Citimortgage Inc v Volkommer
2016 NY Slip Op 32568(U)
December 19, 2016
Supreme Court, Suffolk County
Docket Number: 063096/2014
Judge: Thomas F. Whelan

[* 1]

COPY

MEMO DECISION & ORDER

INDEX No. 063096/2014

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 10/13/16
SUBMIT DATE: 11/25/16
Mot. Seq. 002 - MG
Mot. Seq. 003 - MD
CDISP: **YES**

CITIMORTGAGE INC, Plaintiff, -against- CANDYCE M. VOLKOMMER, a/k/a CANDYCE VOLKOMMER, and PATRICK J. PATRICK J. VOLKOMMER, Defendants.	ROSICKI, ROSICKI & ROSICKI Atty. for Plaintiff 2 Summit Court, Suite 301 Fishkill, NY 12524 YOUNG LAW GROUP, PLLC Atty. for Defendant P. Volkommer 80 Orville Drive, Suite 100 Bohemia, New York 11716

Upon the following papers numbered 1 to 8 read on this motion by the plaintiff to confirm report and for judgment and separate motion by defendant P. Volkommer to vacate default and other relief ; Notice of Motion/Order to Show Cause and supporting papers 1 - 3 ; Separate Order to Show Cause and supporting papers by defendant P. Volkommer 4-5 ; Opposing papers 6-7 ; Reply papers 8 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiff (#002) for an order substituting a subsequent transferee as plaintiff, and an order confirming the report of the referee appointed in a prior order of reference entered upon the defaults of all defendants in answering the complaint and for the issuance of a judgment of foreclosure and sale is considered under RPAPL Article 13 and is granted; and it is further

ORDERED that those portions of the separate motion (#003) by defendant, Patrick J. Volkommer, for an order vacating the May 19, 2015 order of reference on default pursuant to CPLR 5015(3) are considered thereunder and denied; and it is further

ORDERED that those portions of the defendant's separate motion (#003) for an order vacating the May 19, 2015 order of reference and the moving defendant's underlying default in answering pursuant to CPLR 5015(a)(1), 2004, 2005, with leave to appear herein by answer pursuant to CPLR 3012(d) are considered thereunder and are denied; and it is further

ORDERED that the remaining portions of the defendant's motion (#003) wherein he seeks an order imposing sanctions against the plaintiff and/or its counsel due to their purported engagement in frivolous conduct are considered under 22 NYCRR Part 1301-1 and denied.

The plaintiff commenced this action on April 25, 2014 to foreclose the lien of a $359,650.00 mortgage given by the Volkommer defendants to ABN AMRO Mortgage, Group, Inc. on August 29, 2005, to secure a mortgage note likewise given on that day by the Volkommer defendants. According to the complaint filed herein, the loan went into default on August 1, 2009 and remains without cure.

The plaintiff further states in the complaint filed herein that a prior foreclosure action was filed with the clerk on September 10, 2012 under Index Number 12-27859, and that "the plaintiff will undertake to discontinue said action". Said action was brought against the Volkommer defendants, Mortgage Electronic Registration Systems, Inc., as nominee for RBS Citizens, N.A., and unknown defendants John Doe and Jane Doe. Only defendant, Patrick J. Volkommer, appeared in that action by an answer prepared by his current counsel. The record reflects that prior to the interposition of any motions in that action, defense counsel consented to the plaintiff's discontinuance of 2012 action by defense counsel's execution of a stipulation on April 21, 2014, providing for such discontinuance and the cancellation of the notice of pendency. Nevertheless, the plaintiff counsel's did not execute that stipulation until September 12, 2016, after which, said stipulation and the other papers necessary to secure the discontinuance of the prior action was filed with the Clerk.

Following service of the summons and complaint in this action on April 30, 2014, the plaintiff served the Volkommer defendants with a Request for Judicial Intervention by mail on May 15, 2014, which was electronically filed on June 26, 2014 and processed by court personnel on October 28, 2014. Thereafter, the court scheduled a CPLR 3408 settlement conference in the specialized mortgage foreclosure conference part of this court for December 9, 2014, at which, neither of the Volkommer defendants appeared. By notice of motion returnable May14, 2015, duly served upon the Volkommer defendants, the plaintiff sought the deletion of the unknown defendants and an order of reference on default. That motion (#001), which was not opposed by the Volkommer defendants, was granted by order dated May 19, 2015.

The plaintiff served its current motion (#002) for the issuance of a judgment of foreclosure and the other incidental relief upon the Volkommer defendants on August 30, 2016. Six days prior to the noticed return date of said motion on October 13, 2016, defendant, Patrick J. Volkommer, interposed his separate motion (#003) by order to show cause to vacate the prior order of reference, his default in answering with leave to serve an answer and the imposition of sanctions against the

plaintiff and/or his counsel. Both the plaintiff's motion (#002), and the separate motion by defendant Volkommer (#003), were adjourned to November 25, 2016 and marked submitted on that date.

Those portions of the defendant's motion wherein he seeks to vacate the order of reference issued herein on May 19, 2015 pursuant to CPLR 5015(a)(3) are denied. The claim to this relief is predicated upon purported acts of fraud allegedly engaged in by plaintiff's counsel in the preparation and filing of the Request for Judicial Intervention ["RJI"] in this action. Therein, the plaintiff's counsel failed to identify the prior 2012 foreclosure action as a "related action" in the box provided therefor on the RJI form generated by the Office of Court Administration and filed herein.

According to defense counsel, absent this allegedly perjurious and false attestation, "this case would have been transferred to the Honorable John J. Leo, J.S.C., and the undersigned [defense counsel] would have received proper and lawful notice of the 2014 action, which was commenced in direct violation of RPAPL 1301" (*see* page 5, ¶ 22, of the affirmation of Ivan Young, Esq., submitted in support of the defendant's motion [#003]; and at page 8, ¶ 32, wherein it is alleged that "IAS would have transferred this matter to Judge Leo (*i.e. the judge presiding over the active, open and pending 2012 action*") and this 2014 Action would have been dismissed for being brought forth in direct violation of RPAPL 1301 (3)" [citations omitted]). The plaintiff and its counsel are thus charged with failing to give proper notice of this action to the defendant's counsel and with "being able to induce this court into granting a default judgment and order of reference on May 19, 2015" (*id.*, at page 6, ¶23). However, the court finds that these contentions lack merit due to their speculative nature as they are premised upon pure surmise and conjecture as to what would have happened if the 2012 action had been identified as related to this one in the Request for Judicial Intervention served and filed herein.

In addition, relief pursuant to CPLR 5015(a)(3) is available upon a showing of either intrinsic or extrinsic fraud. Claims of intrinsic fraud are based upon assertions that the plaintiff's pleaded factual allegations are false due to perjured testimony or upon the use of false and/or fraudulent documents in support of its claims for relief (*see* ***Deutsche Bank Natl. Trust Co. v Karlis***, 138 AD3d 915, 30 NYS3d 228 [2d Dept 2016]; ***U.S. Bank, N.A. v Peters***, 127 AD3d 742, 9 NYS3d 58 [2d Dept 2015]; ***New Century Mtge. Corp. v Corriette***, 117 AD3d 1011, 986 NYS2d 560 [2d Dept 2014]; ***Bank of New York v Stradford***, 55 AD3d 765, 869 NYS2d 554 [2d Dept 2008]; ***Morel v Clacherty,*** 186 AD2d 638, 589 NYS2d 778 [2d Dept 1992]). To be entitled to a vacatur of an order or judgment upon such grounds, the defendant must establish both a reasonable excuse for the default and a potentially meritorious defense to the action (*see* ***Deutsche Bank Natl. Trust Co. v Karlis***, 138 AD3d 915, *supra*; ***U.S. Bank, N.A. v Peters***, 127 AD3d 742, *supra*; ***Wells Fargo Bank, N.A. v Braun,*** 123 AD3d 698, 998 NYS2d 420 [2d Dept 2014]; ***New Century Mtge. Corp. v Corriette***, 117 AD3d 1011, *supra*; ***Bank of New York v Lagakos***, 27 AD3d 678, 810 NYS2d 923 [2d Dept 2006]; ***Fischman v Gilmore***, 246 AD3d 508, 666 NYS2d 942 [2d Dept 1998]; ***Morel v Clacherty,*** 186 AD2d 638, *supra*).

Here, neither the factual allegations in the plaintiff's complaint nor any of the papers submitted in support of the plaintiff's prior motion (#001) for an order of reference have been shown

to contain false or perjurious statements. To the extent that the failure to identify the 2012 action as one related to this one in the RJI filed herein may be considered as constituting a material omission of fact on the part of plaintiff's counsel, there is no causal connection between such omission and the procurement of the order of reference nor any reliance upon said omission by the defendant (*see* ***Nerey v Greenport Mtge. Funding, Inc.***, ___ AD3d ___, 40 NYS3d 510 [2d Dept 2016]; "*To establish fraud, a plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance, and injury*" [citations omitted]). In any event, and as more fully set forth below, no reasonable excuse for the moving defendant's default in answering is discernable from his moving papers.

In contrast to intrinsic fraud, extrinsic fraud is one practiced in obtaining a judgment that is based opon wrongful acts of trickery or deceit which allegedly induced the moving defendant into defaulting or otherwise wrongfully deterred him or her from litigating the plaintiff's claims (*see* CPLR 5015[a][3]; *see* ***EMC Mtge. Corp. v Toussaint***, 136 AD3d 861, 25 NYS3d 312 [2d Dept 2016]; ***U.S. Bank, N.A. v Peters***, 127 AD3d 742, *supra*; ***Bank of New York v Lagakos***, 27 AD3d 678, 810 NYS2d 923 [2d Dept 2006]; ***Shaw v Shaw***, 97 AD2d 403, 403, 467 NYS2d 231 [2d Dept 1983]). To succeed on such a claim, the defendant must demonstrate that he or she "was led to believe that he or she need not defend the suit" (*see* ***Shaw v Shaw***, 97 AD2d 403, *supra*). As in the case of intrinsic fraud, reliance is a necessary element of a claim of extrinsic fraud.

In the reply papers submitted by the defendant, his counsel clearly characterizes the 5015(a)(3) as a claim for one sounding in "extrinsic fraud" due to the plaintiff's failure to list the 2012 action as a related action on the RJI filed herein. However, defense counsel's assertion that had there been no such failure, he "would have received proper and lawful notice of the 2014 action, which was commenced in direct violation of RPAPL 1301" (*see* page 5, ¶ 22, of the supporting affirmation of defense counsel), is belied by ceratin factual averments put before this court in other paragraphs of defense counsel's supporting affirmation.

In paragraph 11 of defense counsel's supporting affirmation, it is alleged that on May 2, 2014, the defendant contacted his counsel and advised him about the plaintiff's service of the summons and complaint in this action, which service was effected by in hand delivery to the defendant on April 30, 2016 (*see* page 3 of defense counsel's supporting affirmation at ¶ 11). Thereafter on May 29, 2014, the defendant contacted his counsel a second time and advised that he had received the RJI served by plaintiff's counsel by mail on May 15, 2014, a copy of which, the defendant faxed to his counsel (*see id*; at ¶ 12 and Exhibit 9 attached thereto). In response to both inquiries, defense counsel advised the defendant to "disregard" the papers served in this action as "they were probably sent in error, being that the 2012 action was in the process of being voluntarily cancelled by Plaintiff and Rosicki" (*id.* at ¶¶ 11; 12).

Apparent from these factual averments is that the defendant faxed a copy of the RJI to his counsel within nine days of the expiration of the time within which the defendant was required to answer the previously served summons and complaint. While the RJI failed to list the 2012 action

as related to this one, the plaintiff's service thereof upon the defendant did not cause him to default in answering nor did it constitute a lack of any proper notice of the commencement of this action to his counsel. Rather, such default was caused by defense counsel's erroneous presumption that there was no need to respond to the summons and complaint served on April 30, 2014, by in hand delivery to the defendant, nor to service by mail of the RJI because "they were probably served in error". There is thus nothing in the record that suggests that the defendant was in anyway induced or "led to believe" by the plaintiff or its counsel that said defendant need not appear in the action and defend against the plaintiff's claims by virtue of the service and filing of the RJI that failed to list the prior action as one related to this action.

The defendant's reliance upon the Appellate Division decision in ***Bank of New York Mellon v Marolda*** (139 AD3d 774, 33 NYS3d 280 [2d Dept 2016]) is misplaced. Many of the material facts found therein, including complete identity of the summonses and complaints served in the two pending actions and index numbers, the plaintiff's grant of an extension of time to answer in the first commenced action and its failure to give notice of motion practice in the second action, differ materially from facts existent in this action. Contrary to the contentions of defense counsel, the complaint served in this action is not identical to the one served in the 2012 action except for the index number, as there are fewer defendants named in the caption and this complaint contains allegations regarding the existence of the prior commenced action and that it was in the process of being discontinued (*cf.*, page 5, ¶ 18 of defense counsel's supporting affirmation). In addition, the RJI faxed by the defendant to his counsel contained the caption of this action which differed from the caption of the prior action. Moreover, the plaintiff served all of its moving papers upon the defendant, including those put before the court on the plaintiff's first motion (#001) for the order of reference that was granted on May 19, 2015.

Accordingly, the court finds the defendant's claim of extrinsic fraud to be without merit. Those portions of the defendant's motion (#003) wherein he seeks a vacatur of the order of reference pursuant to CPLR 5015(a)(3) are thus denied.

Also denied are those portions of the defendant's motion (#003) wherein he seeks an order vacating the May 19, 2015 order of reference and the moving defendant's underlying default in answering pursuant to CPLR 5015(a)(1), 2004, 2005 for leave to appear herein by answer pursuant to CPLR 3012(d). To be entitled to this relief, it was incumbent upon the defendant to demonstrate "excusable default grounds" which require a showing of a reasonable excuse for the default and a demonstration of a potentially meritorious defense (*see* ***Mellon v Izmirligil***, 88 AD3d 930, 931 NYS2d 667 [2d Dept 2011], *quoting*, ***Wells Fargo Bank, N.A. v Cervini***, 84 AD3d 789, 921 NYS2d 643 [2d Dept 2011]; ***HSBC Bank USA, Natl. Ass'n v Rotimi***, 121 AD3d 855, 995 NYS3d 81[2d Dept 2014]; ***Mannino Dev., Inc. v Linares***, 117 AD3d 995, 986 NYS2d 578 [2d Dept 2014]; ***Diederich v Wetzel***, 112 AD3d 883, 979 NYS2d 605 [2d Dept 2013]; ***Community Preserv. Corp. v Bridgewater Condominiums, LLC***, 89 AD3d 784, 785, 932 NYS2d 378 [2d Dept 2011]). The material facts of the asserted meritorious defense must be advanced in an affidavit of the defendant or a proposed verified answer attached to the moving papers (*see* ***Gershman v Ahmad***, 131 AD3d

1104, 16 NYS3d 836 [2d Dept 2015]; ***Karalis v New Dimensions HR, Inc.***,105 AD3d 707, 962 NYS2d 647 [2d Dept 2013]).

Here, the defendant, solely through his counsel, advances law office failure as the reasonable excuse for the default in answering the complaint. This failure is premised upon defense counsel's claim that he twice advised the defendant in May of 2014 to disregard the papers served upon him in this action "as they were probably sent in error, being that the 2012 action was in the process of being voluntarily cancelled by Plaintiff and Rosicki". However, this erroneous advice, coupled with the defendant's decision to follow it, "'constituted a misguided strategy', not law office failure" (***Bank of New York Mellon v Colluci***, 138 AD3d 1047, 30 NYS3d 667 [2d Dept 2016], *quoting* ***OCE Business Sys., Inc. v J.I. Sopher & Co., Inc.***, 186 AD2d 464, 589 NYS2d 774 [2d Dept 1992]; *see* ***White v Daimler Chrysler Corp.***, 44 AD3d 651, 843 NYS2d 168 [2d Dept 2007]; *see also* ***Emigrant Bank v Wiseman***, 127 AD3d 1013, 6 NYS3d 670 [2d Dept 2015]; ***HSBC Bank USA, N.A. v Rotimi***, 121 AD3d 855, 856, 995 NYS2d 81 [2d Dept 2015]).

Even if it were otherwise, the defendant failed to demonstrate possession of a meritorious defense to the plaintiff's claim for foreclosure and sale. The only defense asserted in the defendant's moving papers and the proposed answer attached thereto is that this second foreclosure action must be dismissed because it was commenced before the prior 2012 foreclosure action was formally discontinued in violation of the provisions of RPAPL § 1301. The court, however, rejects this defense.

RPAPL 1301(3) provides that "[w]hile [an] action is pending or after final judgment for the plaintiff therein, no other action shall be commenced or maintained to recover any part of the mortgage debt, without leave of the court in which the former action was brought" (***Hometown Bank of Hudson Val. v Belardinelli***, 127 AD3d 700, 701, 7 NYS3d 289 [2d Dept 2015]). Conversely, "where a 'foreclosure action is no longer pending and did not result in a judgment in the plaintiff's favor, the plaintiff is not precluded from commencing a separate action' without leave of the court (***TD Bank, N.A. v 250 Jackson Ave., LLC***, 137 AD3d 1006, 27 NYS3d 619 [2d Dept 29016] *quoting* ***Hometown Bank of Hudson Val. v Belardinelli***, 127 AD3d 700, 701, *supra*, *quoting* ***McSorley v Spear***, 13 AD3d 495, 496, 789 NYS2d 52 [2d Dept 2004]). Although the plaintiff in this action secured defense counsel's stipulated consent to discontinue the plaintiff's 2012 action prior to commencing this second foreclosure action and before any judgment was entered therein, there was a technical violation of RPAPL 1301(3) due to the plaintiff's failure to sign and file the papers necessary for the formal discontinuance of said prior action prior to the commencement of this action.

Nevertheless, a technical violation of RPAPL § 1301, which is strictly construed as it is in derogation of common law rights, does not necessarily warrant a dismissal of the second action (*see* ***VNB New York Corp. v Paskesz***, 131 AD3d 1235, 18 NYS3d 68 [2d Dept 2015]). Where a defendant seeking dismissal of the second action, in which no judgment was entered, is not in the position of having to defend the first action because the plaintiff was in the process of discontinuing

said action, the violation of RPAPL § 1301 may be disregarded as a mere irregularity provided it does not prejudice a substantial right of any party (*see* ***Wells Fargo Bank, N.A. v Irizarri***, 142 AD3d 610, 36 NYS3d 689 [2d Dept 2016]; *cf.*, ***Aurora Loan Serv., LLC v Reid***, 132 AD3d 788, 17 NYS3d 894 [2d Dept 2015]).

Under the circumstances of this case, the court finds that the technical violation of RPAPL § 1301(3) is a mere irregularity not causing substantial prejudice to the rights of any party. The 2012 action was essentially dormant following the defendant's appearance therein by answer. Although discovery notices were attached to such answer and disputes with respect thereto aired in correspondence between counsel, no motions were made by any party prior or subsequent to the plaintiff's presentation of the discontinuation stipulation that was executed by defense counsel on April 21, 2014. The court thus finds that the defendant failed to demonstrate a potentially meritorious defense to the plaintiff's claim for foreclosure and sale pursuant to RPAPL § 1301. Those portions of the defendant's motion wherein he seeks a vacatur of the May 19, 2015 order of reference issued herein by this court and a vacatur of his underlying default in answering the complaint pursuant to CPLR 5015(a)(1), 2004, 2005 for leave to appear herein by the answer attached to his moving papers pursuant to CPLR 3012(d) are thus denied.

Also denied are the remaining portions of the defendant's motion (#003) wherein he seeks an order imposing sanctions against the plaintiff and/or its counsel due to their purported engagement in frivolous conduct. The moving papers failed to demonstrate that any conduct complained of herein by the defendant through his counsel constitutes frivolous conduct as that term is defined in 22 NYCRR 130-1(c).

Left for consideration is the plaintiff's motion (#002) for confirmation of the report of the referee to compute and issuance of a judgment of foreclosure directing a sale of the mortgaged premises and the other relief demanded in its moving papers. The moving papers sufficiently demonstrated the plaintiff's entitlement to such relief (*see* ***Cafaro v Tineo***, 135 AD3d 887, 22 NYS3d 909 [2d Dept 2016]; ***HSBC Bank USA, Natl. Assoc. v Simmons***, 125 AD3d 930, 5 NYS3d 175 [2d Dept 2015]). The opposing papers failed to demonstrate any grounds for a denial of the plaintiff's motion.

The proposed judgment attached to the moving papers, as modified by the court to reflect the issuance and terms of this order, has been marked signed.

Dated: 12/19/16

THOMAS F. WHELAN, J.S.C.