

**Vanderbilt Mtge. & Finance Inc. v Khan**

2014 NY Slip Op 30419(U)

February 5, 2014

Supreme Court, Queens County

Docket Number: 26293/2010

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
**Justice**

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VANDERBILT MORTGAGE AND FINANCE, INC., Index No.: 26293/2010

Plaintiff, Motion Date: 01/27/14

- against - Motion No.: 145

MOHAMMAD H. KHAN; MORTGAGE ELECTRONIC Motion Seq.: 4  
REGISTRATION SYSTEMS, INC; UNITED

STATES OF AMERICA O/B/O INTERNAL  
REVENUE SERVICE; NEW YORK STATE  
COMMISSIONER OF TAXATION AND FINANCE;  
FLEET BANK; WESTMINSTER ASSET  
MANAGEMENT CORP; MIDLAND CREDIT  
MANAGEMENT, INC; AMERICAN EXPRESS  
TRAVEL SERVICES; MRC RECEIVABLES CORP;  
RAB PERFORMANCE RECOVERIES, LLC; NEW  
YORK STATE DEPARTMENT OF TAXATION AND  
FINANCE; MIDLAND FUNDING, LLC;  
CRIMINAL COURT OF THE CITY OF NEW  
YORK; NEW YORK CITY ENVIRONMENTAL  
CONTROL BOARD; NEW YORK CITY PARKING  
VIOLATIONS BUREAU; NEW YORK CITY  
TRANSIT ADJUDICATION BUREAU; SAYEED  
KAHN; NUSRAT BEGUM; SHAMIM KHAN;  
MOSHENA ISLAM; MOHAMMAD BARI; ASHAN  
HABIB,

Defendants.

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The following papers numbered 1 to 13 were read on this motion by  
defendant, MOHAMMAD H. KAHN, for an order staying the foreclosure  
action sale of the property known as 107-01 Pinegrove Street,  
Jamaica New York and requiring an examination of why the  
plaintiff/lender has not approved a short sale for the subject  
property:

Papers Numbered

Order to Show Cause-Affidavits-Exhibits.....	1 - 6
Affirmation in Opposition-Affidavits-Exhibits.....	7 - 12
Reply affirmation.....	11 - 13

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This is a motion commenced by order to show cause pertaining to the foreclosure of the rental property located at 107-01 Pinegrove Street Jamaica, New York. The defendant, MOHAMMAD H. KHAN, who does not reside at the premises executed a promissory note dated October 31, 2006 for the sum of \$381,600.00 and a mortgage which was assigned to VANDERBILT MORTGAGE AND FINANCE, INC. In June, 2010. Based upon the record before this court, the defendant defaulted on his mortgage on December 1, 2009 when he failed to make his monthly mortgage payments as well as the subsequent payments.

Plaintiff subsequently accelerated the defendant's mortgage and brought an action to foreclose its mortgage by filing a summons and complaint on October 18, 2010. The complaint alleges that the remaining principal balance at the time the action was commenced was \$381,586.00 with interest due from November 1, 2009.

The affidavit of service on file with the court executed by process server Anthony J. Stefano, on November 1, 2010, states that the defendant was served personally on October 26, 2010 at his home in Virginia. The affidavit also states that a copy of the summons and complaint and all required RPAPL § 1303 notices were served on the defendant at that time. Defendant failed to appear or to serve an answer to the summons and complaint.

A residential foreclosure conference was scheduled in June 2011, however, Referee Evans directed plaintiff to file an application seeking an Order of Reference. In September 2011, plaintiff filed a motion for an order of reference. By order dated October 12, 2011 the application was denied with leave to renew.

On January 25, 2012, plaintiff filed a motion to renew its prior motion for an order of reference. Khan opposed the motion on the ground that there was a pending short sale. By memorandum decision dated May 1, 2012, this court granted the plaintiffs motion for an order of reference. On July 3, 2012, this court signed th order of reference appointing Eugene Crowe, Esq., as referee to ascertain and compute the amount due to the plaintiff for principal and interest on the note and mortgage. The referee

filed his report and found that the plaintiff was due the sum of \$468,095.43 including principal interest and late charges through August 31, 2012.

Plaintiff thereafter moved for an order confirming the Referee's report and for a Judgment of Foreclosure and Sale. Defendant did not oppose the application. The unopposed motion was granted by memorandum decision dated January 15, 2013. A Judgment of Foreclosure and Sale was signed by this Court on September 3, 2013. The sale was scheduled for December 6, 2013.

On December 5, 2013, this court signed the instant order to show cause seeking a stay of the foreclosure sale on the ground that the plaintiff has not been approved for a short sale. This court declined to stay the sale which was scheduled for December 6, 2013 and ordered that the order to show cause be served on plaintiff by December 6, 2013. On December 6, 2013, the sale proceeded as scheduled and the property was sold to the plaintiff as the highest bidder for \$325,750. The order to show cause was thereafter served by the defendant on December 18, 2013.

The Referee, Eugene Crowe, Esq. filed his Report of Sale on January 21, 2014 stating that the property was sold to Vanderbilt Mortgage and Finance, Inc., as the highest bidder for the sum of \$325,750.00. As the total amount awarded to the plaintiff by the referee was \$510,044.49 including principal, interest through December 6, 2013, counsel fees, referee fees and costs, the referee found that there remains a deficiency in the amount of \$184,294.49.

The defendant now moves to for an order staying the sale and requiring the plaintiff to negotiate in good faith for a short sale. Defendant argues that the plaintiff refuses to provide a response to defendant's short sale request in writing despite the fact that defendant has been seeking approval of a short sale for over three years. Defendant claims that the bank did not approve a potential short sale in August 2010 for \$310,000 and also refused to approve a short sale to one Kazi Rizvi in July 2013 for \$350,000. Defendant argues that it is important to have a short sale approved, as a short sale will wipe out any mortgage deficiency that the plaintiff may attempt to obtain after the auction sale. Defendant states, however, that the plaintiff has refused to provide any information as to why a decision on a short sale was not provided by the plaintiff.

In opposition to the motion, plaintiff asserts that the relief requested in the Order to Show Cause, to wit, a stay of the foreclosure sale, is moot as this court denied a temporary

stay and as the sale proceeded as scheduled on December 6, 2013. Therefore, counsel argues that pursuant to law, the foreclosure sale extinguished as a matter of law any further right on behalf of the defendant to redeem the property. Thus, plaintiff argues that as the foreclosure sale took place on December 6 2013, and as the defendant failed to exercise his right to redeem the property prior to that date, the defendant's request for a stay must be denied as moot. Secondly, plaintiff argues that the defendant's request to require the plaintiff to act on his application for a short sale is also without merit as the courts have held that a defaulting defendants attempt to secure a short sale is not a defense to a foreclosure action and does not affect the plaintiff's rights to sell the property pursuant to a Judgment of Foreclosure and sale (see Residential Credit Solutions, Inc. v Lalji, 39 Misc. 3d 1218 [NY Sup Crt Queens Co. 2013]). Moreover, plaintiff asserts that with respect to the purported short sales that the plaintiff did previously approve a short sale because the buyer could not secure financing in a timely fashion. With respect to the latest short sale offer, plaintiff submits that it could not be approved because the defendant did not provide sufficient proof of an actual offer nor any proof of pre-approved financing. Plaintiff states that since 2010 it has negotiated in good faith with the defendant with regard to short sale proposals, but the defendant was unable to produce a viable buyer to complete a short sale.

Upon review and consideration of the defendant's motion to stay the foreclosure sale, and the plaintiff's opposition thereto, this court finds that the motion must be denied. First, as stated by the plaintiff, the sale was not stayed by this court and the property was sold to the plaintiff for \$325,750.00 on December 6, 2013. Therefore, the application is academic. Secondly, the defendant has not disputed that the plaintiff did negotiate in good faith for a short sale but the defendant could not produce a viable buyer. In addition, the defendant failed to exercise his right to redeem the property prior to or at the foreclosure sale. As this court has previously stated, a defaulting defendant's attempt to secure a short sale is not a defense to a foreclosure action and does not affect the plaintiff's right to sell the property pursuant to a Judgment of Foreclosure and Sale.

In addition, defendant has failed to provide any legal support for his request that the Referee should be barred from transferring the property to the plaintiff. There was no legal reason provided as to why the Judgment of Foreclosure and Sale is not valid and enforceable and defendant has failed to provide any reason why the sale was not properly conducted.

Lastly, motions brought on by order to show cause must be served "at a time and in a manner specified therein" (CPLR 2214 [d]). The instant order directed service thereof upon plaintiffs counsel by December 6 2013, but the affidavit of service shows it was not served until December 18, 2013 (see Matter of Smith v New York County Dist. Attorney's Off., 104 AD3d 559 [1<sup>st</sup> Dept. 2013]; Crown Waterproofing, Inc. v Tadco Constr. Corp., 99 AD3d 964 [2d Dept. 2012][the absence of proper service of an order to show cause is a sufficient and complete excuse for a default on the motion, and deprives the court of jurisdiction to entertain the motion]; Matter of Ruine v Hines, 57 AD3d 369 [1<sup>st</sup> Dept. 2008][pursuant to statute, CPLR 304 and 403[d], the mode of service provided for in the order to show cause is jurisdictional in nature and must be literally followed]; Matter of Feldman v Feldman, 54 AD3d 372 [2d Dept. 2008][failure to serve papers in accordance with the order to show cause is a jurisdictional requirement]; Goldmark v Keystone & Grading Corp., 226 AD2d 143 [1<sup>st</sup> Dept. 1996]).

Therefore, in addition to being denied on the merits as set forth above, the motion is also denied for failure to make proper service.

Dated: February 5, 2014  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**