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AMENDED SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x TRIAL TERM PART: 48

SOVEREIGN, F.S.B.,

INDEX NO.:19704/07

Plaintiffs,

MOTION DATE:9-15-08
SUBMIT DATE:9-29-08
SEQ. NUMBER - 001

-against-

JAMES C. BASILE, III, REGINA BASILE,
"JOHN DOE #1" through "JOHN DOE #12",

Defendant.

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The following papers have been read on this motion:

Order to Show Cause, dated 9-3-08.....1
Affirmation in Opposition, dated 9-11-08.....2
Reply Affidavit, dated 9-26-08.....3

In this mortgage foreclosure action in which an Order of Reference has been entered but no Judgment of Foreclosure has issued, defendants, who have previously defaulted move pursuant to CPLR §5015(a)1 to vacate default due to excusable default/meritorious defense, and CPLR § 5015(a) 4, lack of jurisdiction and thus vacate the Order of Reference and presumably for leave to serve an answer. 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. The motion is denied and all stays are vacated and lifted.

This is an action to foreclose a mortgage on premises 958 Grand Blvd., Westbury, New York (Premises). The action was commenced when the Summons and Complaint were filed on November 21, 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 18, 2008, issued an Order of Reference to compute the amount due, pursuant to RPAPL §1321. Copies of the Summons and Complaint were sent by mail to defendant on January 8, 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 copies of affidavits of service stamped "Received" by the Nassau County Clerk evidencing the filing of affidavits of service showing that service was made pursuant to CPLR §308(4) by affixing to the door and mailing to the Premises.

As to service of process, defendants have submitted affidavits stating that they were never served with the Summons and Complaint and did not receive a copy by mail. There is no reference to the information contained in the affidavits of service. Defendants do not deny receipt of the later mailings dated January 8, 2008. For purposes of satisfying CPLR §5015(a)1 defendants rely on the failure to receive process as their excusable defaults and have offered no other legally cognizable 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 defendant 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, defendants have failed to controvert the affidavits of service or to set forth sufficient facts to warrant a traverse hearing. Thus, the claims of improper service have 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 defendants were served by substituted service, CPLR §317 is applicable as to them.

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 also 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 §308.4. 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 defendants. Defendants do not deny the essential allegations of the complaint or that they were in default. The Court has considered whether the attempts by defendants to reinstate the mortgage while the action was pending constitutes a reasonable excuse for their default in answering and while such factors might, under certain circumstances, constitute a reasonable excuse for not responding to the complaint, those conditions are not present here. *Cf Deutsche Bank Nat. Trust Co.*, 20 Misc 3d 1146(A) (Sup. Ct. Richmond Cty 2008).

Among their excuses for not responding to the summons and complaint, the defendants contend that they were in communication with the lender and or its attorneys with respect to possible reinstatement or refinancing, and were never told that the foreclosure action had been commenced or was proceeding.

However, the communications submitted by plaintiff refutes this contention. The letter from plaintiff's counsel dated December 4, 2007, after the action had commenced, specifies an amount for reinstatement, refers to a discontinuance of "the foreclosure action" and states that it is "without prejudice to any foreclosure proceedings". There is no response to this letter until months later, March 26, 2008, which references a reinstatement and contains a counter proposal.

A review of the earlier correspondence discloses that the plaintiff never agreed to delay taking action to collect the debt. Plaintiff's notices dated September 4, 2007 in bold type advise defendants of an intention to foreclose, including the effect of such action upon defendants and their right to continued occupancy of the Premises. The notice from

plaintiff's counsel dated October 25, 2007, also refers to taking action to collect the debt.

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, defendants have failed to make a *prima facie* showing of lack of service hence as an excuse for not answering the claim fails.

The Order of Reference was entered on March 2, 2008, however an order of reference in a mortgage foreclosure action is not the entry of a judgment. 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 sale after issuance of a 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).

In sum then, while the defendants have failed to demonstrate that they should be permitted to vacate their default in answering, there may be no entry of a judgment of foreclosure until additional requisites have been satisfied. If they were the recipient of a subprime or high cost loan, as such terms are defined, defendants may, by virtue of certain new legislation, be entitled to the notice required by the statute and the right to demand a

statutory settlement conference. See L. 2008, ch 472 §3-a, adding RPAPL §1304. Thus, while all stays are lifted, the Court will not entertain submission of a judgment of foreclosure unless and until plaintiff demonstrates that the loan, which is secured by plaintiff's mortgage, was either not subprime high cost or if so, that there has been statutory compliance.

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.

ENTER

DATED: October 3, 2008

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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