

HSBC Mtge. Servs. Inc. v Campos

2013 NY Slip Op 30853(U)

February 22, 2013

Supreme Court, Queens County

Docket Number: 21718/10

Judge: Augustus C. Agate

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MEMORANDUM

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

-----x
HSBC MORTGAGE SERVICES INC.,

Plaintiff,

-against-

EMMA CAMPOS; ET AL.,

Defendant.
-----x

Index No: 21718/10

Motion

Dated: December 11, 2012

M# 1

This motion by the plaintiff for an order appointing a Referee to compute and amending the caption and cross motion by the defendant to dismiss the action, or in the alternative to vacate the defendant's default is decided as follows:

This is an action by plaintiff to foreclose on a mortgage on real property located at 88-30 196th Street, Hollis, New York. Plaintiff contends that it is the holder of the subject mortgage and note pursuant to an assignment. Plaintiff alleges that defendant defaulted in making payments on the subject mortgage beginning in January 2010. As a result of the default, plaintiff elected to accelerate the loan. Plaintiff subsequently commenced this foreclosure action, and now seeks, *inter alia*, the appointment of a Referee to compute. Defendant cross moves to dismiss the action on the ground that the court lacks personal jurisdiction over her and on the ground of lack of standing. In the alternative, defendant seeks to vacate her

default in Answering and interpose a late Answer.

The burden of proving that personal jurisdiction has been acquired over a defendant in an action rests with the plaintiff. (see *Anderson v GHI Auto Serv., Inc.*, 45 AD3d 512, 512-513 [2d Dept 2007]; *Kearney v Neurosurgeons of N.Y.*, 31 AD3d 390, 391 [2d Dept 2006]; *Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d 343, 343 [2003].) Ordinarily, a process server's affidavit of service establishes a prima facie case as to the method of service and, therefore, gives rise to a presumption of proper service. (see *Wells Fargo Bank, N.A. v Chaplin*, 65 AD3d 588, 589 [2d Dept 2009]; *Household Fin. Realty Corp. of N.Y. v Brown*, 13 AD3d 340, 340 [2d Dept 2004]; *Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d at 344.) An unsubstantiated denial of receipt of a summons and complaint by a defendant is insufficient to rebut the presumption of proper service. (*U.S. Natl. Bank Assn. v Melton*, 90 AD3d 742, 743 [2d Dept 2011]; *Thas v Dayrich Trading, Inc.*, 78 AD3d 1163, 1164 [2d Dept 2010].)

In the case at bar, the annexed affidavit of service alleges service upon the defendant at 88-30 196th Street, Hollis, New York on August 31, 2010 through delivery of the summons and complaint to Miguel Campos, her son. (CPLR 308[2].) The affidavit of service describes Miguel Campos as 16-19 years old, 5'7"-5'11" and 150-180 pounds. The affidavit of service further alleges that the summons and complaint were mailed to the defendant on September 3, 2010. Defendant denies that she was ever served

with the summons and complaint and avers that she does not know anyone named Miguel Campos. She states that she has a son named Paul Alva, who is 20 years old who is 5'5" or 5'6" and weighs 140 pounds. Such minor discrepancies in appearance are insufficient to rebut the presumption of proper service and require a traverse hearing. (*Green Point Savings Bank v Clark*, 253 AD2d 514, 515 [2d Dept 1998].)

In addition, the fact that defendant's son was identified by the wrong name on the affidavit of service is also insufficient to raise a factual issue warranting a hearing. (see *Elec. Ins. Co. v Grajower*, 256 AD2d 833, 836 [3rd Dept 1998].) Indeed, defendant does not deny she has a son in the same age range. Further, defendant fails to submit an affidavit from her son denying that he was ever served with a summons and complaint. A careful reading of the defendant's affidavit reveals that she does not even specifically deny that her son was served with the summons and complaint. Thus, defendant fails to rebut the presumption of proper service herein.

A party seeking to vacate a default judgment on the ground of excusable default must establish a reasonable excuse for the default and a potentially meritorious defense to the action. (CPLR 5015[a][1]; *Wauchope v Williams*, 71 AD3d 876, 877 [2d Dept 2010]; *Velasquez v Gallelli*, 44 AD3d 934, 935 [2d Dept 2007]; *Greene v Mullen*, 39 AD3d 469, 469 [2d Dept 2007].)

To the extent defendant argues that she has a reasonable

excuse for the default on the ground she did not receive timely notice of the action, such excuse must be rejected since, as noted above, she has offered nothing to rebut the contents of the affidavit of service. (see *Reich v Redley*, 96 AD3d 1038, 1039 [2d Dept 2012]; *Pezolano v Incorporated City of Glen Cove*, 71 AD3d 970, 971 [2d Dept 2010].)

The defendant also failed to raise a meritorious defense to the action. The argument that the plaintiff does not have standing to bring this action was waived, as the defendant failed to timely interpose an answer or move by pre-answer motion asserting the defense of lack of standing. (CPLR 3211[e]; see *Citimortgage, Inc. v Rosenthal*, 88 AD3d 759, 761 [2d Dept 2011]; *Deutsche Bank Natl. Trust Co. v Hussain*, 78 AD3d 989, 990 [2d Dept 2010]; *HSBC Bank, USA v Dammond*, 59 AD3d 679, 680 [2d Dept 2009].)

Accordingly, this motion by the plaintiff for an order appointing a Referee to compute and amending the caption is granted.

The cross motion by defendant is denied in its entirety.

Settle Order.

Dated: February 22, 2013

AUGUSTUS C. AGATE, J.S.C.

