SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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JP MORGAN CHASE BANK, NATIONAL ASSOCIATION,
Plaintiff, Decision and order

- against - Index No. 507739/14

MS # 5

ELI BITON, CITY OF NEW YORK PARKING VIOLATIONS BUREAU, CITY OF NEW YORK TRANSIT ADJUDICATION BUREAU, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, 219-23 114TH ROAD, INC., CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, ET AL.,

Defendants, January 22, 2019

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PRESENT: HON. LEON RUCHELSMAN

The defendant has moved seeking to vacate a default entered against him. The plaintiff has opposed the motion. Papers were submitted by both parties. After reviewing the arguments of all parties this court now makes the following determination.

This lawsuit concerns a mortgage foreclosure action regarding property located at 643 Midwood Street in Kings County. A summons and complaint was served in August 2014. The plaintiff sought a referee to compute and such motion was granted on default.

The defendant now moves seeking to vacate the default on the grounds there is a reasonable excuse and a meritorious defense and that the interests of justice demand the default is vacated. The plaintiff opposes the motion arguing the defendant has failed to satisfy any of the criteria seeking a default.

Conclusions of Law

A default judgement may be vacated when the party demonstrates a reasonable excuse for failure to appear and a meritorious defense (AIU Insurance Company v. Fernandez, 281 AD2d 542, 721 NYS2d 840 [2d Dept., 2001]). Considering the evidence presented a reasonable excuse has been presented.

It should be noted that the defendant does not dispute the fact that the mortgage payments have not been made per se. Rather, other arguments as noted have been presented.

Thus, a motion to vacate will prove unsuccessful if the party does not allege a defense at all (Halali v. Gabbay, 223 AD2d 623, 636 NYS2d 838 [2d Dept., 1996], Riverhead Savings Bank v. Garone, 183 AD2d 760, 583 NYS2d 483 [2d Dept., 1992]). The defense need not entitle the party to judgement as a matter of law, rather it must simply raise the possibility that the case can be adequately defended (Bellcourt v. Bellcourt, 169 AD2d 855, 564 NYS2d 580 [3rd Dept., 1991], Parker v. City of New York, 272 AD2d 310, 707 NYS2d 199 [2d Dept., 2000], Hitter v. Rubin, 208 AD2d 480, 617 NYS2d 730 [1st Dept., 1994], Cotter v. Con. Ed. Of New York, 99 AD2d 738, 472 NYS2d 384 [1st Dept., 1984], Damselle Ltd. v. 500-12 Seventh Avenue Associates, 184 AD2d 367, 584 NYS2d 846 [1st Dept., 1992]). Thus, where a defense cannot be asserted at all, for example where the defendant was already convicted of felony charges regarding the events which now comprise the civil action, then vacating the

default would be improper (Boorman v. Deutsch, 152 AD2d 48, 547 NYS2d 18 [1st Dept., 1989]).

It is well settled that a mortgage may not be foreclosed unless the plaintiff maintains a legal or equitable interest in the mortgage (Wells Fargo Bank N.A., v. Marchione, 69 AD3d 204, 887 NYS2d 615 [2d Dept., 2009]). Thus, for a plaintiff to establish standing it must be demonstrated that the plaintiff was both (1) the holder or assignee of the subject mortgage and (2) the holder or assignee of the underlying note, either by physical delivery or execution of a written assignment prior to the commencement of the action with the filing of the complaint (see, U.S. Bank, N.A. v. Collymore, 68 AD3d 752, 890 NYS2d 578 [2d Dept., 2009]).

Further, in order to obtain a judgement the plaintiff must present evidence demonstrating the mortgage, the unpaid note and evidence of default (Archer Capital Fund L.P. v. GEL LLC, 95 AD3d 800, 944 NYS2d 179 [2d Dept., 2012]). The defendant's sole argument opposing the evidence presented rests on the fact the plaintiff has failed to prove the defendant is in default since the plaintiff, the entity that was first involved with the defendant assigned the note and mortgage to Chase Home Finance and that there is a gap of time wherein the plaintiff cannot state with certainty the mortgage was unpaid. There is no merit to such an argument. The plaintiff and Chase Home Finance merged on May 1, 2011 thus the affidavit of Gary Brunton who stated the defendant is in default

and has been in continuous default since 2008 is prima facie evidence sufficient to entitle a judgement on this matter since it based upon a review of all documents of the lender. The defendant has presented conclusory and unsubstantiated allegations concerning the integrity of Mr. Brunton and the evidence relied upon by Mr. Brunton. That is insufficient to raise any issue concerning the judgement.

Therefore, the motion seeking to vacate the default is denied.

So ordered.

ENTER:

DATED: January 22, 2019
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC