Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Wells Fargo Bank, N.A.,

Plaintiff,

-against-

Jose Sandoval, Savings Institute Bank & Trust Co. f/k/a The Brooklyn Savings Bank, Capital at Work Co. c/o Stephen S. Weinttraub, P.C., The Metropolitan Homes Inc. Profit Sharing Plan c/o Stephen S. Weinttraub, P.C., State Farm Insurance Company a/s/o Neieves Ranin,

Defendants.

Index No.: 18260/2006

Attorneys/Parties [See Rider Annexed]

Motion Sequence No.: 006; MD
Motion Date: 1/25/17
Submitted: 11/22/17

Motion Sequence No.: 007; MD
Motion Date: 11/15/17
Submitted: 11/22/17

Upon the following papers read on this application by non-party Erick Forgione for an order cancelling the foreclosure sale, for an order joining this action under Index Number 18260/2006 with the action under Index Number 611553/2017 and for an order granting him a default judgment in the action under Index Number 611553/2017; Order to Show Cause dated January 12, 2017 and supporting papers; Affirmation in Opposition dated February 16, 2017 and supporting papers; Reply affirmation dated February 21, 2017 and supporting papers and Order to Show Cause dated October 26, 2017 and supporting papers; Affirmation in Opposition dated November 14, 2017; it is

ORDERED that the application by non-party Erick Forgione to cancel the foreclosure sale is denied; and it is further

ORDERED that the application by non-party Erick Forgione to join this action under Index Number 18260/2006 with the action under Index Number 611553/2017 is denied; and it is further

ORDERED that the application by Erick Forgione for a default judgment against defendant Wells Fargo, N.A. in the action under index number 611533/2017 is denied.

This foreclosure action was commenced by the filing of a summons and complaint on July 17, 2006. After service of process was effectuated upon the named defendants, the court granted a default judgment and order of reference followed by a judgment of foreclosure and sale dated May 5, 2008. The foreclosure sale was scheduled for January 18, 2017, which was cancelled due to the within application brought by non-party Erick Forgione ("Forgione") by way of an order to show cause seeking a stay. The court notes that non-party Eric Forgione seeks in his moving papers a "short adjournment of the foreclosure sale" so that he can "learn the facts necessary to determine whether the debt of plaintiff has been paid in whole or in part." Non-party Forgione has had ample time to conduct his due diligence to determine whether the proceeds from the sale of the premises were used to pay plaintiff. Moreover, Forgione was successful in cancelling the foreclosure sale and in that regard, his application is academic. In any event, non-party Forgione has not filed a timely motion to intervene in this foreclosure proceeding pursuant to CPLR 1012 and as such, his motion otherwise must be denied. As the Second Department recently found in ***Castle Peak 2012-1 Loan Trust v. Sattar,*** 140 AD3d 1107, 35 NYS3d 368 [2d Dept. 2016], when a proposed intervenor is the purchaser of property subject to a known foreclosure action, a motion to intervene must be made timely. A delay of over four months in moving to intervene in the foreclosure action was deemed to be untimely in ***Castle Peak***. Here, the foreclosure action was commenced on July 17, 2006. Forgione has never sought to intervene herein, and thus, any attempt to intervene at this late stage would be unwarranted (***Deutsche Bank v. Golding,*** 123 AD3d 757, 1 NYS3d 113 [2d Dept. 2014](motion to intervene properly denied where proposed intervenor delayed in seeking relief); ***JP Morgan Chase, N.A. v. Edelson,*** 90 AD3d 996, 934 NYS2d 847 [2d Dept. 2011]). Further, even had Forgione timely moved to intervene, he would have no defense to this foreclosure action being that his predecessor in interest, defendant Jose Sandoval, failed to answer and was found in default pursuant to a prior order of the court (*see* ***Citimortgage, Inc. v. Baser,*** 137 AD3d 735, 26 NYS3d 352 [2d Dept. 2016]; ***Novastar Mortgage v. Mendoza,*** 26 AD2d 203, 699 NYS2d 458, 479 [2d Dept. 2006]; ***HSBC Bank USA v. Martin-Lloyd,*** 45 Misc3d 1203 (A), 998 NYS2d 306 [Kings Cty. 2014]). In addition, the Second Department consistently has ruled that "the filing of a notice of pendency provides constructive notice of an action in which the judgment demanded may affect the title to real property. The statute [CPLR 6501] further provides that a person whose conveyance is recorded after the filing of a notice of pendency is bound by all proceedings taken in the action after such filing to the same extent as if he or she were a party" (***Stout St. Fund I, L.P. v. Halifax Group, LLC,*** 148 AD3d 749, 750, 48 NYS3d 443, 445 [2d Dept. 2017]; ***Novastar Mortgage v. Mendoza,*** 26 AD2d 203, 699 NYS2d 458 [2d Dept. 2006]). Here, it is undisputed and indeed conceded by Forgione that he acquired his interest in the subject property on June 20, 2008, approximately two years after plaintiff filed its notice of pendency in the foreclosure action. The Second Department has denied a proposed intervenor's motion to be named as a necessary party defendant where it was determined that the movant had constructive notice of the foreclosure action at the time that his conveyance in the property was recorded (***Novastar Mortgage v. Mendoza,*** 26 AD2d 203, 699 NYS2d 458 [2d Dept. 2006]). Thus, Forgione, having failed to timely intervene in this foreclosure action, is not entitled to any relief herein.

The application by Forgione to join this action with the action under index number 611533/2017, likewise, must be denied. As stated above, Forgione is a non-party to this action and is not entitled to any relief herein.

Notwithstanding, joinder of these actions would be inappropriate under the circumstances. CPLR § 602[a] provides that "[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all of the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." A motion to consolidate or for a joint trial pursuant to CPLR 602 [a] rests in the sound discretion of the trial court (***Mattia v. Food Emporium, Inc.***, 259 AD2d 527, 686 NYS2d 473 [2d Dept. 1999]). Consolidation or joint trials are "favored by the courts in serving the interests of justice and judicial economy" (***Flaherty v. RCP Assoc.***, 208 A.D.2d 496, 498, 616 N.Y.S.2d 801[2nd Dept., 1994]; *see also* ***Shanley v. Callanan Indus.***, 54 N.Y.2d 52, 57, 444 N.Y.S.2d 585, 429 N.E.2d 104 [1981]; ***Mideal Homes Corp. v. L & C Concrete Work***, 90 A.D.2d 789, 455 N.Y.S.2d 394 [2nd Dept. 1982]). When the two actions involve different plaintiffs, a joint trial rather than consolidation is appropriate (***Mas-Edwards v. Ultimate Services, Inc.***, 45 AD3d 540 845 NYS2d 414 [2d Dept. 2007]; *see also* ***Cola-Rugg Enterprises, Inc., v. Consolidated Edison Company of New York, Inc.,*** 109 AD2d 726, 486 NYS2d 43 [2d Dept. 1985]). Indeed, the Second Department prefers joint trials over consolidations (***Megyesi v. Automotive Rentals, Inc.,*** 115 AD2d 596, 496 NYS2d 473 [2d Dept. 1985]).

The stated goal of CPLR 602 [a] is to avoid the unnecessary costs and delays associated with a duplication of trials (***Skelly v. Sachem Cent. School Dist.,*** 309 AD2d 917, 766 NYS2d 108 [2d Dept. 2003]). However, where the opposing party has shown that consolidating or joining the actions for trial will prejudice a substantial right, denial of the motion is warranted, even where there are common questions of law or fact (*see* ***Skelly v. Sachem Cent. School Dist.,*** 309 AD2d 917, 766 NYS2d 108 [2d Dept. 2003]). For example, where there is a "disparity between the stages of litigation to which each case has progressed," it has been determined that for reasons of judicial economy, it is proper to deny a motion for consolidation or a joint trial (***Gouldsbury v. Dan's Supreme Supermarket,*** 138 AD2d 675, 526 NYS2d 779 [2d Dept. 1988]; *see also* ***Rennert Diana & Co. v. Kin Chevrolet,*** 137 AD2d 589, 524 NYS2d 481 [2d Dept. 1988] *citing* ***Steuerman v. Broughton,*** 123 AD2d 681, 507 NYS2d 50 [2d Dept. 1986]; ***Rodway v. Halpern,*** 3 AD2d 941, 163 NYS2d 806 [2d Dept. 1957]).

The delay inherent in joining these two actions for trial would prejudice a substantial right of plaintiff inasmuch as the foreclosure action was concluded in 2008 by a judgment of foreclosure and sale. "A judgment of foreclosure and sale entered against a defendant is final as to all questions at issue between the parties and concludes all matters of defense which were or might have been litigation in the foreclosure action"(*see* ***U.S. Bank, N.A. v. Castillo,*** 38 Misc.3d 1228, 967 NYS2d 870 [Suffolk Cty. 2013]). As such, joining these two actions is unwarranted.

As to Forgione's application for a default judgment against Wells Fargo, N.A. ("Wells Fargo") in the action under index number 611533/2017 (the "2017 action"), counsel for plaintiff in

the foreclosure action advises that it has not been retained to represent Wells Fargo in the 2017 action. Thus, the service of the order to show cause and supporting papers on counsel for plaintiff in the foreclosure action is improper and the application must be denied for failure to serve Wells Fargo with the moving papers. Notwithstanding, Forgione has failed to meet his burden under CPLR 3215.

"On a motion for a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing (*see* CPLR 3215 (f); ***Atlantic Cas. Ins. Co. v. RJNJ Services, Inc.,*** 89 AD3d 649 [2d Dept. 2011]; ***Interboro Ins. Co. v. Johnson***, 123 AD3d 667, 1 NYS3d 111 [2d Dept. 2014]; ***Miterko v Peaslee,*** 80 AD3d 736, 736-737, 915 NYS2d 314 [2d Dept 2011]; ***Levine v. Forgotson's Cent. Auto & Elec., Inc.,*** 41 AD3d 552, 553, 840 NYS2d 598 [2007]; ***599 Ralph Ave. Dev., LLC v. 799 Sterling Inc.,*** 34 AD3d 726, 825 NYS2d 129 [2006]). A verified complaint may be submitted instead of an affidavit when the complaint has been properly served (*see* CPLR 3215 (f); ***Woodson v. Mendon Leasing Corp.***, 100 NY2d 62, 70, 760 NYS2d 727 [2003]). Given that in default proceedings the defendant has failed to appear and the plaintiff does not have the benefit of discovery, the affidavit or verified complaint need only allege enough facts to enable a court to determine that a viable cause of action exists (*see* ***Woodson v. Mendon Leasing Corp.***, 100 NY2d at 70-71). Indeed, defaulters are "deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (***Id.***). Notwithstanding, the plaintiff must submit proof to establish a prima facie case (*see* ***Resnick v. Lebovitz***, 28 AD3d 533 [2d Dept. 2006]); ***Silberstein v. Presbyterian Hospital***, 95 AD2d 773, 463 NYS2d 254 [2d Dept. 1983]). Should the movant seeking a default judgment fail to state a viable cause of action, the movant is not entitle to the requested relief, even on default (*see* ***Green v. Dolphy Constr. Co., Inc.,*** 187 AD2d 635, 590 NYS2d 238 [2d Dept. 1992]).

Here, Forgione has failed to provide proof that plaintiff's mortgage was satisfied at or after the closing on the subject property in June of 2008. Without evidence that plaintiff's mortgage was satisfied, Forgione has not established a prima facie case to discharge plaintiff's mortgage and release the mortgage as a lien on the subject property. Moreover, no proof was submitted that Forgione complied with the notice provisions of CPLR 3215 [g][4].

Accordingly, the motions by Erick Forgione to cancel the foreclosure sale, to join this action with the action under index number 611533/2017, and for a default judgment against defendant Wells Fargo, N.A., in the action under index number 611533/2017 are denied.

Dated: 4/17/2019

HON. WILLIAM B. REBOLINI, J.S.C.

___X___ FINAL DISPOSITION_____ NON-FINAL DISPOSITION

RIDER

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Clerk of the Court