

Aronson v Callahan

2018 NY Slip Op 30937(U)

April 17, 2018

Supreme Court, Ulster County

Docket Number: 16-2499

Judge: James P. Gilpatric

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This opinion is uncorrected and not selected for official publication.

**STATE OF NEW YORK
SUPREME COURT**

ULSTER COUNTY

ALEXANDER ARONSON,

Plaintiff,

- against -

DECISION & ORDER

Index No.: 16-2499

**GLENN CALLAHAN, DONNA M. SPADA,
TECHNICAL SERVICE SPECIALISTS, INC.,
DANIELLE FRIED, JACOB PARKER, and "JOHN
DOE #1" through "JOHN DOE # 10", the names of the
last ten Defendants being fictitious, the true identity
being unknown to the Plaintiff and intended to be
tenants and persons in possession of the premises
described in the complaint or having or claiming an
interest upon the mortgaged premises described in the
complaint.**

Defendants.

**Supreme Court, Ulster County
R.J.I. No.: 55-16-01828**

Present: James P. Gilpatric, J.S.C.

Appearances:

**RUSK, WADLIN, HEPPENR & MARTUSCELLO. LLP
Attorneys for Plaintiff
255 Fair Street/ P.O. Box 3356
Kingston, New York 12402
By: Jason J. Kovacs, Esq.**

**CLAIR & GJERTSEN
Attorneys for Defendant Glenn Callahan
4 New King Street
White Plains, New York 10604
By: Lancelot Colquitt, Esq.**

Gilpatric, J.:

This is an action to foreclose a mortgage issued to the defendants by the plaintiff. The

plaintiff moves for: 1) summary judgment, pursuant to CPLR 3212 against Defendant Glenn Callahan (hereinafter "Defendant Callahan") for foreclosure of a mortgage and dismissing the defenses asserted in his Answer and Affirmative Defenses of said defendant; 2) a default judgment against the defendants Donna M. Spada, Technical Service Specialists, Inc., Danielle Fried and Jacob Parker for their failure to answer the complaint; 3) an appointment of a referee to compute the sums due and owing to the plaintiff, pursuant to CPLR Article 43 and RPAPL § 1321; and; 4) for any such other and further relief as the Court may deem just and proper. The Defendant Callahan opposes the motion. No other defendants have responded to the motion.

The plaintiff submits that on or about October 23, 2009, Defendant Callahan executed and delivered a Mortgage Note and Mortgage in the principal amount of \$120,000.00 securing the premises, a single-family residence located at 2 Mountain View Place North, New Paltz, New York, County of Ulster, State of New York (Plaintiff's Exhibit "A"). It is also submitted by the plaintiff that the Mortgage was recorded in the Ulster County Office of the Clerk on October 27, 2009 and the appropriate mortgage tax was paid upon recording (Plaintiff's Exhibit "A"). The plaintiff asserts that Defendant Callahan breached his obligations under the terms of said Note and Mortgage by failing to make monthly payments as required by the Note, commencing with his failure to pay the balloon payment due on October 23, 2012. (Aronson Affidavit).

In opposition, Defendant Callahan asserts that the plaintiff failed to comply with the statutory directive of RPAPL§ 1320 in his summons and therefore, the plaintiff's complaint should be dismissed. The defendant submits that RPAPL§ 1320 specifically mandates:

"In an action to foreclose a mortgage on a residential property containing not more than three units, in addition to the usual requirements applicable to a summons in the court, the summons shall contain a notice in boldface in the following form:"

"NOTICE 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 company 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.” (RPAPL§ 1320)

Here Defendant Callahan asserts that the plaintiff's summons is in statutorily improper form because the aforementioned requisite statutory notice does not appear within said summons (Plaintiff's Exhibit "A", pp 1-2). The defendant further submits that the improper form was raised by the defendants in their Answer (Plaintiff's Exhibit "B" ¶28-30). Defendant Callahan also notes that the defect has been left uncorrected by the plaintiff even since it was raised as an affirmative defense.

Based upon all of the submissions, the Court finds that the plaintiff's failure to comply with RPAPL §1320 requires the denial of his summary judgment motion. In context of foreclosure reforms, strict compliance of statutory pre-requisites has been the standard (*see Tuthill Fin., a LTD. Partnership v Candlin*, 129 AD3d 1375 [3rd Dept 2015]; *TD Bank, N.A. v Leroy*, 121 AD3d 1256 [3rd Dept 2014]). The purpose of the statutory foreclosure reforms, as in § 1320, was to give unsophisticated homeowners sufficient notice that they are about to lose their homes through foreclosure. As noted in *Tuthill Fin., a LTD. Partnership v Candlin*, the failure to follow RPAPL 1304's requirement that statutory mandated language be printed in 14-point type required was sufficient to deny plaintiff's motion for summary judgment. Here, review of the plaintiff's summons clearly indicates that he has not complied with RPAPL §1320. While courts may disregard a defect or irregularity if a substantial right of a party is not prejudiced, failing to comply with one of the foreclosure reforms mandatory conditions precedent will not be deemed a minor irregularity that can be overlooked (*Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95 [2nd Dept 2011]). Inasmuch as the plaintiff admits that he failed to comply with the statutory language of RPAPL § 1320 in his actual summons, that failure is not excused, and the complaint must be dismissed.

Based upon the aforementioned findings and reasoning, the plaintiff's motion is denied in its entirety and the plaintiff's complaint is dismissed. The Court has considered the remaining arguments and finds them either unavailing or unnecessary to reach.

Based on the foregoing, it is hereby

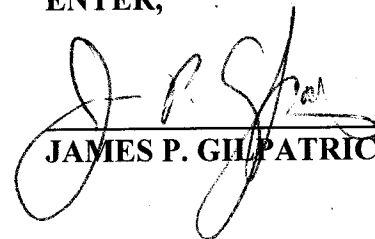
ORDERED that the plaintiff's motion is denied, in its entirety; and, the plaintiff's complaint is hereby dismissed.

This shall constitute the decision of the Court. The original decision and all other papers are being delivered to the Supreme Court Clerk for transmission to the Ulster County Clerk for filing. The signing of this decision shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED.

Dated: April 17, 2018
Kingston, NY

ENTER,



JAMES P. GILPATRIC, J.S.C.

Papers considered:

- 1) Notice of Motion, December 7, 2017;
- 2) Affirmation of Jason J. Kovacs, Esq., dated December 7, 2017;
- 3) Affidavit in Support of Alexander Aronson, dated December 4, 2017, with attached exhibits;
- 4) Affirmation in Opposition of Lancelot Coloquitt, Esq., dated February 16, 2018;
- 5) Reply Affirmation of Jason J. Kovacs, Esq., dated March 12, 2018, with attached exhibits;
- 6) Sur-Reply Affirmation of Lancelot Coloquitt, Esq., dated March 19, 2018.