U.S. Bank N.A. v Sieger
2018 NY Slip Op 32534(U)
October 2, 2018
Supreme Court, Suffolk County
Docket Number: 005007/2013
Judge: James Hudson

[* 1]

Short Form Order

Supreme Court of the County of Suffolk
State of New York - Part XL

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CITIGROUP MORTGAGE LOAN TRUST 2006-WFHE2, ASSET BACKED PASS-THROUGH CERTIFICATES SERIES 2006-WFHE2,

Plaintiff,

-against-

HAL SIEGER,
COMMISSIONER OF TAXATION AND FINANCE - CIVIL ENFORCEMENT,
TOWN SUPERVISOR TOWN OF BROOKHAVEN,
"JOHN DOE #1" through "JOHN DOE #12",
the last 12 names being fictitious and unknown to plaintiff, the person 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,

Defendants.

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MOT. SEQ. NO.: 003-MG; CASEDISP
004-MD; CASEDISP

SHAPIRO, DICARO & BARAK, LLC
Attorneys for the Plaintiff
175 Mile Crossing Boulevard
Rochester, NY 14624

MARVIN EVAN SCHIFF, PC
Attorney for Hal Sieger
One Old Country Road, Suite 125
Carle Place, NY 11514

Upon the following papers numbered 1 to 18 read on this Motion/Order to Show Cause for Judgment of Foreclosure and Sale (003); and Notice of Cross Motion and supporting papers 17-18 (004); ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (seq. no.:003) of Plaintiff requesting an Order of Judgment of Foreclosure and Sale is granted;
and it is further

ORDERED that the cross motion (seq. no.:004) of Defendant Hal Sieger requesting an order vacating the default of Defendant Hal Sieger ("Defendant"); granting Defendant leave to serve and file a late answer; dismissing the foreclosure case, is denied in its entirety.

Case History

This is a matter seeking foreclosure and sale of rental real property situate in Wyandanch, Suffolk County, New York. On May 7th, 2006 Defendant/Mortgagor Hal Sieger closed on a first mortgage loan secured by a note and mortgage on 33 Lake Drive, Wyandanch, NY 11798. Defendant ceased payment July 1st, 2009. Thereafter, on February 19th, 2013 Plaintiff commenced its foreclosure action. On March 18th, 2013 Plaintiff effected service of its summons and complaint and homeowner's foreclosure notice pursuant to CPLR § 308 (1) by in-hand service upon the Defendant. On May 28th, 2013 Defendant's Attorney formed a notice of appearance. On July 16th, 2013 Defendant served his answer. On May 2nd, 2014 a CPLR Rule 3408 mandatory settlement conference was scheduled and canceled as Defendant was determined to be ineligible. On March 16, 2015 Plaintiff filed its motion for an order of judgment of foreclosure and sale. On August 1st, 2016 Plaintiff withdrew its motion and re-filed for that order of judgment of foreclosure and sale on January 5th, 2017, same being motion sequence no.:003. Defendant filed a cross-motion to vacate its default on March 1st, 2017; same being motion sequence no.:004.

Court Observations

It is noted at the outset that Defendant served its untimely answer July 16th, 2013, four (4) months after personal, in-hand service of the summons and complaint upon Hal Sieger. CPLR Rule 320 (a) requires an appearance within twenty (20) days after service of the summons. The case record contains an affidavit of service stating that the complaint was served with the summons. Defendant's answer was due on or before April 8th, 2013.

Defendant, in his cross-motion offers no reason nor excuse for his untimely answer. Defendant does not appear to have taken any action in an attempt to rectify his default prior to the March 1st, 2017 cross-motion; nearly four (4) years after his default.

Based on the record, the Court is not persuaded that Defendant's default is in any way, shape or form "*de minimus*" as contended by Defendant's Counsel. Defendant's Counsel, by his filed notice of appearance, has represented Defendant since May 28th, 2013. Counsel fails to make any argument in defense or explanation of Defendant's default or his reason for not having requested that his client's default be vacated during the four (4) years he has represented the Defendant, prior to the instant cross-motion.

Analysis of Defendant's Cross-Motion Limited to Consideration of Reason or Excuse for His Default

Defendant's Counsel in his affirmation in support of the cross motion (seq. no.:004) begins his argument for relief by asserting: "Assuming *arguendo* that Sieger was deemed to be in default...." There is no argument on this point, Defendant Sieger *is* in default. The relevant question is does Defendant Sieger offers any viable excuse or reason for his default sufficient to order that default vacated?

Defendant's Counsel, in his affirmation avers:

> "Defendant Sieger's excusable default is based in the fact that this action was, upon information and belief initially assigned to the Foreclosure Settlement Conference "Par(t)" resulting in confusion for Defendant with regard to when an Answer would be required."

Defendant's Counsel further avers "while Defendant's Verified Answer was served beyond the time frame set forth in the CPLR, it is respectfully submitted that any delay was *de minimus*." The Court does not agree that a four (4) month delay in answering that which was personally served in hand is *de minimus*.

It is noted by the Court that Defendant's Attorney in his affirmation is attempting to testify without personal knowledge of the facts and circumstances of which he speaks, therefore such statements are a nullity. Despite Counsel's knowledge of this principal of legal practice he offers no affidavit of Defendant Sieger as to what, *in fact*, Defendant Sieger believes or believed, in regard to his default.

"...the bare affirmation of (an) attorney who demonstrated no personal knowledge of the (matter)...Such an affirmation by counsel is without evidentiary value and thus unavailing" (***Zuckerman v. City of New York***, 49 NY2d 557, 563, 404 NE2d 718,720, 427 NYS2d 595 [1980]; *citing* ***Columbia Ribbon & Carbon Mfg. Co. v. A-1-A Corp.***, 42 NY2d 496,500, 369 NE2d 4, 398 NYS2d 1004 [1977]; ***Israelson v. Rubin***, 20 AD2d 668, 247 NYS2d 85 [2d Dept 1964], *affd.* 14 NY2d 887, 200 NE2d 774, 252 NYS2d 90 [1964]; ***Lamberta v. Long Is. R.R.***, 51 AD2d 730, 379 NYS2d 139 [2d Dept 1976]).

The affirmation of Counsel, not based upon personal knowledge of the facts and without supporting documentation, is insufficient (***Mobil Oil Corporation v. Penna***, 139 AD2d 501, 526 NYS2d 849 [2d Dept 1988]; *see* ***Kartiganer Assocs. v. Town of New***

Windsor, 132 AD2d 527, 517 NYS2d 266 [2d Dept 1987], *lv. denied* 70 NY2d 612, 518 NE2d 7, 523 NYS2d 496 [1987]).

Had Defendant Sieger offered the aforesaid excuses by affidavit it would not alter the fact that the stated reasons are insufficient to meet his burden of demonstrating reasonable excuse for his default. The proffered excuses also fail to include supporting documentation.

A determination of what constitutes a reasonable excuse "...lies within the sound discretion of the Supreme Court" (***U.S. Bank National Association v. Grubb***, 162 AD3d 823, 824, 79 NYS3d 210 [2d Dept 2018]; ***Equicredit Corp. of America v. Campbell***, 73 AD3d 1119, 1120, 900 NYS2d 907 [2d Dept 2010]; *see also* ***Star Industries, Inc. v. Innovative Beverages, Inc.***, 55 AD3d 903, 904, 866 NYS2d 857 [2d Dept 2008]).

By way of example, a good faith belief in settlement, supported by substantial evidence, constitutes a reasonable excuse for default - holding that a party's engagement in settlement discussions is a reasonable excuse under CPLR Rule 5015 (a) [1], (***Scarlett v. McCarthy***, 2AD3d 823, 768 NYS2d 342 [2d Dept 2009]; *see also* ***Lehrman v. Lake Katonah Club***, 295 AD2d 322, 744 NYS2d 338 [2d Dept 2002]).

"A defendant seeking to vacate a default in answering a complaint and to compel the plaintiff to accept an untimely answer must show both a reasonable excuse for the default and the existence of a potentially meritorious defense" (***U.S. Bank National Association v. Grubb***, 162 AD3d 823, 79 NYS3d 210 [2d Dept 2018]; *quoting* ***Citimortgage, Inc. v. Stover***, 124 AD3d 575, 576, 2 NYS3d 147 [2d Dept 2015]; *see* ***U.S. Bank, N.A. v, Samuel***, 138 AD3d 1105, 1106, 30 NYS3d 305 [2d Dept 2016]; ***Gershman v. Ahmad***, 131 AD3d 1104, 1105, 16 NYS3d 836 [2d Dept 2015]).

"Since defendant failed to offer a reasonable excuse, it is unnecessary to consider whether they demonstrated the existence of a potentially meritorious defense" (***Dwyer Agency of Mahopac, LLC v. Dring Holding Corp.***,—NYS3d— 2, 2018 WL 4344647 [2d Dept 2018]; ***HSBC Bank USA, N.A. v. Lafazan***, 80 AD3d 651, 914 NYS2d 672 [2d Dept 2011]; *see* ***U.S. Bank, N.A. v. Stewart***, 97 AD3d 740, 948 NYS2d 411 [2d Dept 2012]).

Defendant has failed in his burden to offer any viable excuse or reason sufficient to warrant his default being vacated.

A party may not appeal from an order entered upon his default, the proper remedy being an application to vacate the default, made to the court which issued the order (***Calvagno v. Nationwide Mutual Fire Insurance Company***, 110 AD2d 741, 487 NYS2d 835 [2d Dept

1985]). His default must be explained, be determined to have been meritorious and the default vacated prior to his entering into further litigation in his case.

Defendant has failed to state a legally sufficient basis to vacate his default. Defendant's further arguments are dismissed. The relief requested by Defendant in his cross motion is denied in its entirety.

The Judgment of Foreclosure and Sale submitted by Plaintiff will be signed simultaneously with this Order.

The foregoing decision constitutes the Order of the Court.

DATED: OCTOBER 2nd, 2018
RIVERHEAD, NY

HON. JAMES HUDSON
Acting Justice of the Supreme Court