

Deutsche Bank Natl. Trust Co. v Barwick-Bissat

2015 NY Slip Op 30225(U)

January 30, 2015

Supreme Court, Suffolk County

Docket Number: 09-11908

Judge: James C. Hudson

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 40 - SUFFOLK COUNTY

PRESENT:

Hon. JAMES HUDSON
Acting Justice of the Supreme Court

MOTION DATE 10-27-10 (003)
MOTION DATE 9-8-14 (004)
ADJ. DATE _____
Mot. Seq. # 003 - MD
 # 004 - MD

-----X

DEUTSCHE BANK NATIONAL TRUST
COMPANY AS TRUSTEE FOR THE MLMI
TRUST SERIES 2007-MLN1,

Plaintiff,

- against -

ALISON BARWICK-BISSAT; UNITED
STATES OF AMERICA INTERNATIONAL
REVENUE; NEW YORK STATE
DEPARTMENT OF TAXATION AND
FINANCE; STATE STREET BANKS & TRUST
CO.; "JOHN DOES" AND "JANE DOES", said
names being fictitious, parties intended being
possible tenants or occupants of premises, and
corporations, other entities or persons who claim,
or may claim, a lien against premises,

Defendants.

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Upon the following papers numbered 1 to 43 read on this motion seeking to vacate a default (003); seeking to dismiss the complaint (004); Notice of Motion (003) and supporting papers 1 - 16; Answering Affidavits and supporting papers 9 - 17; Replying Affidavits and supporting papers 18 - 21; Notice of Motion (004) and supporting papers 22 - 29; Answering Affidavits and supporting papers 30-38; Replying Affidavits and supporting papers 39 - 43; ~~Other _____; (and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion (003) by defendant Alison Barwick-Bissat (defendant) to, among other things, stay the proceedings and this motion (004) by defendant to, among other things, dismiss the complaint are consolidated for the purposes of this determination; and it is further

ORDERED that this motion (003) by defendant for an order staying the proceedings to conduct discovery, to vacate her default in answering the summons and complaint and for leave to serve and file a late answer is considered under CPLR 317 and CPLR 3012 and is denied; and it is further

ORDERED that this motion (004) by defendant for an order dismissing the complaint or in the alternative, cancelling all interest, attorney's fees, costs and other penalties that plaintiff may seek against defendant or, in the alternative, sanctioning plaintiff, Deutsche Bank National Trust Company as Trustee for the MLMI Trust Series 2007-MLN1 (Deutsche Bank) on the ground that Deutsche Bank failed to negotiate in good faith as required by CPRL 3408, and for reasonable attorney's fees in the amount of \$14,133.00 is denied.

This is an action to foreclose a mortgage on residential real property known as 55 Roses Grove Road, Southampton, New York. Defendant executed an adjustable rate note dated December 14, 2005 in favor of Mortgage Lenders Network USA (Mortgage Lenders) agreeing to pay the sum of \$692,000.00 with interest at the starting yearly rate of 8.750 percent. On the same date, defendant executed a mortgage in the principal sum of \$692,000.00 on the subject property. The mortgage indicated Mortgage Lenders to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Mortgage Lenders as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on February 13, 2007 in the Suffolk County Clerk's Office. Thereafter, on February 18, 2009, the note and mortgage were transferred by assignment of mortgage from MERS, as nominee for Mortgage Lenders, to plaintiff Deutsche Bank. The assignment of mortgage was recorded on August 20, 2009 in the Suffolk County Clerk's Office. An order of reference dated March 10, 2010 was granted by the court (Spinner, J.). Defendant has failed to answer or otherwise appear in the action.

Initially the court considers defendant's motion seeking, *inter alia*, leave to file and serve a late answer. "A defendant who has failed to appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a potentially meritorious defense to the action to avoid the entering of a default judgment or to extend the time to answer" (*Mellon v Izmiriligil*, 88 AD3d 930, 931 NYS2d 667 [2d Dept 2011], quoting, *Wells Fargo Bank, N.A. v Cervini*, 84 AD3d 789, 921 NYS2d 643 [2d Dept 2011]). A defendant moving under CPLR 317 must establish that he or she did not personally receive notice of the summons in time to defend and that he or she possesses a meritorious defense to the claim of the plaintiff. No demonstration of a reasonable excuse is necessary under CPLR 317, since the statute itself provides for same, namely, non-receipt of personal notice of the summons in time to defend (*see* CPLR 317). Here, there has been no showing that defendant failed to receive notice of the action in time to defend as the record is replete with evidence otherwise. In any event, the absence of any denial of receipt of the mailings of the summons and complaint to the correct address as attested to in the affidavit of the plaintiff's process server is fatal to the defendant's claim for relief under CPLR 317 (*see Burekhovitch v Tatarchuk*, 99 AD3d 653, 952 NYS2d 812 [2d Dept 2012]; *Jackson v Professional Transp. Corp.*, 81 AD3d 602, 916 NYS2d 159 [2d Dept 2011]; *Cavalry Portfolio Serv., LLC v Reisman*, 55 AD3d 524, 865 NYS2d 286 [2d Dept 2008]). Her conclusory claim that she only learned of this action "upon receiving plaintiff's notice of motion for judgment in foreclosure" and "was never personally served for this action" are insufficient to establish that she did not receive notice of the summons and complaint in time to defend (*see Bank of New York v Samuels*, 107 AD3d 653, 968 NYS2d 93 [2d Dept 2013]; *Stevens v Charles*, 102 AD3d 763, 958 NYS2d 722 [2d Dept 2013]; *C & H Import & Export, Inc. v MNA Global, Inc.*, 79 AD3d 784, 912 NYS2d 428

[2d Dept 2010]). Such claims are also insufficient to raise a successful jurisdictional defense of the type contemplated by CPLR 3211 (a)(8) (see *US Natl. Bank Assn. as Trustee v Melton*, 90 AD3d 742, 934 NYS2d 352 [2d Dept 2011]; *Deutsche Bank Natl. Trust Co. v Hussain*, 78 AD3d 989, 912 NYS2d 595 [2d Dept 2010]).

Motions for relief pursuant to CPLR 3012 are governed by a different standard than those made under CPLR 317, although the requirement of a showing of a meritorious defense remains. “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” (*Mannino Development, Inc. v Linares*, 117 AD3d 995, 986 NYS2d 578 [2d Dept 2014]; *HSBC Bank USA, N.A. v Lafazan*, 115 AD3d 647, 983 NYS2d 32 [2d Dept 2014]; *JP Morgan Chase Bank v Palma*, 114 AD3d 645, 979 NYS2d 832 [2d Dept 2014]; *Midfirst Bank v Al-Rahman*, 81 AD3d 797, 917 NYS2d 871 [2d Dept 2011]). The determination of that which constitutes a reasonable excuse lies within the discretion of the Court (see *Mellon v Izmirligil*, 88 AD3d 930, *supra*; [2d Dept 2011]; *Wells Fargo Bank, N.A. v Cervini*, 84 AD3d 789, *supra*; *Maspeth Federal Sav. & Loan Assn. v McGown*, 77 AD3d 890, 909 NYS2d 403 [2d Dept 2010]; *Star Indus. Inc. v Innovative Beverages, Inc.*, 55 AD3d 903,904, 866 NYS2d 357 [2d Dept 2008]). Where the delay in moving to vacate is lengthy, the moving party must offer a reasonable explanation for such delay as well as one for the initial default (see *TD Bank, N.A. v Spector*, 114 AD3d 933, 980 NYS2d 836 [2d Dept 2014]; *Karalis v New Dimensions HR, Inc.*, 105 AD3d 707, 962 NYS2d 647 [2d Dept 2013]).

