

Nationstar Mtge. LLC v Slavutsky

2017 NY Slip Op 31338(U)

June 16, 2017

Supreme Court, New York County

Docket Number: 850164/15

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ PART 13
Justice

NATIONSTAR MORTGAGE LLC,
Plaintiff,
-against-

INDEX NO. 850164/15
MOTION DATE 04-26-17
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

**VLADIMIR SLAVUTSKY, YANNA SLAVUTSKY,
AGRI EXOTIC TRADING INC., BANK OF
NEW YORK, BOARD OF MANAGERS OF THE
100 WEST 93 CONDOMINIUM, CITY REGISTER
OF THE CITY OF NEW YORK, NEW YORK,
EVOLVE BANK & TRUST, JPMORGAN CHASE, N.A.,
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, NEW YORK CITY PARKING VIOLATIONS
BUREAU, YUHA GROUP LLC,**
Defendants.

The following papers, numbered 1 to 8 were read on this motion to to vacate a judgment :

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____ cross motion _____
Replying Affidavits _____

PAPERS NUMBERED	
1 - 5	_____
6 - 8	_____

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that defendant Vladimir Slavutsky's motion pursuant to CPLR §5015[a][1],[4], CPLR §317 and CPLR §3215[f], to vacate and set aside the Judgment of Foreclosure and Sale dated November 16, 2016, is denied. The temporary stay of the scheduled foreclosure sale is vacated.

On June 25, 2008, Vladimir Slavutsky (hereinafter referred to as "defendant") and Yanna Slavutsky, borrowed \$710,500.00 from Golden First Mortgage, as the owners of a condominium apartment, Unit 10F, located at 100 West 93rd Street, New York, New York, Section 409, Block 1223, Lot 1352 (hereinafter referred to as "the property") (NYSEF Doc. # 3). Only Vladimir Slavutsky signed the note in connection with the mortgage (Mot. Exh. G).

The FHA mortgage with Golden First Mortgage nominated and assigned Mortgage Electronic Registration Systems, Inc. (MERS) as the holder of legal title. On November 3, 2009 MERS assigned the mortgage to Federal National Mortgage Association) (NYSEF Doc. # 3). On July 22, 2013 defendant entered into a "Home Affordable Modification Agreement" with plaintiff, adding \$253,577.78 to the initial mortgage amount, for a total principal balance due of \$958,967.22 (Opp. Exh. F). On page 3, paragraph 1, titled "My Representations and Covenants," it states, "B. One of the Borrowers signing this Agreement lives in the property as a principal residence, and the Property has not been condemned" (Opp. Exh. F). On April 18, 2014, Federal National Mortgage Association assigned the June 25, 2008 mortgage to plaintiff, and recorded the transaction in the Office of the New York City Register under File No. 2014000145168 (NYSEF Doc. # 3).

On November 21, 2014 plaintiff sent default notices to the defendant and co-defendant at the property (Opp. Exh. H). On April 22, 2015 plaintiff filed a Notice of Pendency and commenced this action. On May 20, 2015 defendant was served with the summons and complaint through service on doorman at the property, "Frank Teti," as a person of suitable age and discretion (Mot. Exh. A, Opp. Exh. B). On May 26, 2015 an additional mailing of the summons and complaint was made to the defendant at the property (Opp. Exh. B). Only Board

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

of Managers of 100 West 93rd Condominium served an answer to the complaint, asserting cross-claims against the defendant and co-defendant (Opp. Exh. C).

On January 11, 2016 plaintiff moved for summary judgment and the motion was granted on default. On November 16, 2016 this Court granted plaintiff a Judgment of Foreclosure and Sale (Opp. Exh. E). Plaintiff filed the Judgment of Foreclosure and Sale with the County Clerk on December 5, 2016 (Opp. Exh. E).

Defendant's motion pursuant to CPLR §5015[a][1],[4], CPLR §317 and CPLR §3215[f], seeks to vacate and set aside the Judgment of Foreclosure and Sale dated November 16, 2016.

