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SHORT FORM ORDER

INDEX No. 10-27231

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 6/18/12 (#003)
MOTION DATE 9/11/12 (#004)
ADJ. DATE 11-24-12
Mot. Seq. # 003 - MD
004 - MotD

TRAVERSE HEARING SCHEDULED FOR MAY 24, 2013 @ 9:30 AM

SUMMITBRIDGE CREDIT INVESTMENTS, LLC,

Plaintiff,

- against -

FT, LLC, WILLIAM TIMOTHY WALLACE, FATHIA ZOUIYEN, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, and 'JOHN DOE", "JANE DOE", and "DOE ASSOCIATES" and "DOE CORP.", the names being fictitious and being intended to refer to any ad all adult natural persons and to all partnerships, corporations and other legal entities having, or which may claim to have, any lien against or interest in the mortgaged premises described in the complaint in this action, other than persons or entities already defendants herein,

Defendants.

BUCHANAN INGERSOLL & ROONEY, P.C.
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Key Center at Fountain Plaza, Ste. 1230
Buffalo, New York 14202

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Attorney for Defendants FT, LLC, Wallace & Zouiyen
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants, dated August 12, 2012, and supporting papers; (2) Affirmation in Opposition by the plaintiff, dated September 10, 2012, and supporting papers; (3) Reply Affirmation by the defendants, dated September 17, 2012, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that motion sequence #003 and motion sequence #004 are combined herein for the purpose of this determination; and it is further

ORDERED that the motion #003 by plaintiff for the entry of a judgment of foreclosure and sale and, in effect, a confirmation of the report of the referee to compute is considered under RPAPL 1321 and is denied; and it is further

ORDERED that the branches of motion #004 by defendants William Timothy Wallace and Fathia Zouiyen to dismiss the complaint pursuant to CPLR 3211(a)(8) or to vacate the order of reference dated March 9, 2012 pursuant to CPLR 5015(a)(1) and (a)(4) for lack of personal jurisdiction will be set down for a hearing; and it is further

ORDERED that if it is determined during the hearing that jurisdiction has been obtained, the branches of the motion #004 to vacate the order of reference pursuant to CPLR 5015(3), or to dismiss the complaint for plaintiff's failure to comply with service of the RPAPL 1303 notice on Wallace and Zouiyen will be determined at the hearing; and it is further

ORDERED that the branch of the motion to dismiss the complaint or vacate the order of reference pursuant to CPLR 3211(a)(8) and CPLR 5015(a)(4) as to defendant FT, LLC is denied; and it is further

ORDERED that the branch of motion #004 to dismiss the complaint pursuant to CPLR 3215(c) for failure to timely seek a default is denied; and it is further

ORDERED that the branch of motion #004 to dismiss the complaint pursuant to RPAPL 1304 for failure to comply with this condition precedent to commencement of the instant foreclosure action is denied; and it is further

ORDERED that the branch of motion #004 to dismiss the action on the ground that there was no default in making payments, is denied; and it is further

ORDERED that the branch of motion #004 for leave to file and serve a late verified answer in the form annexed to the motion, pursuant to CPLR 2004 and 3012(d) is held in abeyance pending the outcome of the aforementioned hearing.

The instant action was commenced on July 23, 2010 seeking to foreclose on a mortgage executed by defendant FT, LLC by its members, defendants William Timothy Wallace and Fathia Zouiyen (hereinafter the "Mortgagor Defendants" when referred to collectively), securing a note in favor of Bank of America, N.A. ("BOA") in the principal amount of $748,500. When the Mortgagor Defendants failed to answer the complaint or appear in the action, BOA moved for an order of reference (RPAPL 1321[1]) on November 8, 2010 and again on December 19, 2011, as the first motion was denied. The undersigned issued an order of reference, dated March 9, 2012, fixing the default of the Mortgagor Defendants and the caption was amended to substitute the assignee, Summitbridge Credit Investments, LLC, as the plaintiff in place of BOA. The referee has submitted a report as to the amounts due and has

determined that the property should be sold as one parcel. The plaintiff now seeks entry of a judgment of foreclosure and sale, which necessarily requires confirmation of the referee's report. The Mortgagor Defendants seek dismissal of the complaint, and, in the alternative, to vacate the order of reference and for leave to file a late answer.

In its complaint, the plaintiff refers to the mortgaged property upon which it seeks to foreclose as "65 South Main Street, Southampton, New York 11968." However, the Consolidation, Extension and Modification Agreement ("CEMA") dated March 17, 2003 submitted in support of its application refers to the property located at "57 South Main Street, Southampton, New York 11968." The referee's report refers to the property as described in the complaint and annexed thereto is, among other documents, the CEMA. Based on the discrepancies in the complaint and the referee's report, the plaintiff has failed to establish its entitlement to entry of a judgment of foreclosure and sale or confirmation of the referee's report. Therefore, plaintiff's motion is denied.

Turning to the branch of the Mortgagor Defendants' motion for dismissal of the action based on lack of personal jurisdiction pursuant to CPLR 3211(a)(8), they assert that they were never served with the summons and complaint. In support of their assertions, the Mortgagor Defendants point out that the process server's affidavits indicate that pursuant to substituted service, they each were served on August 14, 2010 at their New York City address by leaving a copy of the summons and complaint with Sherry Blevins, a co-tenant, and thereafter on August 17, 2010 by mailing the papers to each of them at the same address. The Mortgagor Defendants assert that Sherry Blevins is a security guard, not a co-tenant, and that the security guard never gave them the papers. Additionally, since the process server did not indicate in his affidavit of service that the security guard denied him access to their apartment, the Mortgagor Defendants maintain that they are entitled to a traverse hearing. Further, the Mortgagor Defendants contend that they did not receive the papers which were purportedly served upon FT, LLC by delivery to the Secretary of State. The Mortgagor Defendants assert that they do not have a "registered agent" on file with the Secretary of State, and that any service of process effectuated upon the Secretary of State was to be mailed to Fathia Zouiyen at 65 South Main Street in Southampton, New York.

In response, the plaintiff's counsel does not dispute that Sherry Blevins was the security guard in the building where the Mortgagor Defendants reside. Instead, counsel asserts that Sherry Blevins refused to allow the process server entry to the building, resulting in the security guard accepting service. Plaintiff's counsel maintains that since the security guard Sherry Blevins was an individual of suitable age and discretion, the Mortgagor Defendants were properly served. Additionally, counsel argues, there is no proof that the service upon the Secretary of State was not properly accomplished.

The process server's affidavit neither indicates that Sherry Blevins was a security guard, nor that the process server was barred from proceeding to the Mortgagor Defendants' apartment by the security guard. Indeed, the process server's affidavit does not set forth that permission was requested to enter the building. Rather, the affidavit gives the impression that the process server entered the building and proceeded to the Mortgagor Defendants' apartment whereat the papers were served upon a co-tenant. Under these circumstances, it cannot be found that the Mortgagor Defendants were properly served pursuant to CPLR 308(2) (*see e.g.* ***Soils Eng'g Svcs., Inc. v Donald***, 258 AD2d 425, 685 NYS2d 723 [1st Dept 723 [1st Dept 1999]; ***McCormack v Goldstein***, 202 AD2d 121, 611 NYS2d 185 [1st Dept

1994], *lv denied* 85 NY2d 801, 624 NYS2d 371 [1995]). In light of William Timothy Wallace's ("Wallace") and Fathia Zouiyen's ("Zouiyen") denial of receipt of the summons and complaint served pursuant to CPLR 308(2) and the submission of sworn statements which raise bona fide concerns involving the veracity of the process server, a hearing is required to determine, whether these defendants were properly served and personal jurisdiction obtained (*see* ***US Bank v Arias***, 85 AD3d 1014, 927 NYS2d 362 [2d Dept 2011]; ***Washington Mut. Bank v Holt***, 71 AD3d 670, 897 NYS2d 148 [2d Dept 2010]). It is also noted that while Wallace and Zouiyen may have acquired actual notice of the lawsuit, "[a]ctual notice alone will not sustain the service or subject a person to the court's jurisdiction when there has not been compliance with prescribed conditions of service" (***Markoff v South Nassau Community Hosp.***, 61 NY2d 283, 288, 473 NYS2d 766 [1984]; *see* ***Feinstein v Bergner***, 48 NY2d 234, 422 NYS2d 356 [1979]; ***Saxon Mtge Servs., Inc. v Bell***, 63 AD3d 1029, 880 NYS2d 573 [2d Dept 2009]).

Nevertheless, the court finds that FT, LLC was properly served on August 12, 2010, pursuant to Limited Liability Company Law ("LLCL") § 303 and CPLR 311-a (a), by service upon the Secretary of State. The Mortgagor Defendants admit that they formed FT, LLC for the purpose of purchasing real property. LLCL § 302 requires a limited liability company to designate the secretary of state as an agent upon which process may be served, and LLCL § 303 provides for service upon the secretary of state by personal delivery or upon the authorized agent designated by the secretary of state. Upon service, LLCL § 303 directs the secretary of state to promptly send copies by certified mail, return receipt requested, to the limited liability company at the address on file with the department of state. As the Mortgagor Defendants do not contend that the address on file with the department of state was incorrect, their mere denial of receipt of the summons and complaint is insufficient to rebut the presumption of proper service created by service upon the Secretary of State (***Wassertheil v Elburg, LLC***, 94 AD3d 753, 941 NYS2d 679 [2d Dept 2012]; ***Thas v Dayrich Trading, Inc.***, 78 AD3d 1163, 913 NYS2d 269 [2d Dept 2010]). Therefore, service upon FT, LLC was deemed completed upon delivery of the summons and complaint to the Secretary of State (*see* ***Paez v 1610 Saint Nicholas Avenue L.P.***, 103 AD3d 553, ___NYS2d___ [1st Dept 2013]). Thus, FT, LLC is not entitled to dismissal of the complaint pursuant to CPLR 3211(a)(8), therefore that branch of the motion is denied.

Also denied is the branch of the Mortgagor Defendants' motion to dismiss the complaint pursuant to CPLR 3215(c) as abandoned for failure to obtain a judgment within one year of their default. In November 2010, the plaintiff took the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference (*see* RPAPL 1321[1]). Thus, although the order of reference was not granted until March 2012, the plaintiff did not abandon the action (*see* ***Klein v St. Cyprian Props. Inc.***, 100 AD3d 711, 954 NYS2d 170 [2d Dept 2012]; ***Home Sav. of Am., F.A. v Gkanios***, 230 AD2d 770, 646 NYS2d 530 [2d Dept 1996]).

If, during the hearing, it is determined that Wallace and Zouiyen were properly served, the hearing will then proceed to determine whether either the action should be dismissed for failure to serve the requisite foreclosure notices, or whether the order of reference obtained on default should be vacated based on "fraud, misrepresentation, or other misconduct of an adverse party" pursuant to CPLR 5015(a)(3). The Mortgagor Defendants seek dismissal of the action based on the plaintiff's undisputed failure to serve Wallace and Zouiyen with the foreclosure notices set forth in RPAPL 1303 and 1304,

and because no settlement conference was held as required under CPLR 3408. The plaintiff maintains that the notices required under RPAPL 1303 and 1304 and the settlement conference mandated by CPLR 3408 are inapplicable as the property being foreclosed is a vacation home, not their primary residence.

It has been held that "the notice requirements of RPAPL 1303 and 1304 are conditions precedent to suit, with the foreclosing party bearing the burden of showing compliance therewith" (***Pritchard v Curtis***, 101 AD3d 1502, 1504, 957 NYS2d 440 [3d Dept 2012], citing *see* ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 102-108, 923 NYS2d 609 [2d Dept 2011] and ***First Natl. Bank of Chicago v Silver***, 73 AD3d 162, 165-169, 899 NYS2d 256 [2d Dept 2010]). Failure to comply with these notice requirements need not be raised by the defendant as an affirmative defense in its answer, but can be raised at any time (***Aurora Loan Servs., LLC v Weisblum***, *supra; **First Natl. Bank of Chicago v Silver***, *supra*). Failure to properly deliver these foreclosure notices at the time of service of the summons and complaint requires dismissal of the action (***Aurora Loan Servs., LLC v Weisblum***, *supra*; ***First Natl. Bank of Chicago v Silver***, *supra*).

RPAPL 1304(3) explicitly provides that the 90-day notice specified in "subdivision one of this section shall not apply, or shall cease to apply...if the borrower no longer occupies the residence as the borrower's principal dwelling." Thus, as it is admitted that the Southampton property is a vacation home, Wallace and Zouiyen were not entitled to the RPAPL 1304 notice. On the other hand, section 1303 provides that "[t]he foreclosing party in a mortgage foreclosure action, involving residential real property shall provide notice to: (a) any mortgagor if the action relates to an owner-occupied one-to-four family dwelling (RPAPL 1303[1][a]). Therefore, if the mortgage being foreclosed pertains to their vacation home, the plaintiff was required to deliver the RPAPL 1303 notice to Wallace and Zouiyen at the time of service of the summons and complaint (*see* RPAPL 1303[2]). However, as set forth above, the complaint alleges that the property sought to be foreclosed is different from the property set forth in the CEMA and the other supporting papers submitted. Therefore, as it cannot be determined on the papers submitted whether Wallace and Zouiyen were entitled to the RPAPL 1303 notice, the matter will be addressed during the hearing.

