

Onewest Bank, FSB v Kallergis
2013 NY Slip Op 31990(U)
July 31, 2013
Sup Ct, Queens County
Docket Number: 31330/2009
Judge: James J. Golia
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE James J. Golia, JSC
Justice

IA Part 33

ONEWEST BANK, FSB, x

Index
Number 31330/2009

Plaintiff(s),

Motion
Date April 11, 2013

– against –

DESPINA KALLERGIS, THOMAS KALLERGIS,
NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD,
“JOHN DOE AND JANE DOE” said names being
fictitious, it being the intention of Plaintiff to
designate any and all occupants of premises
being foreclosed herein,

Motion
Cal. No. 89
Motion Seq. No. 1

Defendant(s).

_____ x

The following numbered papers read on this motion by plaintiff to substitute George Panos, Rosa Diaz, Angel Olivo and Ioanna Kallergis for defendants “John Doe” and “Jane Doe” and for leave to amend the caption reflecting such substitution, and for leave to appoint a referee to ascertain and compute the amount due and owing plaintiff; and this cross motion by defendants Despina Kallergis and Thomas Kallergis to restore this matter to the Residential Foreclosure Settlement Calendar, and to vacate any and all defaults by them and for leave to serve a late answer pursuant to CPLR 3012(d).

Papers
Numbered

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Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff commenced this action on November 20, 2009 to foreclose on a mortgage on the subject real property known as 30-11 90th Street, East Elmhurst a/k/a Jackson Heights, New York (the subject premises) to secure repayment of a note, evidencing a loan in the original principal amount of \$415,000.00, plus interest to defendant defendants Despina Kallergis and Thomas Kallergis, as the record owners of the premises. Plaintiff moves for leave to substitute and amend the caption, and appoint a referee. According to plaintiff's counsel, defendants are in default in answering the complaint.

Defendants Despina Kallergis and Thomas Kallergis, who are sister and brother, oppose the motion and cross move to vacate their defaults and to extend their time to answer the complaint. Plaintiff opposes the cross motion.

Defendants Despina Kallergis and Thomas Kallergis assert they were not properly served with process, but that Despina retained counsel in early 2010 to represent both of them in the foreclosure action. Defendant Despina Kallergis and Thomas Kallergis assert that on December 15, 2011, the attorney served an answer only on behalf of defendant Despina Kallergis, as evidenced by the affidavit of service of the same date. Defendant Despina Kallergis contends that she received a copy of the instant notice of motion, and thereafter changed counsel.

To the extent defendant Despina Kallergis served an answer, plaintiff claims it never received her answer, and in any event, the answer was untimely served and would have been rejected as such. Plaintiff offers an affidavit of service dated December 2, 2009 indicating service of process upon defendant Thomas Kallergis by service of a copy of the summons and complaint upon "Mrs. Kallergis, Wife," on November 30, 2009 at 162 Middlesex Ave., Paramus, New Jersey, as the dwelling place of Thomas Kallergis, and a subsequent mailing to him at the same address. Plaintiff also offers an affidavit of service dated December 7, 2009 of a licensed process server, indicating service of process, together with a copy of the notice pursuant to RPAPL 1303 on colored paper, upon defendant Despina Kallergis by service of a copy of the summons and complaint upon "John Doe a/k/a George Panos, Co Resident" on December 3, 2009, at 8:30 P.M. at the subject premises, as the dwelling place of Despina Kallergis, and a subsequent mailing of a copy of the summons and complaint to her at the same address. These affidavits of service constitute prima facie proof of proper service upon defendants Thomas Kallergis and Despina Kallergis, respectively, pursuant to CPLR 308(2) (*see Bank of New York v Samuels*, 107 AD3d 653 [2d Dept 2013]; *Skyline Agency, Inc. v Ambrose Coppotelli, Inc.*, 117 AD2d 135, 139 [2d Dept 1986]).

Defendant Despina Kallergis states that she, her brother and elderly parents reside at the subject premises, and she does not know "George Panos," and that no person by the name

of “George” resides at the family home. Defendant Thomas Kallergis claims he did not reside at the New Jersey address on November 30, 2009, and that he moved to the subject premises from his marital home in New Jersey in May 2009, as he was involved in divorce proceedings from his wife (now ex-wife), and that his then wife never told him she had been served on his behalf with a copy of the summons and complaint, and did not give him a copy. He submits a copy of his New York State driver’s license, issued on November 2, 2009 (one month before the alleged service), indicating the subject premises address as his address.

CPLR 308(2) requires that delivery be made to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served, and mailing the summons to the defendant’s last known residence or his or her actual place of business.

With respect to defendant Despina Kallergis, that no one named “George” presently resides at the subject premises at this time, does not mean that on the date service was effected, the person described in the affidavit of service as “John Doe a/k/a George Panos” was not residing in the premises and present to accept service as a person of suitable age and discretion (*see e.g. Roberts v Anka*, 45 AD3d 752 [2d Dept 2007]). Defendant Despina Kallergis makes no sworn denial that anyone named “George” or meeting his description, resided in the family home on December 3, 2009. To the extent defendant Thomas Despina states in his affidavit that he was residing at the subject premises with his sister and their parents at the time of the commencement of the action, he too makes no sworn denial that anyone matching John Doe’s description resided there on such date (*see Foster v Jordan*, 269 AD2d 152 [1st Dept 2000]). Defendant Thomas Kallergis also does not deny knowing anyone by the name of “George Panos.” Under such circumstances, defendant Despina Kallergis has failed to rebut the presumption of proper service created by the process server’s affidavit (*see Roberts*, 45 AD3d 752; *Anderson v GHI Auto Serv., Inc.*, 45 AD3d 512 [2d Dept 2007]), and no hearing on the issue of whether defendant Despina Kallergis was properly served is necessary (*cf. Wells Fargo Bank, N.A. v Christie*, 83 AD3d 824 [2d Dept 2011]; *Deutsche Bank Natl. Trust Co. v Pestano*, 71 AD3d 1074, 1074–1075 [2d Dept 2010]; *Wells Fargo Bank, NA v Chaplin*, 65 AD3d 588, 589 [2d Dept 2009]).

The answer of defendant Despina Kallergis was untimely, having been served approximately two years after it was due. Because plaintiff denies receipt of the answer, it cannot be deemed to have waived the late service and default (*cf. Gonzalez v Gonzalez*, 240 AD2d 630 [2d Dept 1997]). To the extent defendant Despina Kallergis seeks to compel acceptance of her untimely answer, she must provide a reasonable excuse for the default and show a potentially meritorious defense (*see Deutsche Bank National Trust Co. v Rudman*, 80 AD3d 651 [2d Dept 2011]; *Maspeth Fed. Sav. & Loan Assn. v McGown*, 77 AD3d 889 [2d Dept 2010]).

Even if it is assumed that law office failure constituted the reasonable excuse for her default in timely serving the answer, defendant Despina Kallergis has failed to demonstrate the existence of a potentially meritorious defense to the action (*see e.g. Targee Street Internal Medicine Group, P.C. v. Deutsche Bank Nat. Trust Co.*, 92 AD3d 768 [2d Dept 2012]; *Weiss v Croce*, 167 AD2d 465 [2d Dept 1990]). To the degree she asserts “lack of jurisdiction” as a first affirmative defense in her answer, the Supreme Court is a court of original, unlimited and unqualified jurisdiction (*see Kagen v Kagen*, 21 NY2d 532, 537 [1968]; NY Const., art VI, § 7) and is competent to entertain all causes of action unless its jurisdiction has been specifically proscribed (*Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159, 166 [1967]). The court has the competence to adjudicate the claim asserted by plaintiff for the foreclosure of the mortgage. In addition, defendant Despina Kallergis was properly served with process, as previously discussed, and the court has personal jurisdiction over her.

The second affirmative defense based upon lack of privity and seventh affirmative defense asserted by defendant Despina Kallergis in her answer are without merit. The mortgage and note bear her signature, and defendant Despina Kallergis is a named party to the mortgage. Plaintiff was the holder of the note, endorsed in blank and without recourse, at the time of the commencement of the action, as evidenced by the annexing of the note so endorsed, to the complaint (*see Bank of New York Mellon Trust Co. NA v Sachar*, 95 AD3d 695 [1st Dept 2012]). Plaintiff therefore is a proper party with standing to commence this foreclosure action (*see U.S. Bank, N.A. v Collymore*, 68 AD3d 752 [2d Dept 2009]; *Mortgage Elec. Registration Sys., Inc. v Coakley*, 41 AD3d 674 [2d Dept 2007]).

