

STATE OF NEW YORK
SUPREME COURT

COUNTY OF KINGS

USROF IV LEGAL TITLE TRUST 2015-1, BY U.S.
BANK NATIONAL ASSOCIATION, AS LEGAL
TITLE TRUSTEE

***AFFIRMATION IN
OPPOSITION***

Plaintiff,

-vs-

BEAUTY MAE TOLBERT; NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD; FELICIA
BYNEM; MR. "JOHN" TOLBERT; WARREN
BYNEM

Index No. 505837/2013

Defendants.

STATE OF NEW YORK)
COUNTY OF MONROE) SS:

CRAIG K. BEIDEMAN, an attorney duly licensed to practice law in the State of New York, hereby affirms under penalty of perjury pursuant to CPLR 2106 as follows:

1. I am associated with the law firm of Fein, Such & Crane, LLP, attorneys for Plaintiff herein and as such am fully familiar with the facts of the litigation after a review of the files, paperless and otherwise, kept on this file in the ordinary course of the foreclosure prosecution.
2. I make this affirmation in opposition to Defendant Beauty Mae Tolbert's (hereinafter "Defendant") Order to Show Cause which seeks a stay of the foreclosure proceedings.

3. Defendant's Order to Show Cause should be denied in its entirety because she fails to meet her burden of demonstrating all of the strict requirements for the proper issuance of a preliminary injunction.

PROCEDURAL HISTORY

4. This action in foreclosure was commenced by the filing of a Notice of Pendency, Summons & Complaint on October 2, 2013 based upon a default of a mortgage given by Defendant and Isaac Wilborn, deceased on August 15, 2005 in the amount of \$209,00.00, whereas said mortgage was in default for May 2010 payment with an unpaid principal balance of \$196,049.03. An additional Notice of Pendency were filed on September 29, 2016_pursuant to N.Y. R.P.A.P.L. § 1331. Copies of the Notice of Pendency, Summons & Complaint, and Certificate of Merit pursuant to N.Y. C.P.L.R. § 3012-b are annexed hereto as Exhibit "A."
5. Defendant was served pursuant to N.Y. C.P.L.R. § 308(2) on October 10, 2013 with the mailing component being completed on October 15, 2013. Service was completed ten days after the filing of the Affidavits of Service in the Kings County Clerk's Office on October 22, 2013. Copies of the Affidavits of Service are annexed hereto as Exhibit "B."
6. Defendant was served with an additional Summons as is required by N.Y. C.P.L.R. § 3215(g) via mail. A copy of the Affidavit of Mailing for the § 3215(g) notice is annexed hereto as Exhibit "C." The mailing was not returned by the Post Office for any reason.
7. Pursuant to N.Y. C.P.L.R. § 320(a), Defendant had thirty days to answer or respond to the Summons & Complaint.

8. This time expired on December 1, 2013 and was not extended by stipulation or order of the Court. N.Y. C.P.L.R. §§ 308(2), 320(a).
9. Defendant failed to respond to the Summons & Complaint in any manner whatsoever.
10. Settlement conferences were held pursuant to N.Y. C.P.L.R. § 3408 between May 7, 2014 and August 5, 2015. A mutual agreeable resolution did not materialize and the matter was released from the Conference Part. A copy of the Conference Release Order is annexed hereto as Exhibit "D."
11. This Court granted Order of Reference in Mortgage Foreclosure on January 31, 2017 which was entered on February 28, 2017. Notice of Entry was served upon Defendant on March 30, 2017. A copy of the Order of Reference in Mortgage Foreclosure, along with Notice of Entry, is annexed hereto as Exhibit "E." The Notice of Entry was not returned by the Post Office for any reason.
12. This Court granted Judgment of Foreclosure and Sale on September 18, 2017 which was entered on October 12, 2017. Notice of Entry was served upon Defendant on November 13, 2017. A copy of the Judgment of Foreclosure and Sale, along with Notice of Entry, is annexed hereto as Exhibit "F."
13. Plaintiff scheduled a foreclosure sale for December 21, 2017 at 2:30 p.m.
14. It is Counsel's policy, practice, and procedure to provide Notice of Sale to all defendants regardless whether or not they appeared in the action. Thus, even though Defendant did not appear in the action, she was provided with Notice of Sale. A copy of the Notice of Sale for the scheduled sale with corresponding Affidavit of Mailing is annexed hereto as Exhibit "G."

15. The sale was cancelled when Defendant the instant Order to Show Cause which seeks a stay of the foreclosure proceedings.

STANDARD OF REVIEW

16. In an Order to Show Cause the burden of proof to obtain any relief sits solely with the defendant. *See Mitchell v. Mid-Hudson Medical Assocs. P.C.*, 213 A.D.2d 932 (3d Dept. 1995); *Myung Chun v. N. Am. Mort. Co.*, 285 A.D.2d 42 (1st Dept. 2001). As the learned Professor David D. Siegel has commented:

“[T]he order to show cause gets its name by directing the recipient to “show cause” why the particular relief being asked for should not be granted. It sounds as if the burden of proof is being shifted to the recipient. It isn’t... when the hearing comes on, the burden of proof is where it always is on a motion: on the Defendant.” Siegel, NY Prac § 248, at 420-421 [4th ed].

DEFENDANT IS NOT ENTITLED TO A STAY (PRELIMINARY INJUNCTION) IN THIS MATTER BECAUSE HE FAILS TO MEET ALL OF THE STRICT REQUIREMENTS NECESSARY FOR ITS ISSUANCE

17. Defendant’s request for an order staying the sale is an application under N.Y. C.P.L.R. § 6301 for a preliminary injunction. It is respectfully submitted that the application must be denied because she fails to meet her burden of demonstrating all of the strict requirements for the proper issuance of a preliminary injunction.

18. Pursuant to N.Y. C.P.L.R. § 6301

“A preliminary injunction may be granted in any action where it appears that a [party] threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the [party]’s rights respecting the subject of the action, and tending to render the judgment ineffectual...”

19. In deciding whether to grant or deny a preliminary injunction, it is well settled that a court must consider whether the party seeking the injunction has established

all of the following requirements by affidavit: (1) a likelihood of ultimate success on the merits; (2) irreparable harm if the injunction is denied; and (3) a balance of the equities in favor of the movant. *See Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839 (2005); *Aetna Ins. Co. v. Capasso*, 75 N.Y. 2d 860 (1990); *Merscorp, Inc., v. Romaine*, 295 A.D.2d 431 (2d Dept. 2002).

20. It must be emphasized that a preliminary injunction is not easily granted. In *Hoeffner v. John F. Frank, Inc.*, 302 A.D.2d 428 (2d Dept. 2003), the Second Department stated the following:

“[P]reliminarily injunctive relief is a drastic remedy which will not be granted unless a clear right thereto is established under that law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the [movant].” *Id.* at 429-30 citing *Peterson v. Corbin*, 275 AD.2d 35. (citations and quotations omitted).

21. Here, Defendant is not entitled to a preliminary injunction in this matter because she has not demonstrated, and cannot demonstrate, a likelihood of ultimate success on the merits as against Plaintiff.
22. It is undisputed that Defendant is in default on the subject loan and she has not demonstrated a meritorious defense to being in default.
23. Indeed, Plaintiff has already established its *prima facie* case and been granted both Order of Reference in Mortgage Foreclosure and Judgment of Foreclosure and Sale. See Exhibits “E” and “F.”
24. Instead, she argues that she was not served with the Summons & Complaint and that she desires to sell the mortgaged premises. Neither is sufficient to demonstrate a meritorious defense.

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