

**BAC Home Loans Serv., LP v Pickersgill**

2013 NY Slip Op 33000(U)

November 26, 2013

Sup Ct, Queens County

Docket Number: 654/10

Judge: Allan B. Weiss

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**M E M O R A N D U M**

SUPREME COURT QUEENS COUNTY  
CIVIL TERM PART 2

**ALLAN B. WEISS**

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BAC HOME LOANS SERVICING, LP f/k/a  
COUNTRYWIDE HOME LOANS SERVICING LP,

Plaintiff,

-against-

LEONARD PICKERSGILL, EDNA PICKERSGILL,  
SANDRA PICKERSGILL, et al.,

Defendants.

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Index No.: 654/10

Motion Date: 9/13/13

Motion Seq. No.: 1

Plaintiff commenced this action on January 1, 2011 to foreclose a mortgage dated January 31, 2008 encumbering the real property known as 504 Beach 64th St., Arverne, N.Y. 11692 given by defendants, Leonard Pickersgill, Edna Pickersgill and Sandra Pickersgill to Wall Street Mortgage Bankers, Ltd., as security for the payment of a note executed and delivered by the defendants, to secure repayment of a note, evidencing a loan in the principal amount \$446,600.00 plus interest. In the complaint, plaintiff alleges that it is the owner and holder of the note and mortgage, that defendants defaulted under the note and mortgage by nonpayment of monthly installment of principal and interest due on November 1, 2008 and continuing thereafter and it elected to accelerate the entire mortgage debt.

The defendants were served with the summons and complaint on January 21, 2011 and did not interpose an answer or otherwise appear. The plaintiff now moves for entry of a default judgment,

amendment of the caption and appointed of a referee to compute the amounts due tot he plaintiff.

The defendants oppose the plaintiff's motion and cross-move pursuant to CPLR 2004 and 3012(d) for an extension of time to answer and compelling plaintiff to accept a late answer and placing this case on the Foreclosure Settlement Conference Calendar.

A defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action, when opposing a motion for leave to enter judgment upon its failure to appear or answer and moving to extend the time to answer or to compel the acceptance of an untimely answer (see Karalis v. New Dimensions HR, Inc., 105 AD3d 707[2013]; Maspeth Fed. Sav. & Loan Assn. v. McGown, 77 AD3d 890 [2010]; Wells Fargo Bank, N.A. v. Cervini, 84 AD3d 789 [2011]). In addition, a motion pursuant to CPLR 3012(d) should include a proposed answer, verified by a person with knowledge of facts constituting the potentially meritorious defense(s) ( see CPLR 3012[d]; Oqman v. Mastrantonio Catering, Inc., 82 AD3d 852 [2011]; Gross v. Kail, 70 AD3d 997 [2010]; Baldwin v. Mateogarcia, 57 AD3d 594 [2007]).

In support of their motion, defendants submitted the affidavit of Leonard Pickersgill, in which he does not assert a jurisdictional defense nor claim that he or any member of the

family did not receive notice of this action in time to defend or that the mortgage is not in default. Pickersgill merely asserts that, after being served with process, he contacted the attorney for the lending institution, but the attorney never instructed him to serve an answer and merely said that he only needed to negotiate a modification of the mortgage so he could save his home from foreclosure. The defendant has failed to set forth the date of his call, the firm he called or the name of the person to whom he spoke. The defendant's unsubstantiated claim does not constitute a reasonable excuse for the inordinate delay of more than 3 1/2 years since the default, and more than 2 year delay after the action was released from the Foreclosure Conference Part and for waiting until plaintiff moved for entry of a default judgment to move for an extension of time to serve an answer or to vacate their default (see Abdul v. Hirschfield, 71 AD3d 707 [2010]; Ujeta v. Wu, 303 AD2d 676 [2003]; Jamieson v. Roman, 36 AD3d 861 [2007]; Merwitz v. Dental Care Services, P.C., 155 AD2d 748 [1989]; Perellie v. Crimson's Restaurant, Ltd., 108 AD2d 903 [1985]; Trotman v. Aya Cab Corp., 300 AD2d 573 [2002]; Kyriacopoulos v. Mendon Leasing Corp., 216 AD2d 532 [1995]).

To the extent that defendant claims that he and co-defendants are unsophisticated and did not know to retain an attorney is equally without merit particularly in view of the instructions appearing in bold type, on the face of the Special

Summons which was served on the defendants pursuant to Real Property Actions and Proceedings Law § 1320 expressly advising the defendants, among other things, that an answer "MUST" be served and advising them to retain an attorney or go to court for information on how to answer the summons. In addition, the defendants appeared in the Foreclosure Settlement Conference Part on five separate occasions beginning on March 28, 2011 and the last time on December 20, 2011 where they were first represented by Queens Volunteer Lawyer Project and subsequently by Gerald A. Green, Esq.

Since the defendant failed to demonstrate a reasonable excuse for his default in appearing or answering, or for his lengthy delay in moving to vacate the default ( see Garal Wholesalers, Ltd. v. Raven Brands, Inc., 82 AD3d 1041, 1042 [2011]) the court need not address whether defendants have a meritorious defense ( see Bank of America, N.A. v. Gowrie, 106 AD3d 677 [2013]; Deutsche Bank Natl. Trust Co. v. Pietranico, 102 AD3d 724 [2013]; Tribeca Lending Corp. v. Correa, 92 AD3d 770 [2012] ). Accordingly, the defendants motion for an extension of time to serve an answer pursuant to CPLR 3012(d) is denied.

Insofar as the defendants seek to have this case restored to the Foreclosure Settlement Conference Part, it is also denied. This action was released from the Foreclosure Conference Part on December 20, 2011 when it was determined that defendants cannot

demonstrate financial ability to qualify for a modification. Defendants have submitted no evidence to demonstrate any change in their financial circumstance.

The plaintiff has established a prima facie case by demonstrating the existence of the mortgage and mortgage note, ownership of the note and mortgage, and the defendants' default in payment (see Capstone Bus. Credit, LLC v. Imperia Family Realty, LLC, 70 AD3d 882 [2010]; U.S. Bank Natl. Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998-2] v. Alvarez, 49 AD3d 711, 712 [2008]).

Accordingly, the plaintiff's motion for appointment of a referee to ascertain and compute the amount due to plaintiff, and amendment of the caption and paragraphs 1, 4, and 21 the complaint and portions of the Notice of Pendency is granted. The branch of the plaintiff's motion seeking a default judgment is granted to the extent that the default of the defendants is declared and fixed.

Settle Order.

Dated: November 26, 2013  
D# 48

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J. S. C.