

<b>US Bank N.A. v Ruvolo</b>
2012 NY Slip Op 32376(U)
September 11, 2012
Sup Ct, Richmond County
Docket Number: 102639/08
Judge: Anthony I. Giacobbe
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF RICHMOND

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TRIAL PART 9

US BANK NATIONAL ASSOCIATION, AS  
 TRUSTEE FOR THE STRUCTURED ASSET  
 INVESTMENT LOAN TRUST, 2005-06

HON. ANTHONY I. GIACOBBE

Plaintiff,

DECISION AND ORDER

-against-

Index No. 102639/08

NICHOLAS RUVOLO, EVELINA RUVOLO,  
 BANK OF AMERICA, N.A.,  
 EPP ROB FUNDING, ANTHONY ATABEY,  
 NUKET ATABEY, BULENT ATABEY, DERYA  
 ATABEY, JOEANN RUVOLO,

Motion No. 002

Defendants.

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The following papers numbered 1 to 4 were fully submitted on the 27<sup>th</sup> day of July, 2012:

Order to Show Cause by Defendant NICHOLAS RUVOLO with supporting papers (dated June 21, 2012)	1
Affirmation in Partial Opposition by Defendant EPP ROB FUNDING (dated June 25, 2012)	2
Affirmation in Opposition by Plaintiff, with Supporting papers (dated July 5, 2012)	3
Reply Affirmation by Defendant NICHOLAS RUVOLO, with supporting papers (dated July 24, 2012)	4

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Upon the foregoing papers, the Order to Show Cause by defendant NICHOLAS RUVOLO (“defendant”) to, *inter alia*, set aside the foreclosure sale regarding the premises located at 284 Giffords Lane, Staten Island, is denied.

It appears plaintiff commenced this foreclosure action on or about June 17, 2008, based on the failure of defendant to make the required payments under a note and mortgage executed by him in 2005. When defendant failed to serve an answer or otherwise appear in the action, an Order of Reference was granted on September 18, 2008, and subsequently a Judgment of

Foreclosure and Sale was signed on January 13, 2009 and the premises sold at auction on September 13, 2011.

Defendant now moves by Order to Show Cause to, *inter alia*, set aside the foreclosure sale and vacate the Judgement of Foreclosure and Sale. In addition, defendant seeks to stay the eviction proceeding now pending against him in Landlord/Tenant Court, and to allow him to file and serve a late answer. According to defendant, after receiving the summons and complaint, he hired an attorney, who he assumed was going to file an answer on his behalf. In addition, defendant assumed that the lender was temporarily precluded from proceeding with the subject foreclosure action since he was actively working with the lender in order to obtain a loan modification. Thus, defendant urges the Court to set aside the foreclosure sale, and allow him the opportunity to attend a settlement conference and enter into a loan modification which would permit him to satisfy the debt with reasonable monthly payments.

As to the sale itself, defendant claims that plaintiff sold the property before his modification eligibility had been determined, thereby violating HAMP Supplemental Directive 10-02. Accordingly, defendant argues that the sale should be set aside. Defendant also claims that he was never served with a Notice of Sale, and that such failure independently warrants vacatur of the foreclosure sale. In addition, defendant contends that the terms of the subject mortgage were sub-prime in nature and, therefore, in violation of various sections of the Banking Law. Finally, defendant maintains that he was defrauded by the real estate and mortgage brokers who assisted him at the time he originally purchased his home.

In support of these allegations, defendant has submitted an affidavit in which he states that he purchased the subject property with the aid of unscrupulous mortgage brokers and that, unbeknownst to him, he unwittingly executed an adjustable rate mortgage. Defendant also submits a copy of his correspondence with American Home Mortgage wherein he requested loss mitigation assistance, with copies of his application for assistance, proof of his maintenance of

insurance, and checking account information which he purportedly submitted to American Home Mortgage.

In opposition, plaintiff contends that there is no basis for the relief requested and that the Order to Show Cause should be denied. More specifically, plaintiff notes that the foreclosure proceedings against defendant were commenced in 2008, and that defendant does not dispute his long history of defaults. In addition, plaintiff argues that since all of the defendants in this action failed to appear or answer the complaint, it was permitted to proceed *ex parte* for an Order of Reference followed by a default Judgment of Foreclosure and Sale, which was granted on January 14, 2009. Plaintiff also notes that defendant has commenced several bankruptcy proceedings during the pendency of this foreclosure action, each of which was subsequently dismissed.

In addition, plaintiff maintains that this defendant was served with a Notice of Sale, and submits a copy of an Affidavit of Service confirming same. It is further argued that defendant's claim that he was under review for a loan modification at the time of the sale is without merit. To the contrary, plaintiff asserts that all of the pertinent papers submitted by defendant indicate that his application for a modification was submitted after the foreclosure sale had taken place. Insofar as defendant raises allegations of fraud underlying his original mortgage application, plaintiff contends that defendant's conclusory allegation or suspicion of fraud does not warrant vacatur of the foreclosure sale.

Finally, plaintiff argues that defendant has provided no justifiable excuse for his default in serving a timely answer or his substantial delay in moving for leave to serve a belated answer to its August 2008 complaint. Alleging that defendant has also failed to provide the Court with a meritorious defense, plaintiff contends that defendant's application should be denied in its entirety.

In partial opposition to the application, the attorneys for defendant EPP ROB FUNDING, a subordinate lien holder, contend that they duly filed a notice of appearance on their client's

behalf and that they were never retained by defendant RUVOLO, and that any allegations to the contrary by defendant in this regard are false. In his Reply, defendant acknowledges that such counsel were not in fact retained by him.

The application is denied. In the opinion of this Court, defendant has not submitted sufficient proof warranting the vacatur of the foreclosure sale.

It is imperative that a defendant seeking to vacate a default in appearing or answering demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action (*see*, CPLR 5015[a][1]; *Deutsche Bank National Trust Co. v. Luden*, 91 AD3d 701 [2<sup>nd</sup> Dept. 2012]). Here, defendant claims that he assumed that an attorney hired by him had served an answer on his behalf in the foreclosure action, and that since he and the lender were actively pursuing settlement negotiations, the latter was precluded from proceeding with the foreclosure action. In the opinion of this Court, these excuses cannot be characterized as either reasonable or justifiable. Defendant has offered no proof of his purported hiring of an attorney following the commencement of the foreclosure action, and the claim that he was actively engaged in settlement negotiations with the lender is unsubstantiated by any proof of pre-dating September 2011, *i.e.*, well after the Judgment of Foreclosure and Sale was granted in January 2009. Defendant has also failed to set forth a meritorious defense to the foreclosure action, admitting, in fact, that he has been in default for more than four years.

With regard to defendant's claim that he never received notice of the scheduled foreclosure sale, there is no such requirement pertaining to a defendant who is in default in answering or appearing in the foreclosure action (*see*, RPAPL 231; *Bank of New York v. Agenor*, 305 AD2d 438 [2<sup>nd</sup> Dept. 2003]). Moreover, even if he was entitled to notice, plaintiff has submitted an affidavit of service establishing that notice of a sale was served upon defendant by mail on August 2, 2011, as well as published in accordance with the service provisions in the

Judgment of Foreclosure and Sale. Accordingly, defendant's mere denial of receipt is insufficient to warrant either vacatur of the judgment or a hearing.

As for defendant's claim of fraud on the part of the real estate and mortgage brokers in the procurement of the mortgage itself, defendant has failed to provide this Court with any facts supporting his claim of fraud (*cf.*, CPLR 3016[b]). Neither has he submitted any details regarding the terms of the subject mortgage which would suggest that it was "sub-prime." Moreover, although defendant seeks permission to file a late answer, no proposed answer has been submitted upon the instant application. In any event, the possible merit of either claim is largely irrelevant where, as here, defendant has failed to demonstrate a reasonable excuse for his default.

Accordingly, it is

ORDERED that the application is denied, and all temporary restraints are lifted.

E N T E R,

Dated: September 11, 2012

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J.S.C.