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SHORT FORM ORDER

INDEX No. 46401/10

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 11/3/11 (#005)
MOTION DATE 9/6/11 (#006)
MOTION DATE 9/22/11 (#007)
ADJ. DATES 2/17/12
Mot. Seq. #005 - XMD
Mot. Seq. #006 - MG
Mot. Seq. #007 - XMD
CDISP Y___ N __X__

PEOPLE'S UNITED BANK,

Plaintiff,

-against-

PONQUOGUE MANOR CONSTRUCTION, LLC, NYS DEPT. OF TAXATION & FINANCE, MICHAEL MARGARELLA, ATRIUM 680, LLC., WESTHAMTPON PROPERTY ASSOCs, INC., RUSSEL CANDELLA, MICHAEL UILLIAN, And JOHN DOE NO.1 TO JOHN DOE XXX", inclusive, the last names being fictitious & unknown to plaintiff, the persons or parties intended to be tenants, occupants, persons or corporations, in any or claiming an interest or lien upon the premises

Defendants.

JASPAN, SCHLESINGER, LLP
Attys. For Plaintiff
300 Garden City Plaza
Garden City, NY 11530

CHARLES TERMINI, ESQ.
Atty for Ponquogue Manor
82 Fairview Ave.
Oceanside, NY 11572

MENICUCCI VILLA ASSOC.
Attys. For Margarella
2040 Victory Blvd.
Staten Island, NY 10314

TSUNIS, GASPARIS, LUSTIG & RING
Attys. For Westhampton Prop.
2929 Expressway Dr. No.
Islandia, NY 11749

Upon the following papers numbered 1 to 16 read on this motion for judgment of foreclosure & sale and cross motions to vacate judgment and other relief; Notice of Motion/Order to Show Cause and supporting papers 5-8; Notices of Cross Motion and supporting papers 1-4; 9-11; Answering Affidavits and supporting papers 12-14; Replying Affidavits and supporting papers 15-16; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#006) by the plaintiff for a judgment of foreclosure and sale is considered under RPAPL Article 13 and is granted; and it is further

ORDERED that the cross motion (#005) by the defendants Ponquogue Manor Construction, LLC and Uillian for an order vacating their defaults in answering and an order extending their time to serve an answer is considered under CPLR 5015 and 3012(d) and is denied.

ORDERED that the cross motion (#007) by defendants Margarella and Atrium 680 LLC for relief pursuant to RPAPL §1351(3) and §1354(3) is considered thereunder and is denied.

In December of 2010, the plaintiff commenced this action to foreclose the lien of its second mortgage of November 30, 2007 in the amount of $1,000,000.00 given by defendant Ponquogue Manor Construction, LLC [hereinafter "Ponquoque"] to the Bank of Smithtown, which has since merged with the plaintiff. This mortgage was thereafter modified and extended by agreement dated October 1, 2009. The mortgaged premises are situated at 68 Foster Avenue, Hampton Bays, New York. Defendants Uillian and Candela guaranteed the obligations of defendant Ponquoque under the terms of said mortgage by the execution of written guarantees of payment and performance. After defaulting in making the payment due under the terms of the second note and mortgage on October 1, 2010, the plaintiff brought this action to foreclose. Defendants Margella and Atrium 680, LLC [hereinafter "Atrium"] were joined herein as party defendants due to their ownership of a mortgage subordinate to the second mortgage for which foreclosure is herein demanded by the plaintiff.

The record reflects that the plaintiff effected service of the summons and complaint upon defendant Ponquogue pursuant to LLC Law § 303 by delivery of same to the office of the Secretary of State in Albany, New York on January 14, 2011. Defendant Uillian was served pursuant to CPLR 308 by delivery of the summons and complaint to a person of suitable age and discretion at Uillian's actual place of business in Coral Springs, Florida and by mailing a copy of same thereto on March 7, 2011. Although service was complete upon both defendants by April 25, 2011, nether appeared by answer or otherwise in response to such service.

