

Bank of N.Y. Trust Co., N.A. v Prosa

2014 NY Slip Op 30558(U)

January 29, 2014

Supreme Court, Suffolk County

Docket Number: 11-27546

Judge: Jr., Andrew G. Tarantino

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.
Justice of the Supreme Court

MOTION DATE 3-26-13
ADJ. DATE _____
Mot. Seq. # 001 - MG
002 - MD

-----X
THE BANK OF NEW YORK TRUST
COMPANY, N.A. AS SUCCESSOR TO JP
MORGAN CHASE BANK, N.A. TRUSTEE FOR
RAAC 2006SP3,
3451 Hammond Avenue
Waterloo, IA 507045400

Plaintiff,

- against -

JOSEPH PROSA, DCFS TRUST, FORD
MOTOR CREDIT COMPANY, ONE BEACON
INSURANCE, PORTFOLIO RECOVERY
ASSOCIATES, LLC.

JOHN DOE (Said name being fictitious, it being
the intention of Plaintiff to designate any and all
occupants of premises being foreclosed herein,
and any parties, corporations or entities, if any,
having or claiming an interest or lien upon the
mortgaged premises.)

Defendants.
-----X

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Upon the following papers numbered 1 to 36 read on this motion for an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1-13; Defendant's Motion and supporting papers 14-27; Answering Affidavits and supporting papers 28-36; ~~Replying Affidavits and supporting papers _____; Other _____; (and after hearing counsel in support and opposed to the motion) it is;~~

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

ORDERED that the motion by plaintiff for an order of reference and the motion by defendant Joseph Prosa (Prosa) for dismissal, are consolidated for the purposes of this determination; and it is further

ORDERED that the motion (001) by plaintiff The Bank of New York Trust Company, N.A. as successor to JP Morgan Chase Bank, N.A. Trustee for RAAC 2006SP3 (Bank of New York), for leave to amend the caption of this action pursuant to CPLR 3025 (b) and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

ORDERED that the caption is hereby amended by striking therefrom the names of defendants “John Doe” and “Jane Doe”; 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 TRUST COMPANY, N.A.
 AS SUCCESSOR TO JP MORGAN CHASE BANK, N.A.
 TRUSTEE FOR RAAC 2006SP3,
 3451 Hammond Avenue
 Waterloo, IA 507045400

Plaintiff,

- against -

JOSEPH PROSA, DCFS TRUST, FORD MOTOR CREDIT
 COMPANY, ONE BEACON INSURANCE, PORTFOLIO
 RECOVERY ASSOCIATES, LLC,

Defendants.

ORDERED that the motion (002) by defendant Joseph Prosa for an order dismissing the underlying action or permitting him to interpose a late answer, is denied; and it is further

ORDERED that the stay previously issued by the court in conjunction with defendant’s application (002) is hereby vacated by virtue of this decision and order.

This is an action to foreclose a mortgage on premises known as 69 Granada Circle, Mount Sinai, New York. On January 31, 2006, defendant Joseph Prosa (Prosa) executed an adjustable rate note in favor of WMC Mortgage Company (WMC), agreeing to pay the sum of \$680,200.00 at the starting yearly rate of 7.990 percent. On January 31, 2006, defendant Prosa also executed a first mortgage in the principal sum of \$680,200.00 on the subject property. The mortgage indicated WMC to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of WMC as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on March 30, 2006 in the Suffolk County Clerk's Office. Thereafter, the note and mortgage were transferred by assignment of mortgage dated December 10, 2007 from MERS as nominee for WMC to The Bank of New York Trust Company, N.A., as trustee. The assignment of mortgage was recorded on December 28, 2007 with the Suffolk County Clerk's Office. Thereafter, the note and mortgage were transferred by assignment of mortgage dated July 26, 2011 from The Bank of New York Trust Company, as trustee, to plaintiff Bank of New York. Said assignment was recorded on August 16, 2011 with the Suffolk County Clerk's Office.

A notice of default dated July 9, 2009 was sent to defendant Prosa stating that he had defaulted on his mortgage loan and that the amount past due was \$88,581.31. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on August 24, 2011. In its complaint plaintiff alleges, in pertinent part, that defendant breached his obligations under the terms and conditions of the note and mortgage by failing to make his monthly payments commencing with the February 1, 2008 payment. Annexed as an exhibit to plaintiff's moving papers is a copy of an affidavit of service evincing service of the summons and complaint pursuant to CPLR 308(2) by delivering to and leaving with "John Doe" #1 (Co-Occupant) a true copy thereof, a person of suitable age and discretion at the dwelling place of defendant Prosa, located at 69 Granada Circle, Mount Sinai, New York, on August 31, 2011 at approximately 7:22 p.m. Defendant Prosa did not interpose an answer in this action.

The Court's computerized records indicate that a foreclosure settlement conference was held on April 26, 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 Prosa, has filed a motion seeking an order permitting him to interpose a late answer. In support of his motion to vacate his default, defendant Prosa, by way of affidavit, denies having been served with any documents in this action and claims that at the time of the alleged service upon him, that he and his wife "should have been home" and that nobody in the household meets the description of the person served. Plaintiff has served opposition to defendant's motion.

Addressing defendant's motion (002), the mortgagor defendant seeks to vacate his default and dismissal of this action on the grounds that the court lacks personal jurisdiction over him due to the fact that "[he] was never personally served with the Summons and Complaint in this case" (*see* ¶ 4 of the Affidavit of Joseph Prosa, sworn to before his attorney on April 17, 2013 attached to the moving papers). Continuing, Prosa avers that he resides at the house with his wife and son (*id* at ¶ 9) and that on August 31, 2011 at 7:22 p.m., the date and time that the summons and complaint were allegedly served upon defendant pursuant to

CPLR 308 (2), defendant and his wife “should have been home” (*id* at ¶ 16). Prosa next avers that “[he] did not receive the Summons and Complaint and there are irregularities as to the alleged mailing” (*id.* at ¶ 17). Prosa denies service or his receipt of any papers in this action challenging the description in the affidavit of service of Kenneth J. Vega.

An affidavit by the moving defendant's wife, Jennifer L. Prosa, is also attached to the moving papers. Like her husband, she admits that she resides at the mortgaged premises and contests service of the summons and complaint on the basis that “[n]either I nor anyone else at my house meets the description of the person allegedly served and we do not know anyone who meets such description”. Likewise, in a similar fashion, moving defendant's son, Matthew Prosa, states that “[n]either I nor anyone else at my house meets the description of the person allegedly served and we do not know anyone who meets such description”. Both the affidavit of Jennifer L. Prosa and Matthew Prosa fail to aver that they were present at the dwelling place on August 31, 2011 at 7:22 p.m., the date and time that the summons and complaint were allegedly served upon defendant pursuant to CPLR 308 (2), making their affidavits of little probative value.

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 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, the affidavit of the plaintiff's process server constituted prima facie evidence of proper service of the summons and complaint pursuant to CPLR 308(2) and of the notice required by Real Property Actions and Proceedings Law § 1303, by delivery to a person of suitable age and discretion at the mortgaged premises, which was described as the dwelling place of defendant Prosa, and by mail to such premises. Defendant's challenge to the affidavit of service of the summons and complaint, the RPAPL §1303 notice by Kenneth J. Vega and additional notice pursuant to CPLR 3215 by Amalia Tamburello, failed to set forth sufficient facts rebutting the statements in plaintiff's affidavits. The defendant's bare, uncertain and vague denial of receipt of the process and other papers that were both delivered and mailed to his “dwelling place” at the address of the mortgaged premises was insufficient to rebut the presumption of proper service (*see U.S. Bank Natl. Assn. v Tate*, 102 AD3d 859, *supra*; *Stevens v Charles*, 102 AD3d 763, *supra*; *Bank of*

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N.Y. v Espejo, 92 AD3d 707; *Deutsche Bank Natl. Trust Co. v Matos*, 77 AD3d 606, 908 NYS2d 732 [2d Dept 2010]; *Facey v Heyward*, 244 AD2d 452, 664 NYS2d 119 [2d Dept 1997]). Under these circumstances, the court finds that the service effected was compliant with the dictates of CPLR 308(2).

A defendant seeking to vacate his or her default and leave to participate in the action upon the vacatur of the default by service of an answer under CPLR 5015(a)(1), 317 or 3012 must provide a reasonable excuse for the default and show a potentially meritorious defense (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr., Co.*, 67 NY2d 138, 501 NYS2d 8 [1986]; *ACT Prop., LLC v Ana Garcia*, 102 AD3d 712; *Deutsche Bank Natl. Trust Co. v Gutierrez*, 102 AD3d 825, 958 NYS2d 472 [2d Dept 2013]; *Wells Fargo Bank, N.A. v Russell*, 101 AD3d 860, 955 NYS2d 654 [2d Dept 2012]). Where the only excuse offered is the defendant's unsuccessful claim that he was not served with process or was not served in time to defend, a reasonable excuse is not established (*see ACT Prop., LLC v Ana Garcia*, 102 AD3d 712; *Deutsche Bank Natl. Trust Co. v Pietranico*, 102 AD3d 724; *Indymac Fed. Bank FSB v Quattrochi*, 99 AD3d 763, 952 NYS2d 239 [2d Dept 2012]; *Reich v Redley*, 96 AD3d 1038, 947 NYS2d 564 [2d Dept 2012]). Such is the case here, as the moving defendant offered no excuse for his default in answering other than his unsuccessful claim of a lack of service. Under these circumstances, the court need not address whether the moving defendant has a meritorious defense (*see Deutsche Bank Natl. Trust Co. v Gutierrez*, 102 AD3d 825; *Deutsche Bank Natl. Trust Co. v Pietranico*, 102 AD3d 724; *Wells Fargo Bank, N.A. v Russell*, 101 AD3d 860).

Accordingly, plaintiff's application (001) 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 motion (002) is denied in its entirety.

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

Dated: 1. 29. 2014



 ANDREW G. TARANTINO JR.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION