

**Hodas v Simon**

2016 NY Slip Op 32232(U)

September 8, 2016

Supreme Court, Suffolk County

Docket Number: 33031/2013

Judge: Jr., Andrew G. Tarantino

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SUPREME COURT - PART 50  
COUNTY OF SUFFOLK - STATE OF NEW YORK

PRESENT

HON. ANDREW G. TARANTINO, JR.  
A.J.S.C.

-----X  
**ARLENE HODAS as Executrix of the Estate of  
MARTIN HODAS, deceased,**  
Plaintiff(s)

Index No. **33031/2013**

Motion seq. **002: MD**  
Motion Date: 6/16/2015

-against-

Motion seq. **003: XmotD**  
Motion Date: 7/6/2015

**LARRY SIMON, CLERK O F THE SUFFOLK  
COUNTY DISTRICT COURT, and "XYZ CORP",  
"JOHNS DOE" and "JANES DOE", the persons  
being fictitious and unknown to plaintiff, the  
persons or parties intended being the tenants,  
occupants, persons or corporations, if any, having or  
claiming an interest in or lien upon the premises  
described in the Complaint,**  
Defendant(s).  
-----X

Motion seq. **004: MG**  
Motion Date: 6/14/2016  
Adj. Date: 7/19/2016

**ORDER DENYING MOTION FOR  
REFERENCE, DENYING CROSS  
MOTION TO DISMISS and  
SCHEDULING PRELIMINARY  
CONFERENCE**

Upon consideration of the motion by the plaintiff Arlene Hodas, as Executrix of the Estate of Martin Hodas, deceased ["the plaintiff"], for an order granting the plaintiff a default judgment against defendant Larry Simon ["the defendant" or "Simon"], and appointing a referee to ascertain and compute the amount due to plaintiff and other relief, the supporting affirmation and exhibits, (sequence 002), the defendant's notice of cross motion to dismiss the complaint and to extend the defendant's time to answer the complaint, the supporting affirmation, affidavit, and exhibits, (sequence 003), the affirmation in opposition to the defendant's dismissal motion and in further support of the plaintiff's motion for a default judgment against the defendant, and the plaintiff's notice of motion for an order directing that the duration of the effectiveness of the notice of pendency filed on December 16, 2013, be extended for a period of three years, until December 16, 2019, the supporting affirmation and exhibits (sequence 004), it is now

*ORDERED* that the motion for an order granting the plaintiff a default judgment against the defendant and appointing a referee to ascertain and compute the amount due the plaintiff is denied; and it is further

*ORDERED* that so much of the cross-motion for an order dismissing the complaint is denied; and it is further

*ORDERED* that so much of the cross-motion for an order granting leave to and extending the time for defendant to file an answer to the complaint in the form annexed to the cross moving papers is granted, and the answer is deemed served upon the service of this order with written notice of its entry upon counsel for the plaintiff within 20 days of entry of the order; and it is

further

*ORDERED* that so much of the plaintiff's motion (004) for an order directing that the duration of the effectiveness of the notice of pendency filed on December 16, 2013, be extended for a period of three years, until December 16, 2019, is granted to the extent that the plaintiff may file and the County Clerk is directed to accept a successive notice of pendency prepared by the plaintiff upon the payment of the appropriate filing fee; and it is further

*ORDERED* that the attorneys for the parties are directed to appear for a preliminary conference to schedule discovery in **DCM Part of the Supreme Court, Suffolk County at 9:30 AM on October 18<sup>th</sup>, 2016.**

On the application for a default judgment and for the appointment of a referee to ascertain and compute the amount due in this foreclosure action, the plaintiff relies upon the allegations in the complaint verified on November 26, 2013, by the decedent, Martin Hodas ["Hodas" or "the decedent"], to be used as the affidavit of the facts constituting the claim and the amount due pursuant to CPLR 3215 [f]. Hodas died on May 24, 2014. Preliminary letters testamentary were obtained on December 22, 2014. Arlene Hodas as Executrix of the decedent's estate was substituted as plaintiff by order dated February 6, 2015 (Tarantino, Jr., J.). The following facts are taken from the complaint, as verified by the decedent.

Larry Simon resides at 11 Whippoorwill Lane, Quogue, County of Suffolk, State of New York 11959, and is the owner of the premises ["the subject premises"]. On or about November 22, 2004, Simon executed a promissory note and mortgage, secured by the subject premises, to obtain a loan of \$100,000.00 from Hodas. Simon executed a mortgage on or about November 22, 2004 ["the subject mortgage"], which the plaintiff understood would be recorded by Simon or his counsel. Hodas later learned that the subject mortgage had not been recorded. Therefore, Hodas's counsel recorded the subject mortgage with the County Clerk on July 6, 2010. Simon failed to make any payments pursuant to the November, 2004 note and mortgage.

To avoid foreclosure of the mortgage, Simon executed a "RESTATED MORTGAGE NOTE" to the plaintiff on or about September 14, 2010, whereby Simon acknowledged indebtedness to Hodas for a total of \$185,000.00. The "Restated Mortgage Note" consolidated the principal indebtedness of \$100,000.00 evidenced by the November, 2004 promissory note plus all of the accrued interest thereon to the date of the execution of the Restated Mortgage Note, an additional \$85,000.00. A copy of an undated document entitled "RESTATED MORTGAGE NOTE" in the amount of \$185,000.00 signed by Simon is attached to the complaint. While Simon's signature appears on the Restated Mortgage Note, below it is a notary signature and an undated jurat, respectively. The Restated Mortgage Note in the amount of \$185,000.00 is alleged to be secured by the November, 2004 mortgage.

According to the allegations in the complaint, after executing the Restated Mortgage Note, Simon made six partial payments for the months of September, October, November, and December of 2010, and January and February of 2011, whereupon Simon stopped making payments

altogether. Plaintiff's counsel mailed a notice of default dated June 15, 2012, to Simon. The notice advised Simon that if payment in full was not made by December 1, 2012, pursuant to an oral agreement between the parties, then foreclosure proceedings against Simon based on the November, 2004 mortgage would commence. Simon failed to make any further payments toward his indebtedness. By reason of the foregoing, the plaintiff elected to accelerate the whole of the principal sum due and owing and commenced the action on December 16, 2013.

Generally, in moving for a default or for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its prima facie case through the production of the mortgage, the unpaid note, and evidence of default (see *U.S. Bank N.A. v. Godwin*, 137 A.D.3d 1260, 1261, 28 N.Y.S.3d 450; *Bank of New York Trust Co. v. Chiejina*, 2016 WL 4371771, at \*2; *HSBC Bank USA, N.A. v. Taher*, 104 A.D.3d 815, 816, 962 N.Y.S.2d 301, 303).

Here, the plaintiff failed to prove by proof in admissible form one or more of the elements for a default in an action to foreclose a mortgage. Without explanation, the plaintiff failed to produce the original note allegedly executed by Simon on November 22, 2004. While the plaintiff apparently claims that it was suing on the Restated Mortgage Note rather than the original note, the Restated Mortgage Note is undated and the notarization of Simon's signature is irregular.

Prescinding from the issue of whether the undated "Restated Mortgage Note", the undated mortgage, and the allegations of default in the complaint verified by the decedent was sufficient to establish the plaintiff's entitlement to a default judgment, in opposition to plaintiff's motion, the defendant raised triable issues of fact as to each element of the cause of action precluding a default judgment in Hodas's favor. Simon submitted an affidavit contesting the facts as set forth in the complaint verified by Hodas. According to the Simon affidavit dated June 19, 2015, Simon borrowed \$100,000.00 from Hodas "on a handshake". In November, 2004, Hodas told Simon that he would like to have the debt placed in writing and that the two needed an attorney to draft up the documents. Simon contacted attorney Donald N. Rizzuto of Valley Stream who prepared a Note and a second mortgage on Simon's home. Simon acknowledges signing the mortgage but attests that he never signed the Note. Thereafter, Simon took out a second mortgage on his home with a bank and determined that there was no record showing that Hodas ever recorded the mortgage.

The Simon affidavit recites that sometime after November 22, 2004, Simon transferred 200,000 shares of Universal Property Development ["UPDA"] stock to Hodas. Hodas told Simon that he had sold the shares for \$.50 per share or for the owed amount of \$100,000.00. Simon believed he had satisfied his debt to Hodas. From that time until September, 2010, Simon never received any request or demand from Hodas. In September, 2010, Hodas contacted Simon and stated that he, Hodas, had recorded the 2004 mortgage in June, 2010, and that Simon still owed him \$100,000.00, plus interest. When Simon demanded that Hodas immediately remove the mortgage, Hodas demanded that Simon sign a "Restated Note" prepared by Hodas's attorneys and threatened Simon with physical harm if Simon refused to sign. Simon believed that he signed the "Restated Note" the weekend after Thanksgiving, on or about November 25, 2010. Simon contends that he made a few payments and then stopped. He heard nothing further until he discovered a copy of the summons and complaint affixed to his front door in early January, 2014.

Upon discovering the complaint, Simon contacted Hodas and reminded the latter that Simon had repaid the debt whereupon Simon attests that Hodas agreed to “stop the foreclosure”. Simon never heard anything further from Hodas or his attorneys until mid-February, 2015, when he received a letter and an order substituting Arlene Hodas as plaintiff in this action and scheduling a conference on March 24, 2015. After a relatively brief period Simon retained an attorney who filed a Notice of Appearance on May 5, 2015. Simon’s newly retained attorney attempted to serve an answer to the complaint on May 5, 2015, but the answer was rejected. On May 22, 2015, the plaintiff filed the motion for a default judgment and an order of reference.

In further opposition to the plaintiff’s motion, the defendant submitted the affidavit of attorney Donald N. Rizzuto dated June 11, 2015 [“the Rizzuto affidavit”]. According to the Rizzuto affidavit, Simon contacted Rizzuto to prepare mortgage documents to evidence a \$100,000.00, second-position mortgage on Simon’s residence located in Quogue, New York in favor of Martin Hodas. On November 22, 2004, attorney Rizzuto appeared at Hodas’s home where he discussed the topic of a second mortgage with both Hodas and Simon. Rizzuto asked both Hodas and Simon to review the title report that they previously assured Rizzuto had been prepared by a reputable title company as well as any and all documentation evidencing that any considerations totaling \$100,000.00 had been conveyed by Hodas to Simon. Hodas indicated that no title report had been prepared and that Hodas did not possess anything to indicate that he had conveyed any consideration for any indebtedness evidenced by the mortgage and note that Rizzuto prepared. Hodas assured Rizzuto that Hodas possessed such documentation, though it was not immediately accessible. Hodas indicated that he could retrieve such records and obtain a title report within a reasonable time. Rizzuto then told both parties that he would hold the executed mortgage and note until he had a chance to review the title report and any instrument evidencing any consideration extended by Hodas to Simon forming the underlying basis of the indebtedness.

Until the date of Rizzuto’s affidavit, Rizzuto attested that he had not received either evidence of the underlying consideration for the note or any title report pertaining to Simon’s property. Upon inquiring of Hodas sometime after November 22, 2004, Hodas indicated to Rizzuto that he was “square” with Simon as the latter had paid back his \$100,000.00 debt. Thus, upon Hodas’s instruction, Rizzuto never filed the mortgage and note.

The plaintiff has raised the deadman’s statute as a bar to the Court’s consideration of the Simon and Rizzuto affidavits in opposition to the plaintiff’s motion for a default judgment (*see* CPLR 4519). Evidence excludable by the deadman’s statute may be considered to defeat a motion for judgment where such evidence is otherwise relevant and competent (*Stone v. Stone*, 76 A.D.2d 833, 428 N.Y.S.2d 487; *Phillips v. Kantor & Co.*, 31 N.Y.2d 307, 338 N.Y.S.2d 882, 291 N.E.2d 129; *McEvoy v. Garcia*, 114 A.D.2d 401, 402, 494 N.Y.S.2d 125, 126). Notably, the allegations in the complaint verified by Hodas may also be subject to the same objection at trial (*Id.* at 402). The affidavits of Simon and Rizzuto raised several issues of fact and credibility not the least of which was whether the debt was satisfied, the amount of the debt, and the circumstances under which Simon executed the “Restated Note” for an additional \$85,000.00, precluding judgment in favor of the plaintiff and the appointment of a referee. For these reasons, the plaintiff’s motion is denied.

The same issues of fact and credibility that preclude judgment in the plaintiff's favor preclude dismissal of the complaint in favor of the defendant. Thus, so much of the defendant's cross motion that seeks an order dismissing the complaint is denied. However, if believed, the Court considers Simon's explanation for his default in answering the complaint a reasonable excuse for his default, that is, that after the complaint was served Hodas acknowledged the repayment of the debt to Simon, and hearing nothing further until his receipt of the order substituting the plaintiff for Hodas in May of 2015, Simon assumed that Hodas had abandoned the action. Moreover, Simon has demonstrated a meritorious defense, that is, payment (see CPLR 3211[a][5]).

Those branches of the defendant's cross motion which were in effect to vacate his default and to extend the time to appear and file an answer and compel the plaintiff to accept his late answer is granted. The defendant provided a potentially meritorious defense and a reasonable excuse for the delay, and there was no evidence that the plaintiff was prejudiced or that the default was willful (see *Finkelstein v. Sunshine*, 47 A.D.3d 882, 852 N.Y.S.2d 168; *Altairi v. Cineus*, 45 A.D.3d 707, 844 N.Y.S.2d 892; *Nickell v. Pathmark Stores, Inc.*, 44 A.D.3d 631, 843 N.Y.S.2d 177). Moreover, public policy favors the resolution of cases on the merits (see *Jolkovsky v. Legeman*, 32 A.D.3d 418, 419, 819 N.Y.S.2d 561; *Montgomery v. Cranes, Inc.*, 50 A.D.3d 981, 982, 855 N.Y.S.2d 681, 682).

So much of the plaintiff's motion (004) for an order directing that the duration of the effectiveness of the notice of pendency filed on December 16, 2013, be extended for a period of three years, until December 16, 2019, is granted to the extent that the plaintiff may file, and the County Clerk is directed to accept, a successive notice of pendency prepared by the plaintiff upon the payment of the appropriate filing fee (see CPLR 6519).

The attorneys for the parties are directed to appear for a preliminary conference to schedule discovery in **Part 50 of the Supreme Court, Suffolk County at 9:30 AM on October 18<sup>th</sup>, 2016.**

Dated: SEP 08 2016

  
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ANDREW G. TARANTINO, JR., A.J.S.C.

FINAL DISPOSITION

NON-FINAL DISPOSITION