

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 14 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 7-11-07
Submission Date: 7-11-07
Motion Sequence No.: 003/MOT D

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HOMECOMINGS FINANCIAL
NETWORK, INC. C/O America's
Servicing Company,

Plaintiff,

COUNSEL FOR PLAINTIFF
Steven J. Baum, P.C.
P.O. Box 1291
Buffalo, New York 14240

- against -

WALTER T. RAMSEY, AMERICAN
BARTER EXCHANGE, INC., CITICORP
CREDIT SERVICES, INC. (USA)
SUCCESSOR BY MERGER TO
ASSOCIATES CREDIT CARD
SERVICES (ASSAG), INC., DENISE
URREGO, GREENWOOD TRUS CO.,
ISSUER OF DISCOVER CARD,
SERVICING AGENT OF DISCOVER
FINANCIAL SERVICES, INC., NEW
YORK STATE DEPARTMENT OF
TAXATION AND FINANCE, PEOPLE OF
THE STATE OF NEW YORK, SARAH
ROBERTS, UNITED STATES OF
AMERICA ACTING THROUGH THE IRS,
WEST GROUP, YELLOW BOOK CO.
INC.,

Defendants.

COUNSEL FOR DEFENDANT
Walter T. Ramsey - *PRO SE*
984 Glen Avenue
West Hempstead, New York 11552

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ORDER

The following papers were read on Defendant's motion to vacate an order to show cause dated June 7, 2007, to vacate the foreclosure sale held on June 12, 2007, to grant Defendant leave to redeem after the foreclosure sale and stay Defendant's eviction:

Order to Show Cause dated July 6, 2007;
Affidavit of Walter T. Ramsey sworn to on July 3, 2007;
Affidavit of William Votta sworn to on June 27, 2007;
Affirmation of David S. Lee, Esq. dated July 10, 2007.

Defendant, Walter J. Ramsey ("Ramsey"), moves to vacate the foreclosure sale, to be granted leave to redeem after the foreclosure sale, to vacate the order to show cause of this Court dated June 7, 2007¹ and staying Defendant's eviction from the premises.

BACKGROUND

Ramsey was the owner of premises 984 Glen Road, West Hempstead, New York.

Ramsey defaulted in the payment of his mortgage. As a result, Plaintiff, Homecomings Financial Network, Inc. ("Homecomings"), the holder of the mortgage, commenced this foreclosure action.

Although Ramsey was served with the summon and complaint in this action by personal delivery [CPLR 308(1)], he defaulted in appearing or answering.

¹Margaret Robertson, Esq., who had served a notice of appearance on behalf of Defendant Sarah Roberts, moved to withdraw because she is no longer practicing law in New York and no longer maintains an office for the practice of New York.

By order dated May 19, 2006, this Court granted an order of reference appointing Steven R. Schlesinger, Esq. as referee to ascertain and compute the amount due to Homecomings. The referee filed a report dated June 26, 2006.

On July 17, 2006, this Court granted a judgment of foreclosure and sale in favor of Homecomings. The foreclosure sale was scheduled for October 3, 2006. Ramsey was served with the notice of sale.

On September 29, 2006, Ramsey obtained an order to show cause returnable October 5, 2006 staying the foreclosure sale pending his refinancing the mortgage. The proceeds of the refinance were to be used to satisfy Homecomings' mortgage. Ramsey asserted he was ready to close on the refinance but the 72 hour waiting period between the closing and the disbursement of the funds would prevent him from satisfying the mortgage prior to the sale date.

Ramsey never closed on the refinance or satisfied the mortgage. He withdrew his order to show cause returnable on October 5, 2006, the return date.

The foreclosure sale was rescheduled for December 12, 2006. Ramsey was served with the notice of that sale.

On December 12, 2006, Ramsey filed a petition in bankruptcy which automatically stayed the foreclosure sale. 11 U.S.C. §362(a). The bankruptcy proceeding were dismissed on April 23, 2007.

The foreclosure sale was rescheduled for June 12, 2007. On May 23, 2007, Homecomings' attorney served a notice of sale upon Ramsey by mailing a copy to him by first class mail addressed to 984 Glen Street, West Hempstead, New York 11552.

On June 12, 2007, the foreclosure sale was held. REO Properties ("REO") was the successful bidder at the sale. The referee executed a deed transferring title to the property of REO. That deed has been delivered to REO and recorded with the Nassau County Clerk.

On June 10, 2007, REO served a ten day notice upon Ramsey pursuant to Real Property Actions and Proceedings Law §713(5). Ramsey did not vacate the premises. Since Ramsey did not vacate the premises, a holdover petition has been or will be commenced.²

Ramsey seeks (1) to vacate this Court's order to show cause dated June 7, 2007 on the ground he was never served with the papers; (2) to vacate the foreclosure sale on the grounds the Notice of Sale served upon him was defective; (3) to permit him to exercise his right of redemption after the foreclosure sale; and (4) to stay the eviction proceedings without requiring him to post a bond.

²The affirmation of David S. Lee, Esq. submitted in opposition to the motion states that a holdover petition has been filed. A copy of the petition in the holdover proceeding was not provided to the Court. The Court has not been advised of the return date of the petition.

DISCUSSION

A. Vacating the Order to Show Cause Dated June 7, 2007

On June 7, 2007, this Court signed an order to show directing co-Defendant Sarah Roberts to show cause why Margaret A. Robertson, Esq. should not be granted leave to withdraw as her attorney in this action. The order to show cause provided for service upon Sarah Roberts and the attorney for the Plaintiff. It did not provide for service upon any other named Defendants including Ramsey. The order to show cause did not contain a stay of the proceedings pending either the hearing or determination of the motion.

CPLR 2103(e) requires that papers be served only upon parties who have appeared in the action. A defendant appears in action by serving an answer or a notice of appearance or by making a motion which has the effect of extending the defendant's time to answer. CPLR 320(a). A motion to dismiss made pursuant to CPLR 3211(a) or a motion to correct pleadings made pursuant to CPLR 3024(b) extends the defendant's time to answer. 1 New York Civil Practice: *CPLR* ¶ 320.04. Ramsey did not serve an answer or a notice appearance. Nor did he file a motion extending his time to appear. Since Ramsey did not appear in the action, he was not entitled to be served with the order to show cause dated June 7, 2007.

Ramsey's rights were not affected by the June 7, 2007 order to show cause or the Court's subsequent order of July 23, 2007 which granted Margaret Robertson leave to withdraw as attorney for Defendant Sarah Roberts.

Thus, Ramsey's argument in this regard is without merit.

B. Vacating the Foreclosure Sale

Ramsey asserts that the foreclosure sale should be vacated because he was not served or not properly served with the notice of sale relating to the June 12, 2007 sale. In his order to show cause, Ramsey indicates he is seeking to vacate the foreclosure sale because he did not receive the notice of the sale required by Real Property Actions and Proceedings Law §236(6).

The Real Property Actions and Proceedings Law ("RPAPL") does not contain a section 236(6). In fact, Real Property Actions and Proceedings Law does not contain a section 236, The statute jumps from section 232 to section 241.

The court cannot grant relief to Ramsey upon a statute that does not exist.

At any time within one year of the sale, the court may vacate the sale "...for failure to comply with the provision of this section as to the notice, time or manner of such sale if a substantial right of a party was prejudiced by the defect." RPAPL §231(6).

Ramsey does not contest that the notice of sale was duly published as required by RPAPL §231(2).

A party who appears in an action and who does not waive service of the notice of sale is entitled to notice of sale in addition that provided for by RPAPL §231. Lajos v. Erps, 176 A.D.2d 703 (2nd Dept. 1991).

Ramsey did not appear in this action. Thus, Homecomings was not required to serve the Notice of Sale upon Ramsey.

Even though Homecomings was not required to serve the notice of sale upon Ramsey, it did so for each of the three sales. The affidavit of service for the notice of sale relating to the June 12, 2007 sale indicates that it was served upon Ramsey by mail at 984 Glen Road, West Hempstead, New York 11552 on May 23, 2007. Ramsey concedes he received the notice of sale on May 30, 2007.

The notice of sale for an adjourned or postponed sale must be made at least three days prior to the sale date. Lajos v. Erps, *supra*; and RPAPL §231(3). Where documents required to be served are served by mail, five days must be added to the notice period. *Id.*; See, CPLR 2103(b). The notice of sale was mailed to Ramsey on May 23, 2007. Ramsey concedes receipt of the notice of sale on May 30, 2007. The sale was scheduled for June 12, 2007 at 11:30 a.m. Thus, Ramsey was given notice in excess of that which is statutorily prescribed.³

³Nothing herein should be construed to mean that this Court is holding that Homecomings was required to give Ramsey notice of the sale. Ramsey did not appear in the action. Therefore, any notice Homecomings gave to Ramsey other than the required publication was gratuitous and not statutorily required.

Since Ramsey was given more notice than statutorily required and since he concedes that he received such notice 12 days prior to the sale, this does not provide a basis for vacating the foreclosure sale.

C. Redemption after Foreclosure

Redemption is not permitted after the foreclosure sale. Deutsche Bank Co. of California, N.A. v. DePalo, 38 A.D.3d 490 (2nd Dept. 2007); and GMAC Mortgage Corp. v. Tuck, 299 A.D.2d 315 (2nd Dept. 2002). Since the foreclosure sale took place on June 12, 2007, Ramsey has no right to redeem.

Ramsey also could have avoid having the property sold at foreclosure by complying with RPAPL § 1341. See, Green Point Savings Bank v. Oppenheim, 237 A.D.2d 409 (2nd Dept. 1997). However, he did not avail himself of the rights or remedies provided by this statute.

Furthermore, even if the Court could give Ramsey the right to redeem after the foreclosure sale, he offers no factual basis to support claim that he will be able to satisfy the mortgage.

The summons and complaint were served upon Ramsey on January 16, 2006. The foreclosure sale was held on June 12, 2007. Ramsey has had nearly 17 months from the date on which he was served with the summons and complaint to the date of the foreclosure sale to sell, refinance or otherwise redeem his equity in the property.

Ramsey offers no evidence that he made any effort to sell the property or refinance the property other than his failed attempt to refinance in October 2006.

That is, Ramsey asserted in support of his application to stay the October 3, 2006 foreclosure sale that he was refinancing his mortgage. He asserted that he needed just a few days to close on the refinance at which time he would satisfy the Homecomings mortgage. This never happened.

Therefore, Ramsey's application to be granted the right to redeem after the foreclosure sale must be denied.

D. Stay of Summary Proceedings

CPLR 2201 grants the court authority to stay proceedings in the proper case. This is not the proper case or the proper court. REO has served Ramsey with a ten day notice of quit. Such notice is required prior to the commencement of a holdover proceeding.

The Nassau County District Court has jurisdiction over landlord-tenant proceedings. RPAPL §701(a).

REO states that it has filed a petition seeking to recover possession of the property. This indicates the commencement or intent to commence a holdover proceeding in District Court. Thus, Ramsey should seek relief relating to his occupancy of the premises in that court in the pending or soon to be pending holdover proceeding.


All of the arguments Ramsey has made in connection with this motion are utterly meritless. This is simply another attempt by Ramsey to avoid or evade the consequences of his not paying his mortgage. Ramsey is advised that making arguments that are meritless or taking action which is designed primarily to delay or prolong the resolution of an action is considered frivolous conduct for which monetary sanctions may be imposed. See, 22 NYCRR 130-1.1.

Accordingly, it is,

ORDERED, that Ramsey's motion is **denied** in its entirety.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
August 16, 2007


Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED

AUG 21 2007

NASSAU COUNTY
COUNTY CLERK'S OFFICE