Flagstar Bank, FSB v Moore
2018 NY Slip Op 30734(U)
April 26, 2018
Supreme Court, Suffolk County
Docket Number: 19239/2013
Judge: Linda Kevins
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

COPY

SHORT FORM ORDER INDEX NO. 19239/2013

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

PRESENT:

Hon. LINDA KEVINS
Justice of the Supreme Court

---X

FLAGSTAR BANK, FSB

Motion Date: 2/6/2018
Sequence Nos. 003
CASE DISP.

Plaintiff,

- against -

DECISION AND ORDER

ARETHA MOORE, ARROW FINANCIAL SERVICES, LLC, PEOPLES ALLIANCE FEDERAL CREDIT UNION, DUANE DOE (REFUSED LAST NAME), JOHN DOE (REFUSED LAST NAME)

Defendant(s).

---X

This case has been recently reassigned to Part 29 of this Court. This case had been assigned to the Honorable W. Gerard Asher, J.S.C., who is now retired from the bench. Section (a) of CPLR §2221 states that a motion for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or modify, an order shall be made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it. Because Justice Asher has retired, this matter is properly before this Court.

The following papers have been read:

Sequence 003:
Defendant Aretha Moore's Order to Show Cause to Vacate the Judgment of Foreclosure and Sale pursuant to CPLR 5015(a)(4) and in the interests of justice..........................1

Plaintiff's Affirmation in Opposition to Defendant's Order to Show Cause 2

The motion is decided as follows:

Plaintiff's action seeks to foreclose a mortgage in the original sum of $184,929.00 executed by Defendant Aretha Moore (hereinafter Defendant), on June 28, 2011, in favor of Plaintiff's predecessor in interest, Mortgage World Banks, Inc, for property located at 137 42nd

Street, Copiague, New York 11726 (subject property). On the same date, Defendant executed a promissory note promising to repay the entire amount of the indebtedness to the mortgage lender. The Note and Mortgage were subsequently assigned to Plaintiff on April 30, 2013.

Defendant defaulted on her mortgage payments starting on October 1, 2012, and continuing to date. A 30-day Notice of Default letter was sent to the mortgagor defendants on November 5, 2012.

This action was started with the service of a Summons and Complaint dated July 22, 2013. Defendant was personally served with the Summons and Complaint on August 2, 2013, at the subject premises. No defendant ever answered the Complaint. Six Foreclosure Settlement Conferences, pursuant to CPLR §3408, were scheduled over the course of a year, starting on January 27, 2014, and ending on January 29, 2015, and the matter was discharged from the Foreclosure Settlement Conference (FSC) Part following the final conference upon the matter being unresolved.

Thereafter, Plaintiff moved by Notice of Motion (Sequence 001) on or about June 30, 2015, for an Order of Reference; no defendant filed opposition. The Motion was granted by Order of Reference dated November 24, 2015 (Asher, J.). That Order noted, among other things, that no defendant answered, moved, or appeared with respect to the Complaint. Next, on or about August 1, 2016, Plaintiff moved for a Judgment of Foreclosure and Sale (Sequence 002), which was granted, without opposition, on August 24, 2016 (Asher, J.)

The subject property was scheduled for a foreclosure sale on June 8, 2017, but was cancelled the day before because on June 7, 2017, Defendant filed for bankruptcy under Chapter 13 of the United States Bankruptcy Code. Defendant's bankruptcy case was dismissed on or about September 13, 2017. Plaintiff then scheduled a second foreclosure sale for November 29, 2017, but the sale was again stayed one day prior thereto, this time in accordance with the Order to Show Cause now before this Court, which was signed on November 28, 2017.

Defendant's Order to Show cause seeks specifically to vacate and set aside the Judgment of Foreclosure and Sale under CPLR §5015(a)(4) and/or in the interest of justice. Defendant also argues, by implication, that the Order of Reference should be vacated. Defendant cites four cases in support of the proposition that because Defendant participated in the CPLR §3408 settlement conferences and communicated with Plaintiff's counsel by e-mail during the time the case was in the FSC Part, she made an "informal appearance," and she is therefore not in default. Defendant also reasons that language added to subsection CPLR §3408 in late 2016 — specifically, subsection (m) — lends further credence to the argument that Defendant is not in default here, essentially because there is a keen desire to resolve foreclosure cases on the merits.