Defendant argues that the judgment should be vacated pursuant to CPLR §5015[a][4] for failure to obtain personal jurisdiction over him because at the time of service on May 20, 2015 he did not reside at the property. Defendant claims he moved out of the property as of January of 2014. He provides a copy of his driver's license issued November 13, 2013 showing an address of 535 Neptune Avenue, Apt. 14C, Brooklyn, New York (hereinafter referred to as the "Brooklyn address") and an Income Affidavit for 2014 dated July 15, 2015, to show he resides with his father at the Brooklyn address, as proof that he was not served and had no notice of this action (Slavutsky Aff. Exhs. A and B). Defendant also relies on the "Affidavit of No Tenants" prepared by plaintiff's process server, in which the doorman stated that there were "no tenants residing at unit 10F" as further proof he had vacated the premises (Mot. Exh.B).

CPLR § 5015[a][4] raises a jurisdictional objection for vacating a default judgment, and must be resolved before CPLR § 5015[a][1] relief seeking a discretionary vacatur of the default (U.S. Bank Nat. Ass'n v. Losner, 145 A.D. 3d 935, 44 N.Y.S. 3d 467 [2nd Dept., 2016]). Pursuant to CPLR § 5015[a][4] a judgment or order must be vacated once the defendant demonstrates a lack of jurisdiction as a result of plaintiff's failure to "properly effectuate service of process." Failure to obtain jurisdiction over the defendant results in any judgment obtained being rendered a nullity (Washington Mut. Bank v. Murphy, 127 A.D. 3d 1167, 10 N.Y.S. 3d 95 [2nd Dept. 2015]).

CPLR §308[2] requires that substituted service on a person of suitable age and discretion be made at defendant's "dwelling place or usual place of abode, followed by the requisite mailing"(U.S. Bank National Ass'n v. Martinez, 139 A.D. 3d 548, 34 N.Y.S. 3d 2 [1st Dept., 2016] quoting CPLR §308[2]). A process server's affidavit is prima facie evidence of proper service. The defendant is required to rebut the statements made in a process server's affidavit by submitting a "sworn, nonconclusory denial of service or swearing to specific facts to rebut the statements in the process server's affidavit" (Johnson v. Deas, 32 A.D. 3d 253, 819 N.Y.S. 2d 751 [1st Dept., 2006], Bank of America, Nat. Ass'n v. Moody, 147 A.D. 3d 712, 45 N.Y.S. 3d 583 [2nd Dept., 2017]). An unsubstantiated denial does not rebut the "presumption of proper service at the address where all notices under the mortgage were to be sent" (Bank of New York v. Espejo, 92 A.D. 3d 707, 939 N.Y.S. 3d 707 [2nd Dept., 2012]). A defendant's successful rebuttal of the process server's affidavit entitles him to a traverse hearing (Johnson v. Deas, 32 A.D. 3d 253, supra at page 254).

Defendant's allegations lack factual specificity and detail, failing to provide the date that he fully vacated the property or when he became a resident at the Brooklyn address. Statements made in defendant's affidavit and his driver's license provide contradictory and inconclusive proof of when he allegedly vacated the property. The Income Affidavit for 2014 is inconclusive proof that the Brooklyn address is defendant's primary residence, or of when he formally moved in. Plaintiff argues that the "Affidavit of No Tenants" simply means that the defendant, as an owner, did not rent the property to tenants. It does mean that the property is not his actual residence. Defendant's conclusory denial of receipt of process does not rebut the process server's affidavit of service, and is not specific enough to warrant a traverse hearing.

Defendant seeks relief pursuant to CPLR §5015[a][1] arguing that he has a reasonable excuse for failure to appear in this action as a result of the lack of service and a meritorious defense. Defendant's proposed meritorious defense is that plaintiff does not have standing because it did not have actual possession of the note when this action was commenced. Defendant also argues that he had no relationship, or privity of contract, and never signed a mortgage or note due to the plaintiff.

In Order to obtain relief pursuant to CPLR § 5015[a][1], the moving party must provide a reasonable excuse for the delay in appearance and must further demonstrate that the case has merit (Navarro v. A. Trenkman Estate, Inc., 279 A.D. 2d 257, 719 N.Y.S. 2d 34 [1st Dept., 2000]). An evaluation of the sufficiency of the excuse for the delay is "consigned to the sound discretion of the court" (Bengal House Ltd. v 989 3rd Ave., Inc., 118 A.D.3d 575, 988 N.Y.S.2d 586 [1st Dept., 2014]). The failure to provide a reasonable excuse for the delay in appearance, renders it unnecessary to consider the existence of a meritorious defense (U.S. Bank Nat. Ass'n v. Brown, 147 A.D. 3d 428, 46 N.Y.S. 3d 107 [1st Dept., 2017] and Nationstar Mortg., LLC v. McLean, 140 A.D. 3d 1131, 35 N.Y.S. 3d 188 [2nd Dept., 2016]).

Defendant failed to provide a reasonable excuse for the delay in appearance. There is no need to consider defendant's remaining arguments or meritorious defense.

CPLR §317 permits a defendant that was "served with a summons other than by personal delivery" and failed appeared, "to defend the action upon a finding by the Court that the defendant did not personally receive notice in time to defend and has a meritorious defense" (PHH Mortg. Corp. v. Muricy, 135 A.D. 3d 725, 24 N.Y.S. 3d 137 [2nd Dept., 2016]). The defendant's failure to establish that they did not receive notice warrants denial of the CPLR §317 relief in this action (see Bank of New York v. Espejo, 92 A.D. 3d 707, 939 N.Y.S. 2d 105 [2nd Dept., 2012]).

Defendant argues that the judgment should be vacated pursuant to CPLR §3215[f], because the complaint is unverified and the affidavit of Raymond Burks, employed by plaintiff as a document execution specialist, relies on hearsay, fails to state a claim, or establish standing.

Pursuant to CPLR §3215[f], a plaintiff establishes entitlement to a default judgment by proof of service and proof of the facts to establish the causes of action. Proof includes that plaintiff was the holder of the note and mortgage, of the default in payment obligations, and defendant's failure to appear (HSBC Bank USA v. Angeles, 143 A.D. 3d 671, 38 N.Y.S. 3d 580 [2nd Dept., 2016]).

Plaintiff in a foreclosure action can rely on assertions in an employee's affidavit under the business records exception to hearsay (Citimortgage, Inc. v. Espinal, 134 A.D. 3d 876, 23 N.Y.S. 3d 251 [2nd Dept., 2015] citing to CPLR §4518[a]). Standing is established in a foreclosure action by physical delivery of the note, or written assignment of the note to the plaintiff, prior to commencement of the action. An employee's affidavit stating the date the note was physically delivered prior to commencement of the action, together with a copy of the endorsed original note, the mortgage, and evidence of the defendant's default is sufficient to state a claim in a foreclosure action. A statement of the manner in which possession of the note was obtained provides clarity, but is not necessary (Aurora Loan Servs. LLC v. Taylor, 25 N.Y. 3d 355, pgs. 366-367, 34 N.E. 3d 363, 12 N.Y.S. 3d 612 [2015] and Loancare v. Firshing, 130 A.D. 3d 787, 14 N.Y.S. 3d 410 [2nd Dept., 2015]).

Defendant has not established entitlement to CPLR §3215[f] relief. The affidavit of Raymond Burks, relies on business records kept in the regular course of business and states that possession of the note was obtained on October 17, 2014. Mr. Burk's affidavit together with the supporting documentation sufficiently states a claim and establishes plaintiff's standing.

Accordingly, it is ORDERED that defendant Vladimir Slavutsky's motion pursuant to CPLR §5015[a][1],[4], CPLR §3215[f] and CPLR §317, seeking to vacate and

set aside the Judgment of Foreclosure and Sale dated November 16, 2016, is denied, and it is further,

ORDERED that the temporary stay of the scheduled foreclosure sale is vacated.

ENTER:



MANUEL J. MENDEZ, J.S.C. MANUEL J. MENDEZ J.S.C.

Dated: June 16, 2017

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE