

Wells Fargo Bank, N.A. v Walters

2013 NY Slip Op 32824(U)

October 22, 2013

Supreme Court, New York County

Docket Number: 105264/07

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN A. MADDEN
Justice

PART 11

WELLS FARGO BANK NA
Plaintiff,
- v -
ERROL WALTERS
Defendant.

FILED
NOV 06 2013
COUNTY CLERK'S OFFICE
NEW YORK

INDEX NO. 105264/07
MOTION DATE _____
MOTION SEQ. NO. 004
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is determined in accordance with the annexed decision And order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: October 22, 2013

J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
WELLS FARGO BANK, N.A., AS TRUSTEE FOR THE
BENEFIT OF THE CERTIFIED HOLDERS, PARK
PLACE SECURITIES, INC., ASSET-BACKED PASS-
THROUGH CERTIFICATES SERIES 2005-WCW2,

INDEX NO. 105264/07

Plaintiff,
-against-

ERROL WALTERS, et al,

Defendant.

-----X
JOAN A. MADDEN, J.:

FILED

NOV 06 2013

X COUNTY CLERK'S OFFICE
NEW YORK

In this mortgage foreclosure action, defendant Errol Walters is moving for an order pursuant to CPLR 317 and CPLR 5015 vacating his default and the Judgment of Foreclosure and Sale entered on June 4, 2008. Plaintiff opposes the motion.

Plaintiff commenced this action in 2007 to foreclose on a mortgage on the property located at 551 West 161st Street in New York City. At that time, defendant Walters acknowledges he was residing in Somerset, New Jersey, and according to plaintiff, the mortgaged property was occupied by tenants who were paying rent to Walters. Upon Walters' failure to appear and answer the complaint, plaintiff moved for an order of reference. In November 2007, the Hon. Marilyn Diamond granted the motion and appointed a referee to compute. In May 2008, Justice Diamond granted plaintiff's motion for a judgment of foreclosure and sale on defendant Walters' default; the judgment was entered on June 4, 2008. On June 24, 2008, plaintiff served a copy of the order with notice of entry on all parties, including defendant Walters.

On July 15, 2008, defendant Walters, *pro se*, filed an order to show cause seeking a “30-day extension of the foreclosure sale,” on the ground that he “has a buyer that has a commitment to purchase the property in a short-sale.” By order dated July 16, 2008, the Hon. Sherry Klein Heitler stayed the sale on condition defendant deposit with the County Clerk the sum of \$3,500 in cash or bond, and directed that the “sale must be completed on or before August 7, 2008.” It is unclear what transpired next, but the property was never sold.¹

In October 24, 2012, defendant Walters filed the instant order to show cause seeking a temporary restraining order staying his “eviction and sale of the property. ” Defendant also moves for order pursuant to CPLR 5015(a) and CPLR 317, vacating his default and the judgment of foreclosure and requests as additional relief: 1) an “evidentiary hearing in which plaintiff is directed to provide proof of ownership of the Original Mortgage and Note showing an unbroken chain of ownership of title and the Original Note showing an unbroken chain of endorsements; 2) an order “striking from the record the Summary Judgment Motion and its accompanying exhibits”; 3) an award of reasonable attorney’s fees of \$8,500 for “defending the instant action”; and 4) alternatively, that the court conduct a “traverse hearing on the issues of service and Jurisdiction.”

Specifically, with respect to CPLR 5015(a), defendant seeks to vacate the default judgment on the following grounds: 1) under CPLR 5015(a)(1), based on excusable default in that he was “never served in the instant matter”; 2) under CPLR 5015(a)(2), based on newly-

¹Plaintiff submits documents from the U.S. Bankruptcy Court for the Southern District of New York, indicating that defendant Walters filed for bankruptcy on April 20, 2001, and that proceeding was marked “case closed” on August 30, 2001.

discovered evidence showing that the court lacked standing and therefore had no subject matter jurisdiction over the action; 3) under CPLR 5015(a)(3), based on plaintiff's alleged fraud and misrepresentation; and 4) under CPLR 5015(a)(4), based on the lack of personal jurisdiction, in that defendant was not properly served.

At the outset, the court must consider the jurisdictional grounds under CPLR 5015(a)(4). Plaintiff asserts that the court lacks personal jurisdiction over him based on improper service. It is well settled that a properly executed affidavit of service raises a presumption of proper service, and a mere conclusory denial of receipt is not enough to rebut that presumption. See ATM One, LLC v. Landaverde, 2 NY3d 472 (2004); Kihl v. Pfeffer, 94 NY2d 118 (1999); Slimani v. Citibank, N.A., 47 AD3d 489 (1st Dept 2008); Northern v. Hernandez, 17 AD3d 285 (1st Dept 2005); Aames Capital Corp v. Ford, 294 AD2d 134 (1st Dept 2002); Fairmont Funding Ltd v. Stefansky, 235 AD2d 213 (1st Dept 1997).

Here, the affidavit of service states that the process server, Manny Bayo, served defendant Errol Walters on April 26, 2007, at 8:40 p.m., at 1 John F. Kennedy Boulevard, Apt 1K, Somerset, New Jersey, 08873, by delivering the papers to "Christine Walters, a person of suitable age and discretion. That person was also asked by deponent whether said premises was defendant's dwelling home and the reply was affirmative." A follow-up mailing was made on the same day, April 26, 2007, "in a prepaid sealed, first class wrapper marked personal and confidential, properly address to defendant at defendant's address." The affidavit of service establishes prima facie that Walters was validly served pursuant to CPLR 308(2), by delivery of the papers to a person of suitable age and discretion at his actual "dwelling place or usual place of abode."

In support of motion to vacate his default, Walters submits an affidavit that plaintiff “or its agents did not personally serve me in this action. I also did not receive directly or indirectly any summons or complaint from a Manny Bayo (‘Bayo’) as alleged in his affidavit of service. I was alerted that a foreclosure action was filed against me directly from prospective buyers who visited my property to inquire about purchasing my home.” Walters also submits an affidavit from his wife, non-party Judith Walters. Notably, Judith Walters admits that when the complaint was “filed,” she and her husband “resided” at the address in the affidavit of service, 1 John F. Kennedy Boulevard, 1k, Somerset, New Jersey. She states that she “never received a copy of any summons and complaint from the Plaintiff and its agents or any process server” and that “at the time of the alleged service, no person by the name ‘Christine Walters’ resided at the 1 John F. Kennedy Boulevard, Apt. 1k, Somerset, New Jersey address.”

Defendant Walters’ conclusory denial that he was “never served” with the summons and complaint and had no knowledge of the action, is insufficient to rebut the presumption of proper service. See ATM One, LLC v. Landaverde, *supra*; Kihl v. Pfeffer, *supra*; Aames Capital Corp v. Ford, *supra*; Fairmont Funding Ltd v. Stefansky, *supra*. While he states that he was not “personally served,” delivery to him personally was not required, as delivery to a person of suitable age and discretion at his actual place of residence properly effectuated service in accordance with CPLR 308(2). Notably, Walters’ affidavit is silent as to Christine Walters, the person of suitable age and discretion who accepted delivery of the papers on his behalf at his residence. While the affidavit from his wife mentions Christine Walters, it has no evidentiary value, as Judith Walters merely states that Christine Walters did not “reside” at their home. That fact alone is insufficient to controvert the affidavit of service, as a “person of suitable age and

discretion” need not “reside” at defendant’s home. Significantly, Judith Walters neither denies knowing someone with the name of “Christine Walters,” nor that such person was present at their home on that day and accepted delivery of the summons and complaint.

Thus, since defendant Walters fails to rebut the presumption that service was properly effectuated as set forth in the affidavit of service, he has not raised an issue of fact for a traverse hearing, and is not entitled to relief pursuant to CPLR 5015(a)(4).

