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| Bank of Am.. N.A. v Yoon |
| 2011 NY Slip Op 31556(U) |
| May 19, 2011 |
| Sup Ct, NY County |
| Docket Number: 112402/09 |
| Judge: Joan A. Madden |
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN
J.S.C.

PART 11

Index Number : 112402/2009
BANK OF AMERICA
vs.
YOON, ICK K
SEQUENCE NUMBER : 002
VACATE DEFAULT JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

FILED PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____ JUN 07 2011

Replying Affidavits _____

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annexed decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: May 19, 2011

[Signature]
HON. JOAN A. MADDEN *c.*
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
BANK OF AMERICA, NATIONAL ASSOCIATION
as successor by merger to LaSalle Bank NA as trustee
for WaMu Mortgage Pass-Through Certificates Series
2006-AR14 Trust,

INDEX NO. 112402/09

Plaintiff,

-against-

ICK K. YOON a/k/a ICK KYUNG YOON, JPMORGAN
CHASE BANK N.A.; BOARD OF MANAGERS OF 1600
BROADWAY ON THE SQUARE, and "JOHN DOE #1"
through "JOHN DOE # 10," the last ten names being
fictitious and unknown to the Plaintiff, the person or parties
intended being the person or parties, if any, having or claiming
an interest in or lien upon the mortgaged premises described
in the complaint,

FILED

JUN 07 2011

NEW YORK
COUNTY CLERK'S OFFICE

Defendants.

-----X
JOAN A. MADDEN, J.:

In this action to foreclose a mortgage, pro se defendant Ick Kyung Yoon ("Yoon") moves for an order vacating his default in answering the complaint, and vacating the Order of Reference issued by this court dated August 17, 2009. Defendant Yoon also moves for an order granting leave to serve and file a late answer. Plaintiff opposes the motion.

A defendant seeking to vacate a default must establish both a reasonable excuse for his default in appearing and answering the complaint, and a potentially meritorious defense to the action. See CPLR 5015(a); Eugene DiLorenzo, Inc. v. A.C. Dutton Lumber Co., Inc., 67 NY2d 138 (1986); M.R. v. 2526 Valentine LLC, 58 AD3d 530, 531 (1st Dept 2009). Here, defendant

Yoon has establish neither a reasonable excuse for his default nor a potentially meritorious defense.

Although defendant Yoon submits an affidavit in support of this motion, the affidavit provides absolutely no explanation or excuse for his default in not answering the complaint. Defendant Yoon's neglect in this regard is consistent with the record, which reveals a pattern of neglect and delay, the latest of which is his default in failing to appear for oral argument of the instant motion on March 31, 2011.

On August 31, 2009, plaintiff commenced this action to foreclose on the mortgage in the principal amount of \$975,000, executed by defendant Yoon in favor of Washington Mutual Bank, FA, dated August 31, 2006, on real property located at 1600 Broadway, Unit 19G, New York, New York. On September 22, 2009, plaintiff filed a Request for Judicial Intervention requesting the scheduling of a mortgage settlement conference. Conferences were scheduled in the Mortgage Foreclosure Part on November 10, 2009 and December 8, 2009. Although defendant Yoon did not appear on November 10, 2009, he appeared on December 8, 2009 and requested an adjournment. According to plaintiff's counsel, plaintiff objected to the adjournment, and the court denied defendant's request and remanded the action back to this court for further proceedings. Plaintiff thereafter made an ex parte motion for an Order of Reference appointing a referee to compute, based on defendant Yoon's default in appearing and answering the complaint. On August 17, 2009, this court granted the motion and issued an Order of Reference.

On December 20, 2010, defendant Yoon filed the instant motion to vacate his default and for leave to serve a late answer. The motion was scheduled for oral argument on March 3, 2011,

but defendant Yoon did not appear. When a question arose as to whether defendant Yoon had been notified of the March 3rd court date, oral argument was adjourned to March 31, 2011, and the court directed the Part 11 clerk to notify Yoon and plaintiff's counsel to notify Yoon by regular and registered mail. On March 31, 2011, defendant Yoon failed to appear, and plaintiff's counsel provided proof that Yoon had been notified of the March 31, 2011 appearance by regular and registered mail, in accordance with the court's direction.

In seeking to vacate his default, defendant Yoon submits an affidavit which does not even attempt to explain the circumstances underlying his default in timely answering, or his 15-month delay in making the instant motion. Notably, defendant Yoon does not dispute the affidavit of service which states that the summons and complaint were served on him by personal delivery of the papers to his wife at his residence in New Jersey, on September 3, 2009. Even though defendant Yoon appeared at the second scheduled settlement conference in the Mortgage Foreclosure Part on December 8, 2009, he did so only to request an adjournment, and took no further steps to appear in this action until a year later when he finally made the instant motion to vacate his default in December 2010. Under these circumstances, where defendant Yoon fails as a matter of law to proffer a reasonable excuse for his default, his motion to vacate the default must be denied, regardless of whether he can demonstrate a potentially meritorious defense. See Admiral Insurance Co v. Marriott Int'l. Inc., 79 AD3d 572 (1st Dept 2010); Caba v. Rai, 63 AD3d 578, 582 (1st Dept 2009); M.R. v. 2526 Valentine LLC, *supra* at 532; Time Warner City Cable v. Tri State Auto. Inc., 5 AD3d 153 (1st Dept), lv app disp 3 NY3d 656 (2004).

However, even if the court were to consider the issue of a meritorious defense, the court would conclude that defendant Yoon likewise fails to satisfy that requirement. In his affidavit,

defendant Yoon alleges that plaintiff lacks standing and “was not the holder of the mortgage and the note in question at the time” plaintiff commenced this action. The record shows otherwise.

In support of its motion for an Order of Reference, plaintiff submitted a copy of the Assignment of Mortgage showing that the mortgage and note were assigned by JPMorgan Chase Bank, N.A. (“Chase”), the successor-in-interest to Washington Mutual Bank, the original mortgagee, to plaintiff on June 30, 2009. This action was commenced well after that date on August 31, 2009. Defendant Yoon’s reliance on the document from the NYC Department of Finance, Office of the City Register, which shows that the Assignment of Mortgage was recorded or filed in the Office of the City Register on September 29, 2009, is misplaced. Plaintiff also submits a copy of an affidavit from the Federal Deposit Insurance Corporation (“FDIC”), stating that on September 25, 2008, Washington Mutual Bank was closed by the Office of Thrift Supervision and the FDIC was named as receiver, and “[p]ursuant to the terms of a Purchase and Assumption Agreement between the FDIC and as receiver of Washington Mutual and JPMorgan Chase Bank, National Association (‘JPMorgan Chase’), dated September 25, 2008 . . . JPMorgan Chase acquired certain assets, including all loans and all loan commitments, of Washington Mutual.” Based on that affidavit and the Assignment of Mortgage, plaintiff has sufficiently demonstrated the chain of title through which it has standing to maintain this action.

Defendant Yoon further alleges that “plaintiff’s predecessor in interest engaged in unconscionable commercial practices, deception, fraud, false pretense and/or misrepresentations with regard to the subject mortgage.” Absent specific factual details, defendant Yoon’s bare and conclusory allegations are insufficient to establish a viable defense.

The court has considered defendant Yoon's remaining allegations, including the allegations and defenses asserted in his proposed answer, and concludes that they are not sufficient to support a potentially meritorious defense to this action.


Finally, the court notes that plaintiff is still required to comply with the March 2, 2011 Administrative Order of the Chief Administrative Judge of the Courts Ann Pfau which directs that "plaintiff's counsel in residential mortgage foreclosure actions shall file with the court in each such action an affirmation in the revised Form A attached." In pending cases such as the instant case, where no judgment of foreclosure has been entered, the affirmation must be filed "at the time of filing either the proposed order of reference or the proposed judgment of foreclosure." As an Order of Reference has already been issued in this action, plaintiff must provide the necessary affirmation when it files a proposed judgment of foreclosure.

Accordingly, it is hereby

ORDERED that the motion by defendant Ick Kyung Yoon to vacate his default in answering, and for leave to serve a late answer, is denied in its entirety.

DATED: May 19, 2011

ENTER:



J.S.C.

HON. JOAN A. MADDEN
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JUN 07 2011