SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------x

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION,

Plaintiff,

-against-

MICHAEL RUSSO; JPMORGAN CHASE BANK, NATIONAL ASSOCIATION SUCCESSOR IN INTEREST TO WASHINGTON MUTUAL BANK F/K/A WASHINGTON MUTUAL BANK, FA, 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,

Defendant.

----------x

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 8
Index No.: 14313/09
Motion Seq. No.: 01

DECISION AND ORDER

Papers Read on this Motion:

Defendant Michael Russo's Order to Show Cause	01
Plaintiff's Legal Memorandum	xx
Plaintiff's Affirmation	xx

Defendant Michael Russo moves to vacate the order of reference and judgment of default entered April 14, 2010 pursuant to CPLR §317, CPLR §2005 and CPLR §5015(a)(2), (3) and (4).

BACKGROUND

On April 20, 2010 an order of reference was granted and a default judgment was entered against defendant mortgagor Michael Russo. Nineteen months after the default was entered, and fourteen months after he claims to have learned of the default in September 2010, defendant seeks to vacate the order of reference pursuant to CPLR §317, CPLR §2005 and CPLR §5015(a)(2), (3) and (4); file an answer with counterclaims; obtain discovery; and amend the caption.

Defendant asserts that, based on a belief that a foreclosure action may have been commenced against him, he retained counsel in April 2009 to defend against the action and attempt to obtain a

mortgage modification. He learned, however, in September of 2010 that his attorney never interposed an answer and failed to appear at a scheduled residential foreclosure conference on December 2, 2009. Defendant contends that he is entitled to vacate the default judgment against him, file an answer, conduct discovery and amend the caption to add the Federal National Mortgage Association (Fannie Mae) as a party based on the grounds of a reasonable excuse for his default (law office failure) and a meritorious defense. In his defense, defendant claims that plaintiff fraudulently alleged ownership of the subject mortgage and promissory note which were, in fact, originated by Washington Mutual Bank, FA (WAMU). In reliance on *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204, 207 [2d Dept 2009], defendant maintains that plaintiff Chase had neither a legal or equitable interest in his mortgage and lacked standing to commence a foreclosure action against him.

ANALYSIS

Entitlement to a judgment of foreclosure may be established as a matter of law, where a mortgagee produces both the mortgage and unpaid note, together with evidence of the mortgagor's default, thereby shifting the burden to the mortgagor to demonstrate through evidence any defense which could raise a question of fact. *U.S. Bank, Nat. Ass'n v Sharif*, 89 AD3d 723 [2d Dept 2011] (citations and quotation marks omitted). However, foreclosure of a mortgage may not be brought by one who has no title to it. *Kluge v Fugazy*, 145 AD2d 537, 538 [2d Dept 1998]. Where standing is raised as a defense by the defendant, the plaintiff is required to prove its standing before the question of entitlement to foreclosure is decided. *U.S. Bank, N.A. v Collymore*, 68 Ad3d 752, 753 [2d Dept 2009].

In order to commence a foreclosure action, the plaintiff must have a legal or equitable interest in the mortgage. *Aurora Loan Services, LLC v Weisblum*, 85 AD3d 95 [2d Dept 2011]. As long as the plaintiff can establish its lawful status as assignee, either by written assignment or physical delivery, prior to the filing of the complaint, the recording of a written assignment after the commencement of

the action will not defeat standing. *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 108 [2d Dept 2011].

A plaintiff establishes standing in a mortgage foreclosure action by demonstrating that it is both the holder or assignee of the subject mortgage and underlying note either by physical delivery or written assignment prior to commencement of the action. *Citimortgage, Inc. v Stosel*, 89 AD3d 887, 888 [2d Dept 2011] (citation and quotation marks omitted). Either a written assignment of the underlying note or the physical delivery of the note prior to commencement of the foreclosure action is sufficient to transfer the obligation and the mortgage passes with the debt as an inseparable incident. *GRP Loan, LLC v Taylor*, 95 AD3d 1172, 1173 [2d Dept 2012].

Under the September 25, 2008 Purchase and Assumption Agreement between plaintiff and the FDIC, plaintiff acquired all of WAMU's loans and commitments from WAMU and its various entities. As a result, plaintiff Chase acquired the servicing rights to defendant's loan. There is no requirement that the FDIC as receiver, endorse or assign the note and mortgage to plaintiff as defendant erroneously asserts. *JP Morgan Chase Bank N.A. v Miodownik*, 92 AD3d 546, 547 [1st Dept 2012]. Defendant offers no evidence to rebut this fact.

Inasmuch as plaintiff did not commence this foreclosure action based on "constructive possession" of the mortgage and note, but rather based on the physical possession of the note and mortgage, defendant's arguments in this regard, based on an erroneous assumption, are unavailing. Defendant offers no viable rebuttal to the fact that the Fannie Mae guidelines provide for the transfer of the note and mortgage to the servicer and provide that a foreclosure action be commenced in the servicer's name against a defaulting borrower.

Pursuant to CPLR §317 "a person served with a summons other than by personal delivery to him [or her] or to his [or her] agent for service designated under Rule 318, . . . may be allowed to

defend the action," by seeking to vacate a default judgment within one year of learning of the judgment upon demonstrating a potentially meritorious defense. *Matter of Rockland Bakery, Inc. v B.M. Baking Co., Inc.*, 83 AD3d 1080, 1081 [2d Dept 2011]. In support of such a request, a party must demonstrate, and the court must find, that the party did not receive actual notice of the summons and complaint in time to defend the action. *Wassertheil v Elburg, LLC*, 94 AD3d 753, 754 [2d Dept 2010] (citations and quotation marks omitted).

By defendant's own admission, he became aware of the default judgment and order of reference in September 2010 but did not file the instant application until November 2011, more than one year later. The mere denial of receipt of the summons and complaint is insufficient to establish a lack of actual notice for the purpose of CPLR §317. *Wassertheil v Elburg, LLC*, *supra* at p. 754.

The affidavit of the process server constitutes *prima facie* evidence as to the method of service and, therefore, gives rise to a presumption of proper service. *Washington Mut. Bank v Holt*, 71 AD3d 670 [2d Dept 2010]. Defendant's unsubstantiated denial of service is insufficient to rebut the presumption of proper service. *Mortgage Elec. Registration Sys., Inc. v Schotter*, 50 AD3d 983 [2d Dept 2008]. Defendant has failed to submit a sworn denial of service or specific facts to rebut the process server's affidavit. The bare unsubstantiated allegation that defendant was not served with the summons and complaint is insufficient to rebut the presumption of proper service of the complaint in a mortgage foreclosure action. *Beneficial Homeowner Serv Corp. v Girault,* 60 AD3d 984 [2d Dept 2009].

CPLR §5015(a)(3) provides that a court may vacate a judgment on the grounds of "fraud, misrepresentation or other misconduct of an adverse party." The movant must articulate a fraud not in the inducement of the documents, which form the basis for the complaint, but in the procurement of the judgment. *Tribeca Lending Corp. v Crawford*, 79 AD3d 1018, 1020 [2d Dept 2010], *lv to appeal*

dismissed 16 NY3d 783 [2010]. No viable allegations of either extrinsic or intrinsic fraud have been proffered by defendant.

Defendant has failed to offer any evidence that the underlying mortgage and note are invalid, that there was no default in payment, or that he has any viable defense to foreclosure. As such, he has failed to present a potentially meritorious defense sufficient to satisfy the requirements of CPLR §317 or CPLR §2005.[1] *Zarzuela v Castanos*, 71 AD3d 880 2d Dept 2010.

Having failed to demonstrate any "newly discovered" evidence, fraud, misrepresentation or other misconduct of the adverse party; and having failed to adequately rebut the presumption of proper service, defendant cannot obtain relief under CPLR §317, CPLR §5015(a)(2), (3), or (4). As such, it is hereby

ORDERED, that the defendants' application to vacate the order of reference and default judgments is ***denied*** in its entirety.

This constitutes the Decision and Order of the Court.

DATED: July 2, 2012
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.
X X X

F:\DECISION - DEFAULT JUDGMENT\JPMorgan Chase v Russo CAK.wpd

[1]CPLR 2005 provides as follows:
"Upon an application satisfying the requirements of subdivision (d) of section 3012 or subdivision (a) of rule 5015, the court shall not, as a matter of law, be precluded from exercising its discretion in the interests of justice to excuse delay or default resulting from law office failure."