The court will now address the branch of Mortgagor Defendants' motion to vacate the order of reference obtained on default. Their arguments for such relief are predicated on CPLR 5015(a)(1), excusable default and a meritorious defense, CPLR 5015(a)(3), "fraud, misrepresentation, or other misconduct of an adverse party," and although not succinctly set forth in the notice of motion, CPLR 5015(a)(4), lack of jurisdiction.

It is well settled that to be entitled to vacatur of the order of reference under CPLR 5015(a)(1), the moving defendant is required to set forth a justifiable excuse for the default and a meritorious defense (*see* ***Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.***, 67 NY2d 138, 501 NYS2d 8 [1986]; ***Sussman v Jo-Sta Realty Corp.***, 99 AD3d 787, 951 NYS2d 683 [2d Dept 2012]; ***Development Strategies Co., LLC v Astoria Equities, Inc.***, 71 AD3d 628, 896 NYS2d 396 [2d Dept 2010]; ***Shaw v Shaw***, 97 AD2d 403, 467 NYS2d 231 [2d Dept 1983]). Where a motion to vacate is coupled with a request to serve a late answer, in addition to a potentially meritorious defense, the motion papers must include a proposed answer (*see* CPLR 3012[d]; ***Baldwin v Mateogarcia***, 57 AD3d 594, 869 NYS2d 217 [2d Dept 2008]; ***Bekker v Fleischman***, 35 AD3d 334, 825 NYS2d 270 [2d Dept 2006]).

To support of their argument for vacatur under CPLR 5015(a)(1), the Mortgage Defendants deny that they were served, and offer as a meritorious defense that they were not in default under an alleged oral modification of the loan terms. A failure to be properly serve with process falls under CPLR 5015(a)(4), lack of jurisdiction. As set forth above, a hearing is required to determine whether personal jurisdiction has been obtained over Wallace and Zouiyen. However, as FT, LLC was properly served, vacatur under CPLR 5015(a)(4) is not warranted as to it.

Moreover, the purportedly meritorious defense under CPLR 5015(1), which in essence alleges that payments were made pursuant to the terms of a modified agreement, and thus, no default in payment occurred, is unavailing. The statute of frauds bars an oral modification of a contract, including a mortgage, which as herein, expressly provides that modifications must be in writing, the integrity of which is protected by the General Obligations Law (*see* GOL §§ 5-703[4], 15-301; ***Carlin v Jemal***, 68AD3d 655, 891 NYS2d 391 [1st Dept 2009]; ***North Bright Capital, LLC v 705 Flatbush Realty, LLC***, 66 AD3d 977, 889 NYS2d 596 [2d Dept 2008]; ***B. Reitman Blacktop, Inc. v Missirlian***,52 AD3d 752, 860 NYS2d 211 [2d Dept 2008]). Nonetheless, an oral modification of a mortgage will be enforced where there is partial performance that is unequivocally referable to the modification (*see* ***Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group***, 93 NY2d 229, 689 NYS2d 674 [1999]; ***Chemical Bank v Sepler***, 60 NY2d 289, 469 NYS2d 609 [1983]; ***Martini v Rogers***, 6 AD3d 404, 774 NYS2d 378 [2d Dept 2004]). Unsubstantiated, vague and conclusory allegations of the existence and terms of any such oral modification are, however, insufficient, as detailed factual allegations are required to establish a modification (*see* ***Money Store of N.Y., Inc. v Kuprianchik***, 240 AD2d 398, 658 NYS2d 1019 [2d Dept 1997]; ***Bank of Smithtown v Boglino***, 254 AD2d 319, 678 NYS2d 640 [2d Dept 1998]).

Here, Wallace asserts that he was previously employed by a subsidiary of BOA. He asserts that to accommodate him as an employee, BOA orally agreed to, and prior and subsequent to commencement of the instant action accepted, interest only payments. In support, Wallace submits the mortgage invoice and copies of monthly bank account statements which reflect that he and Zouiyen paid the monthly interest amount billed. Acceptance of payments of less than the full amount of the accelerated debt does not cure the default, is not an act inconsistent with the commencement of a foreclosure action, and does not constitute proof of an oral modification, especially where, as here, provisions in the CEMA and mortgage loan documents expressly state that the Mortgagor Defendants remain liable for the accelerated debt even after partial payments are accepted (*see* ***UMLIC VP, LLC v Mellace***, 19 AD3d 684,799 NYS2d 61 [2d Dept 2005]; ***P.T. Bank Cent. of Asia v Ho Ho Ho Realty***, 273 AD2d 212, 709 NYS2d 116 [2d Dept 2000]; *see also* ***Lavin v Elmakiss***, 302 AD2d 638, 754 NYS2d 741 [3d Dept 2003], *lv denied* 2 NY3d 703, 778 NYS2d 462 [2004]).

However, under CPLR 5015(a)(3), the fraud referred to can be "intrinsic" or "extrinsic" to the issue in controversy (***Oppenheimer v Westcott***, 47 NY2d 595, 419 NYS2d 908 [1979]; ***Bank of N.Y. v Lagakos***, 27 AD3d 678, 679, 810 NYS2d 923 [2d Dept 2006]). If it is demonstrated that the order of reference was procured by extrinsic fraud, lack of a reasonable excuse is obviated, as the default judgment is a nullity requiring unconditional vacatur irrespective of whether there is a meritorious defense (*see* ***Bank of N.Y. v Stradford***, 55 AD3d 765, 869 NYS2d 554 [2d Dept 2008]; ***Bank of N.Y. v***

Lagakos, 27 AD3d 678, 679, 810 NYS2d 923 [2d Dept 2006]; ***Shaw v Shaw***, *supra*). Similarly, under CPLR 5015(4), if service is not duly effected, the court is without jurisdiction over the Mortgagor Defendants, all proceedings taken thereafter would be null and void mandating vacatur of the order of judgment (*see* ***Shaw v Shaw***, *supra*; ***Mayers v Cadman Towers, Inc.***, 89 AD2d 844, 453 NYS2d 25 [2d Dept 1982]).

In support of vacatur under CPLR 5015(a)(3), the Mortgagor Defendants contend that the plaintiff misrepresented to the court that the instant foreclosure action pertained to a commercial property, although it is a residential property. The plaintiff has not responded to this contention.

Although identifying the action in the complaint as a "Commercial Mortgaged Premises" appears innocuous, such identification sends the action on a different track in the court system. For instance, a commercial mortgage foreclosure, unlike a residential mortgage foreclosure action, is not scheduled for the mandatory settlement conference under CPLR 3408, and the court is not alerted to ensure compliance with the greater protections afforded to homeowners confronted with foreclosure set forth in the Home Equity Theft Prevention Act ("HEPTA") prior to issuing any order or judgment, especially one on default. Additionally, the plaintiff's counsel in a residential mortgage foreclosure action is required to file with the court an affirmation confirming the accuracy of the plaintiff's pleadings (*see* Administrative Order 548/10 which has been replaced 431/11); there is no such requirement in commercial mortgage foreclosure actions. Therefore, inaccurately identifying the type of foreclosure action, can lead to a finding of the type of fraud for which this court has the inherent discretionary power to vacate its judgment or order in the interests of justice (*see* ***Woodson v Mendon Leasing Corp.***, 100 NY2d 62, [2003]), or to unconditionally relieve a party from a judgment or an order based upon the means through which it was procured, i.e., extrinsic fraud (*see* CPLR 5015[a][3]; ***Oppenheimer v Wescott***, 47 NY2d 595, 419 NYS2d 908 [1979]; ***Bank of N.Y. v Stradford***, 55 AD3d 765, 869 NYS2d 554 [2d Dept 2008]; ***Bank of N.Y. v Lagakos***, 27 AD3d 678, 679, 810 NYS2d 923 [2d Dept 2006]; ***Shaw v Shaw***, *supra*; *see also* ***Nachman v Nachman***, 274 AD2d 313, 710 NYS2d 357 [1st Dept 2000]). However, even if extrinsic fraud in the procurement of a judgment or order is demonstrated, thereby constituting a reasonable excuse for a default, it must also be established that such fraud prevented the defaulting party from fully and fairly litigating the matter (*see* ***Putnam County Natl. Bank of Carmel v Simpson***, 204 AD2d 297, 614 NYS2d 149 [2d Dept 1994]).

Here, however, based on the papers submitted, the court cannot determine whether vacatur of the order of reference is warranted based on extrinsic fraud or to prevent a substantial injustice. Therefore, again if personal jurisdiction is established, thereafter the arguments for vacatur will also be fully explored and determined (*see* ***Ralph C. Cutro Co. v Valenzuela***, 113 A2d 793, 493 NYS2d 370 [2d Dept 1985]; ***Shaw v Shaw***, *supra*).

Any arguments by the parties not explicitly addressed herein have been reviewed and deemed to be devoid of merit.

Accordingly, the motion by the plaintiff is denied. The motion by the Mortgagor Defendants is decided to the extent that counsel for the parties are directed to appear for a hearing ready to present evidence on the issues herein above set forth on **May 24, 2013** at 9:30 AM in Part 17 of the Supreme Court, 1 Court Street in Riverhead, New York.

Dated: 4-15-13

PETER H. MAYER, J.S.C.