On June 6, 2011, the plaintiff moved for an order of reference which was granted on July 6, 2011 by the Justice originally assigned to this matter [*see* Order dated July 6, 2011; Emerson, J]. Subsequent to the filing of the report of the referee to compute appointed in the July 6, 2011 order of reference, the plaintiff interposed the motion, now numbered "006", for a judgment of foreclosure and sale. The plaintiff's motion contained a return date of September 16, 2011. By notice of cross motion dated September 9, 2011, defendants Margarella and Atrium 680, LLC, moved for an order directing that the plaintiff's judgment contain a direction that a subordinate mortgage allegedly owned by the cross movants be paid out of the surplus, if any, realized by the sale pursuant to RPAPL § 1351(3) and § 1354(3). By a notice of cross motion (#005) dated September 30, 2011, with a return date of November 3, 2011, defendants Ponquogue and Uillian cross moved to vacate their default in answering and for an extension of time to serve an answer.

Each of the three applications were marked submitted before Justice Emerson on November 3, 2011. On February 1, 2012, Justice Emerson issued an order recusing herself from further presiding over this action. The motions were re-numbered by clerical staff and calendared before the undersigned on February 17, 2012 on which date, they were marked fully submitted for determination. For the reasons stated below, the plaintiff's motion is granted while the cross motion by the subordinate mortgagee defendants Margerella & Atrium 860, LLC and the cross motion by defendants Ponquogue and Uillian, are denied.

The court first considers the cross motion (#005) by defendants Ponquogue and Uillian for an order vacating their defaults and extending their time to answer. It is well settled that a "defendant who

has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action when . . . moving to extend the time to answer or to compel the acceptance of an untimely answer" (***Maspeth Fed. Sav. & Loan Assn. v McGown***, 77 AD3d 890, 909 NYS2d 642 [2d Dept 2010], *citing* ***Lipp v Port Auth. of NY & NJ***, 34 AD3d 649, 649, 824 NYS2d 671 [2d Dept 2006]; *see also* ***Midfirst Bank v Al-Rahman***, 81 AD3d 797, 917 NYS2d 871 [2d Dept 2011]; ***Deutsche Bank Natl. Trust Co. v Rudman***, 80 AD3d 651, 914 NYS2d 672 [2d Dept 2010]). This standard to applications made both prior and subsequent to the a formal fixation of a default by the court (*see* ***Bank of New York v Espejo***, ___AD3d___, 2012 WL 503661 [2d Dept 2012]; ***Integon Natl. Ins. Co. v Norterile,*** 88 AD3d 654, 930 NYS2d 260 [2d Dept 2011]; ***Ennis v Lema,*** 305 AD2d 632, 760 NYS2d 197 [2d Dept 2003]; ***Landa, Picard & Weinstein v Ruesch***, 102 AD2d 813, 476 NYS2d 383 [2d Dept 1984] *cf.*, ***Guzetti v City of New York***, 32 AD3d 234, 820 NYS2d 29 [1st Dept 2006]). Where such a motion is coupled with a request to serve a late answer, the motion papers should include a proposed answer, verified by one having knowledge of facts constituting a potentially meritorious defense (*see* CPLR 3012[d]; ***Ogman v Mastrantonio Catering, Inc.,*** 82 AD3d 852, 918 NYS2d 375 [2d Dept 2011]; ***Gross v Kail,*** 70 AD3d 997, 893 NYS2d 891 [2 Dept 2010]; ***Baldwin v Mateogarcia***, 57 AD3d 594, 869 NYS2d 217 [2d Dept 2007]; ***Bekker v Fleischman***, 35 AD3d 334, 825 NYS2d 270 [2d Dept 2006]).

The determination of that which constitutes a reasonable excuse lies within the discretion of the Supreme Court (*see* ***Mellon v. Izmirligil***, 88 AD3d 930, 931 NYS2d 667 [2d Dept 2011]; ***Maspeth Fed. Sav. & Loan Assn. v McGown***, 77 AD3d 890, *supra*; ***Star Indus. Inc. v Innovative Beverages, Inc.***, 55 AD3d 903, 904, 866 NYS2d 357 [2d Dept 2008]). While the successful assertion of a claim of improper or defective service usually results in a dismissal for lack of jurisdiction (*see* CPLR 3211[a][8]), a defect in service may, instead, simply constitute a reasonable excuse for a default in answering (*see* CPLR 317; *see also* ***Equicredit Corp. of Am. v Campbell***, 73 AD3d 1119, 900 NYS2d 907 [2d Dept 2010]).

As an excuse for Ponquogue's failure to answer, defendant Uillian asserts the following allegations: that "as managing member [of defendant Ponquoque,LLC] I was never served the summons and complaint but received a copy in the mail." [*see* ¶ 17 of Uillian's affidavit dated September 30, 2011). Advanced as an additional ground of excusable default is a claim by Uillian and his counsel that the "matter was in effect stayed" because immediately after his receipt of the summons and complaint by mail, defendant, Uillian, then acting without counsel, was engaged in complex settlement negotiations with the plaintiff (*see* ¶¶ 18-21 of Uillian's affidavit; and ¶¶ 7-11 of the September 30, 2011 affirmation of Uillian's counsel). Unfortunately, neither of these circumstances constitute a reasonable excuse for the defendants' defaults.

It is well settled that a process server's sworn affidavit of service constitutes prima facie evidence of proper service and that conclusory and unsubstantiated claims that this court lacks jurisdiction due to improper service are insufficient to rebut the presumption of due service that arose from the process server's affidavit (*see* ***US Natl. Bank Assn. as Trustee v Melton***, 90 AD3d 742, 934 NYS2d 352 [2d Dept 2011]; ***Deutsche Bank Natl. Trust Co. v Hussain***, 78 AD3d 989, 912 NYS2d 595 [2d Dept 2010]; ***In re Win Mtge. Corp. v Davis***, 72 AD3d 943, 898 NYS2d 854 [2d Dept 2010]; ***Beneficial Homeowner Serv. Corp. v Girault***, 60 AD3d 984, 875 NYS2d 815 [2d Dept 2009]). Here, defendant Uilliano's claim that he was never "served" with the summons and complaint, in his capacity as a manager of defendant Ponquoque is insufficient to rebut the presumption of due service set forth in the affidavits of the plaintiff's process server and does not qualify as reasonable excuse for the defaults

of the moving defendants in answering (*see* ***Bank of New York v Espejo***, ___AD3d___, 2012 WL 503661[2d Dept 2012], *supra*).

Also rejected are the moving defendants' claims that their engagement in settlement negotiations constitutes a reasonable excuse for their default in answering. While claims of ongoing settlement negotiations between a defendant and a plaintiff to a pending action may, under certain circumstances, constitute a reasonable excuse for a default in answering (*see* ***Scarlett v McCarthy***, 2 AD3d 623, 768 NYS2d 342 [2d Dept 2003]), the movant must demonstrate a good faith belief in a settlement that is supported by substantial evidence (*see* ***Armstrong Trading, Ltd. v MBM Enter.***, 29 AD3d 835, 815 NYS2d 689 [2d Dept 2006]) and justifiable reliance thereon *(see* ***American Shoring, Inc. v D.C.A. Const., Ltd.***, 15 AD3d 431, 789 NYS2d 722 [2d Dept 2005]). Absent such a showing, vague and unsubstantiated claims of on-going settlement negotiations will not be accepted as a justification for a default (*see* ***Mellon v Izmirligil***, 88 AD3d 930, 931 NYS2d 667 [2d Dept 2011]; ***Kouzios v Dery***, 57 AD3d 949, 950, 871 NYS2d 303 [2d Dept 2008]; ***Antoine v Bee***, 26 AD3d at 306, 812 NYS2d 557 [2d Dept 2008]; ***Majestic Clothing Inc. v East Coast Stor., LLC***, 18 AD3d 516, 518, 795 NYS2d 289 [2d Dept 2006]).

Here, the record is devoid of due proof that the parties engaged in settlement discussions from which a good faith belief in a settlement could have been justifiably relied upon by the moving defendants. Uillian's claims that a reasonable excuse for the defaults exist because he was in a self-representative capacity when his purported self- initiated contacts and "complex settlement negotiations" with the plaintiff or its agents were undertaken are equally unavailing and do not warrant of finding of a reasonable excuse for such defaults. While not a model of clarity, these allegations may fairly be read as asserting claims that ignorance of the law and/or legal procedures should be viewed as a reasonable justification for the defaults. However, recent appellate case authorities have instructed that confusion or ignorance of the law, legal processes and/or court procedures do not constitute reasonable excuses for the failure to answer or otherwise appear (*see* ***Garal Wholesalers, Ltd. v Raven Brands, Inc.***, 82 AD3d 1041, 919 NYS2d 358 [2d Dept 2011]; ***US Bank Natl. Assoc. v Slavinski***, 78 AD3d 1167, 912 NYS2d 285 [2d Dept 2010]; ***Yao Ping Tang v Grand Estate, LLC.***, 77 AD3d 822, 910 NYS2d 104 [2d Dept 2010]; ***Dorrer v Berry***, 37 AD3d 519, 830 NYS2d 277 [2d Dept 2007]; ***Awad v. Severino***, 122 AD2d 242, 505 NYS2d 437 [2d Dept. 1986]).

In view of the lack of a reasonable excuse, it is unnecessary to consider whether the defendants sufficiently demonstrated the existence of a potentially meritorious defense (*see* ***Tribeca Lending Corp. v Correa***, ___AD3d___, 2012 WL 502467, [2d Dept 2012]; ***Alterbaum v Shubert Org., Inc.***, 80 AD3d 635, 914 NYS2d 681 [2d Dept 2011]). In any event, review of the record indicates that no such defense was advanced here by the moving defendants. The court thus denies the cross motion (#005) by defendants Ponquogue and Uillian for relief from their defaults.

The plaintiff's motion (#006) for confirmation of the report of the referee to compute and for entry of judgment of foreclosure and sale is granted. The moving papers clearly demonstrated the plaintiff's entitlement to such relief (*see* RPAPL 1351).

The cross motion (#007) by defendants, Margarella and Atrium, the subordinate mortgagors, for an order directing that the plaintiff's judgment contain a direction that the subordinate mortgage be paid

out of the surplus, if any, realized by the sale pursuant to RPAPL §1351(3) and §1354(3) is considered thereunder and denied. RPAPL §1351(3) provides as follows:

> 3. If it appears to the satisfaction of the court that there exists no more than one other mortgage on the premises which is then due and which is subordinate only to the plaintiff's mortgage but is entitled to priority over all other liens and encumbrances except those described in subdivision 2 of section 1354, upon motion of the holder of such mortgage made without valid objection of any other party, the final judgment may direct payment of the subordinate mortgage debt from the proceeds in accordance with subdivision 3 of section 1354.

This statutory provision thus authorizes the direct payment of surplus monies derived from a mortgage foreclosure sale to the holder of a valid second mortgage and allows the second mortgagee to be paid without having to bear the delay and expense attendant with surplus money proceedings (*see* ***Liberty View Ltd. Partnership v 90 West Assoc.***, 150 Misc2d 913, 571 NYS2d 376 [Sup Ct. New York County, 1991]). Upon a successful motion by the subordinate mortgage under this section, RPAPL § 1354(3) authorizes the court to make provision in the judgment of foreclosure that the referee apply surplus monies directly in satisfaction of the subject second mortgage.

Here, the cross moving papers submitted by defendants Margarella and Atrium included no proof whatsoever in support of defendant Margarella's claim that the October 23, 2009 mortgage purportedly owned by him and defendant Atrium is subordinate only to the mortgage of the plaintiff for which foreclosure is sought. Moreover, there are no allegations, let alone proof, that the mortgage of these cross movants is entitled to priority over all other liens and encumbrances except those described in subdivision 2 of RPAPL §1354. Indeed, the record reflects that neither of these statements are accurate as it is replete with evidence that the premises are subject to a first mortgage owned by the plaintiff for which foreclosure is not demanded herein. These ccircumstances appear to run afoul of the statutory requirement that there be "no more than one other mortgage on the premises which is then due" and the requirement that the movant show that its mortgage "is entitled to priority over all other liens and encumbrances except those described in subdivision 2 of section 1354" (*see* RPAPL §1351[3]; *cf.*, ***Liberty View Ltd. Partnership v 90 West Assoc.***, 150 Misc2d 913, *supra*). For these reasons, the cross motion (#007) by defendants Margarella and Atrium is denied, and their proposed order to the contrary has been marked "not signed".

The plaintiff shall settle judgment, upon a copy of this order.

DATED: 2/29/12

THOMAS F. WHELAN, J.S.C.