

Mulvaney v Fatigati-Klempka

2012 NY Slip Op 31218(U)

May 1, 2012

Sup Ct, Suffolk County

Docket Number: 2009-35237

Judge: Jeffrey Arlen Spinner

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SUPREME COURT : STATE OF NEW YORK
IAS PART 21 : SUFFOLK COUNTY

P R E S E N T:

HON. JEFFREY ARLEN SPINNER
Justice

COPY

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CONCETTA MULVANEY,

ORDER

Plaintiff

Index no. 2009-35237

-against-

KRISTINA FATIGATI-KLEMPKA, WELLS
FARGO BANK N.A. As Trustee Of
Option One Mortgage Loan Trust
2005-5 Asset Back Certificates
Series 2005-5, SLOMINS INC.,
JUSTIN MANJARES, JAMES SEAN and
GREG ROCHESTER,

Mot. Seq. 004-RRH
Original Ret. Date: 11-16-2011
Final Submit Date: 4-25-2012

Defendants

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Plaintiff commenced this action on September 11, 2009 claiming foreclosure of a privately held first mortgage encumbering premises known as 76 Westwood Avenue, Deer Park, Town of Babylon, New York District 0100 Section 024.00 Block 01.00 Lot 027.000. On August 9, 2011 a Judgment of Foreclosure & Sale was granted by the Court (Mayer, J.) and on November 11, 2011, a public sale was conducted by the Referee pursuant to that judgment. By Order To Show Cause dated November 16, 2011 (Spinner, J.), Defendant WELLS FARGO BANK N.A. sought, albeit unsuccessfully, a stay of all proceedings under this index number. This Order To Show Cause is the matter that is presently before the Court.

Defendant WELLS FARGO BANK N.A., through the office of its former counsel Steven J. Baum P.C., asserts that it is entitled to a stay of proceedings and demands dismissal of this action with prejudice together with several alternative pleas for relief. The application contains no Affidavit of any kind from any representative of WELLS FARGO; instead it relies solely upon the Affirmation of Jason B. Desiderio Esq., an associate of the Baum firm, together with a plethora of selected exhibits. For all of the reasons hereinafter set forth, the relief sought by said Defendant is denied with prejudice and the matter is set down for a hearing to determine what sanctions, if any, should be imposed upon Defendant's counsel in accordance with the provisions of 22 NYCRR § 130-1.1.

(RR)

The Affirmation of Jason B. Desiderio Esq., submitted as the primary support for the application, is dated November 4, 2011 and avers, in Paragraph 2 thereof, that "I make this affirmation based upon a review of the court file herein, my client's loan file, public records and communications with my client." The Affirmation is followed by an undated statement that reads as follows: "Jason B. Desiderio, Esq., an attorney at law licensed to practice in the State of New York and the attorney for the Defendant in this action hereby certifies that, to the best of his knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of this pleading or the contentions therein are not frivolous as defined in 22 N.Y.C.R.R. 130-1.1-c. /s/ Jason B. Desiderio" When the Order To Show Cause was granted by the Court on November 16, 2011, the Court relied wholly upon the veracity of the statements made by Mr. Desiderio in his Affirmation, presuming that they were true, accurate and correct. Documentary proof submitted by Plaintiff's counsel reveals, regrettably, that this is not at all the case.

Mr. Desiderio asserts, in Paragraph 4, that Plaintiff "...seeks to foreclose a satisfied mortgage and further improperly seeks to recover attorneys fees in so doing." continuing on that "...there is no legal basis for any award of attorneys fees..." and "Judgment was sought and obtained ex parte when notice of such application was required." Counsel then goes on to assert that the mortgage sought to be foreclosed had been satisfied on September 8, 2005, appending a purported Satisfaction dated September 9, 2005 which appears to be an obvious forgery. Continuing on, counsel collaterally attacks the Court's award of counsel fees as well as the Referee's computation of interest, neither of which is legally or factually efficacious. Conspicuously absent, however, is any claim of a lack of service or any explanation for Defendant's default or any reasonable excuse (or indeed, any excuse at all) for the default. Indeed, counsel fails to advise the Court that his client was in default of appearance. The application, considered under both CPLR § 317 and CPLR § 5015 is woefully insufficient as a matter of law and cannot be considered.

Plaintiff's counsel has submitted opposing papers which reveal, in stark clarity, how Defendant's counsel has failed to adhere to the obligation of candor toward the tribunal that is imposed upon him (and all attorneys, for that matter) by 22 NYCRR § 1200, Rule 3.3. This alone is sufficient to warrant a hearing.

The opposing papers filed by Jeffrey B. Hulse Esq. are dated November 14, 2011. They reveal that on December 4, 2007 (some 22 months prior to the commencement of this action) WELLS FARGO BANK N.A., through its counsel Steven J. Baum P.C. (the same attorney of record as in this matter), sued to foreclose its mortgage encumbering the same property, under index no. 2007-37620. Inasmuch as that action was commenced in Suffolk County, this Court, in accordance with the provisions of CPLR § 4511, takes judicial notice of all proceedings under that index number.

In the 2007 proceeding by WELLS FARGO (the "2007 Action"), a Judgment of Foreclosure & Sale was granted by the Court (Kent, J.) on April 30, 2009 which, among other things, purported to "cut off" Plaintiff's senior lien. In the 2007 action, the Court granted an Order To Show Cause brought by Mr. Hulse on June 2, 2009 which was resolved by a written Stipulation of Settlement dated July 7, 2009 which was thereafter ratified by an Order of the Court (Kent, J.) on August 26, 2009. That Stipulation of Settlement, executed by Henry P. DiStefano Esq. on behalf of Steven J. Baum P.C. and by Jeffrey B. Hulse Esq. on behalf of CONCETTA MULVANEY, recited, in pertinent part, that "Plaintiff acknowledges that MULVANEY holds a mortgage which is senior to that of the Plaintiff and is not aware of the filing of any Satisfaction of Mortgage to remove MULVANEY's mortgage of record." That Stipulation also expressly vacated the judgment as to Plaintiff and her interest and discontinued the action against her with prejudice. This was all accomplished some 28 months prior to the filing of the instant Order To Show Cause.

It is equally disturbing to the Court that Defendant did not reply, in any manner, to Plaintiff's voluminous and substantive opposition to the Order To Show Cause. No steps were taken by counsel, either to address or to otherwise rectify what are substantial and serious misrepresentations that were made to the Court, under oath, by Defendant's counsel, in derogation of 22 NYCRR § 130-1.1 and Rules 3.3 and 3.4 of the Disciplinary Rules.

Glaringly absent from Mr. Desiderio's papers is any mention of the 2007 Action that was prosecuted by his office. Instead, he puts forth the baseless claim that Plaintiff's mortgage had been previously satisfied and that this action was wrongfully commenced by Plaintiff. He does so in spite of the fact that his firm was counsel of record when that very issue was fully addressed and resolved. The issues that were determined in the Stipulation of Settlement were fully addressed and subject to the doctrine of res judicata, thus barring any relitigation. In spite of that, the above facts were obviously concealed from this Court.

The so-called "frivolous conduct" rule is embodied in the Rules of the Chief Administrator of the Courts as 22 NYCRR § 130-1.1. The Rule empowers the Court to award costs, attorney's fees and other financial sanctions against any party or attorney who engages in what is deemed to be "frivolous conduct." Specifically, Section (c) thereof defines that term as follows: "For purposes of this Part, conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false." 22 NYCRR § 130-1.1 (c). It continues, in pertinent part, that "...In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, (1) the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and (2) whether or not the conduct was

continued when its lack of legal or factual basis was apparent or should have been apparent, or was brought to the attention of counsel or the party."

On its face, the facts as they are before the Court lead to the conclusion that the conduct of Mr. Desiderio clearly falls within the parameters of 22 NYCRR §§ 130-1.1(c)(1) & (3). As such, this matter warrants a hearing to determine what sanctions, if any, should be imposed upon Steven J. Baum P.C., Jason B. Desiderio Esq., the Defendant or any one of them.

It is, therefore,

ORDERED that the application of Defendant WELLS FARGO BANK N.A. shall be and the same is hereby denied in its entirety; and it is further

ORDERED that the foreclosure sale of November 10, 2011 regarding the subject property shall be and the same is hereby ratified and confirmed; and it is further

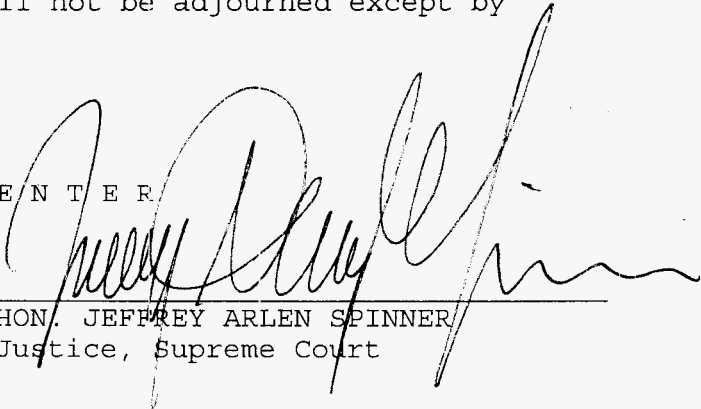
ORDERED that a hearing shall be convened on June 20, 2012 at 2:30 p.m. at the Part 21 of the Supreme Court, 1 Court Street, Riverhead, New York, for the purpose of determining what sanctions, if any, should be imposed upon Steven J. Baum P.C. and/or Jason B. Desiderio Esq; and it is further

ORDERED that a principal of Steven J. Baum P.C. as well as Jason B. Desiderio Esq. personally shall be present for said hearing; and it is further

ORDERED that said hearing shall not be adjourned except by express directive of the Court.

Dated: May 1, 2012
Riverhead, New York

E N T E R



HON. JEFFREY ARLEN SPINNER
Justice, Supreme Court

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