Lake Wildwood Props., Inc. v Horseblock Road Props., LLC
2019 NY Slip Op 33186(U)
October 23, 2019
Supreme Court, Suffolk County
Docket Number: 23912/2010
Judge: William B. Rebolini

Short Form Order

COPY

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Lake Wildwood Properties, Inc.,

Plaintiff,

-against-

Horseblock Road Properties, LLC, Thaler & Gertler, LLP, JDM Capital Funding, LLC, Eugene Fernandez, as Trustee of the Eugene Fernandez Revocable Living Trust, Eugenio Fernandez, C.A.S.S. Holdings, LLC, by Eugene Fernandez in his capacity as Managing Member, The Phen Group, LLC, Old Field Properties, LLC, Lake Avenue Properties, LLC, Global Homes II, LLC, Global Home Group, LLC, Half Hollow Estates, LLC, People of the State of New York,

Defendant.

Motion Sequence No.: 005; MD TD
Motion Date: 5/1/19
Submitted: 8/7/19

Index No.: 23912/2010

Attorneys [See Rider Annexed]

Upon the following papers read on this application by defendants Horseblock Road Properties, LLC and Eugene Fernandez for an order vacating the Judgment of Foreclosure and Sale dated January 24, 2012, for an order invalidating the notice of sale, for a stay of the foreclosure sale scheduled for April 23, 2019, and for an order pursuant to CPLR 2221 and 5015 for reargument and modification of the Judgment of Foreclosure and Sale dated January 24, 2012; Order to Show Cause dated April 18, 2019 and supporting papers, together with Exhibits A through S submitted therewith; Affirmation in Opposition dated May 6, 2019 and Exhibits A through W annexed thereto; and Attorney Affirmation dated July 31, 2019; it is

ORDERED that the motion by defendants Horseblock Road, LLC and Eugene Fernandez is granted to the extent that the plaintiff shall submit an amended Order of Reference and include therein, *inter alia*, a provision that defendants be afforded an opportunity to submit evidence to the

referee in computing the amount due the plaintiff and that such evidence be submitted to the referee within thirty (30) days from date of service of the order of reference with notice of entry; and it is further

ORDERED that within ninety (90) days from the date of the Order of Reference, that plaintiff submit an amended judgment of foreclosure and sale; and it is further

ORDERED that the motion by defendants' to invalidate the notice of sale and for a stay of the foreclosure sale is denied as moot.

In this foreclosure action, an order of reference was granted on October 19, 2011 and a judgment of foreclosure and sale was granted on January 24, 2012. A foreclosure sale was scheduled for April 23, 2019. On April 18, 2019, after a hearing was held before this court, an order to show cause containing a stay of the foreclosure sale was issued. In that application, defendants Horseblock Road, LLC ("Horseblock") and Eugene Fernandez (collectively referred to herein as "defendants") seek an order vacating the Judgment of Foreclosure and Sale dated January 24, 2012 and invalidating the notice of sale, for a stay of the foreclosure sale scheduled for April 23, 2019, and for an order pursuant to CPLR 2221 and 5015 for reargument and modification of the Judgment of Foreclosure and Sale dated January 24, 2012.

By way of background, prior to the granting of a judgment of foreclosure and sale, the parties entered into a stipulation dated January 18, 2012, that was so-ordered by the court, providing for defendants to make certain payments to plaintiff and as part of that stipulation defendants agreed to the entry of the judgment of foreclosure and sale. After the judgment of foreclosure and sale was issued and prior to a foreclosure sale scheduled for July 17, 2012, another agreement was entered into between plaintiff and defendants and RCS Management, LLC ("RCS"), who was a proposed third-party purchaser of plaintiff's interest in the subject mortgage and note. The new agreement dated July 13, 2012, provided that RCS would make certain payments to plaintiff, RCS was an additional obligor on the mortgage, and defendant Horseblock issued a promissory note to plaintiff in the amount of $100,000.00 together with prepaid interest in the amount of $16,000. As part of that agreement, the foreclosure sale was cancelled but the action remained open and a foreclosure sale could only be re-noticed in the event of a default in the payments due under the agreement. It is undisputed that plaintiff and defendant Horseblock agreed on July 16, 2014 to extend the maturity date of the mortgage and note to January 5, 2015 although Horseblock and RCS were behind on their monthly interest payments in the amount of $14,805.88. It is further undisputed that RCS and defendants did not fulfill certain of their obligations under the July 13, 2012 agreement. Plaintiff claims that the only payments made by either RCS or defendants pursuant to the July 13, 2012 agreement were interest payments or presumably payments made by defendants on the $100,000 promissory note. Defendants, however, assert that additional sums towards the principal amount due and owing were paid on the mortgage after the entry of the judgment of foreclosure and sale. Defendants proposed to satisfy the mortgage in full for $1,091,913.90, which is the amount they claim is due and owing on the mortgage. Plaintiff, however, rejects defendants' assertions as to the actual amount due and instead claims that the judgment of foreclosure and sale figure of $3,362,856.32 is true and accurate.

The law is well settled that in order to be relieved of a default judgment, a party must show:

(1) a justifiable reason for the default; and (2) demonstrate that there is a meritorious defense to the action (***US Bank N.A. v. Smith,*** 132 AD3d 848, 19 NYS3d 62 [2d Dept. 2015]; ***Bank of New York v. Lagakos,*** 27 AD3d 678, 810 NYS2d 923 [2d Dept. 2006]; *see also* ***Chase Home Finance, LLC v. Minott***, 115 AD3d 634, 981 NYS2d 757, 758 [2d Dept. 2014]; ***Wells Fargo Bank v. Malave***, 107 AD3d 880 [2d Dept. 2013]; ***Citimortgage, Inc. v. Brown,*** 83 AD3d 644, 919 NYS2d 894 [2nd Dept 2011]; *citing* CPLR Rule 5015 [a] [1]; ***Development Strategies Co., LLC, Profit Sharing Plan v. Astoria Equities, Inc.***, 71 AD3d 628 [2nd Dept 2010]; ***U.S. Bank N.A. v. Slavinski***, 78 AD3d 1167 [2d Dept 2010]); ***Clarke v. Clarke***, 75 A.D.2d 836, 427 N.Y.S.2d 871 [2d Dept. 1980]; ***393 Lefferts Partner, LLC v. New York Avenue at Lefferts, LLC***, 68 A.D.3d 976 [2d Dept. 2009];***Wade v. Village of Whitehall***, 46 A.D.3d 1302 [3rd Dept. 2007]). A motion to vacate a default judgment should be made as soon as reasonably practicable after learning of the default (*see* ***Hoffman v. SnoHaus Ski Shops of Huntington***, 185 AD2d 874 [2d Dept. 1992]; ***63 Middle Neck Road LLC v. Benlevi***, 2012 NY Slip Op 30786 [Sup. Ct. Nassau Cty. 2012]). The determination of what constitutes a reasonable excuse for the default in answering is left to the sound discretion of the court (*see* ***Scott v. Ward***, 130 AD3d 903 [2d Dept. 2015]; ***Sganga v. Sganga***, 95 A.D.3d 872, 942 N.Y.S.2d 886 [2d Dept.2012]; ***Rogers v. Rogers***, 65 A.D.3d 1029, 886 N.Y.S2d 44 [2d Dept. 2009]). In order to demonstrate a meritorious defense, the defendant must do more than merely make conclusory allegations or vague assertions (***Peacock v. Kalikow***, 239 A.D.2d 188, 658 N.Y.S.2d 7 [1st Dept. 1997]; ***M. Cooper Motor Leasing Ltd. V. Data Discount Center***, 125 A.D.2d 454 [2d Dept. 1986]). To satisfy its burden, defendant must submit an affidavit from one with personal knowledge of the facts (*see* ***Peacock v. Kalikow,*** *supra*). If the court determines that a reasonable excuse of the default was not proffered, then it need not consider the existence of a meritorious defense (***Cuzzo v. Cuzzo***, 65 A.D.3d 1274, 885 N.Y.S.2d 619 [2d Dept. 2009]).

Here, defendants bring this application over seven (7) years after the issuance of the judgment of foreclosure and sale and have not offered any excuse for their default, nor have they asserted a meritorious defense other than bare and conclusory allegations of misconduct on the part of plaintiff, which are insufficient to warrant vacatur (*see, e.g.,* ***Wells Fargo Bank, N.A. v. Hornes,*** 94 AD3d 755, 942 NYS2d 129 [2d Dept. 2012]; ***Bank of New York v. Stradford,*** 55 AD3d 765, 869 NYS2d 554 [2d Dept. 2008]; ***Bank of New York v. Lagakos,*** 27 AD3d 678, 810 NYS2d 923 [2d Dept. 2006].

A motion for leave to renew or reargue is addressed to the sound discretion of the Supreme Court (see ***Matter of Swingearn***, 59 A.D.3d 556, 873 N.Y.S.2d 165 [2d Dept. 2009]). A motion to reargue must be "based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]; ***Haque v. Daddazio***, 84 AD3d 940, 922 NYS2d 548 [2d Dept. 2011). The purpose of a reargument motion "...is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (***Foley v. Roche***, 68 A.D.2d 558, 418 N.Y.S.2d 588, 593 [1st Dept.1979], *citing* ***Fosdick v. Town of Hempstead***, 126 N.Y. 651 [1891]; ***Amato v. Lord & Taylor, Inc.,*** 10 AD3d 374, 781 NYS2d 125 [2d Dept 2004]; ***American Trading v. Fish***, 87 Misc.2d 193, 383 N.Y.S.2d 943 [Sup. Ct. NY Cty. 1975]; *see also* ***Rodriguez v Gutierrez,*** 138 AD3d 964, 967, 31 NYS3d 97 [2d Dept 2016], *quoting* ***Matter of Anthony J. Carter, DDS, P.C. v Carter,*** 81 AD3d 819, 820, 916 NYS2d 821 [2011]). Here, defendants do not assert what specific matters of fact or law the Court allegedly overlooked or misapplied in any prior orders and thus, leave to reargue is denied (***Amato v. Lord & Taylor, Inc.,*** 10 AD3d 374, 781

NYS2d 125 [2d Dept 2004]; ***Carven Associates v. American Home Assur. Corp.***,199 A.D.2d 104 [1st Dept.1993]; ***Pahl Equip. Corp. v. Kassis***, 182 A.D.2d 22 [1st Dept. 1992]; *lv. denied in part, lv. dismissed in part*, 80 N.Y.2d 1005 [1992]; *rearg. denied* 81 N.Y.2d 782 [1993]).

It is well established that lenders are under no obligation to modify the terms of their loans with defaulting borrowers (*see* ***Wells Fargo Bank, N.A. v. Meyers,*** 108 AD3d 9, 966 NYS2d 108 [2d Dept. 2013]; ***EMC Mtge. Corp. v. Stewart,*** 2 AD3d 772, 769 NYS2d 408 [2d Dept. 2003]; ***Wells Fargo Bank, N.A. v. Van Dyke,*** 101 AD3d 638, 958 NYS2d 331 [1st Dept. 2012]; ***Onewest Bank, FSB v. Davies,*** 38 Misc.3d 1230, 967 NYS2d 868 [Sup. Ct. Suffolk Cty. 2013]). Thus, plaintiff is not required to accept from defendants an amount that is less than what is due and owing on the existing mortgage and note. However, defendants assert that post foreclosure, additional sums were paid to plaintiff which reduced the outstanding principal balance. Plaintiff does not deny the receipt of funds from defendants and RCS after the entry of the judgment of foreclosure and sale, but claims those were payments of interest only. Inasmuch as an agreement was entered into between the parties dated July 13, 2012 subsequent to the date of the judgment of foreclosure and sale, which appears to have resulted in a reduction of the principal amount due, and furthermore, in light of the conflicting amounts claimed to be due and owing to plaintiff, defendants' motion is granted, only to the extent as set forth in the above ordered paragraphs. The court has considered the remaining contentions of the parties and finds that they lack merit.

The foregoing constitutes the ***Decision*** and ***Order*** of the Court.

Dated: 10/23/2019

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

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**

RIDER

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