Countrywide Home Loans, Inc. v Rojas
2014 NY Slip Op 31295(U)
April 25, 2014
Supreme Court, Suffolk County
Docket Number: 08-17121
Judge: Joseph C. Pastoressa
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[* 1]

SHORT FORM ORDER

INDEX No. 08-17121

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 9-25-13
ADJ. DATE ______
Mot. Seq. # 002 - MG
Mot. Seq. # 003 - XMD

COUNTRYWIDE HOME LOANS, INC.
400 Countrywide Way
Simi Valley, CA 93065

Plaintiff,

- against -

NELSON ROJAS, MARCELA ROJAS, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR COUNTRYWIDE HOME LOANS, INC.,

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.

FRENKEL, LAMBERT, WEISS, WEISMAN & GORDON, LLP
Attorneys for Plaintiff
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Bay Shore, New York 11706

CABANILLAS & ASSOCIATES, P.C.
Attorneys for Defendants
Nelson Rojas and Marcela Rojas
245 Main Street, Suite 210
White Plains, New York 10601

Upon the following papers numbered 1 to 51 read on this motion for an order of reference and cross motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers 16 - 31; Answering Affidavits and supporting papers 32 - 44; Replying Affidavits and supporting papers 45 - 51; ~~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

[* 2]

ORDERED that this motion (002) by plaintiff Countrywide Home Loans, Inc. (Countrywide) for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321; seeking to fix the defaults of the non-appearing, non-answering defendants; and, for leave to amend the caption of this action pursuant to CPLR 3025 (b), is granted; and it is further

ORDERED that the caption is hereby amended to reflect the plaintiff as Bank of America, N.A. s/b/m to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP; and it is further

ORDERED that the caption is further amended by striking therefrom the names of defendants "John 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

---x

Bank of America, N.A. s/b/m to BAC Home Loans Servicing, LP
f/k/a Countrywide Home Loans Servicing, LP

Plaintiff,

-against-

Nelson Rojas. Marcela Rojas, Mortgage Electronic Registration Systems, Inc. as nominee for Countrywide Home Loans, Inc.

Defendants.

---x

ORDERED that the cross motion (003) by defendants Neslon Rojas and Marcela Rojas (Rojas) 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; for an order pursuant to CPLR 3211 dismissing the complaint for failure to obtain personal jurisdiction over the defendants; for an order dismissing the complaint for failure to provide proper notice of default as required under the mortgage loan; for an order pursuant to CPLR 3012 (d) extending defendants' time to appear in the action; and, for an order pursuant to CPLR 3215 (f) denying plaintiff's application for failure to establish its case as a matter of law, is denied.

This is an action to foreclose a mortgage on premises known as 87 Orient Avenue, Brentwood, New York. On June 6, 2005, defendant Nelson Rojas executed a note in favor of Countrywide Home Loans, Inc.

(Countrywide) agreeing to pay the sum of $284,000.00 at the yearly rate of 6.750 percent. On the same date, defendants Rojas executed a mortgage in the principal sum of $284,000.00 on their home. The mortgage indicated Countrywide to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Countrywide as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on June 23, 2005 with the Suffolk County Clerk's Office. Thereafter, on April 30, 2008, the note and mortgage were transferred by assignment of mortgage from MERS, as nominee for Countrywide, to plaintiff Countrywide. The assignment of mortgage was recorded on May 15, 2008 with the Suffolk County Clerk's Office.

Countrywide sent a notice of default dated February 19, 2008 to defendant Nelson Rojas stating that he had defaulted on his mortgage loan and that the amount past due was $5,067.04. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on May 2, 2008. In its complaint, plaintiff alleges in pertinent part, that defendant Nelson Rojas breached his obligations under the terms of the note and mortgage by failing to make the monthly payments commencing with his January 1, 2008 payment. None of the defendants answered, moved or otherwise appeared in the action.

The Court's computerized records indicate that a foreclosure settlement conference was held on August 29, 2013 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. Defendants Rojas, in opposition to the instant application, assert, *inter alia*, 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 defendants were not properly served with a summons and complaint in this action.

Initially addressing defendants' cross-motion, the court rejects defendants' 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 [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 (7) specifically requires that "[m]otions shall be held in abeyance while settlement conferences are being held..."

Those branches of defendants' motion seeking a dismissal of the complaint on the basis that plaintiff failed to obtain personal jurisdiction over the defendants and vacatur of defendants' default are denied. In seeking to vacate a default, a defendant is required to demonstrate a reasonable excuse for the delay in appearing and answering the complaint and a potentially meritorious defense to the action (*see* CPLR 5015 [a] [1]), or, under the circumstances of this case, that service of the summons and complaint was defective (*see* CPLR 5015[a] [4]; Sime v Ludhar, 37 AD3d 817 [2d Dept 2007]). When a defendant seeking to vacate a default raises a jurisdictional objection pursuant to CPLR 5015 (a) (4), the court is required to resolve the

jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5015 (a) (1) (see Roberts v Anka, 45 AD3d 752 [2d Dept 2007]; Marable v Williams, 278 AD2d 459 [2d Dept 2000]; Taylor v Jones, 172 AD2d 745 [2d Dept 1991]). Under CPLR 317, a defendant is not required to offer a reasonable excuse for his or her default (see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co., 67 NY2d 138 [1986]), but must demonstrate that he or she did not personally receive notice of the summons in time to defend the action (*id.* at 143, 501 NYS2d 8; see Fleisher v Kaba, 78 AD3d 1118 [2d Dept 2010]; see also Clover M. Barrett, P.C. v Gordon, 90 AD3d 973 [2d Dept 2011]).

The process server's affidavit sworn to on May 15, 2008 reveals that he made three attempts, on Wednesday, May 7, 2008 at 6:10 a.m., Friday, May 9, 2008 at 7:45 p.m. and Saturday, May 10, 2008 at 2:55 p.m., to personally serve the summons and complaint on defendants Rojas at the subject address pursuant to CPLR 308 (1) or CPLR 308 (2), then affixed the summons and complaint to the door and mailed a copy on May 15, 2008 to the subject address. The affidavit of service contains the statements "Deponent asked the below named person if he/she is aware of the named defendant's normal routine and the time the defendant departs from or arrives at the above address and received a negative reply. Deponent additionally asked the below named party if he/she was aware of the defendant's place of business and received a negative reply. Deponent confirmed with the below named party that the defendant does reside at the above address." In addition, the affidavit of service contains the statement "Your deponents office ran a people at work search with Accurint to possibly obtain a current place of employment. Said search found Decolores Fence Inc., as a possible place of employment for the defendant. However, your deponents office called said company and the phone number is not in service. Search is attached hereto."

Here, "due diligence" for the purposes of CPLR 308 (4) was satisfied with the three visits on different occasions and at different times, end of the week, weekend, midweek, and evening, morning and afternoon, to defendants' residence, which address was confirmed by a neighbor (see Estate of Waterman v Jones, 46 AD3d 63 [2d Dept 2007]; Akler v Chisena, 40 AD3d 559 [2d Dept 2007]). Since there is no indication that defendants Rojas worked Saturdays or that their workplace was readily ascertainable, plaintiff was not required to attempt to serve them at their workplace (see JPMorgan Chase Bank, N.A. v Szajna, 72 AD3d 902 [2d Dept 2010]). Defendant Marcela Rojas' bare assertion that she was at home on May 7, 2008, May 9, 2008 and May 10, 2008 is insufficient to rebut the prima facie proof of proper service pursuant to CPLR 308 (4) created by the process server's affidavit (see 425 East 26th Street Owners Corp. v Beaton, 50 AD3d 845 [2d Dept 2008]). The process server properly resorted to service of process pursuant to CPLR 308 (4), and plaintiff obtained personal jurisdiction over defendants Rojas (see JPMorgan Chase Bank, N.A. v Szajna, supra; id.).

Addressing defendants' application which seeks an order permitting them to interpose a late answer, it is well settled that "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 ... moving to extend the time to answer or to compel the acceptance of an untimely answer" (see Maspeth Fed. Sav. & Loan Assn. v McGown, 77 AD3d 890 [2d Dept 2010], quoting Lipp v Port Auth. of N.Y. & NJ, 34 AD3d 649 [2d Dept 2006]; Karalis v New Dimensions HR, Inc., 105 AD3d 707 [2d Dept 2013]; Swedbank, AB v Hale Ave. Borrower, LLC, 89 AD3d 922 [2d Dept 2011]; Community Preservation Corp. v Bridgewater Condominiums, LLC, 89 AD3d 784 [2d Dept 2011]; Midfirst Bank v Al-Rahman, 81 AD3d 797 [2d Dept 2011]; Deutsche Bank Natl. Trust Co. v Rudman, 80 AD3d 651 [2d Dept 2010]). The determination as to

what constitutes a reasonable excuse lies within the sound discretion of the trial court (see Segovia v Delcon Constr. Corp., 43 AD3d 1143 [2d Dept 2007]; Matter of Gambardella v Ortov Light., Inc., 278 AD2d 494 [2d Dept 2000]).

Here, the undetailed claim by defendant Marcela Rojas that she did not know she had to answer or otherwise appear in the action does not constitute reasonable excuses for failure to timely answer in the action (see U.S. Bank N.A. v Slavinski, 78 AD3d 1167 [2d Dept 2010]; Yao Ping Tang v Grand Estate, LLC, 77 AD3d 822 [2d Dept 2010]; Dorrer v Berry, 37 AD3d 519 [2d Dept 2007]). As the Court concludes that defendants Rojas do not have a reasonable excuse for defaulting in the action, it is unnecessary to address whether they have a meritorious defenses (see Midfirst Bank v Al-Rahman, 81 AD3d 797 [2d Dept 2011]; Deutsche Bank Natl. Trust Co. v Rudman, 80 AD3d 651, 914 NYS2d 672 [2d Dept 2010]).

Addressing that branch of defendants' cross-motion which raises an allegation of lack of standing, it is well established that "where a defendant does not challenge a plaintiff's standing, the plaintiff may be relieved of its obligation to prove that it is the proper party to seek the requested relief." (Wells Fargo Bank Minnesota Natl. Assn. v Mastropaolo, 42 AD3d 239 [2d Dept 2007]). The court went on to hold that "an argument that a plaintiff lacks standing, if not asserted in the defendant's answer or in a pre-answer motion to dismiss the complaint, is waived pursuant to CPLR 3211(e)" [citations omitted] (see Wells Fargo Bank Minn., NA v Mastropaolo, 42 AD3d 239; see also HSBC Bank, USA v Dammond, 59 AD3d 679 [2d Dept 2009] [waived standing issues does not constitute meritorious defense on application to vacate default]; Deutsche Bank Natl. Trust Co. v Young, 66 AD3d 819 [2d Dept 2009] [standing issue unavailing on application to vacate default judgment]; US Bank, NA v Emmanuel, 83 AD3d 1047 [2d Dept 2011]; Deutsche Bank Natl. Trust Co. v Hussain, 78 AD3d 989 [2d Dept. 2010]; Countrywide Home Loans Serv., LP v Albert, 78 AD3d 983 [2d Dept 2010]; Aames Funding Corp. v Houston, 57 AD3d 808 [2d Dept 2008]). Here, the defense of standing was waived by the moving defendants due to their unsuccessful attempt to secure a vacatur of their default in answering, the absence of any duly served answer raising such defense and their failure to timely move for dismissal under CPLR 3211 (see Bank of NY v Alderazi, 99 AD3d 837 [2d Dept 2012];Countrywide Home Loans Serv., LP v Albert, 78 AD3d 983 [2d Dept 2010]; Deutsche Bank Trust Co., Am. v Stathakis, 90 AD3d 983 [2d Dept 2011]; Holubar v Holubar, 89 AD3d 802 [2d Dept 2011]; McGee v Dunn, 75 AD3d 624 [2d Dept 2010]; see also HSBC Bank USA, NA v Schwartz, 88 AD3d 961 [2d Dept 2011]; HSBC Bank, USA v Dammond, 59 AD3d 679 [2d Dept 2009]; Wells Fargo Bank Minn., NA v Mastropaolo, supra).

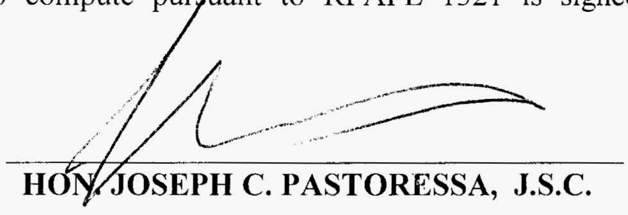
The moving defendants' remaining demands for relief which include claims for dismissal of the complaint on the grounds that the plaintiff allegedly failed to provide proper notice pursuant to the mortgage and that the affidavit in support of plaintiff's application, which was made by a non-party, was not supported by a power of attorney or servicing agreement, are denied. Here, the moving defendants' failure to establish a reasonable excuse for their default resulted in the denial of their application to vacate it. The foregoing circumstances, coupled with the non-jurisdictional nature of defendants' assertions, vitiate any claim the moving defendants may have had to a dismissal of the plaintiff's complaint or denial of plaintiff's motion (see Pritchard v Curtis, 101 AD3d 1502 [3d Dept 2012]; see also Deutsche Bank Natl Trust Co. v Posner, 89 AD3d 674 [2d Dept 2011]).

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 [2d Dept 2003]; see also Argent Mtge. Co., LLC v Mentesana, 79 AD3d 1079 [2d Dept 2010]; Village Bank v Wild Oaks Holding, 196 AD2d 812 [2d Dept 1993]).

Here, plaintiff produced the unpaid note executed by defendant Nelson Rojas and the mortgage executed by defendants Rojas, 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, supra). The affidavit of Robert Andrew Krenitsky, assistant vice president to Bank of America, N.A. (BANA), avers that defendants defaulted on their loan by failing to make monthly payments due on January 1, 2008 and subsequent payments thereafter; that a notice of default dated February 19, 2008 was mailed to defendants Rojas via first class mail; and, that defendants have not cured the default.

Accordingly, plaintiff's application (002) to fix the defaults of 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 Green Tree Serv. v Cary, 106 AD3d 691 [2d Dept 2013]; Vermont Fed. Bank v Chase, 226 AD2d 1034 [3d Dept 1996]; Bank of East Asia, Ltd. v Smith, 201 AD2d 522 [2d Dept 1994]). Defendants' cross motion (003) 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: April 25, 2014

HON. JOSEPH C. PASTORESSA, J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION