

Bank of New York Mellon v Lawrence

2014 NY Slip Op 30545(U)

January 14, 2014

Sup Ct, Suffolk County

Docket Number: 28311/2011

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

The Bank of New York Mellon f/k/a The Bank of New York, as Trustee for the Certificateholders CWALT Inc., Alternative Loan Trust 2006-40T1, Mortgage Pass-Through Certificates, Series 2006-40T1,

Plaintiff,

-against-

Staci Lawrence, Bank of America, NA, The Board of Managers of The Villas at West Hills and "John Doe #1" through "John Doe #10", the last ten names being fictitious and unknown to the plaintiff, the person or parties intended being the parties, if any, having or claiming an interest in or lien upon the mortgage premises described in the complaint,

Defendants.

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Attorneys/Parties [See Rider Annexed]

Motion Sequence No.: 001; MG

Motion Date: 1/16/13

Submitted: 12/11/13

Motion Sequence No.: 002; XMD

Motion Date: 1/30/13

Submitted: 12/11/13

Upon the following papers numbered 1 to 25 read upon this application for an order of reference: Notice of Motion and supporting papers, 1 - 16; Notice of Cross Motion and supporting papers, e17 - 22; Answering Affidavits and supporting papers, 23 - 35; it is

ORDERED that this motion (001) by plaintiff The Bank of New York Mellon fka The Bank of New York, as Trustee for the Certificateholders CWALT Inc., Alternative Loan Trust 2006-40T1, Mortgage Pass-Through Certificates, Series 2006-40T1 (Mellon), for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, for a default judgment against the non-answering, non-appearing defendants, for leave to amend the caption of this action pursuant to CPLR 3025 (b) and for leave to amend the complaint *nunc pro tunc* to reflect that plaintiff is a National Association, is granted; and it is further

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ORDERED that the caption is hereby amended by substituting Samantha Barkoff in place of “John Doe #1” and by striking therefrom the names of “John Doe #2” through “John Doe #10”; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court; and it is further

ORDERED that the caption of this action hereinafter appear as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK**

The Bank of New York Mellon fka The Bank of New York,
as Trustee for the Certificateholders CWALT Inc., Alternative
Loan Trust 2006-40T1, Mortgage Pass-Through Certificates,
Series 2006-40T1,

Plaintiff,

-against-

Staci Lawrence, Bank of America, NA, The Board of Managers
of The Villas at West Hills, Samantha Barkoff

Defendants.

ORDERED that the cross motion (002) by defendant Staci Lawrence (Lawrence) for an order pursuant to CPLR 3215(c) dismissing the complaint on the grounds that plaintiff failed to take proceedings for the entry of a judgment within one year of defendant’s default and for leave pursuant to CPLR 3012(d) extending defendant’s time to appear in the action, is denied.

This is an action to foreclose a mortgage on premises known as 48 Villas Circle, Melville, New York. On September 15, 2006, defendant Lawrence executed a note in favor of Mid-Island Mortgage Corp. (Mid-Island) agreeing to pay the sum of \$538,200.00 at the yearly rate of 7.25 percent. On September 15, 2006, defendant Lawrence executed a mortgage in the principal sum of \$538,200.00 on her home. The mortgage indicated Mid-Island to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Mid-Island as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on October 2, 2006 with the Suffolk County Clerk’s Office. Thereafter, on February 16, 2010, the note

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and mortgage were transferred by assignment of mortgage from MERS to plaintiff Mellon and recorded on April 26, 2011 with the Suffolk County Clerk's Office.

Countrywide Home Loan Servicing LP (Countrywide), servicer of the mortgage loan, sent a notice of default dated August 18, 2008 to defendant Lawrence stating that she had defaulted on her mortgage loan and that the amount past due was \$8,516.99. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on September 2, 2011. In its complaint, plaintiff alleges in pertinent part, that defendant breached her obligations under the terms of the note and mortgage by failing to make the monthly payments commencing with her June 1, 2008 payment. Defendant Lawrence did not answer the complaint.

The Court's computerized records indicate that a foreclosure settlement conference was held on August 6, 2012 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321. Defendant Lawrence, in opposition to the instant application, asserts that plaintiff's complaint should be dismissed on the basis that it failed to take proceedings for the entry of a judgment within one year of defendant's default and that she was never served with a summons and complaint in this action. Plaintiff has submitted opposition to the cross-motion.

Initially addressing defendant's cross-motion, contrary to defendant's contentions, the court rejects defendant's assertion that the plaintiff abandoned its claims under CPLR 3215(c). CPLR 3215(c) provides claimants with an exception to the otherwise mandatory nature of that provision, namely, that any failure to move within one year of the default may be excused if sufficient cause is shown why the complaint should not be dismissed (*see* CPLR 3215[c]; ***Giglio v NTIMP, Inc.***, 86 AD3d 301, 926 NYS2d 546 [2d Dept 2011]). Good cause has been held to have been demonstrated where, as here, a delay in prosecuting the action was caused by the plaintiff's participation with borrower in foreclosure settlement conferences in an effort to determine if a loan modification could be achieved. Furthermore, NYCRR 202.12-a (c)(7) specifically requires that "[m]otions shall be held in abeyance while settlement conferences are being held..."

In addition, the court rejects defendant's claim that she was not served with process in this action. It is well established that a process server's sworn affidavit of service constitutes prima facie evidence of proper service (*see* ***ACT Prop., LLC v Ana Garcia***, 102 AD3d 712, 957 NYS2d 884 [2d Dept 2013]; ***Deutsche Bank Natl. Trust Co. v Pietranico***, 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]; ***Bank of N.Y. v Espejo***, 92 AD3d 707, 939 NYS2d 105 [2d Dept 2012]; ***Deutsche Bank Natl. Trust Co. v Hussain***, 78 AD3d 989, 912 NYS2d 595 [2d Dept 2010]; ***Wells Fargo Bank, NA v McGloster***, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]). A defendant can rebut the process server's affidavit by a sworn denial of service in an affidavit containing specific and detailed contradictions of the allegations in the process server's affidavit (*see* ***Bank of N.Y. v Espejo***, 92

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AD3d 707; *Bankers Trust Co. of California, NA v Tsoukas*, 303 AD2d 343, 756 NYS2d 92 [2d Dept 2003]). Bare, conclusory and unsubstantiated denials of receipt of process are insufficient to rebut the presumption of proper service created by the affidavit of the plaintiff's process server and to require a traverse hearing (see *U.S. Bank Natl. Assn. v Tate*, 102 AD3d 859, 958 NYS2d 722 [2d Dept 2013]; *Stevens v Charles*, 102 AD3d 763, 958 NYS2d 443 [2d Dept 2013]; *Irwin Mtge. Corp. v Devis*, 72 AD3d 743, 898 NYS2d 854 [2d Dept 2010]; *Beneficial Homeowner Serv. Corp. v Girault*, 60 AD3d 984, 875 NYS2d 815 [2d Dept 2009]). A defendant who fails to swear to specific facts to rebut the statements in the process server's affidavits is not entitled to a hearing on the issue of service (see *Chichester v Alal-Amin Grocery & Halal Meat*, 100 AD3d 820, 954 NYS2d 577 [2d Dept 2012]; *Bank of N.Y. v Espejo*, 92 AD3d 707; *US Natl. Bank Assoc. v Melton*, 90 AD3d 742, 934 NYS2d 352 [2d Dept 2011]).

Here, defendant Lawrence failed to submit any documentary evidence in support of her claim that she was never served with a copy of the summons and complaint. As such, the court is left with only her unsubstantiated and conclusory denial of service and/or receipt of any papers in this action. As indicated above, such denials are insufficient to rebut the prima facie showing of proper service created by the process server's affidavits. Under these circumstances, the court finds that the service effected was compliant with the dictates of CPLR 308(1).

Similarly unavailing, is defendant's claim that she believed that as a *pro se* litigant, her appearance in court was an appearance in the case and "in effect an oral answer 'general denial' to [p]laintiff's [c]omplaint." The determination of what constitutes a reasonable excuse lies within the sound discretion of the Court (see *Maspeth Fed. Sav. & Loan Assn. v McGown, supra*; *Star Indus., Inc. v Innovative Beverages, Inc.*, 55 AD3d 903, 866 NYS2d 357 [2d Dept 2008]; *Antoine v Bee*, 26 AD3d 306, 812 NYS2d 557 [2d Dept 2006]). The court finds that no satisfactory excuse has been offered for the seventeen month delay in serving and filing an answer in this matter. Inasmuch as defendant Lawrence has failed to demonstrate a reasonable excuse for her default, it is unnecessary to determine whether she demonstrated the existence of a potentially meritorious defense (see *Wells Fargo Bank, N.A. v Cervini, supra*; *HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]; *Maspeth Fed. Sav. & Loan Assn. v McGown, supra*).

The remaining assertions raised by defendant are rejected by the court as similarly lacking in merit.

In any event, "[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default" (*Republic Natl. Bank of N.Y. v O'Kane*, 308 AD2d 482, 482, 764 NYS2d 635 [2d Dept 2003]; see *Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, 1080, 915 NYS2d 591 [2d Dept 2010]). Once a plaintiff has made this showing, the burden then shifts to defendant to establish by admissible evidence the existence of a triable issue of fact as to a defense (see *Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

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Here, plaintiff produced the unpaid note and mortgage executed by the defendant, an assignment of mortgage, as well as evidence of nonpayment, thereby establishing a prima facie case as a matter of law (see *Wells Fargo Bank Minnesota, Natl. Assn. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). The affidavit of Robert Andrew Krenitsky, assistant vice president to Bank of America, N.A., plaintiff's servicing agent, avers that defendant defaulted on her payment due July 1, 2008 and thereafter; that a notice of default was mailed to defendant on August 18, 2008; and, that the default has not been cured.

Accordingly, plaintiff's application (001) for a default judgment as to the non-appearing, non-answering defendants and for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (see *Vermont Fed. Bank v Chase*, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; *Bank of East Asia, Ltd. v Smith*, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]). Defendant's cross-motion (002) for an order pursuant to CPLR 3215(c) and 3012(d) permitting her to interpose an answer late is denied.

The proposed order appointing a referee to compute pursuant to RPAPL §1321 is signed simultaneously herewith as modified by the court.

Dated:

1/14/2014


 HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___ X ___ NON-FINAL DISPOSITION

RIDER

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