

Wells Fargo Bank, N.A. v Bellino

2017 NY Slip Op 31684(U)

July 25, 2017

Supreme Court, Suffolk County

Docket Number: 47818/2009

Judge: Howard H. Heckman, Jr.

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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.: 47818/2009
MOTION DATE: 06/20/2017
MOTION SEQ. NO.: 004 MD
CASE DISP

-----X
WELLS FARGO BANK, N.A.,

Plaintiff,

-against-

CONSTANTINO V. BELLINO, ANA BELLINO,
AMANDA BELLINO,

Defendants.
-----X

PLAINTIFFS' ATTORNEY:
DAVIDSON FINK, LLP
28 EAST MAIN ST., STE. 1700
ROCHESTER, NY 14614

DEFENDANT'S ATTORNEY:
ALEXANDER PAYKIN, P.C.
350 FIFTH AVENUE, 59TH FL.
NEW YORK, NY 10118

Upon the following papers numbered 1 to 41 read on this motion 1; Notice of Motion/ Order to Show Cause and supporting papers 1-26; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 27-41; Replying Affidavits and supporting papers ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendants Constantino V. Bellino and Ana Bellino brought on by Order to Show Cause (Molia, J.) dated May 3, 2017 seeking an order pursuant to CPLR 2004, 3012(d), 5015 & 6301: 1) staying the sale of the foreclosed premises originally scheduled for May 4, 2017; 2) vacating the Judgment of Foreclosure and Sale dated October 25, 2016; and 3) granting defendants leave to serve a late answer is denied; and it is further

ORDERED that the referee is directed to forthwith reschedule a foreclosure sale of the premises and to notify all appropriate parties.

Plaintiff commenced this action to foreclose a mortgage in the original sum of \$517,500.00 executed by defendants Constantino V. Bellino and Ana Bellino on October 31, 2006 in favor of Option One Mortgage Corporation. On the same date the defendant Constantino V. Bellino executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. Defendant Constantino V. Bellino executed a loan modification agreement dated October 1, 2008 creating a single lien in the sum of \$524,592.99. By assignment the plaintiff became the owner and holder of the promissory note and mortgage. The defendants have defaulted in making timely monthly mortgage payments since July 1, 2009 and continuing to date. Plaintiff commenced this mortgage foreclosure action by filing a notice of pendency together with the summons and complaint with the Suffolk County Clerk's Office on December 3, 2009. Defendants' counsel filed a notice of appearance as of September 15, 2010. By Order (Gazzillo, J.) dated March 1, 2013 plaintiff's unopposed default judgment motion was granted and a referee was appointed to compute the sums due and owing to the plaintiff. Plaintiff's unopposed motion for an order confirming the referee's report and for a Judgment of Foreclosure and Sale was granted on October 25, 2016. The foreclosure

sale scheduled for May 4, 2017 was stayed as a result of this application made on May 3, 2017.

Defendant's order to show cause seeks an order permanently enjoining the sale of the premises, vacating this Court's Judgment of Foreclosure and Sale dated October 25, 2016 and granting leave for defendants to serve a late answer.*1 In support of the motion, defendants submit two affirmations of counsel and claim that the Judgment of Foreclosure and Sale must be vacated since the plaintiff lacked standing to prosecute this foreclosure action based upon a defective chain of assignment. Defendants also claim that the mortgage assignment to plaintiff occurred prior to defendant's execution of the loan modification and argue that defendant Ana Bellino never signed the loan modification. It is defendants' position that plaintiff is not entitled to foreclose the loan modification absent the original (second) mortgagor's (Ana Bellino's) signature. Defendants also argue that they should be permitted to serve a late answer based upon their prior attorney's failure to seek permission to do so and that a meritorious defense exists based upon the plaintiff's lack of standing. Defendants contend that the mortgage lender has failed to negotiate in good faith to grant them a loan modification and argue that equity weighs in their favor based upon the bank having taken advantage of their prior counsel's "failures". Defendants also claim that the plaintiff's failure to serve them with a copy of the motion seeking a judgment of foreclosure and sale requires that the judgment be vacated.

In opposition, the plaintiff submits an attorney affirmation and claims that no legal basis exists to justify granting the defendants' motion. Plaintiff contends that the defendants failed to serve any opposition to its default judgment motion and have therefore waived their right to challenge the mortgage lender's standing to prosecute this action. Plaintiff claims that no basis exists to vacate the Judgment of Foreclosure and Sale since the defendants have failed to provide a reasonable excuse for their default and have failed to submit a meritorious defense to this foreclosure action. Plaintiff argues that absent submission of an affidavit from an individual with personal knowledge detailing the reasons for the defendants' default in appearing, serving an answer and submitting opposition to the default judgment motion, no legal grounds are stated to vacate the defendants' continuing default and to permit service of a late answer. Plaintiff claims that the submission of an attorney's affirmation claiming the "law office" failure of defendants' former counsel provides insufficient evidence to justify vacating the defendants' continuing default. Plaintiff also argues that service of this application was not made in compliance with the service requirements set forth in Acting Justice Molia's Order to Show Cause and therefore the court is without jurisdiction to make a determination.

*1- Although defendants' application for relief does not include a request for an order vacating Acting Justice Gazzillo's March 1, 2013 Order granting a default judgment and for the appointment of a referee, such relief is implicit since absent an order vacating that Order, no legal basis exists to grant the defendants' permission to serve a late answer.

Initially, with respect to the procedural irregularities recited by the parties concerning service of motions in this action, the issue presented is whether the service requirements were jurisdictional in nature and if so, whether such requirements were strictly obeyed. Clearly, an order to show cause signed by the court, which requires service by a particular date and time and by a particular method, mandates compliance of all components of service be accomplished in accordance with the court's order (*U.S. Bank, N.A. v. Feliciano et al.*, 103 AD3d 791, 959 NYS2d 453 (2nd Dept., 2013); *Codrington v. CitMortgage, Inc.*, 118 AD3d 843, 988 NYS2d 636 (2nd Dept., 2014); *El Greco Society of Visual Arts, Inc. v. Diamantidis*, 47 AD3d 929, 852 NYS2d 165 (2nd Dept., 2008)).

In this case, the service provision set forth in the May 3rd, 2017 Order to Show Cause signed by Acting Justice Molia stated: "let service of a copy of this Order and the papers by overnight delivery and facsimile transmission upon the Attorneys for Plaintiff in the within action, Davidson Fink LLP... and upon the Referee, Richard J. Kaufman, Esq.,... no later than 4:30 p.m. on the 3rd day of May, 2017 be deemed good and sufficient service."

Defense counsel's affirmation of service attached to the motion papers states (first as to plaintiff's counsel, Davidson Fink.LLP): "1. That on May 3, 2017, I served a true copy of the Emergency Order to Show Cause granted May 3, 2017, by depositing the same with an overnight delivery in a wrapper properly addressed. Said delivery was made prior to the latest time designated by the overnight delivery service for overnight delivery... to Davidson Fink, LLP, Attn: Elizabeth Clarke, Esq., 28 East Main Street, Suite 1700, Rochester, NY 14614. 2. I additionally served Plaintiff's counsel by facsimile, at 585-784-8907 first making 3 diligent attempts to fax the entire Emergency Order to Show Cause, with all Supporting documents. Upon discovering that Plaintiff's fax machine was unable to receive such a voluminous transmission, I faxed the Emergency Order to Show Cause with a cover letter advising of the circumstances and notifying that the supporting papers would be delivered by Federal Express the next day." Defense counsel's affirmation of service (second as to the referee) states: "That on May 3, 2017, I served with the Emergency Order to Show Cause granted May 3, 2017, pursuant to said Order on Richard J. Kaufman, Esq."

While plaintiff claims that defense counsel's failure to "strictly comply" with the service requirements set forth in the Order to Show Cause is a jurisdictional defect, the record shows that defendant's attorney made a good faith effort to strictly obey those service requirements, yet was unable to transmit by fax the numerous pages of exhibits which were attached to the original motion papers and plaintiff's counsel does not deny receiving those papers the following day. Under the circumstances, service of the motion papers is deemed to have been in compliance with the service requirements of the Order to Show Cause based upon the impossibility of transmitting the remaining pages of defendant's application. Moreover, the status of the foreclosure action itself had been inalterably affected by Acting Justice Molia's execution of the May 3rd Order which stayed the foreclosure sale scheduled the following day, making service of the additional papers relevant only as to plaintiff's submission of opposing papers prior to the scheduled May 22, 2017 return date for submission of the motion.

As to service of plaintiff's motion seeking a judgment of foreclosure and sale, defendants claim that plaintiff's counsel failed to serve them with notice of that application which was a "jurisdictional" defect rendering the Judgment of Foreclosure and Sale void. The record shows that Raymond Lang & Associates filed a notice of appearance dated September 15, 2010 (which was filed with the County Clerk on September 20, 2010). While defense counsel submits a copy of a May

23, 2011 Stipulation signed by defendant's then counsel Lang and defendant Constantino Bellino stating that Lang had withdrawn as defendant's counsel, court records (up to and including the date of this order) indicate that Raymond Lang & Associates, 532 Broad Hollow Road, Melville, NY 11747 continue to represent the Bellino defendants in this action. It would appear therefore that the Stipulation was never filed with the court clerk (which is not inconsistent with defense counsel's exhibit D- a letter addressed to "Judge Ralph Gazzello" (sic) dated March 16, 2012, on defendants' stationery, signed by Ana Bellino, indicating that Raymond Lang is "no longer our lawyer" since letters addressed to a judge's chambers do not qualify as notification of withdrawal of counsel in official court records maintained by the clerk).

Court records indicate that plaintiff's motion seeking an order confirming the referee's report and for a judgment of foreclosure and sale was served on the Clerk's Office on July 8, 2016 and was made originally returnable on August 8, 2016. The affidavit of service annexed to the motion papers indicates that service of the motion was made by first-class mail on July 7, 2016 upon Raymond Long, Esq., as attorney for the Bellino defendants addressed to 85 Main Street, Cold Spring Harbor, NY 11724. Based upon court records service of this motion upon defendant's counsel of record was proper and provided sufficient notice of plaintiff's application and no basis exists to vacate the Judgment of Foreclosure and Sale on the grounds asserted by the defendants. *2

*2- It should be noted that at this juncture of the foreclosure action, the defendants were determined to be in default based upon Acting Justice Gazzillo's March 1, 2013 Order. The only basis that they therefore would have been entitled to service and notice of plaintiff's motion seeking a judgment of foreclosure and sale was on the basis of the notice of appearance filed by attorney Lang. That notice of appearance does not request service of any papers and/or notice of subsequent proceedings be served upon him, but merely states that he has been "retained" as both parties' attorney. While a notice of appearance filed by an attorney representing a defendant who has defaulted in appearing requesting service of papers entitles the attorney to service of papers and notice of all proceedings through and subsequent to judgment (*see Home Savings Bank v. Chiola*, 203 AD2d 525, 611 NYS2d 235 (2nd Dept., 1994); *Martine v. Lowenstein*, 68 NY 456 (1877)), a defaulting defendant retains no such right and the failure to serve the pro se defaulting defendants with a copy of the motion for an order confirming the referee's report and for a judgment of foreclosure and sale cannot be considered a jurisdictional defect.

With respect to the defendants' claim that the complaint must be dismissed based upon plaintiff's lack of standing, the record clearly shows that the defendants did not timely answer the complaint or timely submit a pre-answer motion seeking to dismiss the complaint on that basis. Under such circumstances, absent a meritorious application by the defendant seeking to vacate their default in appearing based upon a demonstration of a reasonable excuse for their default and of an arguably meritorious defense and seeking permission to extend the time within which to serve an answer, the defendants have waived their right to assert the defense of plaintiff's lack of standing (see *HSBC Bank USA v. Angeles*, 143 AD3d 671, 38 NYS3d 580 (2nd Dept., 2016); *Nationstar Mortgage, LLC v. Avella*, 142 AD3d 594, 36 NYS3d 679 (2nd Dept., 2016); *Bank of New York Trust Co., N.A. v. Chiejina*, 142 AD3d 570, 36 NYS3d 512 (2nd Dept., 2016); *Chase Home Finance, LLC v. Garcia*, 140 AD3d 820, 31 NYS3d 894 (2nd Dept., 2016); *U.S. Bank, N.A. v. Gulley*, 137 AD3d 1008, 27 NYS3d 601 (2nd Dept., 2016); *FCDB FF1 2008-1 Trust v. Videjus*, 131 AD3d 1004, 17 NYS3d 54 (2nd Dept., 2015); *Southstar III, LLC v. Entienne*, 120 AD3d 1332, 92 NYS2d 558 (2nd Dept., 2014); *Wells Fargo Bank Minnesota, N.A. v. Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 (2nd Dept., 2007)). In this case, the affidavits of service submitted by the plaintiff state that the defendants were served with copies of the summons, complaint and RPAPL 1303 notice by substituted service on a person of suitable age and discretion pursuant to CPLR 308(2) on December 8, 2009 and December 10, 2009. By letter dated December 28, 2009, defendants Constantino Bellino and Ana Bellino admitted receiving the summons and sought additional time to obtain a loan modification. No answer was ever served by the defendants. Under these circumstances the defaulting defendant have waived their right to assert the lack of standing as a defense to plaintiff's action.

As to defendants' application seeking leave to serve a late answer, the law requires proof to establish a reasonable excuse for the defendants' failure to timely serve an answer and a showing of an arguably meritorious defense (see *Deutsche Bank National Trust Co. v. Gutierrez*, 102 AD3d 825, 958 NYS2d 478 (2nd Dept., 2013); *Deutsche Bank National Trust Co. v. Karlis*, 138 AD3d 915, 30 NYS3d 228 (2nd Dept., 2016); *U.S. Bank, N.A. v. Cherubin*, 141 AD3d 514, 36 NYS3d 154 (2nd Dept., 2016)). Defendants have wholly failed to provide any reasonable explanation for their default in timely answering the plaintiff's complaint. While defense counsel's affirmation claims that "law office" failure together with the defendants' "good faith" belief that the action could be settled provide adequate grounds to establish a reasonable explanation for their default, neither excuse is supported by relevant, admissible evidence. There is no affidavit submitted by either mortgagor detailing the reason(s) why their attorney failed to seek to vacate their default in appearing in this action. Nor is there any sworn testimony from the Bellino defendants to establish the factual basis for their attorney's claimed belief that this action could be settled or to show that they made any effort to cure their default for the past 7 & 1/2 years. The mere submission of an attorney's affirmation (who was presumably only recently retained on the eve of the foreclosure sale) alluding to prior counsel's faults in failing to submit timely opposition to this action does not provide any evidentiary support to establish excusable default. Accordingly defendants' motion seeking leave to serve a late answer must be denied regardless of whether defendants have demonstrated the existence of a potentially meritorious defense to plaintiff's action (see *U.S. Bank, N.A. v. Cherubin, supra - Aurora Loan Services, LLC v. Lucero*, 131 AD3d 496, 14 NYS3d 707 (2nd Dept., 2015)) and it is unnecessary for the court to consider that aspect of the defendants' claims (see *Deutsche Bank National Trust Co. v. Rudman*, 80 AD3d 651, 914 NYS2d 672 (2nd Dept., 2011); *Deutsche Bank*

National Trust Co. v. Gutierrez, supra.; *Deutsche Bank National Trust Co. v. Pietranico*, 102 AD3d 724, 957 NYS2d 868 (2nd Dept., 2013); *Wells Fargo Bank, N.A. v. Russell*, 101 AD3d 860, 955 NYS2d 654 (2nd Dept., 2012).

With respect to defendant's request for injunctive relief, the law is clear that to obtain a preliminary injunction, the moving party must establish by clear and convincing evidence of: 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 35 (2nd Dept., 2016)). It's clear that the defendants have been afforded temporary injunctive relief as a result of the stay imposed by the Order to Show Cause which has had the effect of delaying the sale of the foreclosed premises which were scheduled on May 4, 2017. No basis exists to further delay the sale.

Finally, with respect to defendants' assertion seeking "justice and equity", the court retains "the inherent equitable power to ensure that a sale conducted pursuant to a judgment of foreclosure and sale 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*, 47 NY2d 515, 520, 419 NYS2d 56 (1992)). Although defense counsel goes to great lengths to depict his clients as "victims" of their prior counsel and of plaintiff's counsel, this record shows that the defendant Constantino Bellino signed a promissory note and that defendants Constantino Bellino and Ana Bellino signed a mortgage (which mortgage was subsequently modified) obligating them to make timely monthly mortgage payments for a period of thirty years and that less than three years later, they defaulted in making payments. It would appear that under the circumstances it was the mortgage lender, and not the defaulting borrowers, that was the victim of this transaction. The defendants concede that they were served with the pleadings and at no time sought to serve an answer. In point of fact, the record shows that defense counsel filed his notice of appearance months after the time within which an answer was required to be served had expired and the defendants were afforded an opportunity to oppose plaintiff's motion for a default judgment yet chose not to submit any opposition.

Moreover court records indicate that these defendants were afforded a total of seven CPLR 3408 court mandated settlement conferences. At the conclusion of the seventh conference on May 4, 2011, the court attorney/referee marked the action "not settled" and referred the action to an IAS Part. Three subsequent settlement conferences were conducted when the action was assigned to Acting Justice Gazzillo's part. On each occasion the action was marked "not settled" and there is no indication that the representatives of the mortgage lender acted in bad faith when appearing in court for these ten conferences since, had they acted in such manner, it was the responsibility of the court attorney/referee to make a record of such actions.

Under these circumstances, no legal basis exists to justify any further delay in scheduling the sale of the premises since the defendants have failed to make a clear and convincing showing of a likelihood of success on the merits or the balancing of the equities in their favor. The issue of irreparable injury also favors the mortgage lender given the length of time the defendants have defaulted in making any good faith effort to resolve their default.

Accordingly, the defendants' motion is denied and the plaintiff is directed to notify the court appointed referee to forthwith reschedule the foreclosure sale on notice to all appropriate parties.

Dated: July 25, 2017

HON. HOWARD H. HECKMAN, JR.

J.S.C.