

BAC Home Loans Servicing LP v Ahmed
2016 NY Slip Op 32567(U)
December 12, 2016
Supreme Court, Suffolk County
Docket Number: 40698/2009
Judge: Howard H. Heckman
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SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

COPY

PRESENT:
HON. HOWARD H. HECKMAN JR., J.S.C.

INDEX NO.: 40698/2009
MOTION DATE: 02/11/2016
MOTION SEQ. NO.: 003MG
004 MD

-----X
BAC HOME LOANS SERVICING LP,

Plaintiffs,

-against-

MAQSOOD AHMED,

Defendants.
-----X

PLAINTIFFS' ATTORNEY:
ROSICKI, ROSICKI & ASSOCIATES, P.C.
26 HARVESTER AVENUE
BATAVIA, NY 14020

DEFENDANTS' ATTORNEYS:
GRAUSSO & FOY, LLP
65A AIR PARK DR., STE. 12-13
RONKONKOMA, NY 11779

Upon the following papers numbered 1 to 32 read on this motion _____; Notice of Motion/ Order to Show Cause and supporting papers 1- 13 #003; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 14- 28 #004; Replying Affidavits and supporting papers 29-32; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff BAC Home Loans Servicing LP, seeking an order: 1) restoring this action to the court calendar; 2) granting a default judgment; 3) substituting Everbank as the named party plaintiff in place and stead of BAC Home Loans Servicing, LP and discontinuing the action against defendants identified as "John Does" and "Jane Does"; 4) deeming all non-appearing defendants in default; 4) amending the caption; and 5) appointing a referee to compute the sums due and owing to the plaintiff in this mortgage foreclosure action is granted; and it is further

ORDERED that the cross motion by defendant Maqsood Ahmed seeking an order pursuant to CPLR 3404 & 3212 denying plaintiff's motion and dismissing plaintiff's complaint is denied; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of the Court; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared and not waived further notice pursuant to CPLR 2103(b)(1),(2) or (3) within thirty days of the date of this order and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff's action seeks to foreclose a mortgage in the original sum of \$275,200.00 executed by the defendant Maqsood Ahmed on August 18, 2004 in favor of America's Wholesale Lender. On that same date the defendant executed a promissory note promising to re-pay the entire amount of indebtedness to the mortgage lender. On July 18, 2006 defendant Ahmed executed a second mortgage in the sum of \$59,193.40 in favor of America's Wholesale Lender and signed a second promissory note promising to re-pay the amount borrowed to the mortgage lender. By Consolidation, Extension and Modification Agreement dated July 18, 2006 the defendant executed a consolidated mortgage creating a single lien in the sum of \$326,000.00 in favor of America's Wholesale Lender. Defendant Ahmed executed a consolidated promissory note in the sum of \$326,000.00 on the same date promising to re-pay America's Wholesale Lender the entire amount of the consolidated loan. By Assignment dated October 5, 2009 Mortgage Electronic Registration Systems, Inc. as nominee for America's Wholesale Lender assigned the consolidated mortgage to plaintiff BAC Home Loans Servicing, LP. Plaintiff claims that the defendant has defaulted in making timely monthly mortgage payments since February 1, 2009.

Plaintiff commenced this action by filing a summons and complaint and notice of pendency with the Suffolk County Clerk's Office on October 28, 2009. Personal service of the summons and complaint upon defendant Ahmed was accomplished pursuant to CPLR 308(4) by affixing a copy of the summons and complaint and an RPAPL 1303 notice on blue paper to the door of the mortgaged premises on November 3, 2009, with a follow-up mailing to the residential premises on November 10, 2009. Service by publication upon defendant PRS Assets, LLC pursuant to CPLR 316 was completed on January 27, 2011. Although no court order was ever signed, court records indicate that the action was "purged" on December 30, 2014. Plaintiff's motion seeks an order restoring this action to the court's active case calendar, granting a default judgment based upon the defendant's failure to serve an answer and for the appointment of a referee.

In support of the cross motion and in opposition to plaintiff's motion, defendant Maqsood Ahmed submits an affidavit stating that plaintiff's process server failed to serve an RPAPL 1303 upon him and therefore the complaint must be dismissed. Defendant also submits an attorney's affirmation together with a memorandum of law and claims that the lender's delay in prosecuting this foreclosure action requires that the complaint be dismissed as abandoned since the action was "purged" by the court and the bank delayed seeking to restore it within one year of the court marking. Finally, defendant contends that the plaintiff has failed to submit sufficient proof to show that it complied with mortgage notice of default service requirements and to prove that it has standing to maintain this action.

In response, the plaintiff submits an attorney's affirmation and argues that no basis exists to dismiss the complaint as abandoned since the bank has consistently sought to prosecute its claims. Plaintiff contends that this action is meritorious based upon the defendant's continuing default in making mortgage payments due under the terms of the parties' agreement and argues that the defendant has waived his right to assert the defenses he now raises in his cross motion since he defaulted in serving an answer. Plaintiff maintains that absent any demonstration of a reasonable excuse for his failure to timely serve an answer and of a meritorious defense, no legal basis exists to vacate the defendant's default in appearing and therefore the defendant has waived the defenses he is attempting to assert in his cross motion.

With respect to plaintiff's claimed "abandonment" of prosecution of this foreclosure action, it is clear that the defaulting defendant's reliance of the statutory standard set forth pursuant to CPLR 3404 ("Dismissal of abandoned cases") has no relevance to this prosecution since that statute has no application to pre-note of issue cases (*Paradiso v. St. John's Episcopal Hospital*, 134 AD3d 1002, 20 NYS3d 913 (2nd Dept., 2015); *Suburban Restoration Co., Inc. v. Viglotti et al.*, 54 AD3d 750, 863 NYS2d 724 (2nd Dept., 2008)). CPLR 3216 ("Want of Prosecution") provides the statutory framework and preconditions for seeking dismissal for pre-note of issue cases.

At issue is the question of the plaintiff's delay in prosecuting this action and whether the undisputed facts justify that the action be restored, after it was "purged" from active court inventory by a clerk's office notation on December 30, 2014. CPLR 32115 (c) provides that "if the plaintiff fails to take proceedings for the entry of judgment within one year after a default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion unless sufficient cause is shown why the complaint should not be dismissed." It is not necessary however for a plaintiff to actually obtain a default judgment within one year to avoid dismissal but rather it is enough that the plaintiff timely takes preliminary steps toward a default judgment of foreclosure and sale by moving for an order of reference to establish that it initiated proceedings for entry of judgment (CPLR 3215 (c); *Wells Fargo Bank, N.A. v. Combs*, 128 AD3d 812, 10 NYS3d 121 (2nd Dept., 2015)). "As long as proceedings are being taken which manifest an intent not to abandon the case but to seek a judgment, the action should not be subject to dismissal." (*Brown v. Rosedale Nurseries*, 259 AD2d 256, 686 NYS2d 22 (1st Dept., 1999); *Aurora Loan Services, LLC v. Gross*, 139 AD3d 772, 32 NYS3d 249 (2nd Dept., 2016)). Plaintiff has submitted sufficient evidence to establish a reasonable explanation for its delay in prosecuting this action given the delays occasioned by additional service requirements by order of publication; changes in court procedures as a result of administrative orders; the investigation necessary to determine damage done by the November, 2012 storm; mortgagee service transfers; and confirmation of other court settlement requirements. Plaintiff has also submitted evidence to establish it has a meritorious foreclosure action against the defaulting defendant who has failed to make any payments under the terms of the parties' agreement for more than seven years. Plaintiff's motion to restore the marking of this action as active must therefore be granted.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material question of fact from the case. The grant of summary judgment is appropriate only when it is clear that no material and triable issues of fact have been presented (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957)). The moving party bears the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851 (1985)). Once such proof has been proffered, the burden shifts to the opposing party who, to defeat the motion, must offer evidence in admissible form, and must set forth facts sufficient to require a trial of any issue of fact (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 (1979)).

Entitlement to summary judgment in favor of the foreclosing plaintiff is established, prima facie by the plaintiff's production of the mortgage and the unpaid note, and evidence of default in payment (*see Wells Fargo Bank N.A. v. Eraboba*, 127 AD3d 1176, 9 NYS3d 312 (2nd Dept., 2015);

Wells Fargo Bank, N.A. v. Ali, 122 AD3d 726, 995 NYS2d 735 (2nd Dept., 2014)).

Proper service of an RPAPL 1303 notice on the borrower(s) is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing compliance with this condition (*Aurora Loan Services, LLC v. Weisblum*, 85 AD3d 95, 923 NYS2d 609 (2nd Dept., 2011); *First National Bank of Chicago v. Silver*, 73 AD3d 162, 899 NYS2d 256 (2nd Dept., 2010)). RPAPL 1303 requires that notice be delivered with the summons and complaint to commence the foreclosure action. The notice must be in bold, fourteen-point type and shall be printed on colored paper that is other than the color of the summons and complaint, and the title of the notice shall be in bold, twenty-point type and the notice shall be on its own page.

While service of a statutory notice pursuant to RPAPL 1303 is considered a condition precedent to a mortgage foreclosure action (*Aurora Loan Services, LLC v. Weisblum, supra.*; *First National Bank v. Silver, supra.*), a failure to comply with this notice provision is not a jurisdictional defect sufficient to provide independent grounds for vacating a default by a party who has otherwise defaulted in appearing in an action (*U.S. Bank, N.A. v. Carey*, 137 AD3d 894, 28 NYS3d 68 (2nd Dept., 2016); *Pritchard v. Curtis*, 101 AD3d 1502, 957 NYS2d 440 (3rd Dept., 2012)). A defaulting mortgagor/defendant may advance a statutory or mortgage notice defense in support of an application seeking to vacate his default in answering the complaint pursuant to CPLR 5015. However to be successful, the defaulting mortgagor/defendant is required to vacate his own default by providing proof to demonstrate a reasonable excuse for his failure to timely answer the complaint, and the mere showing of a possible meritorious defense (i.e plaintiff's alleged failure to comply with RPAPL 1303) is legally insufficient to provide a basis to set aside his continuing default in appearing in this action (*Flagstar Bank v. Jambelli*, 140 AD3d 829, 32 NYS3d 625 (2nd Dept., 2016); *Wassertheil v. Elburg*, 94 AD3d 753, 941 NYS2d 679 (2nd Dept., 2012); *Hosten v. Oladapo*, 44 AD3d 1006, 844 NYS2d 417 (2nd Dept., 2007)).

In this case, the defendant has defaulted in serving an answer to the plaintiff's complaint and therefore has waived his right to contest the RPAPL 1303 notice defense, as well as the additional defenses raised by defendant's counsel in his memorandum of law concerning plaintiff's alleged lack of standing and plaintiff's alleged failure to serve a default notice in compliance with mortgage requirements, absent a showing of a reasonable excuse for his failure to serve an answer to the complaint. In this regard, absent submission of an application by the defendant seeking to vacate his (conceded) default, and for permission to serve a late answer (which requires proof of both a reasonable excuse for his failure to timely answer and a demonstration of an arguably meritorious defense), no basis exists to deny plaintiff's motion since the defendant waived his right to assert such defenses by defaulting in serving an answer (*see U.S. Bank v. Carey, supra.*; *Pritchard v. Curtis, supra.*). Moreover, even were the court to consider the merits of the arguments raised by the defendant, the plaintiff has submitted sufficient evidence to establish that the required mortgage and RPAPL 1303 default notices were served by the mortgage servicer and by the process server in compliance with mortgage and RPAPL 1303 requirements.

Finally, the bank has shown that the defendant has defaulted under the terms of the mortgage by failing to make timely monthly mortgage payments since February 1, 2009. The bank having proven entitlement to a default judgment, it is incumbent upon the defendant to submit relevant, admissible proof sufficiently substantive to raise genuine issues of fact concerning why the lender is not entitled to foreclose the mortgage. Defendant has failed to raise any significant factual issue in

opposition to the plaintiff's application. Accordingly defendants' cross motion is denied and plaintiff's motion seeking an order granting a default judgment and for the appointment of a referee must be granted. The proposed order for the appointment of a referee has been signed simultaneously with the execution of this order.

Dated: December 12, 2016


J.S.C.