Defendant then argues that because she was not in default, Plaintiff is required to make out a prima facie case for Summary Judgment but cannot because it sent conflicting letters regarding default obligations, namely, a 30-Day Notice sent on November 5, 2012, which gave her 30 days to cure her default or the mortgagee would accelerate the loan, while a 90-Day Notice sent on October 16, 2012, pursuant to RPAPL §1304, advised her she had 90 days to resolve the default. Defendant then maintains that the 90-Day Notice de-accelerated the loan, requiring Plaintiff to send a new 30-Day Notice in order to accelerate the loan once more.

Defendant cites three cases as authority for this argument, which is that Plaintiff has failed to meet the required notice, which is a condition precedent to foreclosure.

Defendant also signed a 10-paragraph Affidavit, confirming that she communicated by e-mail with Plaintiff's counsel during the time the case was with the Foreclosure Settlement Part, but Defendant denied any knowledge of having been in default and assumed she was not because of her communication with Plaintiff's counsel. She also claims, among other things, she has a job and a family and foreclosing on her home would be unjust.

Notably, Defendant neither attaches a proposed Answer to the Complaint, nor asks for time to interpose an Answer.

Plaintiff's Opposition argues that Defendant has not proffered a reasonable excuse or meritorious defense in order to vacate the default. The Opposition outlined more than four years of court activity, including the unopposed Motion for an Order of Reference and the unopposed Motion for Judgment of Foreclosure and Sale. Plaintiff further argues that not knowing one's legal obligation to answer the Complaint cannot be used as an excuse to vacate the default. Finally, Plaintiff argues that it has fulfilled its notice requirement under RPAPL §1304, and that the doctrine of Law of the Case requires denial of the instant Order to Show Cause.

I. Vacating a Default Under CPLR §5015

Vacating a prior order or judgment is governed by CPLR §5105, which states in pertinent part:

> (a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:
>
> 1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; or
>
> 2. newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404; or
>
> 3. fraud, misrepresentation, or other misconduct of an adverse party; or
>
> 4. lack of jurisdiction to render the judgment or order; or
>
> 5. reversal, modification or vacatur of a prior judgment or order upon which it is based.

By submitting proof of service of a copy of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendants' failure to answer or appear, the plaintiff demonstrated its entitlement to a default judgment against the defendants (*see* CPLR 3215 [f] (see *Wells Fargo Bank, NA v. Mayen*, 1555 AD3d 811, 64 NYS3d 291 [2d Dept 2017];

HSBC Bank USA, NA v. Alexander, 124 AD3d 838, 4 NYS3d 47 [2d Dept 2015]). Since Plaintiff has already established Defendant has defaulted, it is incumbent upon Defendant to meet at least one of the standards set forth in the statute above in order for her default to be vacated.

Since Defendant specifically argues Plaintiff lacks standing, this issue is addressed first below. By implication, however, the facts and arguments supporting Defendant's arguments to vacate the Order of Reference and Judgment of Foreclosure and Sale also raise the question of whether Defendant has proffered a reasonable excuse and meritorious defense. Thus, this Court is charged with determining whether Defendant has provided a reasonable excuse (see *Apladenaki v Greenpoint Mtge. Funding, Inc.*, 117 AD3d 975, 976, 986 NYS2d 588 [2d Dept 2014]).

A. Vacating a Default Under §5015(a)(4)

A defaulting defendant cannot raise an RPAPL §1304 defense in effort to vacate a Judgment of Foreclosure and Sale even if it were deemed meritorious because it is not to be considered absent a showing of a reasonable excuse for such default (*see Bank of America v. Agarwal,* 150 AD3d 651, 57 NYS3d 153 [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]). Therefore, the RPAPL §1304 defense is not a "jurisdictional" defense (*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]).

Regarding Defendant's argument that Plaintiff provided contradictory notices when comparing the 30-day letter and the RPAPL §1304 90-day notice, the law is clear that while such a defense may be raised by a non-defaulting defendant any time before judgment, such a defense is waived where a defendant fails to raise it in opposition to a plaintiff's summary-judgment motion (*see New York Community Bank v. J Realty Far Rockaway, Ltd,* 108 AD3d 756, 969 NYS2d 796 [2nd Dept 2013]; *Starkman v. City of Long Beach,* 106 AD3d 1076, 965 NYS2d 609 [2nd Dept., 2013]).

Defendant cites three cases for the proposition that failing to demonstrate compliance with RPAPL §1304 requires a plaintiff be denied summary judgment. However, none of these cases are directly on point. All three decisions cited were ruled in favor of defendants in those cases because, unlike here, each defendant moved at the first opportunity, prior to defaulting. All three cases stand for the same proposition, namely, that a plaintiff must demonstrate compliance with notice requirements set forth in the mortgage when notifying a defendant that he or she is in default. (*U.S. Bank N.A. v Sabloff,* 153 A.D.3d 879, 60 NYS3d 343 [2d Dept 2017], *Emigrant Bank v. Myers*, 147 AD3d 1027, 47 NYS3d 446 [2d Dept 2017]; *HSBC Mortgage Corporation v. Gerber,* 100 AD3d 966, 955 NYS2d 131 [2d Dept 2012]). None of these cases hold that an RPAPL §1304 Notice de-accelerates a mortgage because a 30-day Notice shortened the time.

Accordingly, Plaintiff does not need to demonstrate that it had standing to commence this action in order to establish its entitlement to a default judgment (see *Bank of New York Mellon v.*

Izmirligil 144 AD3d 1067; 44 NYS3d 44 [2d Dept 2016], citing *US Bank N.A. v Dorestant*, 131 AD3d 467, 470 [2d Dept 2015]).

B. Vacating a Default Under CPLR §5015(a)(1)

In order to vacate a default pursuant to CPLR 5015(a)(1), the movant must demonstrate a reasonable excuse for the default and a potentially meritorious defense (*Chase Home Finance LLC v. Weinfeld*, — Misc 3d —, 2018 NY Slip Op 01899 [2d Dept 2018]). As stated in the statute, such a motion must be "made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party." If the moving party fails to establish a reasonable excuse for the default, the court does not need to determine if the party has established a meritorious defense (see *Lutz v Goldstone*, 31 AD3d 449, 450, 840 N2d 620 [2d Dept 2006]).

Here, assuming arguendo Defendant's arguments are a request to vacate her default under CPLR §5015(a)(1), such arguments fail. Defendant raises two supposed reasonable excuses: 1) she believed she had appeared because she participated in FSC Part conferences and exchanged e-mails with Plaintiff regarding at least one conference in July 2014, and, accordingly, she was unaware that she had to submit an Answer to the Complaint, and 2) Plaintiff provided conflicting notices about when she would be considered in default because the 90-Day Notice and the 30-Day Notice recited different times.

However, Plaintiff correctly points out that a motion to vacate should be made reasonably soon after learning of the default (see e.g., *Hoffman v. Sno Haus Ski Shops of Huntington, Inc.*, 185 AD2d 874, 587 NYS2d 856 [2d Dept 1992]). Defendant has offered no reasonable excuse for waiting two years to move to vacate the November 24, 2015, Order of Reference, which is when the default was granted.

Defendant claims that she did not know she was entitled to submit an Answer to the Complaint. However, it is undisputed that she was personally served with the Summons and Complaint, which states, in part: "YOU ARE HEREBY SUMMONED to answer the complaint in this action and serve a copy of your answer…within twenty days after the service is complete…"

Further, Plaintiff was provided with the RPAPL §1320 warning, which stated:

> YOU ARE IN DANGER OF LOSING YOUR HOME. IF YOU DO NOT RESPOND TO THIS SUMMONS AND COMPLAINT BY SERVING A COPY OF THE ANSWER ON THE ATTORNEY FOR THE MORTGAGE COPANY WHO FILED THIS FORECLOSURE PROCEEDING AGAINST YOU AND FILING THE ANSWER WITH THE COURT, A DEFAULT JUDGMENT MAY BE ENTERED AND YOU CAN LOSE YOUR HOME.

SPEAK TO AN ATTORNEY OR GO TO THE COURT WHERE YOUR CASE IS PENDING FOR FURTHER INFORMATION ON HOW TO ANSWER THE SUMMONS AND PROTECT YOUR PROPERTY.

SENDING A PAYMENT TO YOUR MORTGAGE COMPANY WILL NOT STOP THIS FORECLOSURE ACTION.

YOU MUST RESPOND BY SERVING A COPY OF THE ANSWER ON THE ATTORNEY FOR THE PLAINTIFF (MORTGAGE COMPANY) AND FILING THE ANSWER WITH THE COURT.

This RPAPL§1320 warning cited above provides adequate notice that if she did not respond to the Summons and Complaint by serving an answer, a default judgment could be entered and she could lose her home (see *Chase Home Fin., LLC v Minott*, 115 A.D.3d 634, 981 NYS2d 757 [2d Dept 2014]).

Defendant's four cited cases, analyzed below, demonstrate examples of reasonable excuses deserving of vacatur. The consistent factor in all four cases is that each defendant took direct action at the first opportunity to address the lawsuit and the alleged default. Once again, this is not the case here.

In *Jeffers v. Stein* [1] the Second Department held that defendants' attorney's appearance in the Supreme Court the day the action was commenced, in order to oppose the plaintiff's order to show cause, along with a request for adjournment of the motion, filing papers in opposition to the motion, and appearance for oral argument on the motion, constituted an informal appearance precluding a default. In *City of Newburgh v 96 Broadway LLC* [2], the Second Department held that a default was not warranted when, following the start of the action in June 2007, defendants made an informal appearance by twice appearing in court, petitioning to remove the action to federal district court, entering into a stipulation with plaintiff, and opposing plaintiff's motion to hold them in contempt. In *Carlin v. Carlin* [3], a matrimonial action, it was held that although the defendant defaulted in answering, she, among other things, opposed the plaintiff's numerous motions, filed cross motions, and appeared and participated at a preliminary conference. And in *Wells Fargo Bank v. Butler* [4], a foreclosure action, the assigned Supreme Court Judge denied plaintiff's default motion, noting that plaintiff moved for default in 2008 three separate times (the first two motions were denied with leave to renew over concerns about questionable service of process), and the third motion was not heard because the case was referred to the Foreclosure Settlement Conference Part where 25 conferences were held over a four-year period, and the

---

[1] 99 AD3d 970, 953 NYS2d 146 [2d Dept 2012]

[2] 72 AD3d 632, 897 NYS2d 720 [2d Dept 2010]

[3] 52 AD3d 559, 861 NYS2d 74 [2d Dept 2008]

[4] 41 Misc 3d 547, 971 NYS2d 41 [Sup Ct 2013]

[* 7]

unresolved motion was not reintroduced until March 2013. Defendant appeared at two motion conferences thereafter.

Even if this Court were to credit Defendant for the twelve months the case was in the FSC Part, the facts show Defendant failed to oppose Plaintiff's June 2015 Motion for an Order of Reference, nor did she oppose Plaintiff's August 2016 Motion for Judgment of Foreclosure and Sale. The within Order to Show Cause was brought two years after Defendant defaulted in answering or opposing the motion that produced the Order of Reference. Therefore, at this late juncture, Defendant has not made an informal appearance that would allow her to submit a late Answer as she has no reasonable excuse and no meritorious defense. And as noted earlier, even now there is no request before this Court to submit an Answer.

Defendant's argument regarding CPLR §3408 (m) is likewise unavailing. This statute went into effect in December 2016, which is almost three years after the initial conference at the FSC Part was held. That statute provides, in sum, that a defendant in a foreclosure case shall be presumed to have a reasonable excuse for the default and has up to 30 days to file an answer following the initial settlement conference. Thus, even if the statute was in effect in early 2014, Defendant has not complied with the plain language set forth.

On the other hand, Plaintiff correctly argues that in *Chase Home Fin., LLC v Minott*, 115 A.D.3d 634, 981 NYS2d 757 (2d Dept 2014), it was held that attending a foreclosure settlement conference is not enough to constitute a reasonable excuse so as to overcome a default when the defendant failed to answer the complaint for "multiple" years. Likewise, the fact that a defendant was not represented by counsel until he moved to vacate his default does not constitute a reasonable excuse to vacate (*Bank of N.Y. Mellon v Genova*, — Misc 3d —, 2018 Slip Op 02179 [2d Dept 2018]; *Wells Fargo Bank, NA v Besemer*, 131 AD3d 1047, 16 NYS3d 819 [2d Dept 2015]; *U.S. Bank N.A. v Slavinski*, 78 AD3d 1167, 912 NYS2d 285 [2d Dept 2010]; *Dorrer v Berry*, 37 AD3d 519, 830 NYS2d 277 [2d Dept 2007]). Similarly, a mortgagor in default has not provide a reasonable excuse for having failed to answer simply by claiming that he had little understanding of the legal process (*Wells Fargo Bank, NA v Besemer*, 131 A.D.3d 104, 16 NYS3d 819 [2d Dept 2015]). And a defendant who claimed she engaged in settlement negotiations and was not knowledgeable about the law was denied the right to vacate her default based on those excuses (*US Bank, NA v. Samuel*, 138 AD3d 1105, 30 NYS3d 305 [2d Dept 2016]).

Finally, the e-mails submitted by Defendant (Exhibit A) consist of 39 pages, but are merely multiple copies of a single exchange between Defendant and Plaintiff's Attorney's office concerning the adjournment of one of the settlement conferences in July 2014. Nothing in the e-mails indicate Plaintiff waived any right to bring a default. Likewise, there is nothing confusing about the exchange such that Defendant would be lead to believe she was granted any special rights or that Plaintiff mislead her in any capacity. The e-mail exchange, therefore, does not provide Defendant a reasonable excuse for having failed to answer the Complaint.

In sum, Defendant has not set forth a reasonable excuse or a meritorious defense warranting this Court to vacate the Order of Reference or Judgment of Foreclosure and Sale under CPLR §5015(a)(1).

II. Equitable Vacatur of a Default

While a court retains such powers to ensure that foreclosure is not made an "instrument of injustice" (see *Alfaki v. Celestial Church of Christ Calvary Parish*, 24, AD3d 476, 808 NYS2d 230 [2d Dept 2005], quoting *Guardian Loan Co. v. Early*, 47 NY2d 515, 520, 419 NYS2d 56 [1992]), any determination of a breach of good faith must be made on the totality of the circumstances (see e.g., *U.S. Bank N.A. v. Rodriguez*, 41 MISC 3d 656, 972 NYS2d 451 [Sup Ct, Bronx County, August 5, 2013[). In light of the facts presented here, this Court finds that there has been no credible evidence of injustice warranting court intervention.

Since this Order to Show Case to Vacate Defendant's Default is now resolved, the Court need not address Plaintiff's argument about Law of the Case.

Accordingly, it is hereby

ORDERED, that Defendant's Order to Show Cause (003) to Vacate the Order of Reference and Judgment of Foreclosure and Sale is ***DENIED***, and it is further

ORDERED, that the stay of sale of the subject property is lifted, and it is further

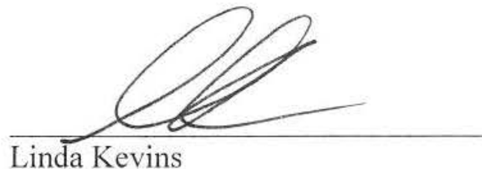
ORDERED, that Plaintiff is directed to serve a copy of this Order with Notice of Entry within 30 days of the date of this Order upon all parties who have not waived further notice, as well as upon the Referee, and to promptly file the Affidavits of Service with the Clerk of the Court; and it is further

ORDERED, that upon service of this Order with Notice of Entry, the Referee is hereby directed to schedule the sale of the subject property forthwith.

Any relief not specifically granted herein is denied.

This constitutes the Order of the Court.

Dated: 4/26/18



Linda Kevins