Embrace Home Loans, Inc. v Hoelzl
2015 NY Slip Op 30224(U)
February 9, 2015
Supreme Court, Suffolk County
Docket Number: 12-21997
Judge: John Iliou
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[* 1]

SHORT FORM ORDER

INDEX No. 12-21997

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 14 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN ILIOU
Acting Justice of the Supreme Court

MOTION DATE 8-28-14 (002)
MOTION DATE 9-25-14 (003)
ADJ. DATE 10-24-14
Mot. Seq. # 002 - MG
003 - XMD

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EMBRACE HOME LOANS, INC.,

Plaintiff,

- against -

CARL M. HOELZL and KATHLEEN A HOELZL,

Defendants.

----------X

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Upon the following papers numbered 1 to 28 read on this motion for a judgment of foreclosure and sale; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers 11 - 19; Answering Affidavits and supporting papers 20 - 26; Replying Affidavits and supporting papers 27 - 28; ~~Other __; (and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion (002) by plaintiff, Embrace Home Loans Inc. (Embrace), for an order granting it a judgment of foreclosure and sale is granted; and it is further

ORDERED that the cross motion (003) by defendants Carl M. Hoelzl and Kathleen A. Hoelzl (defendants) for an order denying plaintiff's motion for a judgment of foreclosure and dismissing the plaintiff's complaint for lack of standing; or in the alternative, an order dismissing plaintiff's complaint pursuant to CPRL 3215 (c); or in the alternative, an order pursuant to CPLR 5015 vacating the order of reference and granting defendants leave to file and serve upon plaintiff a late answer pursuant to CPLR 3012(d) and 2004; or in the alternative, an order pursuant to CPLR 3408 restoring the matter to the foreclosure settlement part is denied.

This is an action to foreclose a mortgage on residential real property known as 12 Burgess Lane, Stony Brook, New York. Defendants executed a promissory note dated May 23, 2009 in favor of Advance Financial Services, Inc. (Advanced) agreeing to pay the sum of $333,452.00 at the rate of 5.000 percent. On the same date, defendants also executed a first mortgage in the principal sum of $333,452.00 on the subject property. The mortgage indicated Advanced to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Advanced as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on June 22, 2009 in the Suffolk County Clerk's Office. Thereafter, the note and mortgage were transferred by assignment of mortgage on July 13, 2012 from MERS, as nominee for Advanced, to Embrace, the plaintiff herein.

Plaintiff commenced the instant action on July 20, 2012. Defendants failed to interpose an answer or otherwise appear in the action. Plaintiff subsequently moved (001) for a default judgment and an order of reference. By order dated November 18, 2013 the court (Collins, J.) granted the plaintiff's application for an order of reference.

Plaintiff now moves (002) for an order granting it a judgment of foreclosure and sale. Plaintiff's submissions in support of its motion include its attorney's affirmation, the Referee's oath and report of amount due dated June 25, 2014 indicating the amount due to be $350,135.16, plaintiff's affidavit of amount due from Michael Blair, senior vice president of Cenlar FSB, servicing agent for plaintiff, the order of reference dated November 18, 2013 (Collins, J.), the note, mortgage, assignment of mortgage, the pleadings, and the affidavits of service of process.

Defendants have filed a cross motion seeking, *inter alia*, an order pursuant to CPLR 2004 and 3012(d) permitting them to interpose a late answer. In support of defendants' motion to vacate their default, defendant Carl M. Hoelzl, by way of affidavit, denies having been served with a copy of the summons and complaint. Plaintiff has served opposition to defendants' cross motion.

Addressing defendants' 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, the court is left with the unsubstantiated and conclusory denial of service. As indicated above, such denials are insufficient to rebut the prima facie showing of proper service created by the process server's affidavit. Furthermore, defendant Carl M. Hoelzl's bald denial of service of the summons and complaint is negated by his statement that "when [he] was first served with the summons and complaint, [he] was unrepresented and did not realize that [he] had to respond with an answer." 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 defendants have 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).

Addressing defendants' assertion 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, 837 NYS2d 247 [2d Dept 2007]). Furthermore, "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* ***US Bank, NA v Emmanuel***, 83 AD3d 1047, 921 NYS2d 320 [2d Dept 2011]; ***Deutsche Bank Natl. Trust Co. v Hussain***, 78 AD3d 989, 912 NYS2d 595 [2d

Dept 2010]; ***Countrywide Home Loans Serv., LP v Albert***, 78 AD3d 983, 912 NYS2d 96 [2d Dept 2010]; ***Deutsche Bank Natl. Trust Co. v Young***, 66 AD3d 819, 886 NYS2d 617 [2d Dept 2009] [standing issue unavailing on application to vacate default judgment]; ***HSBC Bank, USA v Dammond***, 59 AD3d 679, 875 NYS2d 490 [2d Dept 2009] [waived standing issues does not constitute meritorious defense on application to vacate default]). Based upon the foregoing, defendants' assertion of a standing defense is unavailing since the defendants waived such defense by failing to assert it in a timely pre-answer motion to dismiss or as an affirmative defense in an answer (*see* ***Deutsche Bank Natl. Trust Co. v Young***, 66 AD3d 819).

In addition, in light of defendants' status as parties in default, they are not entitled to affirmative relief of a non-jurisdictional nature. Here, there was no vacatur of the defendants' default in answering in place at the time of the interposition of their cross motion. Accordingly, the defendants' contentions, which are non-jurisdictional in nature, are summarily rejected by the Court.

Defendants' assertion that plaintiff failed to comply with the requirements of RPAPL 1304, a condition precedent to commencement of a foreclosure action, is rejected by the Court. Mr. Hoelzl asserts by affidavit that he is seeking leave of court "to interpose a late answer to include an affirmative defense ... for violations of RPAPL 1304..." The Court notes that Mr. Hoelzl does not deny having received the 90 day pre-foreclosure notice pursuant to RPAPL 1304 and does not indicate in his affidavit what violations of RPAPL 1304 might have occurred.

Proper service of the notices required by RPAPL 1304 is a condition precedent to the commencement of a residential foreclosure action, and is the plaintiff's burden to establish (*see* ***Deutsche Bank Natl. Trust Co. v Spanos***, 102 AD3d 909, 961 NYS2d 200 [2d Dept 2013]; ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 923 NYS2d 609 [2d Dept 2011]). Here, plaintiff contends that it served the 90-day notice as required by RPAPL 1304. The affirmation of plaintiff's counsel reflects that the 90-day notice dated January 9, 2012, containing the requisite language required by statute, was sent by first class mail and registered mail. The affidavit of Michael Blair also evidences that a 90-day notice pursuant to RPAPL 1304 was sent to defendants by first class mail and certified mail. Finally, a copy of the notice pursuant to RPAPL 1304 was annexed to plaintiff's opposition papers. The court is again left with only a nebulous assertion contained in the affidavit of defendant Carl M. Hoelzl. As indicated above, such a vague averment is insufficient to rebut the prima facie showing of proper service created by plaintiff's submissions.

Also unavailing is defendant's contention that the plaintiff abandoned its claims under CPLR 3215(c). In mortgage foreclosure actions, it is well settled law that a foreclosing plaintiff may not be deemed to have abandoned its foreclosure action under CPLR 3215(c) when it takes "the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference" under RPAPL 1321 (1) within one year of the defendants' default (***Klein v St. Cyprian Prop., Inc.***, 100 AD3d 711, 954 NYS2d 170 [2d Dept 2012]; *see also* ***U.S. Bank Natl. Assn. v Poku***, 118 AD3d 980, 989 NYS2d 75 [2d Dept 2014]; ***Home Sav. of Am., F.A. v Gkanios***, 230 AD2d 770, 646 NYS2d 530 [2d Dept 1996]). "Where application is made to the court for the entry of a default judgment within one year of the defendant's default, the court may not refuse to enter judgment or dismiss the complaint as abandoned pursuant to CPLR 3215(c)" (***Nowickiv Sports World Promotions***, 48 AD3d 435, 851 NYS2d

270 [2d Dept 2008]). The outcome of such application is irrelevant because it is the mere interposition of an application for a default judgment within one year of the default that suffices for purposes of CPLR 3215(c) (*see* ***U.S. Bank Natl. Assn. v Poku***, 118 AD3d 980; ***Brown v Rosedale Nurseries, Inc.***, 259 AD2d 256, 686 NYS2d 22 [1st Dept 1999]; ***Home Sav. of Am., F.A. v Gkanios***, 230 AD2d 770). Here the credible evidence reveals that plaintiff took the preliminary steps toward obtaining a default judgment with the timely filing of an order of reference and that a general pattern of delay in proceeding with the litigation has not been demonstrated (*see* CPLR 205[a]).

Based upon the foregoing, plaintiff's motion is granted and defendant's cross motion is denied in its entirety. The proposed judgment of foreclosure and sale is signed as modified by the Court.

Dated: 2-9-15

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**