Defendant Despina Kallergis has failed to demonstrate the fourth, fifth, sixth and ninth affirmative defenses based upon the doctrines of laches and unclean hands, payment and failure to meet a condition precedent to acceleration, respectively, have any merit. Laches is not a defense to a mortgage foreclosure proceeding where, as here, the action was commenced within the statute of limitations (CPLR 213[4]; *see New York State Mtge. Loan Enforcement & Admin. Corp. v North Town Phase II Houses, Inc.*, 191 AD2d 151 [1st Dept 1993]; *Schmidt's Wholesale, Inc. v Miller & Lehman Const., Inc.*, 173 AD2d 1004 [3d Dept 1991]). Even if the defense was available here, defendant Despina Kallergis has made no showing that she changed her position, or failed to take some action to her prejudice as a result of the alleged delay. Nor has defendant Despina Kallergis offered any proof that plaintiff engaged in “immoral or unconscionable conduct directly related to the subject matter” so as to be charged with unclean hands (*Frymer v Bell*, 99 AD2d 91, 96 [1st Dept 1984]). Defendant Despina Kallergis furthermore offers no proof that all sums due under the note and mortgage have been paid. Any dispute as to the exact amount owed plaintiff pursuant to the subject mortgage and note may be resolved after a reference pursuant to RPAPL 1321 (*see Crest/Good Mfg. Co. v Baumann*, 160 AD2d 831 [2d Dept 1990]). The claim that plaintiff failed to meet a condition precedent to accelerating the loan is unsupported by any allegations or proof (*see Moran Enterprises, Inc. v Hurst*, 96 AD3d 914

[2d Dept 2012]). In any event, plaintiff provided defendant Despina Kallergis with the required notice of default on May 9, 2009 (*see* affidavit of Caryn Edwards, assistant secretary of plaintiff, ¶ 6; plaintiff’s Exhibit “D”).

To the degree defendant Despina Kallergis asserts as a eighth affirmative defense that plaintiff failed to provide her with a notice pursuant to RPAPL 1303, the affidavit of service dated December 7, 2009 indicates service of such notice on colored paper was made upon her at the same time as service of the summons and complaint (*see Aurora Loan Services, LLC v Weisblum*, 85 AD3d 95 [2d Dept 2011]). Defendant Despina Kallergis makes no sworn denial of receipt of such notice.

That branch of the cross motion by defendant Despina Kallergis, in effect, to vacate her default in serving a timely answer and to compel acceptance of her late answer is denied (CPLR 2004, 3012[d]; *Beneficial Homeowner Service Corp. v Charles*, 95 AD3d 1049 [2d Dept 2012]).

To the extent defendant Thomas Kallergis claims he was not served at his actual dwelling place and usual place of abode as required by CPLR 308(2), his sworn claim that he did not reside at the New Jersey premises, along with his submission of the copy of his driver’s license is sufficient to rebut the prima facie showing and to necessitate a hearing (*see Dime Sav. Bank of Williamsburg v 146 Ross Realty, LLC*, 106 AD3d 863 [2d Dept 2013]; *Toyota Motor Credit Corp. v Lam*, 93 AD3d 713, 714 [2d Dept 2012]; *U.S. Bank, N.A. v Arias*, 85 AD3d 1014, 1016 [2d Dept 2011]). Under such circumstances, that branch of the cross motion by defendant Thomas Kallergis to vacate his default in answering and to compel acceptance of his proposed answer is granted only to the extent of directing a hearing to determine whether he was properly served with process. **A hearing on the issue of whether defendant Thomas Kallergis was properly served shall be held on September 12, 2013 at the Supreme Court, Queens County, 25-10 Court Square, Long Island City, New York 11101, on at 10:00 A.M. in Part 33.**

With respect to the motion by plaintiff, it is denied without prejudice to renewal following the traverse.

Dated: July 31, 2013

James J. Golia, J.S.C.