

SHORT FORM ORDER

INDEX NO. 64272/2014

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

PRESENT:

Hon. LINDA KEVINS
Justice of the Supreme Court

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USAA FEDERAL SAVINGS BANK,

Motion Date: 2/06/2018
Sequence No. 003
CASE DISP.

Plaintiff,

- against -

**DECISION AND
ORDER**

STEPHEN E. GOTSCH, AMERICAN EXPRESS BANK, FSB;
COMMISSIONER OF TAXATION AND FINANCE CIVIL
ENFORCEMENT CO ATC; HSBC BANK USA, NATIONAL
ASSOCIATION

Subject Property:
15 Foxhurst Road
Dix Hills, NY 11746

Defendant(s).
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This case had been assigned to the Honorable W. Gerard Asher, J.S.C., who has retired from the bench. As a result, this case has been recently reassigned to Part 29 of this Court. Section (a) of CPLR §2221 states, in pertinent part, that a motion for leave to vacate or modify an Order shall be made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it. Therefore, the matter is properly before this Court.

The following papers have been read upon this application:

- Defendant Stephen E. Gotsch's Order to Show Cause seeking to "Invalidate the Foreclosure Sale of 18 October 2017 for 15 Foxhurst Drive (sic), Dix Hills, NY 11746."..... 1
- Plaintiff's Affirmation in Opposition to Defendant's Order to Show Cause..... 2
- Defendant's November 9, 2017, letter requesting a Hearing..... 3

The motion is decided as follows:

Facts and Allegations

Plaintiff's action seeks to foreclosure a residential mortgage in the original sum of \$350,000.00 executed by Defendant Stephen E. Gotsch (hereinafter Defendant), on June 5, 2009,

for property located at 15 Foxhurst Road¹, Dix Hills, New York 11746 (subject property). On the same date, Defendant executed a promissory note promising to repay the entire amount of the indebtedness to the mortgage lender.

Defendant does not dispute having defaulted on his mortgage payments starting on July 1, 2011, and continuing to date. A 30-day Notice of Default letter was sent to him on October 4, 2013. As of the date of this Order, Defendant has not made a mortgage payment in almost seven years.

This case was commenced on June 4, 2014, with the service of a Summons and Complaint; Defendant did not answer the Complaint. A Settlement Foreclosure Conference was held on December 9, 2014, but Defendant failed to appear and the matter was discharged.

Plaintiff eventually brought two motions, both of which were granted on default, resulting in: 1) an Order of Reference dated November 25, 2015 (Asher, J.); and 2) a Judgment of Foreclosure and Sale dated July 6, 2016 (Asher, J.)

The first Foreclosure Sale of the subject property was set for November 14, 2016, but on that same day Defendant filed for bankruptcy under Chapter 13 of the United States Bankruptcy Code and the sale was stayed by operation of law; the bankruptcy case was dismissed on January 25, 2017. The second Foreclosure Sale date was set for April 24, 2017, but on that same date Defendant again filed for bankruptcy under Chapter 13; the second bankruptcy case was dismissed on June 26, 2017. The third Foreclosure Sale date was scheduled for October 18, 2017, and on that date Defendant filed for bankruptcy under Chapter 13 for the third time, which was under case number 8-17-76405-reg. Nevertheless, the property was sold that day at auction to Plaintiff. Defendant allegedly “sent notice to the banks (sic) attorney” beforehand advising them of the bankruptcy filing. Defendant also alleges that his unnamed realtor advised the Referee before the auction about the bankruptcy filing. However, he presents no evidence of this other than bald assertions.

Defendant has, at all times during the pendency of this action, resided at an address in Cold Spring Harbor, New York, not at the subject property. The bankruptcy cases all recite Defendant’s address in Cold Spring Harbor as well.

Moreover, aside from the arguments raised in the pending application, Defendant has not raised any defense to this foreclosure action in any capacity.

The pending Order to Show Cause, filed on October 26, 2017, seeks to “Invalidate the Foreclosure Sale” of the subject property. Upon presentation of the Order to Show Cause the court granted a Temporary Restraining Order, restraining the transference of the deed and the Suffolk County Sheriff from taking any action concerning the subject property. Defendant’s purported basis for having brought the application was to stay proceedings in accordance with the October 18, 2017, bankruptcy filing. Therefore, Defendant maintains that the October 18,

¹ Defendant repeatedly refers to the property as 15 Foxhurst Drive in his hand-written papers before this Court. The subject property, which was sold at foreclosure, is located at 15 Foxhurst Road, not 15 Foxhurst Drive.

2017 Foreclosure Sale violated Federal Bankruptcy Laws and that the Referee violated RPAPL §231(4) by conducting the sale.

In Opposition, Plaintiff filed an Affirmation dated November 7, 2017, arguing that there was no bankruptcy stay in place because the applicable Bankruptcy statute states if two or more bankruptcy cases were pending against the debtor within the previous year but were dismissed, the stay shall not go into effect upon the filing of the later case. Plaintiff also argues that Defendant's evidence regarding the Referee is hearsay. Finally, Plaintiff argues that because Defendant did not reside at the property, he has not suffered prejudice or irreparable harm as a result of the Foreclosure Sale.

Defendant subsequently served a letter dated November 9, 2017, requesting a hearing without specifying the purpose of the hearing.

Plaintiff's third bankruptcy petition was dismissed on December 18, 2017.

Analysis

First, the evidence plainly shows that Defendant filed two prior bankruptcy cases within the previous year and both were dismissed. Plaintiff correctly argues that, as of the date of the foreclosure sale, there was no stay in place in light of the explicit language of 11 U.S.C §362(c)(4)(A)(i), of the United States Bankruptcy Code, which states:

If a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed; other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b) [11 USCS § 707(b)], the stay under subsection (a) shall not go into effect upon the filing of the later case.

Therefore, the Foreclosure Sale was not stayed by the filing of Defendant's third bankruptcy petition (see *Deutsche Bank Natl. Trust Co. v. Dixon*, 93 AD3d 630, 939 NYS2d 705 [2d Dept 2012]).

Next, while the court possesses broad equitable powers to set aside a foreclosure sale where fraud, collusion, mistake, or misconduct casts doubt on the fairness of the sale (see e.g., *Ocwen Fed. Bank, FSB v. Bassi*, 294 AD2d 478, 742 NYS2d 850 [2d Dept 2002]), Defendant presents no evidence to set aside the sale in this case. Moreover, Defendant presents no evidence to show that Plaintiff violated the restraints imposed by the pending Order to Show Cause. Thus, there is no reason to conduct a hearing.

Finally, the evidence suggests that Defendant's three bankruptcy filings, each one initiated on the same date as a scheduled Foreclosure Sale, were brought simply to delay the sale of the subject property and may fairly be characterized as an abuse of the legal system (see generally, *Astoria Fed. Sav. & Loan Association/Fidelity N.Y. FSB v. Lane*, 64 AD3d 454, 883 NYS2d 473 [1st Dept 2009]; see also *In re Melton*, 2011 Bankr.LEXIS 1588, 2011 WL 1600506 [EDNY, April 27, 2011, No. 8011-70984-reg]), where the court noted that "courts have

consistently held that serial filings to prevent foreclosure constitute an abuse of the bankruptcy process.”).

Nevertheless, this Court shall not sanction Defendant at this time. However, Defendant Stephen E. Gotsch is now on notice that any further attempt by him to delay the resolution of this foreclosure action may subject him to sanctions.

Therefore, upon the foregoing papers, it is hereby

ORDERED, that Defendant’s Motion (003) is **DENIED**; and it is further


ORDERED, that the restraints imposed in the October 26, 2017, Order (Pitts, J.) are hereby vacated, and it is further

ORDERED, that Plaintiff is directed to serve a copy of this Order with Notice of Entry forthwith upon all parties who have appeared and not waived further notice, as well as upon the Referee and the Suffolk County Sheriff, and to promptly file the Affidavit of Service with the Clerk of the Court.

Any relief requested and not specifically granted herein is denied.

This constitutes the Order of the Court.

Dated: May 9, 2018



Linda Kevins