

U.S. Bank Natl. Assn. v Jones

2008 NY Slip Op 31899(U)

June 25, 2008

Supreme Court, Nassau County

Docket Number: 0534-07/

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----X
U.S. BANK NATIONAL ASSOCIATION, as Trustee

TRIAL TERM PART: 48

Plaintiff,

-against-

INDEX NO.: 10534/07

**MOTION DATE: 6-23-08
SUBMIT DATE: 6-23-08
SEQ. NUMBER - 001**

**SUSIE JONES, MORTGAGE ENTERPRISES, LTD.,
CAPITAL ONE BANK; CHASE MANHATTAN
BANK USA, N.A., BANK ONE DELAWARE, N.A.,
CHRISTINA JONES,**

Defendants.

-----X

The following papers have been read on this motion:

- Order to Show Cause, dated 6-4-08.....1**
- Affirmation in Opposition, dated 6-20-08.....2**

In this mortgage foreclosure action in which an Order of Reference has been entered but no Judgment of Foreclosure has issued, defendant Susie Jones, who has previously defaulted moves (i) pursuant to CPLR §3012(d), extension of time to appear or plead, 5015(a)1 vacate default due to excusable default/meritorious defense, 5015(a) 4, lack of jurisdiction and 3215(g)(3)(iii) to vacate the Order of Reference and for leave to serve an answer. Although not noticed the Court will also consider this motion as having been made

pursuant to CPLR §317 (meritorious defense and failure to receive notice in time to defend), (ii) pursuant to CPLR §3211(a)1, (documentary evidence) §3211(a)(3), (lack of capacity to sue) and 3211 (a) 8(lack of jurisdiction over the defendant); (iii) pursuant to CPLR §306-b, failure to file proof of service, (iv) pursuant to CPLR §308 failure to serve defendant, (v) pursuant to CPLR §3211(a)(7) (failure to properly identify the property being foreclosed). The motion is denied and all stays are vacated and lifted.

This is an action to foreclose a mortgage on premises 177 Belmont Blvd., Elmont, New York (Premises). The action was commenced when the Summons and Complaint were filed on June 15, 2007. A Notice of Pendency was also filed on that date.

After defendant failed to appear and respond to the Complaint, this Court, on March 20, 2008, issued an Order of Reference to compute the amount due, pursuant to RPAPL §1321 and the plaintiff served notice of entry thereof on April 18, 2008. Copies of the Summons and Complaint were sent by mail to defendant on April 28, 2008 and plaintiff has submitted an affidavit of service to that effect which comports with the requirements of CPLR §3215(g)(3).

The plaintiff has submitted a copy of an affidavit of service stamped "Received" by the Nassau County Clerk evidencing the filing of an affidavit of service showing that service was made pursuant to CPLR §308(2) by serving "Christina Jones granddaughter" and mailing to the Premises. Christina Jones has also signed an acknowledgment of service.

Plaintiff has also submitted a recorded copy of an assignment of mortgage dated prior to the commencement of this action and recorded after the commencement.

As to service of process, defendant has submitted a brief affidavit stating that she was never served with the Summons and Complaint and did not receive a copy by mail. There is no submission by Christina Jones and no reference to the information contained in the affidavit of service. She does not deny receipt of the later two mailings dated April 18, 2008 and April 28, 2008. For purposes of satisfying CPLR §5015(a)1 defendant relies on the failure to receive process as her excusable default and has offered no other explanation.

An affidavit of service by a process server which specifies the papers served, the person who was served, and the date, time, address and sets forth facts showing that service was made by an authorized person, and in an authorized manner, constitutes prima facie evidence of proper service. *Maldonado v. County of Suffolk*, 229 AD2d 376 (2d Dept. 1996), *Sandor Realty Corp v. Arvis*, 209 AD2d 682 (2d Dept. 1994). A conclusory denial of receipt such as is present here is insufficient to raise an issue of fact which would entitle defendant to a traverse hearing. *Id.* A sworn denial of service by a respondent will rebut the presumption of proper service where it refutes factual allegations in the process server's affidavit or presents a question of fact rather than baldly denying receipt of process. *Silverman v. Deutsch*, 283 AD2d 478 (2d Dept. 2001); *European Am. Bank v. Abramoff*, 201 AD2d 611 (2d Dept. 1994). Here, defendant has failed to controvert the affidavit of service or to set forth sufficient facts to warrant a traverse hearing. Thus, the claim of improper service has no merit.

CPLR §317 applies when a person who is served by other than personal service defaults and has a meritorious defense. Not applicable here is the further requirement of

moving within one year of discovery of the judgment. Since defendant was served by substituted service, CPLR §317 is applicable as to her.

The Court, in its discretion, may relieve any party from the effect of a default upon proof of both a meritorious claim or defense and as to CPLR §5015 (a)1, a reasonable excuse for the default. *Chemical Bank v. Vasquez*, 234 A.D.2d 253 (2d Dept. 1996).

A motion to vacate may be predicated upon CPLR §317 if made within one year of receipt of knowledge of the judgment, and the focus is on the manner of service. When a defendant is served by other than personal service, the provisions of this section become applicable. *Fleetwood Park Corp., v. Jerrick Waterproofing Co.*, 203 AD2d 238 (2d Dept. 1994). As noted above, CPLR §317 is applicable here because service is alleged to have been made pursuant to CPLR §308.2. Under CPLR §317 a defendant must also show that it did not receive actual notice of the process in time to defend, *Brockington v. Brookfield Development Corp.*, 308 AD2d 498 (2d Dept. 2001), *Maines Paper and Food Service, Inc., v. Farmington Food Inc.*, 233 AD2d 595 (3d Dept. 1996), and there must be a showing of a meritorious defense from a person with knowledge of the facts containing factual material, and not merely conclusory allegations or vague assertions. *Peacock v. Kalikow*, 239 AD2d 188 (1st Dept. 1997). While it is not necessary to establish the validity of a defense as a matter of law, it is necessary to demonstrate a defense that is potentially meritorious. *Marinoff v. Natty Realty Corp.*, 17 AD3d 412 (2d Dept. 2005), *Cupoli v. Nationwide Insurance Company*, 283 AD2d 2d 961 (4th Dept. 2001).

A motion to vacate pursuant to CPLR §5015 (a)1 places emphasis on the presence of an excusable default rather than the manner or means of service. A court may consider the application of either CPLR §317 or CPLR §5015 (a) 1, even where not raised by the moving party. The common feature of both statutes is the showing of a meritorious defense. *Id.*

On a motion pursuant to CPLR §5015 (a) 1 a person must demonstrate a reasonable excuse for its delay in appearing and a meritorious defense. *DiLorenzo v. Dutton, Lumber Co.*, 67 NY2d 138 (1986). See, *Incorporated Vil. Of Hempstead v. Jablonsky*, 283 AD2d 55 (2d Dept. 2001); *Matter of Gambardella v. Ortov Lighting*, 278 AD2d 494 (2d Dept. 2000); *Parker v. City of New York*, 272 AD2d 310 (2d Dept.). This section also requires that the application be made within one year after service of the judgment with notice of entry and it is not controverted that there has been a timely motion under this section.

The common feature of meritorious defense necessary under both CPLR §317 and 5015(a)1 has not been established by the respondents.

The defense of lack of standing is predicated upon plaintiff's failure to have recorded the assignment of mortgage however, that defense is unavailing as to defendant because the assignment preceded the action and the complaint alleges, correctly, that plaintiff is the assignee. Failure to record might implicate the rights of others, see *Washington Mut. Bank, NA v. Peak Health Club, Inc.*, 48 AD3d 793 (2d Dept. 2008), but not the defendant in this case. A reading of RPL §291 discloses that a conveyance, which includes an assignment of a mortgage, may be recorded and the failure to do so may affect the rights of subsequent grantees. However, the statute does not mandate recordation.

Where a plaintiff is the assignee of a mortgage and underlying note at the time the foreclosure action is commenced, the plaintiff has the requisite standing to maintain the action and contrary to defendant's contention, it has not been held that as between plaintiff and defendant recording is necessary. *Federal Nat. Mortg. Ass'n v. Youkelsone*, 303 AD2d 546 (2d Dept. 2003). Since the assignment here contained all of the rights of the assignee to the mortgage and the debt *TPZ Corp., v. Dabbs*, 25 AD3d 787 (2d Dept. 2006), where the assignor continued to act in control and *Kluge v. Fugazy*, 145 AD2d 537 (2d Dept. 1998), where the mortgage but not the note was assigned, are not applicable.

In sum, there is no requirement or authority that an assignment of a mortgage must be recorded in order to be effective as against the borrower.

Defendant's claim that plaintiff failed to comply with CPLR §3215 (g)3 does not apply. That statute which was recently amended while this action was pending, to apply to residential foreclosure actions (L. 2007, ch 458, eff August 1, 2007) provides that when a default judgment based upon nonappearance is sought against a natural person, an affidavit must be submitted that additional notice has been given at least 20 days before the entry of such judgment. Here, the Order of Reference was entered on March 20, 2008 and notices were given on April 18, and April 28, 2008, sending the Order of Reference and giving notice that a default judgment is about to be entered.

An order of reference in a mortgage foreclosure action is not the entry of a default judgment as contemplated by CPLR §3215. RPAPL §1321 governs the procedure in a foreclosure action after a defendant has failed to interpose an answer and requires a court to

make a determination of the amount due and other issues. Entry of a judgment of sale is separately addressed in RPAPL §1351.

It is the judgment of foreclosure and sale that terminates the right of redemption RPAPL §1341, *NYCTL 1996-1 Trust v. LFJ Realty Corp*, 307 AD2 957 (2d Dept. 2003) and that is final as to all questions at issue and all matters of defense, *Gary v. Bankers Trust Co. Of Albany, N.A.*, 82 AD2d 168 (3rd Dept. 1981). It is the judgment of foreclosure and not the order of reference which confers the right to sell the property. *New York State Mortgage Loan Enforcement and Admin. Corp., v. New Colony Camp Houses, Inc.*, 187 AD2d 955 (4th Dept. 1992). Since the order of rReference is separate and distinct from the judgment of foreclosure and there is no contrary legislative direction, the notice provision of CPLR §3215 is required as a predicate to the judgment of foreclosure and not as to the Order of Reference.

The second prong of CPLR §5015(a) 1, excusable default, has not been satisfied. The sole excuse offered for not responding to the complaint is lack of service of process. However, defendant has failed to make a *prima facie* showing of lack of service hence as an excuse for not answering the claim fails.

Defendant's argument that the complaint is defective because the description of the Premises does not contain the tax map designation is lacking in merit. Defendant does not allege that the description is incorrect but rather that it is inadequate. Here, the complaint contains the street address and a metes and bounds description of the Premises, together with the date and recording information of the mortgage. Even an erroneous description will not deprive a court of jurisdiction as long as the pleadings and other papers are sufficiently particular to give notice of the property that is being foreclosed. *United Companies Lending*

Corp., v. Rogers, 45 AD3d 1419 (4th Dept. 2007); *American Mortgage Bank v. Matovitz*, 208 AD2d 788 (2d Dept. 1994). In this case, the court finds that the information contained in the complaint is sufficient to apprise the defendant of the identity of the Premises and the failure to insert the Section Block and Lot number does not constitute a meritorious defense. Defendant's allegation of noncompliance with CPLR §306-b also fails. The action commenced on June 15, 2007, defendant was served on June 18, 2007 and affidavits of service were filed on June 20, 2007, all as required by the statute. Such filing also satisfies the substituted service provision of CPLR §308(2). There is no evidence to support the position of non-filing of the proof of service as to defendant and defendant has not by way of reply challenged the documentary evidence submitted by the plaintiff.

The Court has considered the remaining contentions of the defendant not specifically mentioned here and finds them to be similarly lacking in merit. The motion is denied, all stays are vacated.

This shall constitute the Decision and Order of this Court.

ENTERED ENTER

DATED: June 25, 2008

JUL 01 2008

NASSAU COUNTY
 COUNTY CLERK'S OFFICE 
 DANIEL PALMIERI
 Acting Supreme Court Justice

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