

Bank of Am., N.A. v Bias
2019 NY Slip Op 31528(U)
May 29, 2019
Supreme Court, New York County
Docket Number: 850066/2017
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

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BANK OF AMERICA, N.A.,

Plaintiff,

- v -

JERRY BIAS, LAUREN BIAS, JPMORGAN CHASE BANK, N.A., THE CITY OF NEW YORK, A MUNICIPAL CORPORATION ACTING BY AND THROUGH ITS DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, BOARD OF MANAGERS OF THE 1400 FIFTH AVENUE CONDOMINIUM, UNITED STATES OF AMERICA O/B/O INTERNAL REVENUE SERVICE, JOHN DOE #1 THROUGH #6, AND JANE DOE #1 THROUGH #6, THE LAST TWELVE NAMES BEING FICTITIOUS, IT BEING THE INTENTION OF PLAINTIFF TO DESIGNATE ANY AND ALL OCCUPANTS, TENANTS, PERSONS OR CORPORATIONS, IF ANY, HAVING OR CLAIMING AN INTEREST IN OR LIEN UPON

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89

were read on this motion to/for

JUDGMENT - SUMMARY

The motion by plaintiff to deem defendant Jerry Bias timely served, for summary judgment and to appoint a referee to compute is granted. The cross-motion by defendant Lauren Bias to dismiss, or for a stay, is denied.

Background

In this mortgage foreclosure action, plaintiff seeks to recover on a note worth over \$1 million to secure a property located at 1400 5th Avenue in Manhattan. Plaintiff claims that the Biases failed to make the monthly payments starting in March 2016.

In opposition, defendant Lauren Bias observes that she has been attempting to get a loan modification but is unable to because she is divorced from defendant Jerry Bias (who is the borrower and sole signatory on the note). Ms. Bias claims that in the divorce, she agreed to take responsibility for the property but is unable to do so because there is an IRS lien owed by Jerry and he owes more than \$400,000 in child support.

Ms. Bias also contends that the 90-day notice was never sent and wonders why several copies of the notices were sent to an address other than the subject premises (219 East 31st Street C/O Deborah B. Kahn). Ms. Bias argues that plaintiff cannot establish with admissible evidence that the mailing was ever done.

Discussion

Plaintiff is entitled to summary judgment. As an initial matter, the fact that copies of the 90-day notice were sent to other addresses does not render service on the address invalid. Plaintiff simply sent additional notices to a different address. The Court also declines to grant a stay due to the alleged pending investigation into Mr. Bias; that has nothing to do with the instant foreclosure action. The Court also declines to dismiss the case because plaintiff failed to make a motion for summary judgment within 90 days as directed in the order dated August 1, 2018; dismissal is too drastic of a remedy for missing a single deadline.

The Court also rejects Ms. Bias' claims with respect to plaintiff's proof of mailing. The fact is that the Walker affidavit is sufficient to establish that the 90-day notices were sent to the subject premises (NYSCEF Doc. No. 61). Ms. Walker (VP for plaintiff) claims she is aware of plaintiff's mailing practices and that plaintiff images proof of mailing (*id.*). She also points the court to the bulk mailing receipt (NYSCEF Doc. No. 79). The fact is that plaintiff can rely on business records as an exception to the hearsay rule to establish mailing (*see Bank of New York*

Mellon v Gordon, 97 NYS3d 286, 293-94, 2019 NY Slip Op 02306 [2d Dept 2019]). Ms. Walker need not have personally mailed the 90-day notice in order for plaintiff to meet its burden.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is granted and the answer, affirmative defenses and counterclaims of defendant Lauren Bias a/k/a Lauren M. Bias a/k/a Lauren Maillan Bias a/k/a Lauren Maillan-Bias are severed and dismissed; and it is further

ORDERED that the cross-motion by defendant Lauren Bias a/k/a Lauren M. Bias a/k/a Lauren Maillan Bias a/k/a Lauren Maillan-Bias to dismiss the complaint is denied; and it is further

ORDERED that plaintiff is deemed to have timely served defendant Jerry Bias as of December 11, 2017 nunc pro tunc; and it is further

ORDERED that plaintiff is entitled to a default judgment against the non-answering defendants; and it is further

ORDERED that Elaine Shay 800 Third Avenue, Suite 2800, New York, NY 10022, is hereby appointed Referee in accordance with RPAPL § 1321 to compute the amount due to Plaintiff for principal, interest and other disbursements advanced as provided for in the note and mortgage upon which this action is brought, and to examine whether the mortgaged property can be sold in parcels; and it is further

ORDERED that the Referee may take testimony pursuant to RPAPL § 1321; and it is further

ORDERED that by accepting this appointment the Referee certifies that she/he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) (“Disqualifications from appointment”), and §36.2 (d) (“Limitations on

appointments based upon compensation”), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of \$350 shall be paid to the Referee for the computation of the amount due and upon the filing of her/his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further;

ORDERED that the Referee is prohibited from accepting or retaining any funds for herself/himself or paying funds to him/herself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that plaintiff shall forward all necessary documents to the Referee within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that plaintiff must bring a motion for a judgment of foreclosure and sale within 30 days of receipt of the referee’s report; and it is further

ORDERED that if plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to plaintiff’s failure to move this litigation forward; and it further

ORDERED that the caption be amended to remove John Doe #1 through John Doe #6 and Jane Doe #1 through Jane Doe #6 from the caption, and the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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BANK OF AMERICA, N.A.,
Plaintiff,

v.

JERRY BIAS a/k/a JERRY B. BIAS, LAUREN
BIAS a/k/a LAUREN M. BIAS a/k/a LAUREN
MAILLIAN BIAS a/k/a LAUREN MAILLIAN-
BIAS, JPMORGAN CHASE BANK, N.A., THE
CITY OF NEW YORK, A MUNICIPAL
CORPORATION ACTING BY AND THROUGH
ITS DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT,
BOARD OF MANAGERS OF THE 1400 FIFTH
AVENUE CONDOMINIUM, UNITED STATES
OF AMERICA O/B/O INTERNAL REVENUE
SERVICE,
Defendant(s).

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and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the parties being added and removed; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address (www.nycourts.gov/suptctmanh)); and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

Next Conference: November 12, 2019 at 2:15 p.m. If plaintiff has moved for a judgment of foreclosure and sale before the conference, then plaintiff can seek an adjournment. Please

consult the part's rules for information about how to obtain an adjournment. An appearance is required if a motion for a JFS has not been made; counsel appearing for plaintiff must come prepared to explain the delay or interest may be tolled.

5/29/19

DATE



ARLENE P. BLUTH, J.S.C.

HON. ARLENE P. BLUTH

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE