

US Bank Natl. Assn. v Walker

2012 NY Slip Op 30821(U)

March 19, 2012

Supreme Court, Suffolk County

Docket Number: 17456-11

Judge: Denise F. Molia

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**SUPREME COURT - STATE OF NEW YORK
IAS PART 39 - SUFFOLK COUNTY**

PRESENT: Hon. DENISE F. MOLIA
Justice of the Supreme Court

**MOTION DATE: 12-08-11
12-09-11**

US BANK NATIONAL ASSOCIATION

Plaintiff,

**MOT. SEQ. #: 001 MG
MOT. SEQ. #: 002 MD**

-against-

WILLIE J. WALKER; ASSET ACCEPTANCE LLC; CACH LLC; CLERK OF THE SUFFOLK COUNTY DISTRICT COURT; COMMISSIONER OF TAXATION AND FINANCE; COUNTY OF SUFFOLK; FATMA KAZDAL; HSBC BANK NEVADA NA; MAUREEN BURCH; MAUREEN WALKER; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; PEOPLE OF THE STATE OF NEW YORK; PERSOLVE LLC; PIEDAD WETHERINGTON; TASKIN KAZDAL; WR MARRANS SONS INC; "JOHN DOES" AND "JANE DOES" , said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises,

**ROSICKI, ROSICKI & ASSOCIATES, P.C.
ATTORNEYS FOR PLAINTIFF
26 HARVESTER AVENUE
BATAVIA, N.Y. 14020**

**RONALD D. WEISS, P.C.
ATTORNEY FOR DEFENDANT
734 WALT WHITMAN ROAD, SUITE 203
MELVILLE, N.Y. 11747**

Defendants,

_____x

Upon the following papers numbered 1 to 21 read on this motion by the plaintiff for an order pursuant to RPAPL § 1321 and the motion by the defendant Willie J. Walker for an order pursuant to CPLR 3012 (d); Notice of Motion/Order to Show Cause and supporting papers 1 - 11; 12 - 17; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 18 - 21; Replying Affidavits and supporting papers _____; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (001) by the plaintiff for an order pursuant to Real Property Actions and Proceedings Law § 1321 for leave to enter a default judgment as against the defendants and an order of reference appointing a referee to compute; and pursuant to CPLR 3025 (b) for leave to amend the caption of the summons and complaint is granted; and it is further

ORDERED that this motion (002) by the defendant Willie J. Walker for an order pursuant to CPLR 3012 (d) extending his time to appear and answer and compelling the plaintiff to accept his proposed answer is considered and is denied; and it is further

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ORDERED that Ellen Savino with an office at 425 Broad Hollow Road, Melville, New York 11747 is appointed Referee to ascertain and compute the amount due upon the note and mortgage documents which this action was brought to foreclose, and to examine and report whether the mortgaged property can be sold in parcels; and it is further

ORDERED that pursuant to CPLR 8003 (a) the Referee be paid the fee of \$250.00 for the computation of the amount due the plaintiff; and it is further

ORDERED that by accepting this appointment the Referee certifies that he/she is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including but not limited to, section 36.2 (c) ("Disqualifications from appointment") and section 36.2 (d) ("Limitations on appointments based upon compensation"); and it is further

ORDERED that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF SUFFOLK

US BANK NATIONAL ASSOCIATION, Plaintiff, -against- WILLIE J. WALKER;
ASSET ACCEPTANCE LLC; CACH LLC; CLERK OF THE SUFFOLK COUNTY DISTRICT
COURT; COMMISSIONER OF TAXATION AND FINANCE; COUNTY OF SUFFOLK;
FATMA KAZDAL; HSBC BANK NEVADA NA; MAUREEN BURCH A/K/A MAUREEN
BURCH; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; PEOPLE OF
THE STATE OF NEW YORK; PERSOLVE LLC; PIEDAD WETHERINGTON; TASKIN
KAZDAL; WR MARRANS SONS INC; Defendants.

This is an action to foreclose a mortgage on residential real property known as 3430 Great Neck Road, Amityville, New York 11701 (the subject property). Willie J. Walker (the defendant mortgagor) allegedly executed a fixed rate note dated April 17, 2007 (the note) in favor of Lend America (the lender) agreeing to pay the principal sum of \$316,499 at the rate of 6.50% beginning on June 1, 2007 through to May 1, 2037, the maturity date. To secure said note, the defendant mortgagor executed a mortgage (the subject mortgage) of the same date on the subject property. The note bears an undated endorsement without recourse by the lender to US Bank, NA (the plaintiff). The mortgage indicates that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for the lender and its successors and assigns and that for the purposes of recording the mortgage MERS was the mortgagee of record. MERS as nominee for the lender allegedly transferred the mortgage and note to the plaintiff by assignment dated June 9, 2011.

The defendant mortgagor allegedly defaulted on his monthly payment of interest on October 1, 2010 and each month thereafter. The plaintiff allegedly sent the defendant mortgagor a notice of default dated December 8, 2010, as well as a 90-day notice dated October 19, 2010 pursuant to RPAPL § 1304. The defendant mortgagor allegedly failed to cure his default.

The plaintiff commenced the instant action by the filing of a summons and complaint on July 1, 2011. None of the defendants have filed an answer. According to the records maintained by the Court's computerized database, a settlement conference was held in the Specialized Mortgage Foreclosure Conference Part on September 28, 2011. These records also show that notice of the conference was mailed in accordance with the court's standard practice to the defendant mortgagor at the subject property and that it was not returned to the court as undeliverable. On September 28, 2011, however, this case was marked to indicate that there was no appearance or participation from the defendant mortgagor. As a result, this case was referred to IAS Part 39. Accordingly, there has been compliance with CPLR 3408 and no further settlement conference is required.

The plaintiff now moves by notice of motion for, inter alia, an order appointing a referee to compute and an amendment of the caption. In support of the motion, the plaintiff submits, among other things, the summons and complaint, affidavits of service, the note and mortgage, the assignment, and an affidavit of merit from an officer of the plaintiff. In his affidavit of merit, the plaintiff's officer alleges, inter alia, that the note and subject mortgage were assigned to the plaintiff by instrument dated June 9, 2011. According to the officer, the plaintiff sent the required 90-day notice to the defendant mortgagor prior to commencing this action, and the loan was reviewed, if applicable, for a possible loan modification pursuant to federal legislation. The plaintiff's officer further alleges that the factual allegations set forth in the complaint are true to his knowledge except as to those matters which are alleged upon information and belief. In the complaint, the plaintiff alleges, inter alia, that it is the owner and holder of the subject mortgage and the note and that it has complied with the provisions of section five hundred ninety-five-a of the Banking Law as well as section six-L or six-M of the Banking Law.

The defendant mortgagor now moves for an order pursuant to CPLR 3012 (d) extending his time to appear and answer and compelling the plaintiff to accept his proposed answer. The submissions in support of this motion include an affidavit from the defendant mortgagor and a proposed verified answer. In his affidavit, the defendant mortgagor alleges that he did not answer the complaint because he was initially unable to afford an attorney to represent him. He also alleges that he was engaged in negotiations with the plaintiff at the time of service and that he had "received assurances" that a decision would be made with respect to a possible loan modification. The defendant mortgagor contends that his communications with the plaintiff should have extended his time to answer. In the proposed answer, the defendant mortgagor alleges, among other things, lack of standing; failure of the plaintiff to engage in a good-faith effort at loss mitigation; and a predatory loan.

In opposition to the defendant mortgagor's motion, the plaintiff contends that the defendant mortgagor has neither a reasonable excuse for his default in answering nor a valid defense to this foreclosure action. The plaintiff also contends that since a notice of appearance was interposed by his counsel prior to this motion, the defendant mortgagor thereby waived any potential defenses such as standing which could only have been raised by an answer or by motion.

A plaintiff in a mortgage foreclosure action establishes a prima facie case, as a matter of law, by submission of the mortgage, the mortgage note, bond or obligation, and evidence of default (*see, Valley Nat'l Bank v Deutsche*, 88 AD3d 691 [2d Dept 2011]; *Wells Fargo Bank v Karla*, 71 AD3d 1006 [2d Dept 2010]; *Wash. Mut. Bank FA v O'Connor*, 63 AD3d 832 [2d Dept 2009]). The burden then shifts to the defendant to demonstrate "the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (*Capstone Bus. Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882, 883 [2d Dept 2010]). In the instant case, the plaintiff produced the executed note and mortgage, evidence of nonpayment, and the notice of default. The plaintiff also submitted, inter alia, an affidavit from an officer of the plaintiff whereby it is alleged that the plaintiff is still the holder of the note and mortgage, as well the assignment which predates the commencement of this action (*see, U.S. Bank, N.A. v Collymore*, 68 AD3d 752 [2d Dept 2009]). As the plaintiff demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the defendant mortgagor (*see, HSBC Bank USA v Merrill*, 37 AD3d 899 [3d Dept 2007]). Accordingly, it was incumbent upon the defendant mortgagor to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action (*see, Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079 [2d Dept 2010]; *Aames Funding Corp. v Houston*, 44 AD3d 692 [2d Dept 2007]).

Turning to the issues raised by the defendant mortgagor's motion, it is well settled that a "defendant who seeks to successfully oppose a motion for leave to enter a default judgment based on the failure to timely serve an answer and seeks leave to extend the time to appear or to compel acceptance of an untimely answer must provide a reasonable excuse for the default and for the delay and show a potentially meritorious defense" (*Deutsche Bank Nat'l. Trust Co. v Rudman*, 80 AD3d 651, 652 [2d Dept 2011]; *see also, May v Hartsdale Manor Owners Corp.*, 73 AD3d 713 [2d Dept 2010]; *Sbarra v Sievernich*, 2011 NY Slip Op 32064U [Sup Ct, Suffolk County, July 13, 2011, Cohalan, J.]). The determination of what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court (*see, Star Indus. Inc. v Innovative Beverages, Inc.*, 55 AD3d 903 [2d Dept 2008]). Vague, nonspecific and uncorroborated factual assertions, upon which a claim of a reasonable excuse for a default are predicated, are generally insufficient to satisfy the reasonable excuse requirements (*see, Wells Fargo Bank v Linzenberg*, 50 AD3d 674 [2d Dept 2008]; *Canty v Gregory*, 37 AD3d 508 [2d Dept 2007]).

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, Performance Constr. Corp. v Huntington Bldg., LLC*, 68 AD3d 737 [2d Dept 2009]), the movant must demonstrate a good faith belief in settlement that is supported by substantial evidence (*see, Armstrong Trading Ltd. v MBM Enters.* 29 AD3d 835 [2d Dept 2006]), and a justifiable reliance thereon (*see, Am. Shoring, Inc. v D.C.A Constr., Ltd.*, 15 AD3d 431 [2d Dept 2005]; *cf., Scarlett v McCarthy*, 2 AD3d 623 [2d Dept 2003]). Concerning foreclosure actions, claims that the mortgagor contacted the lender in an attempt to secure a loan modification agreement are, without more, insufficient to establish a good faith belief in settlement and the concomitant reasonable excuse for the mortgagor's failure to answer the summons and complaint (*see, OneWest Bank FSB v Berry*, 25 Misc3d 1218A [Sup Ct, Suffolk County, Oct. 23, 2009,

Whelan, J.J). Further, confusion or ignorance about legal procedures have been likewise held not to constitute reasonable excuses for the failure to answer or otherwise appear (*see, US Bank v Nat'l Assn. v Slavinski*, 78 AD3d 1167 [2d Dept 2010]; *Bank of NY v Jayaswal*, 33 Misc3d 1214A [Sup Ct, Suffolk County, Oct. 17, 2011, Whelan, J.]).

Under the circumstances presented here, the Court finds that the conclusory allegations of settlement negotiations do not constitute a reasonable excuse for defendant mortgagor's lengthy default (*see, Bank of N.Y. Mellon v Izmirligil*, 88 AD3d 930 [2d Dept 2011]; *Swedbank, AB, N.Y. Branch v Hale Ave. Borrower, LLC*, 89 AD3d 922 [2d Dept 2011]; *U.S. Bank, N.A. v Buettner-Howes*, 2010 NY Slip Op 31151U [Sup Ct, Greene County, May 14, 2010, Teresi, J.]; *cf., Emigrant Mtge. Co. v Abbey*, 2011 NY Slip Op 30600U [Sup Ct, Queens County, Mar. 14, 2011, McDonald, J.]). The defendant mortgagor has attempted to partially place the blame for its default in answering upon the plaintiff, however, he was already in default for approximately two months by the time this case was assigned to the Specialized Mortgage Foreclosure Conference Part (*see, Wells Fargo Bank, N.A. v Cervini*, 84 AD3d 789 [2d Dept 2011]; *Bethune v Prioleau*, 82 AD3d 810 [2d Dept 2011]; *May v Hartsdale Manor Owners Corp.*, 73 AD3d 713, *supra*). In this case, the defendant mortgagor's proffered excuses for not interposing a timely answer have been judicially determined to be unreasonable (*see, People by Abrams v Scudds*, 195 AD2d 778 [3d Dept 1993]; *Awad v Severino*, 122 AD2d 242 [2d Dept 1986]; *Long Is. Minimally Invasive Surgery, P.C. v Lester*, 12 Misc3d 1183A [App. Term, 1st Dept, 2006]; *HSBC Bank USA, N.A. v Fuller*, 2011 NY Slip Op 30749U [Sup Ct, Albany County, Mar. 31, 2011, Teresi, J.]). Specifically, the defendant mortgagor's unsubstantiated, self-serving claims that the plaintiff made "false promises" which "lulled [him] into a state of well-being" which made him believe that he would not have to answer the complaint, are insufficient to establish a reasonable excuse for the default (*see, Bank of NY v Jayaswal*, 33 Misc3d 1214A, *supra*). Moreover, the conclusory assertions contained in plaintiff's counsel's affirmation that discovery is needed are insufficient to defeat the plaintiff's motion (*see, JP Morgan Chase Bank, N.A. v Agnello*, 62 AD3d 662 [2d Dept 2009]; *HSBC Bank USA, N.A. v Fuller*, 2011 NY Slip Op 30749U, *supra*). Accordingly, the defendant mortgagor has failed to establish that he should be excused from timely filing an answer.

Since the defendant mortgagor failed to offer a reasonable excuse, it is unnecessary to consider whether he demonstrated the existence of a potentially meritorious defense (*see, Deutsche Bank Nat'l. Trust Co. v Rudman*, 80 AD3d 651, *supra*; *HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566 [2d Dept 2011]; *Bank of Am., N.A. v Gowrie*, 2011 NY Slip Op 30658U [Sup Ct, Queens County, Feb. 25, 2011, Agate, J.]). In any event, the defendant mortgagor failed to demonstrate possession of any meritorious defense (*see, Levy v Prime East 15th, LLC*, 89 AD3d 1066 [2d Dept 2011]; *Valley Nat'l Bank v Deutsche*, 88 AD3d 691 [2d Dept 2011]; *Argent Mtge. Co., LLC v Mentasana*, 79 AD3d 1079, *supra*; *JP Morgan Chase Bank, N.A. v Leschins*, 2011 NY Slip Op 32861U [Sup Ct, New York County, Oct. 18, 2011, Madden, J.]; *U.S. Bank Nat'l Assn. v Slavinski*, 78 AD3d 1167 [2d Dept 2010]; *Bank of NY v Jayaswal*, 33 Misc3d 1214A, *supra*; *10 Connor Lane v C. Connor Lane Assoc., LLC*, 2011 NY Slip Op 31439U [Sup Ct, Suffolk County, May 10, 2011, Martin, J.]).

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Based upon the foregoing, the motion for leave to enter a default judgment against all the defendants, none of which has answered, and for an order of reference is granted (*see*, RPAPL § 1321; *HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, *supra*). Correspondingly, the motion by the defendant mortgagor for an order extending his time to appear and answer and compelling the plaintiff to accept his answer is denied (*see, id.*).

The branch of the instant motion wherein the plaintiff seeks an order amending the caption by excising the fictitious named defendants, John Does and Jane Does, is granted pursuant to CPLR 1024. By its submissions, the plaintiff established the basis for this relief (*see, Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer*, 67 AD3d 872 [2d Dept 2009]). All future proceedings shall be captioned as indicated above.

Accordingly, the plaintiff's motion for an order of reference is granted and the defendant mortgagor's motion for an order extending his time to answer is denied. The proposed order appointing a referee to compute, as modified by the Court, has been signed simultaneously herewith.

Dated: 3-19-12



Hon. DENISE F. MOLIA, J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION