motion, seeks to strike all John Doe defendants herein, which would have presumably included New York State Department of Taxation of Finance. Given the fact that it cannot be determined from the papers whether plaintiff has merely mistakenly neglected to seek proper substitution of New York State Department of Taxation and Finance, the court will not assume same by awarding any relief with respect to amendment of the caption, *sua sponte*.

to wit: in Poughkeepsie, New York (*see* CPLR 3408 [a] [requiring a conference when the defendant is a resident of the subject premises]).[2]

Turning to the remaining branch of the cross motion, in order to vacate her default in answering the amended complaint, Mrs. Gerasimou must demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the action (CPLR 5015 [a][1]; *see Deutsche Bank Nat. Trust Co. v Ramirez*, 117 AD3d 674 [2014]; *Wells Fargo Bank, NA v Joshi*, 114 AD3d 936 [2014]; *JP Morgan Mtge. Acquisition Corp. v Hayles*, 113 AD3d 821 [2014]). Moreover, the court can compel the acceptance of a pleading upon such terms as may be just and upon a showing of a reasonable excuse for the delay or default (CPLR 3012 [d]). The showing of a reasonable excuse is the same under both CPLR provisions *(see Stephan B. Gleich & Assoc. v Gritsipis*, 87 AD3d 216 [2011]).

In support, defense counsel, *inter alia*, indicates that the default was not wilful inasmuch as the failure to answer the amended complaint was a single, isolated event, the fact being that Mrs. Gerasimou answered herein evincing her intent to litigate this matter. Further, counsel cites the apparent lack of prejudice to plaintiff since it was aware of her affirmative defenses contained in her answer to the complaint. As to the actual excuse proffered, counsel states that "same can be attributed to law office failure."

"Where a party asserts law office failure, it must provide 'a detailed and credible explanation for the default' " (*GMAC Mtge. LLC v Guccione*, 127 AD3d 1136 [2015], quoting *People's United Bank v Latini Tuxedo Mgt., LLC*, 95 AD3d 1285 [2012]; *see 1158 Props., LLC v 1158 McDonald, LLC*, 104 AD3d 658 [2013]; *HSBC Bank USA, Natl. Assn. v Wider*, 101 AD3d 683 [2012]). A court may exercise its discretion in excusing the default; however, mere neglect will not be accepted as a reasonable excuse under CPLR 2005 (*see JP Morgan Chase Bank, Nat. Assn v Russo*, 121 AD3d 1048 [2014]). A reading of defense counsel's affirmation in support of Mrs. Gerasimou's cross motion in its totality reveals that counsel does not principally rely upon law office failure as the purported reasonable excuse; it would appear, rather, that counsel genuinely believes that plaintiff has no right to declare a default against his client, averring that there would be no justification to deny "vacating any claimed default in light of plaintiff's own overreaching conduct themselves in fabricating a default," and noting that Mrs. Gerasimou was filing the cross motion "as a precaution." This, coupled with the absence of any detail as to the alleged law office failure, renders Mrs. Gerasimou unable to proffer a reasonable excuse for her default in answering the amended complaint (*see Eastern Sav. Bank, FSB v Charles*, 103 AD3d 683[2013]; *HSBC Bank USA, Natl. Assn.*, 101 AD3d at 683; *Cantor v Flores*, 94 AD3d 936 [2012]). The facts offered by

---

2. It is also noted that Mrs. Gerasimou is not the borrower herein, having only executed the mortgage and not the underlying obligation.

counsel for the first time in reply to plaintiff's opposition cannot be considered (*see 47 Thames Realty, LLC v Robinson*, 61 AD3d 923 [2009]; *Murray v New York City Health & Hospitals Corp.*, 52 AD3d 792 [2008]). It is noted that, to the extent counsel alludes to dismissal of the action for plaintiff's failure to move within one year for a default judgment (CPLR 3215 [c]), also in reply to plaintiff's opposition, the default herein occurred upon the failure to answer the amended complaint in June 2015; plaintiff's current motion was, thus, made within one year of the default.

Given the above finding as to Mrs. Gerasimou's failure to demonstrate a reasonable excuse, the court need not consider whether she has established the existence of a potentially meritorious defense (*see Bank of N.Y. v Young*, 123 AD3d 1068 [2014]; *JP Morgan Chase Bank, Nat. Assn*, 121 AD3d at 1049; *HSBC Bank USA, Natl. Assn.*, 101 AD3d at 683).

Even assuming the court were to accept the excuse as reasonable, given the alleged lack of prejudice to plaintiff (*see e.g First Fed. Sav. & Loan Assn. of Rochester v O'Daly*, 201 AD2d 532 [1994]), Mrs. Gerasimou has not demonstrated the existence of potentially meritorious defenses. Initially, though she seeks an order deeming her answer to the original complaint as the answer to the amended complaint, said answer containing forty separate affirmative defenses,[3] Mrs. Gerasimou focuses on roughly five in support of her cross motion. They are, however, without merit for the reasons discussed, *infra*.

To the extent Mrs. Gerasimou states that the mortgagee has not accelerated, aside from the fact that this defense does not appear to be one which was raised by her in her answer, same is without merit inasmuch as plaintiff has accelerated the loan by commencement of the instant action (*see* ¶ 10 of the Amended Complaint).

To the extent that Mrs. Gerasimou states that she did not receive notice of the transfer of the loan to plaintiff, same is without merit inasmuch as she has not established her entitlement to such a notice. Indeed, she is not a signatory to the note here. Notwithstanding, the note specifically advises the borrower that "I understand that the Lender may transfer this Note." Further, this defendant does not explain how a RESPA violation affects the enforceability of a mortgage loan (*see* 12 USC § 2615).

To the extent that Mrs. Gerasimou states that plaintiff lacks standing, plaintiff more than adequately establishes its standing by virtue of: (1) the affidavit of Renee Hicks, Vice President Loan Documentation of plaintiff, who states that plaintiff was in possession of the endorsed note on June 4, 2010 and on or before commencement of the within action; (2) the

---

3. Though the last affirmative defense is titled "Forty-First Affirmative Defense," there is no "Second Affirmative Defense" pleaded.

affidavit of Kyra Schwartz, employee of the attorneys for plaintiff in this action, detailing the firm's receipt of the original loan documents on July 9, 2012, and that same remains in their storage; and (3) the inclusion of the note, mortgage, and assignment of mortgage as exhibits to the summons and complaint.

To the extent Mrs. Gerasimou challenges the authority of Wells Fargo Home Mortgage to send, *inter alia*, the notice of default, plaintiff adequately addresses this claim in opposition to the cross motion by its submission of correspondence from the Comptroller of the Currency, dated May 10, 2004, demonstrating that Wells Fargo Home Mortgage and plaintiff merged effective May 8, 2004.

As to Mrs. Gerasimou's claims that there are defects with respect to the pre-commencement notices, same is also without merit. As Mrs. Gerasimou was not a borrower, she is not entitled to an RPAPL § 1304 notice. As to the notice of default, the one sent to Mr. Gerasimou was sufficient under the terms of the subject mortgage – and another notice need not have been mailed to Mrs. Gerasimou as well – as "Notice to any one Borrower will be notice to all Borrowers" (see ¶ 15 of the mortgage document).

Accordingly, Mrs. Gerasimou's cross motion is denied. Plaintiff's motion is granted only to the extent that the caption is amended so as to delete "John Doe #1" through "John Doe #10." The motion is otherwise denied.

Dated: February 29, 2016

J.S.C.