Here, defendant asserts that her default was caused by a family medical emergency requiring her protracted attention. However, this assertion is insufficient to support a finding that her default in answering was justifiable so as to warrant relief under CPLR 3012 and 2005 or that her time to answer should be extended under CPLR 2004, for good cause shown. Defendant does not deny receipt of the summons with the notice required by RPAPL 1320 or the separate CPLR 1303 notice, warning of the consequences of a default, thereby warranting rejection of the excuse advanced by defendant as a reasonable one for purposes of CPLR 2005 and 3012 (d) (see *Dimopoulos v Caposella*, 118 AD3d 739, 987 NYS2d 434, 435 [2d Dept 2014]; *Chase Home Finance, LLC v Minott*, 115 AD3d 634,981 NYS2d 757 [2d Dept 2014]; *Karalis v New Dimensions HR, Inc.*, 105 AD3d 707, 962 NYS2d 647 [2d Dept 2013]). The Court further notes that defendant has not offered a reasonable explanation for the lengthy delay in moving to vacate her default. This is especially so given the fact that her application was filed in excess of five years from date that this action was commenced on March 26, 2009. 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, 958 NYS2d 472 [2d Dept 2013]; *Deutsche Bank Natl. Trust Co. v Pietranico*, 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]; *Wells Fargo Bank, N.A. v Russell*, 101 AD3d 860, 955 NYS2d 654 [2d Dept 2012]).

Addressing defendant’s 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; **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, defendant's assertion of a standing defense is unavailing since defendant 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).

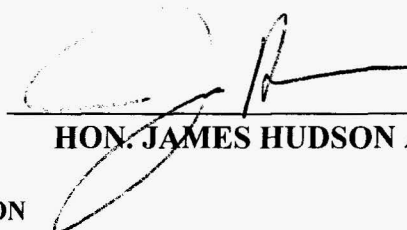
Also unavailing is defendant's contention that the action should be stayed in order to afford defendant an opportunity to obtain discovery. CPLR 3212(f) provides that "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just". Appellate case authorities have long instructed that to avail oneself of the safe harbor this rule affords, the claimant must "offer an evidentiary basis to show that discovery may lead to relevant evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff" (**Martinez v Kreychmar**, 84 AD3d 1037, 923 NYS2d 648 [2d Dept 2011]; *see Garcia v Lenox Hill Florist III, Inc.*, 120 AD3d 1296, 993 NYS2d 86 [2d Dept 2104]; **Seaway Capital Corp. v 500 Sterling Realty Corp.**, 94 AD3d 856, 941 NYS2d 871 [2d Dept 2012]). In addition, the party asserting the rule must demonstrate that he or she made reasonable attempts to discover facts which would give rise to a genuine triable issue of fact on matters material to those at issue (*see Swedbank, AB v Hale Ave. Borrower, LLC*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]). The papers submitted by defendant were insufficient to satisfy the aforementioned statutory burden. Thus, defendant failed to sufficiently demonstrate that she made reasonable attempts to discover the facts which would give rise to a triable issue of fact or that further discovery might lead to relevant evidence (*see* CPLR 3212 [f]; **Anzel v Pisotino**, 105 AD3d 784, 962 NYS2d 700 [2d Dept 2013]; **Cortes v Whelan**, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]; **Sasson v Setina Mfg. Co., Inc.**, 26 AD3d 487, 810 NYS2d 500 [2d Dept 2006]).

Defendant's application for an order dismissing the complaint or in the alternative, cancelling all interest, attorney's fees, costs and other penalties that plaintiff may seek against defendant or, in the alternative, sanctioning plaintiff Deutsche Bank on the ground that it failed to negotiate in good faith as required by CPRL 3408, and for reasonable attorney's fees in the amount of \$14,133.00 is denied in its entirety. Absent a "viable jurisdictional claim", a party in default may not move for affirmative relief without an order relieving such defendant from his or her default in place at the time the affirmative relief is demanded (*see U.S. Bank Natl. Assn. v Gonzalez*, 99 AD3d 694, 952 NYS2d 59 [2d Dept 2012]; **Holubar v Holubar**, 89 AD3d 802, 934 NYS2d 710 [2d Dept 2011]; **McGee v Dunn**, 75 AD3d 624, 906 NYS2d 74 [2d Dept 2010]). Here, there was no vacatur of the defendant's default in answering in place at the time of the interposition of this motion. As such, the defendant's application for affirmative relief is procedurally improper and denied on that basis.

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Based upon the foregoing, defendant's motions under sequence numbers 003 and 004 are denied in their entirety.

Dated: January 30, 2015



HON. JAMES HUDSON A.J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION