

Bank of New York Mellon v Miletta

2014 NY Slip Op 31887(U)

April 8, 2014

Sup Ct, Suffolk County

Docket Number: 09-31335

Judge: Elizabeth H. Emerson

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 8 - SUFFOLK COUNTY

PRESENT:

Hon. ELIZABETH H. EMERSON
Justice of the Supreme Court

MOTION DATE 2-27-13; 11/11/13
ADJ. DATE 11/7/13
Mot. Seq. # 001 - MG
002 - XMD

-----X
The Bank of New York Mellon f/k/a The Bank of
New York, as Trustee for The Certificateholders
CWMBS, Inc., Alternative Loan Trust 2006-8T1
Mortgage Pass-Through Certificates, Series 2006-7,

Plaintiff,

Frenkel, Lambert, Weiss, Weisman &
Gordon, LLP
Attorneys for Plaintiff
53 Gibson Street
Bay Shore, New York 11706

- against -

Joseph Miletti, Renee De Gonzague Miletti, New
York State Commission of Taxation and Finance,
Schwing Electrical Supply Corp., 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 persons or
parties, if any, having or claiming an interest in or
lien upon the mortgage premises described in the
complaint,

Defendants.

Kingham Law Group, PLLC
Attorneys for Defendant, Joseph Miletti
4250 Veterans Memorial Highway
Suite 3020W
Holbrook, New York 11741

Renee De Gonzague Miletti
Defendant Pro Se
17 Sarah Anne Court
Miller Place, New York 11764

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Upon the following papers numbered 1 to 33 read on this motion for an order of reference; Notice of Motion/ Order
to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers 15 - 21; Answering Affidavits
and supporting papers 22 - 33; ~~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 this motion (001) by plaintiff The Bank of New York Mellon f/k/a The Bank of
New York, as Trustee for The Certificateholders CWMBS, Inc., Alternative Loan Trust 2006-8T1 Mortgage
Pass-Through Certificates, Series 2006-7 (Mellon), awarding plaintiff a default judgment as to the non-
appearing, non-answering defendants, for leave to amend the caption of this action pursuant to CPLR 3025

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(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 substituting Josephine De Gonzague as a party defendant in place of “John Doe #1” and by striking therefrom the names of the remaining defendants “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**

_____x
 The Bank of New York Mellon f/k/a The Bank of New York,
 as Trustee for The Certificateholders CWMBS, Inc.,
 Alternative Loan Trust 2006-8T1 Mortgage Pass-Through
 Certificates, Series 2006-7,

Plaintiff,

- against -

Joseph Milette, Renee De Gonzague Milette, New York State
 Commission of Taxation and Finance, Schwing Electrical
 Supply Corp., Josephine DeGonzague,

Defendants.

_____x
ORDERED that the cross motion (002) by defendant Joseph Milette for an order pursuant to CPLR 2005 and 3012(d) permitting him to interpose an answer late is denied.

This is an action to foreclose a mortgage on premises known as 17 Sarah Anne Court, Miller Place, New York (subject premises). On January 20, 2006, defendant Joseph Milette executed a fixed rate note in favor of Concord Mortgage Corp. (Concord), agreeing to pay the sum of \$570,000.00 at the yearly rate of 6.750 percent. On January 20, 2006, defendants Joseph Milette and Renee De Gonzague Milette executed a first mortgage in the principal sum of \$570,000.00 on the subject property. The mortgage indicated Concord to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Concord as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on February 14, 2006 in the Suffolk County Clerk’s Office. Thereafter, the mortgage was transferred by assignment of mortgage dated August 18, 2008 from MERS as nominee for Concord to The Bank of New York, as Trustee for The Certificateholders CWMBS, Inc., Alternative Loan Trust 2006-8T1 Mortgage Pass-Through Certificates, Series 2006-7. The assignment of mortgage was recorded on

September 19, 2008 with the Suffolk County Clerk's Office. Thereafter, the note and mortgage were transferred by a correction assignment of mortgage dated July 27, 2009 from The Bank of New York, as Trustee for The Certificateholders CWMBS, Inc., Alternative Loan Trust 2006-8T1 Mortgage Pass-Through Certificates, Series 2006-7 to Countrywide Home Loans, Inc. Thereafter, the mortgage was transferred by assignment of mortgage dated July 27, 2009 from Countrywide Home Loans, Inc. to plaintiff, Mellon.

Countrywide Home Loans, Inc. sent a notice of default dated January 8, 2009 to defendant Joseph Miletta stating that he had defaulted on his mortgage loan and that the amount past due was \$19,331.86. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on August 13, 2009. 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 November 1, 2008 payment and subsequent payments thereafter. Annexed as an exhibit to plaintiff's moving papers is a copy of an affidavit of service evincing personal service of the summons and complaint pursuant to CPLR 308(1) on Joseph Miletta at 17 Sarah Anne Court, Miller Place, New York on August 20, 2009 at 7:10 a.m. Defendant Miletta did not interpose an answer in this action.

The Court's computerized records indicate that a foreclosure settlement conference was held on June 24, 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 a default judgment contending that none of the defendants have answered the complaint or moved with respect thereto and, the time in which to answer or move with respect thereto has expired.

Defendant Miletta, has filed a cross-motion seeking an order pursuant to CPLR 2005 and 3012(d) permitting him to interpose a late answer. In support of defendant's motion to vacate his default, defendant Joseph Miletta 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 was not residing at the subject premises. Plaintiff has served opposition to defendant's cross-motion.

Addressing defendant's cross-motion, 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, defendant Miletta failed to submit any documentary evidence to support his claim that he did not live at the subject premises at the time that he was served. Furthermore, defendant failed to rebut the evidence submitted by the plaintiff in opposition to his cross-motion, namely: that defendant Miletta had represented his premises as 17 Sarah Anne Court, Miller Place, New York in a Permanent Modification Agreement dated August 13, 2008; that on September 25, 2009, defendant Miletta listed 17 Sarah Anne Court, Miller Place, New York as his residence when he was approved for a Trial Loan Modification Agreement; and, that in a letter from defendant Miletta to Bank of America dated November 1, 2009, defendant listed 17 Sarah Anne Court, Miller Place, New York as his address. In any event, the court is left with only the unsubstantiated and conclusory denials of service and/or receipt of any papers in this action that are advanced in the affidavit of defendant Miletta on his cross-motion. 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).


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 A.D.3d 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 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 2005 and 3012(d) permitting him to interpose an answer late is denied.

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

Dated: April 8, 2014



ELIZABETH H. EMERSON
J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION