

Deutsche Bank Natl.Trust Co. v Bye

2018 NY Slip Op 33334(U)

December 19, 2018

Supreme Court, Suffolk County

Docket Number: 041816/2009

Judge: James Hudson

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

PRESENT:

HON. JAMES HUDSON

Acting Justice of the Supreme Court

X-----X
DEUTSCHE BANK NATIONAL TRUST
COMPANY, AS TRUSTEE OF THE
RESIDENTIAL ASSET SECURITIZATION
TRUST 2004-A10 MORTGAGE PASS-THROUGH
CERTIFICATES, SERIES 2004-J UNDER
POOLING AND SERVICING AGREEMENT
DATED DECEMBER 1, 2004,

Plaintiff,

-against-

DAVID H. BYE, SUZANNE M. BYE,
JP MORGAN CHASE BANK, N.A.,
LINCOLN EQUITIES CREDIT CORP.,

Defendants.

X-----X

INDEX NO.:041816/2009

**MOT. SEQ. NO.: 005-MG; CASEDISP
006-MD; CASE DISP**

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Attorney for Defendants David H. Bye and
Suzanne M. Bye
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Upon the following papers numbered 1 to 38 read on this Motion for Foreclosure and Cross Motion to Vacate;
(~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. no.:005) of Plaintiff requesting confirmation of the referee's oath and report, granting a judgment of foreclosure and sale, extinguishing and declaring invalid the lien of Lincoln Equities Credit Corp. is granted in its entirety, and it is further

ORDERED that the cross motion (seq. no.:006) of Defendants David H. Bye and Suzanne M. Bye ("Defendants") requesting vacatur of default, dismissal of the case, or, in the alternative, vacatur of the order of reference, compelling discovery and rescheduling of foreclosure conferences, is denied in its entirety.

Case History

This is an action seeking foreclosure and sale of residential real property situate in East Hampton, Suffolk County, New York. On October 12th, 2004 Defendants/Mortgagors David H. Bye and his wife, Suzanne M. Bye closed on a mortgage loan on their home (the subject premises) by executing a \$650,000.00 note secured by a mortgage on 79 Harrison Avenue, East Hampton, New York 11937. Same mortgage and note have been assigned to Plaintiff/Mortgagee.

On November 1st, 2008 Defendants defaulted on that loan.

On October 19th, 2009 Plaintiff moved by summons and complaint in foreclosure. Personal in-hand service pursuant to CPLR §308 (1) was made upon Defendant Suzanne M. Bye, and by personal service pursuant to CPLR §308 (2) upon Defendant David H. Bye.

On January 25th, 2010, April 13th, 2010, June 8th, 2010, and August 17th, 2010, a series of CPLR Rule 3408 mandatory settlement conferences were held. Defendants failed to appear at any of the scheduled conferences. Defendants aver in their cross-motion (seq. no.:006) that Counsel attended in their place and stead. No settlement was achieved and the matter was released and this foreclosure action continued.

The case proceeded through four (4) motion sequences. Defendants were represented by their former Counsel Young Law Group, PLLC, who filed *inter alia*, a prior motion to dismiss and vacate Defendants' default (seq. no.:003), which motion was denied by Judge Martin in an Order dated April 14th, 2016.

On April 14th, 2016 Judge Martin signed an order of reference and appointment of referee, Judge Martin determined that Defendants are in default; having failed to timely answer or appear in the instant foreclosure action.

On June 5th, 2017, Plaintiff filed its instant motion (seq. no.:005), pursuant to RPAPL §1351 seeking confirmation of the Referee's oath and report, granting judgment of foreclosure and sale, and extinguishing and declaring invalid the lien of Lincoln Equities Credit Corp..

On June 17th, 2017, Plaintiff's Counsel, RAS Boriskin, LLC and Ronald D. Weiss, P.C., as Defendants' Counsel entered into a Stipulation, agreeing *inter alia*, that "Defendant's opposition papers to the Motion, and any cross-motion, shall be served on or before August 16, 2017..."

By an undated Consent to Change Attorney form, date stamped upon filing "July 18th, 2017," Ronald D. Weiss, Esq. entered into the case as Defendants' Counsel in the place and stead of The Young Law Group, PLLC, by Ivan Young Esq.

On August 29th, 2017, Defendants filed their cross-motion (seq. no.:006). The papers before the Court for review do not contain an affidavit of service indicating when Defendants' cross-motion was served upon Plaintiff's Counsel.

Preliminary Matter

Defendants are in default by April 14th, 2016 Court Order. They cannot now move for affirmative relief unless and until they successfully move to vacate their default. Defendants' cross-motion (seq. no.:006) contains a plea for vacatur of default.

There is a troubling question whether the Court may consider that cross-motion. Same motion is dated August 16th, 2017, the last day upon which Defendant may make service upon Plaintiff (per the terms of the parties' June 17th, 2017 Stipulation). The affidavit of service of the cross-motion is conspicuous by its absence.

The Court record contains no indication of any extension of service times beyond that contained in the August 16th, 2017 Stipulation.

In the event service of the cross-motion is untimely, Defendants have no plea for relief before this Court, and Plaintiff's motion (seq. no.:005) is unopposed.

The Court notes that Plaintiff has not filed a rejection of the cross-motion as untimely.

The Court will consider Defendants' cross-motion. The Court declines to speculate.

Defendants' Cross-Motion (Seq. No.:006)

Defendants' default necessitates consideration of the cross-motion, which, *inter alia*, contains a request for vacatur of that default as a matter precedent.

Defendants' Allegations of Attorney Incompetence

In his affirmation in support of the cross-motion, Defendants' Counsel, Ronald D. Weiss, Esq. makes several accusations and assertions against The Young Law Group, PLLC, former Counsel for the Defendants. These are noted at the beginning of this decision

because they lead the Court to question the veracity of the affirmant. No statement/accusation of Attorney Mr. Weiss discussed herein is substantiated by any supporting documentation.

Attorney Mr. Weiss avers in paragraph 8 of his affirmation, (supported by Defendant David H. Bye in paragraph 9 of his affidavit): "...Prior Counsel did not oppose the Motion for Order of Reference which was filed on November 4, 2014 and was granted without opposition on April 18, 2016..."

Attorney Mr. Weiss alleges that The Young Law Group failed to oppose Plaintiff's cross-motion, (seq. no.:004); and offers that attorney failure as the reason for Defendants' default.

The record reflects that a reply was submitted by The Young Law Group.

The record also reflects that Motion sequence no.:003, November 14th, 2014, was Defendants' motion, made by The Young Law Group. That motion was to vacate Defendants' default and dismiss the complaint. That motion was denied.

Motion sequence numbers 003 and 004 were decided by Judge Martin by Order dated April 14th, 2016. An Order of Reference was issued by Judge Martin as part of that Decision.

As purported further evidence of incompetent legal representation by The Young Law Group, Attorney Mr. Weiss, in paragraph 43 of his affirmation states:

"As per the Defendant's affidavit the Defendant, he was unaware that this action was proceeding due to not being fully advised by his Prior Attorney..." (syntax is as written).

That allegation is not supported by any evidence; and is incomprehensibly vague. Mr. Weiss alleges in paragraph 49 of his affirmation: "The Defendant has now learned that his prior Attorney did not answer the complaint..."

It is noted that The Young Law Group was retained by Defendants four (4) years after answer was due.

In paragraph 37 of his affirmation, Attorney Mr. Weiss opines:

“The Defendant’s Prior Counsel who attended the (CPLR Rule 3408) conferences was a malpractice attorney who did not specialize in this area of practice and was not able to properly represent the client at conferences.”

No evidence is offered in support of that assertion of attorney incompetence.

In paragraph 6 of his affidavit, Defendant David H. Bye states:

“I hired Hertsfield and Rubin, a personal injury attorney to handle my malpractice case against the Chiropractor. The attorney did attend the foreclosure conferences held and my Prior Attorney advised the Court that I was in the process of negotiating a potential settlement of the malpractice lawsuit, but did not answer on my behalf.”

It is noted that Defendant David H. Bye does not allege attorney incompetence.

The four (4) CPLR Rule 3408 mandatory foreclosure conferences were held during 2010. Prior to Ronald D. Weiss, Esq., Defendants’ only other attorney of record was The Young Law Group, which firm was retained during 2013.

Vacatur of Default CPLR Rule 5015(a)(1)

CPLR Rule 5015. Relief from Judgment or Order provides, 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...” McKinney’s CPLR Rule 5015 (2018).

A motion to vacate a default judgment pursuant to CPLR Rule 5015 (a) (1) must be made within one (1) year after such entry.

In the case at bar, Plaintiff's cross-motion for default judgment (seq. no.:004) was decided April 14th, 2016 and entered June 9th, 2016 by Judge Martin.

The record reflects that Defendants' cross-motion (seq. no.:006) was filed August 29th, 2017; more than one year later.

Absent a "valid jurisdictional claim", a party in default may not move for affirmative relief without an order relieving such defendant from his or her default in place at the time affirmative relief is demanded (*see U.S. Bank Natl Assn. v. Gonzalez*, 99 AD3d 692, 952 NYS2d 59 [2d Dept 2012]; *Holubar v. Houlbar*, 89 AD3d 802, 934 NYS2d 710 [2d Dept 2011]; *McGee v. Dunn*, 75 AD3d 624, 906 NYS2d 74 [2d Dept 2011]).

"That a party in default may not move for affirmative relief of a non-jurisdictional nature, such as dismissal of a complaint pursuant to CPLR 3211 or otherwise, without successfully moving to vacate his or her default, is clear" (*US Bank N.A. v. Orellana*, 40 Misc3d 1204[a], 975 NYS2d 370 [Table], 2013 WL 3336823 [Sup Ct Suffolk County 2013]; *see HSBC Mtge. Corp. v. Morocho*, 106 AD3d 875, 965 NYS2d 570 [2d Dept 2013]; *Gonzalez, supra.*; *Deutsche Bank Trust Co. Am. v. Stathakis*, 90 AD3d 983, 935 NYS2d 651 [2d Dept 2011]; *Holubar, supra.*; *McGee, supra.*; *US Bank Natl Assn. v. Vardales*, 39 Misc3d 12119[A], 2013 WL 1490658 [Sup Ct Suffolk County 2013]; *Deutsche Bank Natl Trust Co. v. Young*, 2012 WL 6019543 [Sup Ct Suffolk County 2012]).

Absent a vacatur of his default, a defendant is without authority to oppose or otherwise seek affirmative relief of a non-jurisdictional nature (*Morocho* at 875, 570).

A defaulting defendant is deemed to have admitted all the allegations in the complaint (*HSBC Bank USA National Association v. Simms*, 163 AD3d 930, 81 NYS3d 517 [2d Dept 2018]).

As there is no motion to vacate Defendants' default, the Court will not consider the claims raised by Defendant's opposition (*The Money Source, Inc. v. Dell'Aquila*, 60 Misc3d 1232[A], 2018 WL 4355087 [Table] [Sup Ct Suffolk County 2018]).

Defendants' cross-motion for relief vacating their default pursuant to CPLR Rule 5015 (a) (1) is untimely and cannot be considered by the Court.

The additional relief requested in Defendants' cross-motion (seq. no.:006) cannot be considered. The Defendants are in default and have not raised a jurisdictional issue.

The relief requested by Defendants in their cross-motion is denied in its entirety.

Plaintiff's Motion (Seq. No.: 005)

Plaintiff's motion for relief comes before the Court unopposed.

Plaintiff's unopposed motion sufficiently demonstrates its entitlement to the relief requested (see *Deutsche Bank Natl. Trust Co. v. Islar*, 122 AD3d 566, 996 NYS2d 130 [2d Dept 2014]; *Plaza Equities, LLC v. Lamberti*, 118 AD3d 688, 986 NYS2d 843 [2d Dept 2014]; *Jessabell Realty Corp. v. Gonzalez*, 116 AD3d 908, 985 NYS2d 897 [2d Dept 2014]).

Where a defendant fails to oppose a motion, there is, in effect, a concession that no question of fact exists, and the facts as alleged in the moving papers may be deemed admitted (see *Kuehne & Nagel v. Baiden*, 36 NY2d 539, 369 NYS2d 667, 330 NE2d 624 [1975]).

The relief requested by Plaintiff in its motion (seq. no.:005) for an order pursuant to RPAPL §1351, confirming the oath and report of the appointed Referee, granting judgment of foreclosure and sale, extinguishing and declaring invalid the lien of Lincoln Equities Credit Corp. is granted in its entirety.

A Judgment of Foreclosure and Sale will be executed simultaneously with this Decision.

The foregoing decision constitutes the Order of the Court.

DATED: DECEMBER 19th, 2018
RIVERHEAD, NY



HON. JAMES HUDSON
Acting Justice of the Supreme Court