Turning to CPLR 5015(a)(1), a defendant seeking to vacate a judgment on grounds of excusable default must establish both a reasonable excuse for his default in appearing and answering the complaint, and a potentially meritorious defense to the action. See Eugene DiLorenzo, Inc v. A.C. Dutton Lumber Co, Inc, 67 NY2d 138 (1986); M.R. v. 2526 Valentine LLC, 58 AD3d 530, 531 (1st Dept 2009). Defendant Walters fails to satisfy his burden, as he has not established a reasonable excuse for his default. The only excuse he proffers is his objections as to service of process, which the court has already rejected. Absent a reasonable excuse, the court need not reach the issue of whether he has a potentially meritorious defense. See Tribeca Technology Solutions, Inc v. Goldberg, ___ AD3d ___, 2013 WL 5641409 (1st Dept 2013); Bendeck v. Zablah, 105 AD3d 457 (1st Dept 2013); Admiral Insurance Co v. Marriott Int’l, Inc, 79 AD3d 572 (1st Dept 2010), lv app den 17 NY3d 708 (2011); Caba v. Rai, 63 AD3d 578, 582 (1st Dept 2009); Time Warner City Cable v. Tri State Auto, Inc, 5 AD3d 153 (1st Dept), lv app disp 3 NY3d 656 (2004). Thus, Walters is not entitled to relief under CPLR 5015(a)(1).

Defendant’s reliance on CPLR 5015(a)(2) is misplaced, as by its express terms that provision is intended to provide relief from judgment after trial. The court notes, however, that to the extent defendant contends subject matter is lacking due to a purported lack of standing on

plaintiff's part, such contention is without merit, as a party's lack of standing does not constitute a jurisdictional defect. See HSBC Bank USA, N.A. v. Taher, 104 AD3d 815 (2nd Dept 2013); Deutsche Bank National Trust Co v. Hunter, 100 AD3d 810 (2nd Dept 2012).

As to CPLR 5015(a)(3), defendant fails to make a sufficient showing that plaintiff engaged in the type of fraud or misconduct that would warrant vacatur of the default judgment of foreclosure and sale pursuant to that provision. See Citimortgage, Inc v. Bustamante, 107 AD3d 752 (2nd Dept 2013); US Bank National Ass'n v. Allen, 102 AD3d 955 (2nd Dept 2013); Deutsche Bank National Trust Co v. Hunter, *supra*.

Finally, defendant relies on CPLR 317 to vacate his default and the judgment. Under CPLR 317, a person served with a summons other than by personal delivery and who does not appear, can defend the action within one year after obtaining knowledge of entry of the judgment, but in no event more than five years after such entry, "upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense." In making a CPLR 317 motion, defendant does not have to come forward with a reasonable excuse for his default. See Olivaria v. Lin & Son Realty, Corp, 84 AD3d 423 (1st Dept 2011).

Defendant Walters' request for CPLR 317 relief is untimely. See US National Bank Ass'n v. Melton, 90 AD3d 742 (2nd Dept 2011). The undisputed record establishes that at the latest, Walters had actual knowledge of the judgment in July 2008, when he filed his *pro se* order to show cause to stay the foreclosure sale. However, he did not make the instant motion to vacate the default until more than four years later, in October 2012. The undisputed record likewise establishes that Walters received notice of the summons in time to defend the action.

See Cavalry Portfolio Services, LLC v. Reisman, 55 AD3d 524 (2nd Dept 2008). As determined above, the affidavit of service attesting that the summons and complaint were delivered and mailed to Walters' correct residence, creates a presumption of proper delivery, mailing and receipt. See id. Defendant Walters' bare assertion that he did not personally receive notice of the summons in time to defend the action is insufficient to overcome that presumption. See id.

Based on the foregoing, defendant Walters has failed to establish a factual or legal basis for vacating his default and the judgment of foreclosure and sale. His motion is therefore denied in its entirety, and the stay of the enforcement of the judgment, including defendant's eviction and the foreclosure sale of the subject property, is lifted forthwith.

Accordingly, it is

ORDERED that the motion by defendant Walters to vacate his default and the judgment of foreclosure and sale, is denied in its entirety; and it is further

ORDERED that the stay of the enforcement of the judgment, including defendant's eviction and the foreclosure sale of the subject property, is lifted forthwith.

DATED: October 22, 2013

FILED
NOV 06 2013
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:



J.S.C.