

U.S. Bank N.A. v Nava
2018 NY Slip Op 30074(U)
January 9, 2018
Supreme Court, Queens County
Docket Number: 706535/2014
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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U.S. BANK NATIONAL ASSOCIATION, AS
TRUSTEE FOR CREDIT SUISSE FIRST BOSTON
MORTGAGE SECURITIES CORP., CSAB
MORTGAGE-BACKED PASS-THROUGH
CERTIFICATES, SERIES 2006-1,

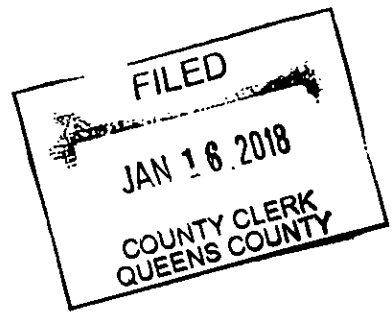
Index No. 706535/2014
Motion Date: 12/15/17
Motion Nos.: 157 & 158
Motion Seqs.: 3 & 4

Plaintiff,

- against -

MERCEDES NAVA, MOISES NAVA, BNB BANK
NATIONAL ASSOCIATION, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC.
AS NOMINEE FOR N.Y. FINANCIAL MORTGAGE
LENDING, NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, ADRIANA NAVA, ALEJANDO
NAVA,

Defendants.



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The following electronically filed documents read on this motion
by plaintiff (seq. no. 3) for an Order pursuant to CPLR 2004,
extending the time fixed by RPAPL 1351 for the mortgaged premises
to be sold under the direction of the referee to November 17,
2017; and on this Emergency Order to Show Cause by defendants
Mercedes Nava and Moises Nava (collectively hereinafter the Nava
defendants) (seq. no. 4) for an Order pursuant to CPLR 6301,
restraining and enjoining the Court's Referee and the third-party
purchaser AA Properties USA LLC at the auction sale of November
17, 2017 from closing title to the subject premises, and pursuant
to CPLR 2003 and RPAPL 231(6), vacating the auction sale of
November 17, 2017 and requiring plaintiff to file a new motion to
extend time to sell:

Table with 2 columns: Document Description and Papers Numbered. Includes entries for Notice of Motion, Affirmation in Opposition, Reply Affirmation, and Emergency Order to Show Cause.

Affirmation in Opposition-Exhibits.....EF 131 - 133
Reply Affirmation-Exhibits.....EF 137 - 140

This foreclosure action pertains to the property located at 23-56 21st Street, Astoria, New York.

A Judgment of Foreclosure and Sale was granted on January 30, 2017 and entered on February 10, 2017. Plaintiff was unable to request the Referee to conduct the foreclosure sale within ninety days of the date of judgment as required by RPAPL 1351(1) because the previously timely scheduled sale was cancelled due to a Chapter 7 bankruptcy filing by defendant Moises Nava. The auction sale was scheduled for, and held on, November 17, 2017. As the sale was held after the time fixed by RPAPL 1351, plaintiff seeks an Order extending the time. The Nava defendants seek an Order vacating the auction sale of November 17, 2017.

In support of the Nava defendants application, Moises Nava submits affidavits affirming that he wishes to complete a short sale. Prior to the auction sale, he submitted an offer and proof of funds on October 16, 2017. However, plaintiff's servicing company refused to look at the offer as it was submitted too late.

Counsel for the Nava defendants argues that the November 17, 2017 sale was improper because the time for an authorized sale had expired in May. Counsel further argues that the short sale application would have been considered if the improper November 17, 2017 sale was not scheduled.

Initially, this Court notes that the Nava defendants are in default and have failed to vacate their default in answering. It is well settled that a party in default may not seek affirmative relief absent the vacatur of default unless the application is premised upon jurisdictional grounds (U.S. Bank N.A. v Gonzalez, 99 AD3d 694 [2d Dept 2012]; Deutsche Bank Trust Co., Ams. v Stathakis, 90 AD3d 983 [2d Dept 2011]; Holubar v Holubar, 89 AD3d 802 [2d Dept 2011]; McGee v Dunn, 75 AD3d 624 [2d Dept 2010]). Accordingly, as the Nava defendants are in default, their application must be denied.

In any event, CPLR 2004 provides that "[e]xcept where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed." Under the circumstances herein, this Court finds that plaintiff has demonstrated good cause for its delay in

proceeding with the auction sale. Additionally, defendants have not demonstrated that they have been prejudiced by the delay. Rather, defendants waited nearly a year after the entry of the Judgment of Foreclosure and Sale to proceed with a short sale. The Nava defendants' desire to proceed with a short sale is not a defense to the foreclosure action, and the court may not endeavor to force an agreement upon plaintiff (see Wells Fargo Bank, N.A. v Meyers, 108 AD3d [2d Dept. 2013]).

Lastly, since a sale has already taken place, the right to redeem the property has been extinguished (see Norwest Mortgage, Inc. v Brown, 35 AD3d 682 [2d Dept. 2006]; GMAC Mortgage Corp. V Tuck, 299 AD2d 315 [2d Dept. 2002]; First Federal Savings and Loan Assoc. of Port Washington v Smith, 83 AD2d 601 [2d Dept. 1981]).

Accordingly, and for the above stated reasons, it is hereby

ORDERED, that in accordance with CPLR 2004, plaintiff's motion (seq. no. 3) to extend the time fixed by RPAPL 1351 is granted; and it is further

ORDERED, that the ninety day period pursuant to RPAPL 1351 for the mortgaged premises to be sold under the direction of the referee is extended until November 17, 2017, and the sale held on November 17, 2017 is deemed timely; and it is further

ORDERED, that the application by defendants Mercedes Nava and Moises Nava (seq. no. 4) is denied in its entirety; and it is further

ORDERED, that the stay contained in the Order to Show Cause dated December 8, 2017 is hereby lifted, and the closing of title between the Court's Referee and the third-party purchaser or its assignee for the premises known as 23-56 21st Street, Astoria, NY 11105 may proceed.

Dated: January 9, 2018
Long Island City, N.Y.

ROBERT J. McDONALD
J.S.C.

FILED
JAN 16 2018
COUNTY CLERK
QUEENS COUNTY