Deutsche Bank Natl. Trust Co. v Karibandi
2017 NY Slip Op 31534(U)
July 3, 2017
Supreme Court, Suffolk County
Docket Number: 20759/13
Judge: Howard H. Heckman
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[* 1]

Short Form Order

SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

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

INDEX NO.: 20759/13
MOTION DATE: 04/05/2017
MOTION SEQ. NO.: 003 MD

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DEUTSCHE BANK NATIONAL TRUST CO.,

Plaintiff,

-against-

RAMAKRISHNA KARIBANDI,

Defendants.

---X

PLAINTIFFS' ATTORNEY:
GROSS POLOWY, LLC
25 NORTH POINTE PKY., STE. 25
AMHERST, NY 14228

DEFENDANT'S ATTORNEY:
HARVEY SORID, ESQ.
1 EAB PLAZA EAST E
UNIONDALE, NY 11553

Upon the following papers numbered 1 to 15 read on this motion 1-4 ; Notice of Motion/ Order to Show Cause and supporting papers___; Notice of Cross Motion and supporting papers___ ; Answering Affidavits and supporting papers 5-15 ; Replying Affidavits and supporting papers ____; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendant Ramakrishna Karibandi brought on by Order to Show Cause dated June 27, 2017 seeking an order pursuant to CPLR 2005, 3408, 5240 & 6301: 1) staying the sale of the foreclosed premises scheduled for July 6, 2017 ; 2) vacating the Judgment and Foreclosure and Sale dated April 5, 2017; and 3) staying further prosecution of this foreclosure action pending the scheduling of a settlement conference for the purpose of granting the defendant a loan modification or to reinstate the existing mortgage loan is denied; 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 ten days of the date of this order and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff commenced this action to foreclose a mortgage in the original sum of $644,000.00 executed by defendant Karibandi on August 25, 2006 . On the same date the defendant executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. The defendant defaulted in making timely monthly mortgage payments beginning August 1, 2012 and continuing to date. Plaintiff commenced this foreclosure action by filing a summons and complaint with the County Clerk on August 5, 2013. Defendant's counsel served a timely answer dated September 30, 2013 on behalf of defendant Karibandi. The answer set forth one affirmative defense– plaintiff's lack of standing. By short form Order dated April 29, 2016, plaintiff's summary judgment motion was granted and a referee was appointed to compute the sums due and owing to the plaintiff. A Judgment of Foreclosure and Sale was granted on April 5, 2017. The property is scheduled to be sold at auction on July 6, 2017.

[* 2]

Defendant's motion seeks an order staying the sale of the premises, vacating the judgment of foreclosure and sale, and compelling the parties to appear for a conference so that the mortgage loan can either be modified or reinstated. In support of the motion defendant submits an affidavit and an attorney's affirmation and claims that the mortgage lender has failed to negotiate in good faith and has steadfastly refused to modify the mortgage loan in reliance upon inaccurate information used to calculate defendant's monthly income. Defendant claims that the April 5, 2017 Judgment must be vacated on the basis that plaintiff failed to prove that the statutorily required RPAPL 1304 90-day pre-foreclosure notices of default were never served upon the defendant. Defendant seeks to vacate the judgment "in the interests of justice" claiming that this defense can be raised "at any time". Defendant also asserts that Karibandi has the financial ability to make modified mortgage payments and requests that, in addition to vacating the foreclosure judgment, the court direct the lender to appear at a conference to either modify or reinstate the existing loan.

In opposition, the plaintiff submits an attorney affirmation and claims that no legal basis exists to justify granting the defendant's motion. Plaintiff contends that the defendant cannot raise an RPAPL 1304 defense for the first time where judgment has already been granted and where the defendant had ample opportunity to raise the defense in opposition to the plaintiff's original summary judgment motion and in opposition to plaintiff's motion seeking a judgment of foreclosure and sale. Plaintiff also claims that the lender has no duty to modify the terms of the underlying note and mortgage, and argues that defendant's desire for a loan modification presents no viable grounds to either compel an additional settlement conference or to further stay the foreclosure sale. Plaintiff also asserts that the defendant was afforded numerous opportunities for a loan modification, the most recent review having taken place between November 17th and December 28th, 2016. On each occasion the defendant was determined to be not eligible.

The law is clear that to obtain a preliminary injunction, the moving party must establish by clear and convincing evidence: 1) a likelihood of success on the merits; 2) irreparable injury absent injunctive relief; and 3) that the equities balance in his favor (*Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 NY3d 839, 800 NYS2d 48 (2005)); *Zoller v. HSBC Mortgage Corp (USA)*, 135 AD3d 932, 24 NYS3d 168 (2nd Dept., 2016); *Chase Home Finance, LLC v. Cartelli*, 140 AD3d 911, 32 NYS3d 515 (2nd Dept., 2016)).

In this case, the defendant is not merely seeking to stay the scheduled sale, but also to vacate the Judgment of Foreclosure and Sale granted in April, 2017. The reasons asserted by the defendant to vacate the Judgment are primarily based on the "interests of justice" and no statutory authority is cited in support of the defendant's request with the exception of its newly raised, post-judgment "defense" never asserted in opposition to plaintiff's two prior applications and never set forth in defendant's answer. Defendant concedes that the statutory authority for vacating the judgment (CPLR 5015) is inapplicable and couches his argument based upon this court's inherent discretionary power, not confined rigidly by well-defined rules, to vacate a prior judgment where the interests of justice require (citing *Town of Warwick v. Black Bear Compounds*, 95 AD3d 1002, 943 NYS2d 608 (2nd Dept., 2012)). As has been written, a court always retains "the inherent equitable power to ensure that a sale conducted pursuant to a judgment of foreclosure is not made the "instrument of injustice"" (*Alkaifi v. Celestial Church of Christ Calvary Parish*, 24 AD3d 476, 477, 808 NYS2d 230 (2nd Dept., 2005) quoting *Guardian Loan Co. v. Early, supra, at p. 520*)). Put another way: "Once equity is invoked, the court's power is as broad as equity and justice require" (*U.S. Bank, N.A. v. Losner*, 145 AD3d 935, 44 NYS3d 467 (2nd Dept., 2016) citing *Norstar Bank v. Morabito*, 201

[* 3]

AD2d 545, 546, 607 NYS2d 426 (2nd Dept., 1994)).

The record reveals that the defendant retained counsel who served a timely answer to plaintiff's complaint setting forth only one affirmative defense claiming the plaintiff lacked standing to maintain this action. Court records indicate that three CPLR 3408 court mandated settlement conferences were held on February 10, 2014; May 13, 2014; and July 18, 2014. Defendant was represented by counsel during each conference. At the conclusion of the July 18, 2014 conference, the court attorney/referee responsible to oversee the conference concluded that the action could not be settled and the action was remanded to continue as an active foreclosure action (although not assigned to an IAS Part). Thereafter, on November 14, 2014 plaintiff served and filed a summary judgment motion. Defendant served opposition papers to the motion on December 2, 2014 and the motion was marked submitted on December 11, 2014. The motion remained sub judice until the action and the underlying motion were assigned to this IAS Part by Administrative Order (Hinrichs, J.) dated June 28, 2016. Upon re-assignment, plaintiff's motion was granted by short form Order dated August 29, 2016. A review of the motion papers submitted by the defendant reveals that the only defense asserted by the defendant was plaintiff's claimed lack of standing. Defendant never raised the plaintiff's alleged failure to serve an RPAPL 1304 notice defense in opposition to plaintiff's summary judgment motion.

Court records further show that on January 13, 2017 plaintiff submitted a motion seeking an order confirming the referee's report and for a judgment of foreclosure and sale. That motion was also opposed by the defendant who submitted opposing papers on January 23, 2017. The motion was marked fully submitted on March 28, 2017 and by Order dated April 5, 2017 plaintiff's motion was granted in its entirety. A review of defendant's opposition papers reveals that defendant's opposition consisted of an attorney's affirmation claiming that plaintiff's counsel's failed to timely serve defendant's counsel's office with a copy of the August 29,2016 Order of Reference which defendant claimed resulted in significant prejudice to defendant's ability to seek leave to appeal that order. Defendant again did not raise plaintiff's alleged failure to serve an RPAPL 1304 notice as a defense in opposition to plaintiff's motion.

The doctrine of res judicata prevents a party from litigating a claim which has already been litigated or which ought to have been litigated (see Siegel, "New York Civil Practice" Sections 4442 & 4443, pg. 585). The principle is grounded upon the premise that "once a person has been afforded a full and fair opportunity to litigate a particular issue, that person may not be permitted to do so again" (*see Gramatan Homes v. Lopez*, 46 NY2d 484, 484, 414 NYS2d 308 (1979); *Davey v. Jones Hirsch Connors & Bull*, 138 AD3d 417, 27 NYS3d 867 (1st Dept., 2016); *Matter of JPMorgan Chase*, 135 AD3d 762, 24 NYS3d 667 (2nd Dept., 2016)). The related law of the case doctrine is a rule of practice which provides that once an issue is judicially determined either directly or by implication, it is not to be reconsidered by judges or courts of coordinate jurisdiction in the course of the same litigation (*see Martin v. City of Cohoes*, 37 NY2d 162, 371 NYS2d 687 (1975); *J-Mar Service Center, Inc. V. Mahoney, Connor & Hussey*, 45 AD3d 809, 847 NYS2d 130 (2nd Dept., 2007); *Vanguard Tours, Inc. v. Town of Yorktown*, 102 AD2d 868, 477 NYS2d 40 (2nd Dept., 1984); *Holloway v. Cha Laundry, Inc.*, 97 AD2d 385, 467 NYS2d 834 (1st Dept., 1983)).

The award of summary judgment in this case is the law of the case. In response to plaintiff's summary judgment motion, the defendant was required to lay bare his proof and to assert all relevant defenses he possessed to prove that genuine issues of material fact existed to defeat the

evidentiary showing made by the plaintiff. The court's award of summary judgment in plaintiff's favor was a determination that none of the defenses asserted by the defendant were meritorious, and it was incumbent upon the defendant to present all of his defenses in opposition to the motion. Since defendant only raised the defense of standing in opposition to the motion, Karibandi waived his right to assert all other defenses, including an RPAPL1304 defense, and the law of the case doctrine precludes consideration of this waived defense that was dismissed by this court's August 29, 2016 Order (*see Madison Acquisition Group, LLC v. 7614 Fourth Real Estate Development, LLC*, 134 AD3d 683, 20 NYS3d 418 (2nd Dept., 2015); *Certain Underwriters at Lloyd's of London v. North Shore Signature Homes, Inc.*, 125 AD3d 799, 1 NYS3d 841 (2nd Dept., 2015)). Having failed to either seek leave to re-argue the prior order or to appeal it, no legal basis exists to re-consider that prior determination and clearly the defense has been waived. *1

The defendant's attempt to raise the "condition precedent" RPAPL 1304 defense for the first time in this motion, claiming that such defense is "jurisdictional" and can be asserted "at any time", is not viable. There are no legal grounds to permit the defendant to assert the RPAPL 1304 90-day pre-foreclosure defense for the first time on the eve of a foreclosure sale, where judgment has been entered and where the defendant has timely answered and never asserted the defense in his answer or in opposition to plaintiff's motions for summary judgment and for a judgment of foreclosure and sale.

The law is clear that defense counsel's oft-repeated phrase (cited initially in *First National Bank of Chicago v. Silver*, 73 AD3d 162, 163, 89 NYS2d 256 (2nd Dept., 2010) and subsequently in *Aurora Loan Services v. Weisblum*, 85 AD3d 95, 923 NYS2d 609 (2nd Dept., 2011) & *CitiMortgage, Inc. v. Espinal*, 134 AD3d 876, 879, 23 NYS3d 251 (2nd Dept., 2015)), that an RPAPL 1304 defense "can be raised at any time" is not an accurate exposition of state law. The phrase's usage has become common-place among foreclosure attorneys given the "strict compliance" mandates that accompany the statute's current requirements, however its application has certain procedural limitations. For example, it is without question that a foreclosure defendant cannot raise this defense for the first time on appeal (*see PHH Mortgage Corporation v. Celestin*, 130 AD3d 703, 11 NYS3d 871 (2nd Dept., 2015); *Bank of America v. Barton*, 149 AD3d 676, 50 NYS3d 546 (2nd Dept., 2017); *Emigrant Bank v. Marando*, 143 AD3d 856, 39 NYS3d 83 (2nd Dept., 2016); *FNMA v. Cappelli*, 120 AD3d 621, 990 NYS2d 856 (2nd Dept., 2014)). Nor can the defense be asserted by a defaulting defendant either in opposition to a default judgment motion, or in opposition to a motion seeking a judgment of foreclosure and sale, in cases where no reasonable excuse has been demonstrated which would provide a basis to vacate the defendant's default. In such cases the courts require a showing of a reasonable explanation for the defendant's default and, even if the defendant's newly asserted RPAPL 1304 defense were deemed meritorious, it is not considered absent a showing of a reasonable excuse (*see Bank of America v. Agarwal*, 150 AD3d 651, 2017 NY Slip Op 03467 (2nd Dept., 2017); *HSBC Bank USA, N.A. v. Clayton*, 146 AD3d 942, 45 NYS3d 543 (2nd Dept., 2017); *Flagstar Bank v. Jambelli*, 140 AD3d 829, 32 NYS3d 625 (2nd Dept., 2016); *Wassertheil v. Elburg, LLC*, 94 AD3d 753, 941 NYS2d 679 (2nd Dept., 2012); *Hosten v. Oladapo*, 44 AD3d 1006, 844 NYS2d 417 (2nd Dept., 2007)). Based upon these rulings the RPAPL 1304 defense is clearly not a "jurisdictional" defense which, in and of itself, can be used to vacate a default judgment (*see 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)).

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*1. It should be noted that defendant also failed to raise the defense in opposition to plaintiff's

subsequent motion for a judgment of foreclosure and sale, which at least in one instance did not result in waiver (*see Emigrant v. Lifshitz*, 143 AD3d 755, 38 NYS3d 822 (2nd Dept., 2016)).

The issue remaining is whether a defendant who has timely answered, and has had every opportunity to assert all relevant defenses, yet did not do so throughout the contested proceedings up to and including judgment, should be permitted to assert an RPAPL 1304 defense as a post-judgment defense, the effect of which would require vacating the foreclosure judgment but not the award of summary judgment. Quite simply the answer is no. The CPLR provides the procedural mechanism for cases to be litigated. The complaint is opposed by an answer. The answer sets forth defenses and counterclaims which are required to be proved or disproved during the course of litigation. Upon an award of judgment in favor of a plaintiff, the defenses asserted (and not asserted) are dismissed and defendant's sole recourse is to appeal the judgment. The procedural rules nowhere provide for special defenses which can be asserted "at any time" and the defendant cites to no statutory authority which would provide grounds to vacate the judgment (see CPLR 5015).

In essence, defendant's sole recourse is for this court to exercise its inherent equitable powers to vacate the judgment on grounds that defendant claims are required by justice. Defendant's affidavit sets forth the grounds he claims require granting this motion. He claims the bank treated him unfairly by not accepting his monthly income calculations and by refusing to grant him a loan modification based upon those adjusted calculations. He also states that he desperately wants to save his family's home; that his mother became ill in India requiring his presence there to care for her; and that he has paid tuition for his two children, one of whom is in medical school and the other attending NYU with a tuition cost of $45,000.00 per year.

The evidence submitted shows that defendant promised to re-pay a loan in the sum of $644,000.00 over a period of thirty years beginning with a monthly payment due on October 1, 2006. Less than six years later, beginning with the August 1, 2012 payment, the defendant defaulted in making timely monthly mortgage payments. The defendant has continued to default in making payments for nearly the past five years. Defendant claims that the bank has treated him unfairly by not granting him a loan modification. However court records indicate that CPLR 3408 court mandated settlement conferences were held on three occasions and during each conference the defendant was represented by counsel. No agreement was reached, but more importantly, there is no indication that bank representatives acted in bad faith during these negotiations. The court attorney/referee, whose responsibility includes monitoring and conducting the conferences and making notations during instances of bad faith, made no such reference in this case and given the fact that defendant was represented by counsel the fact that the action was marked "not settled" indicates that despite the efforts of both sides no loan modification could be reached. The test for determining whether a party participated in good faith is one of reasonableness taking into consideration the actions taken by parties engaging in the settlement conference. In this case, there is no relevant, admissible evidence to substantiate the defendant's claim of "bad faith". While the defendant seeks "equitable" relief, the law is clear that a foreclosing party has no obligation to modify the terms of its loan freely entered into by a borrower and a failure to do so does not provide a defense to a mortgage foreclosure action (*Citibank, N.A. v. Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 (2nd Dept., 2012)).

While this court is not unsympathetic to the defendant's situation, the facts clearly show that the defendant, who concedes that he is not without financial resources, entered into an agreement in

which he promised to re-pay the sum of $644,000.00 to the bank, by making monthly payments as required and agreed to under the terms of the mortgage loan. The bank, in good faith, loaned the defendant the monies he requested, based upon the condition that the defendant/borrower would abide his promise and re-pay the entire amount of monies he was given by the bank. Defendant does not dispute that he breached the agreement and has not provided any statement concerning how he intends to re-pay the amount he has borrowed or how much money he has been able to save in view of the fact that he has made no payments to the bank for nearly five years. Clearly this court has the equitable authority to prevent a foreclosure sale to ensure that such sale is not made the instrument of injustice. However, in this case, the equities weigh heavily in favor of the party who has not breached its agreement and who has not received any consideration for the amount of monies loaned to the borrower for nearly five years. Under these circumstances, no legal basis exists to justify any delay in conducting the sale of the premises since the defendant has failed to make any showing of a likelihood of success on the merits or the balancing of the equities in his favor. Nor do any legal grounds exist to vacate the April 5, 2017 Judgment of Foreclosure and Sale.

Accordingly, the defendant's motion is denied in its entirety.

Dated: July 3, 2017

Hon. Howard H. Heckman Jr.

J.S.C.