STATE OF SOUTH CAROLINA)
)
COUNTY OF NEWBERRY)

IN THE COURT OF COMMON PLEAS
DOCKET NO. 2010-CP-36-0103

EverBank)
)
Plaintiff,)
)
vs.)
)
Lenora Scurry, Patrick Scurry, The South Carolina Department of Revenue,)
)
Defendants)

ORDER

This matter arises out of an action for the foreclosure of a mortgage which previously resulted in a decree of foreclosure and sale in favor of the plaintiff EverBank on March 11, 2013. A sale was held on sales day April 1, 2013. The plaintiff was the successful bidder. Before the sale was confirmed and deed delivered the defendants Scurry filed a motion to set aside the judgment and sale. The motion was made pursuant to Rule 60 (b) (1), (3), (4), and/or (5). The defendants also submitted an answer and counterclaim setting forth their contention that they have meritorious defenses. Although under the Rule the motion "does not affect the finality of a judgment or suspend its operation" the final operation of the judgment and delivery of the deed to the plaintiff was held in abeyance until determination of the motion.

The defendant South Carolina Department of Revenue answered the complaint alleging it has a tax lien against the defendants Scurry and has not responded to their motion which does not affect its position.

On February 12, 2010 the defendants Scurry, husband and wife, executed and delivered a promissory note in the amount of $152,192.00 to Primary Capital Advisors LC in the amount of $152,192.00 plus interest payable in installments payable to Primary Capital Advisors LC, identified as "Lender" in the note, or its order, in consideration and payment of a loan to the defendants Scurry by the lender. The note provided that it is secured by a mortgage dated on the same day, February 12. 2010. The was made to "Mortgage Electronic Registration Systems. Inc. ('MERS') (solely as nominee for Lender, as hereinafter defined, and Lender's successors and assigns), as mortgagee." Primary Capital Advisors LC is identified as "Lender", and the mortgage further states that it "secures to Lender"payment of the debt. The mortgage again states

that MERS holds "solely as nominee for Lender and Lender's successors and assigns," and also "to the successors and assigns of MERS."

On February 28, 2012 MERS executed a written assignment "as nominee for Primary Capital Advisors LC, and its successors and/or assigns" purporting to assign the "mortgage and note thereby secured" to EverBank c/o EverHome Mortgage Company. It was recorded on March 6, 2012 in Book 1610, page 178 by the plaintiff's law firm.

The foreclosure action was commenced by EverBank against the defendants Scurry and the South Carolina Department of Revenue (which is not participating in this proceeding relating to the motion of the defendants Scurry and any reference herein to "defendants" without and specific identification refers only to the Scurry defendants). The pleadings were filed on February 27, 2012, and, on the same day the defendants Scurry were served with the summons, complaint, lis pendens and notice of foreclosure intervention evidenced by affidavits of service dated February 27, 2012, filed on February 28, 2012 amended by affidavits of service dated on March 5, 2012, filed on March 6, 2012 but stating the same time of service as the February 27 affidavits. (The amendments clarified the person actually served, and there is no dispute or issue by the Scurrys as to effective service).

On March 30, 2012 the plaintiff filed an affidavit of default as to the defendants Scurry and on February 11, 2013 filed certification of compliance with Administrative Order 2011-05-02-01 and that the defendants Scurry "failed, refused, or voluntarily elected not to participate in any foreclosure intervention process." The defendant South Carolina Department of Revenue has answered alleging its lien for unpaid taxes.

On March 30, 2012 by order of the Clerk of Court the undersigned was appointed special referee to make appropriate findings of fact and conclusions of law with authority to enter final judgment. After notice to all parties a hearing on the foreclosure action was held on March 8, 2013. (The delay in scheduling a hearing was due to bankruptcy proceedings filed by the defendants Scurry). The defendants Scurry did not appear at the hearing. On March 11, 2013 an Order and Judgment of Foreclosure and Sale was filed. After due advertisement a sale was held on sales day, April 1, 2013. The plaintiff was successful bidder. Before the sale was confirmed and a deed to the plaintiff issued the defendants Scurry on April 26, 2013 filed their Motion to Vacate the Judgment and Sale.

The defendants Scurry in their motion assert that they did not answer the complaint of the plaintiff due to mistake, inadvertence, surprise, or excusable neglect, Rule 60(b) (1); and that they did not attend the scheduled hearing of the foreclosure reference after notice of the time and place of the hearing because of misrepresentations by the plaintiff bank that the hearing was not going to be held. Rule 60(b) (3) and perhaps because of the vices of 60(b) (1). The motion was also based on the assertion that the judgment was void, Rule (60) (b) (4) and contrary to Rule 60(b) (5), specifically that "it is no longer equitable that the judgment should have prospective application."

A hearing on the motion was held by me after scheduling with counsel for the defendants

Scurry and counsel for the plaintiff attended by both counsel and the defendants Scurry. No testimony was taken. memoranda were filed and arguments made by both counsel.

The factual basis for relief pursuant to Rule 60 (b) (1) and (3) from the failure to answer the complaint or attend the foreclosure reference was presented by affidavits of Mr. and Ms. Scurry. Defendants Exhibits A and B. The asserted reasons for relief by virtue of Rule 60 (b) (3) and (5) were legal arguments.

As to the failure to answer the complaint and attend the foreclosure reference:

Failure to answer:

In their affidavits the Scurrys contended that the process server made statements to them which led them to believe to believe that they did not have to take the summons and complaint seriously and misled them to think that they did not need seek legal advice or file a response to the summons and complaint. The affidavit of Ms. Lenora Scurry, Exhibit A, set out her recollection of the events of service of the foreclosure papers and her communications with the plaintiff bank. The affidavit of her husband, Mr. Patrick Scurry, Exhibit B, added no factual averments and that her statements were "true and correct to the best of my knowledge."

In paragraph 3 of her affidavit Ms. Scurry stated:

> The man who served us the papers to begin this foreclosure case met with us inside our home and sat at our dining room table with my husband and me. I asked him what the documents were, and he said they were nothing to worry about. I noticed the name 'EverBank' on the documents, and I told him that we were trying to get a modification. The man told us that Obama was coming out with a program to help homeowners, and he made conversation with us and generally acted like these papers were nothing for us to worry about.
> Because of what the man told me, I did not worry about the papers, examine them, or take them to a lawyer.

Plaintiff's counsel filed an affidavit of the process server by which he denied any conversations with the Scurrys and denied any entry to their home.

There is no evidence, or even indication, that the process server, identified by Ms. Scurry in her affidavit as "the man who served the papers," had any authority to speak on behalf of the plaintiff bank, or its attorneys, or that anything occurred in the conversation as related by Ms. Scurry that would indicate to her or her husband that he knew what he was talking about or that the Scurrys would be justified in relying on what he may have said with respect to the significance of the papers being served upon them at a time when they were discussing a loan modification with the plaintiff bank as the result of a default in payments from the September 01, 2011 payment due date as indicated in Defendant's Exhibit A-1. Nothing in the items supporting the defendant's motion indicates that the process server was any thing more than that. The

defendant's counsel states in the motion, paragraph 6, that the process server was a "person acting on the plaintiff's behalf,' but furnishes nothing to leap to a conclusion that he could speak "on the plaintiff's behalf' as to the significance of the foreclosure action.

I find no credible evidence or argument that the failure to answer or otherwise respond to the Summons and Complaint based upon the requirements of Rule 60(b) (1) or (3) sufficient to set aside and vacate the judgment of foreclosure and sale pursuant to that judgment.

Failure to attend the foreclosure reference hearing.

The defendants Scurry also contend that the judgment of foreclosure and sale should be vacated and set aside because of "the Defendants' failure to attend the hearing in this case [i.e. the foreclosure reference hearing]. The Defendants believed the hearing was cancelled because of the actions and representations of persons acting on behalf of the Plaintiff." Defendants' motion paragraph 7. The basis for this contention is presented by the Scurry's affidavits, Exhibits A and B and Exhibits A-1 - A-7. Exhibits A-1 - A-7 are letters or notices from the plaintiff bank relating to the efforts of the Scurrys to obtain a modification of their loan. Although the Scurrys did not participate in foreclosure intervention (see supra certification of compliance with Administrative Order 2011-05-02-01) they were attempting to obtain a modification of the loan with the plaintiff bank at the time of the commencement of the foreclosure action. Affidavit of Lenora Scurry, Exhibit A, paragraphs 3 and 4.

Ms. Scurry in her affidavit stated that she received a notice of the foreclosure hearing but thought the plaintiff bank, "[b]ased on what Everhome's employees were telling me about the modification process, I believed Everhome would instruct the law firm not to go forward with the hearing. As I thought the hearing was cancelled, we did not attend it." What Everhome employees were "telling" Ms. Scurry can only be found in Exhibits A-1 - A-7. A reading of those exhibits does not support or justify her belief that the hearing was going to be cancelled or that the foreclosure action was not proceeding. Ms. Scurry stated in her affidavit that she telephoned the Weston Adams law firm, plaintiff's foreclosure counsel, and asked an unidentified employee if the hearing was going to be cancelled in view of the modification process and was told only that it would be cancelled "if their client told them to." Exhibit A, paragraph 9. There is no claim by the Scurrys of a follow up inquiry to the Adams law firm of a communication to it from the plaintiff bank of a cancellation of the hearing. The Scurry's effort to have the loan modified was unsuccessful, and Ms. Scurry was so notified by the plaintiff bank for lack submission of necessary documentation. Exhibit A, paragraph 13, Exhibit A-7.

I find nothing in Exhibits A-1 - A-7 suggesting intentional or even unintentional misrepresentation of a cancellation of the foreclosure reference hearing.

I find that the defendants are not entitled to have the judgement and sale vacated under Rule 60(b) (1) or (3).

Rule 60(b) (4) and (5)

Subsection (4) of Rule 60(b) applies to a judgment that is void; subsection (5) applies to a judgment when "it is no longer equitable that the judgment should have prospective application".

The defendants argue that the judgment of foreclosure and sale should be set aside and vacated because of the amount of the award of attorney's fees and the provision of the decree that

> the amount of the judgment shall be subject to increase to permit the Plaintiff to recover additional costs, commissions and expenses not included in the judgment figures set forth [in the decree]. It may also increase to include supplemental compensation for attorney's services not contemplated by the initial fee awarded. Jurisdiction over the fee award and total debt is reserved to facilitate the assessment and payment of any such costs and/or supplemental compensation. Such additional costs, commissions and expenses may be established by affidavit and shall be adjudicated by the Court without further hearing.

The attorney's fees awarded by the decree were "for services performed and anticipated to be performed until final adjudication of the within action under the terms of the note and mortgage."

Attorney's fees and costs are authorized by the note and mortgage. The defendants argue that the purpose of an action of the nature of the present one is to determine debt not to create debt. That may be true, but the note and mortgage authorize collection of fees and costs in actions to collect money because of default in payment of the initial debt. If such fees and costs are incurred in actions to collect a debt and are authorized by the agreed upon documents creating the debt they are not unauthorized additions to debt. Moreover, in the present case, since a personal deficiency judgment against the defendants is waived, the plaintiff's remedy was recovery of the real property subject to the mortgage which has occurred by its successful nominal bid and acknowledgment that it has paid all fees and costs without any recourse against the defendants personally. Consequently, the defendants are not prejudiced thereabout and have no legal or equitable claim justifying the Court to vacate the judgment and sale under Rule 60(b) (4) and (5).

Meritorious defense

The defendants have submitted in support of their motion an answer and counterclaim. In order to obtain relief from a default judgment the defendants as moving parties in addition to meeting the burden of establishing entitlement to relief under Rule 60 (b) (1), (3), (4) and (5) must also show a meritorious defense. The defenses and counterclaims alleged by the defendants are based upon the evidence presented in support of their motion. That evidence as presented

does not meet the burden of showing that they are entitled to relief. They the same insufficient showing which fails to show that they are entitled to relief on the basis of their claim under Rule 60(b) cannot be turned into defenses to the foreclosure action.

IT IS THEREFORE ORDERED that the motion of the defendants is denied.

Newberry, S. C.
September 6, 2013

Joseph W. Hudgens
Special Referee