

<b>Wells Fargo Bank, N.A. v Yanes</b>
2015 NY Slip Op 30357(U)
March 2, 2015
Supreme Court, Suffolk County
Docket Number: 09-28002
Judge: John H. Rouse
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 12 - SUFFOLK COUNTY

**PRESENT:**

Hon. JOHN H. ROUSE  
Acting Justice of the Supreme Court

MOTION DATE 7-16-14 (003)  
MOTION DATE 12-3-14 (004)  
ADJ. DATE \_\_\_\_\_  
Mot. Seq. # 003 - MG  
# 004 - XMD

-----X  
WELLS FARGO BANK, N.A.,

Plaintiff,

- against -

LUVIA YANES, RUDY ORELLANA,

Defendants.  
-----X

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Upon the following papers numbered 1 to 52 read on this motion for an order granting a judgment of foreclosure and sale; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23; Notice of Cross Motion and supporting papers 24 - 35; Answering Affidavits and supporting papers 36 - 52; ~~Replying Affidavits and supporting papers \_\_\_\_\_~~; Other \_\_\_\_\_; (and after hearing ~~counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion (003) by plaintiff Wells Fargo Bank, NA (Wells Fargo) for an order granting it a judgment of foreclosure and sale is granted; and it is further

**ORDERED** that this cross motion (004) by defendant Luvia Yanes (defendant) for an order vacating the order of reference pursuant to CPLR 5015(a)(3) and (4) and/or dismissing the complaint pursuant to CPLR 3211(a)(2) and (4), is denied.

This is an action to foreclose a mortgage on residential real property known as 6 Healy Street, Huntington, New York. Defendants Luvia Yanes and Rudy Orellana executed a promissory note dated June 26, 2007 in favor of Lend America agreeing to pay the sum of \$368,231.00 with interest at the yearly rate of 7.500 percent. On the same date, defendants Yanes and Orellana also executed a mortgage in the principal sum of \$368,231.00 on the subject property. The mortgage indicated Lend America to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Lend America as well as the mortgagee of record for the purposes of recording the mortgage. Thereafter, on February 5, 2009, the mortgage was transferred by assignment of mortgage from MERS, as nominee for Lend America, to plaintiff Wells Fargo. The assignment of mortgage was recorded on February 27, 2009 in the Suffolk County Clerk's Office.

Plaintiff now moves (003) for an order granting it a judgment of foreclosure and sale. Plaintiff's submissions in support of its motion include its attorney's affirmation of regularity, the Referee's oath and report of amount due dated May 9, 2014 indicating the amount due to be \$574,514.90, plaintiff's affidavit of merit and amounts due from Natalie Bryant, vice president loan documentation of Wells Fargo, the order dated November 20, 2013 granting an order of reference, the note, mortgage, an assignment of mortgage, the summons and complaint, and the affidavits of service of process.

Defendant now cross moves (003) for an order vacating the order of reference pursuant to CPLR 5015(a)(3) and (4) and/or for an order dismissing the complaint pursuant to CPLR 3211(a)(2) and (4). Defendant Luvia Yanes contends that "[she] was never properly served with the summons and complaint". She further contends that "[she] did not have any notice whatsoever of the lawsuit until she received court paperwork in the mail after the date of substituted-service".

Defendant's submissions in support of her motion include, *inter alia*, the affidavit of defendant; defendant's proposed amended answer with affirmative defenses; the note, mortgage and an assignment of mortgage; the summons and complaint; and, the order dated November 20, 2013 granting an order of reference.

In opposition to the cross motion, plaintiff contends, *inter alia*, that defendant is in default and did not move to vacate her default; that the affirmative defense of standing has been waived; that defendant cannot vacate her default as she has not proffered a reasonable excuse for her default and a meritorious defense; and, that plaintiff is entitled to a judgment of foreclosure and sale.

Here, defendant has filed a cross motion seeking various forms of relief. The defendant's application to vacate her default pursuant to CPLR 3215 and to dismiss the action for lack of personal jurisdiction or for leave to serve and file a late answer, however, are not set forth in a notice of cross motion duly served pursuant to CPLR 2215. Appellate Division, Second Department case law has warned about the need for cross motions when seeking affirmative relief (*see Lee v Colley Group McMontebello, LLC*, 90 AD3d 1000, 934 NYS2d 331 [2d Dept 2011] [the plaintiff "was required to serve a notice of cross motion in order to obtain the affirmative relief of an extension of time to serve the summons with notice upon the defendant ..."]; *DeLorenzo v Gabbino Pizza Corp.*, 83 AD3d 992, 921 NYS2d 565 [2d Dept 2011] ["To the extent that the plaintiff attempted to informally seek leave to effect late service of the original summons and complaint ... that affirmative relief should have been sought in a notice of cross motion to the Supreme Court"]; *DiLacio v New York City Dist. Council of United Bhd. of Carpenters & Joiners of Am.*, 80 AD3d 553, 914 NYS2d 309 [2d Dept 2011] ["To the extent that the plaintiff now seeks either leave to amend the complaint or leave to replead, the issue is not properly before this Court, as the plaintiff did not cross-move for this relief before the Supreme Court"]; *99 Cents Concepts, Inc. v Queens Broadway, LLC*, 70 AD3d 656, 893 NYS2d 627 [2d Dept 2010] ["plaintiff failed to cross-move for any affirmative relief pursuant to CPLR ... the contention is not properly before us"] [internal citations omitted]). In light of the foregoing, defendant's request for affirmative relief in the absence of a cross motion, renders defendant's request procedurally defective and is accordingly denied on that ground.

In any event, as to the merits of defendant's un-noticed application, 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, 830 NYS2d 775 [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, 846 NYS2d 280 [2d Dept 2007]; *Marable v Williams*, 278 AD2d 459, 718 NYS2d 400 [2d Dept 2000]; *Taylor v Jones*, 172 AD2d 745, 569 NYS2d 131 [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, 141, 501 NYS2d 8 [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, 1119, 912 NYS2d 604 [2d Dept 2010]; *see also Clover M. Barrett, P.C. v Gordon*, 90 AD3d 973, 2011 NY Slip Op 09581 [2d Dept 2011]).

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]). 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]). However, 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 process server's affidavit of service constituted prima facie evidence of proper service upon defendant pursuant to CPLR 308 (2) and defendant's conclusory and unsubstantiated denial of receipt of the summons and complaint is insufficient to rebut the presumption of proper service created by said affidavits (*see Beneficial Homeowner Service Corp. v Girault*, 60 AD3d 984, 875 NYS2d 815 [2d Dept 2009]). All that is offered by defendant is a general denial of service (*cf. US Bank, NA v Arias*, 85 AD3d 1014, 927 NYS2d 362 [2d Dept 2011]). Accordingly, the branch of the defendant's application seeking a vacatur of her default for lack of personal jurisdiction is denied.

The moving defendant's alternate request for leave to serve and file a late answer is equally unavailing. To be entitled to such relief pursuant to CPLR 5105 and CPLR 3012, the moving defendant was required to set forth a justifiable excuse for their default and a meritorious defense (*see Development Strategies Co., LLC v Astoria Equities, Inc.*, 71 AD3d 628, 896 NYS2d 396 [2d Dept 2010]; *Mora v Scarpitta*, 52 AD3d 663, 861 NYS2d 110 [2d Dept 2008]; *Grinage v City of New York*, 45 AD3d 729, 846 NYS2d 300 [2d Dept 2007]; *Yellow Book of New York, Inc. v Weiss*, 44 AD3d 755, 843 NYS2d 190 [2d Dept 2007]). Here, the only excuse offered by the defendant was improper service which has been found to be unmeritorious.<sup>1</sup> Since the defendant offered no other excuse for her default, she is not entitled to the relief demanded pursuant to CPLR 5015(a)(1) (*see Tadco Constr. Corp. v Allstate Ins. Co.*, 73 AD3d 1022, 900 NYS2d 687 [2d Dept 2010]; *Pezolano v Incorporated City of Glen Cove*, 71 AD3d 970, 896 NYS2d 685 [2d Dept 2010]). The moving defendant's claim to one or more meritorious defenses are thus inconsequential and the Court need not determine whether defendant demonstrated a meritorious defense (*see Development Strategies Co., LLC v Astoria Equities, Inc.*, 71 AD3d 628).

Addressing defendant's assertion 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, 837 NYS2d 247 [2d Dept 2007]). The Appellate Division, Second Department further reasoned 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, 875 NYS2d 490 [2d Dept 2009] [waived standing issues do not constitute meritorious defense on application to vacate default]; *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]; *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]). Based upon the foregoing, defendant's assertion of a standing defense is unavailing since the 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).

Lastly, defendant defaulted in answering the summons and complaint served upon her pursuant to CPLR 308 (2) in July of 2009. In light of defendant's status as a party in default, she is not entitled to affirmative relief of a non-jurisdictional nature. Here, there was no vacatur of the defendant's default in answering in place at the time of the interposition of his cross motion. Therefore, the defendant's

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<sup>1</sup> The Court notes that defendant's counsel has proffered an additional excuse for delay through his affirmation, namely, that defendant was delayed due her attempts to secure a loan modification. However, council's averment is summarily rejected by this Court as same consisted only of his bare, conclusory statement which demonstrated no personal knowledge of the excuse being asserted (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Sharpe v Osorio*, 21 AD3d 467, 800 NYS2d 213 [2d Dept 2005]; *Grovey v Gimbel Brothers, Inc.*, 146 AD2d 742, 537 NYS2d 67 [2d Dept 1989]).

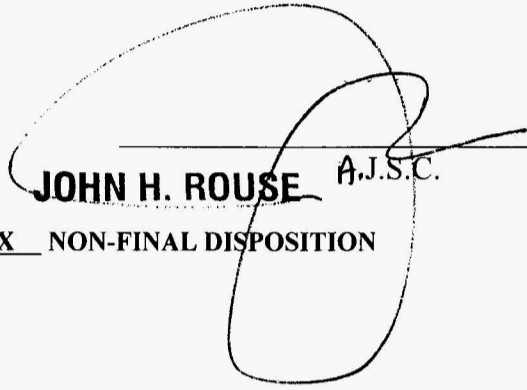
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contentions, which are non-jurisdictional in nature, are summarily rejected by the Court (*see U.S. Bank Natl. Assn. v Gonzalez*, 99 AD3d 694, 952 NYS2d 59 [2d Dept 2012]; *Deutsche Bank Trust Co., Am. v Stathakis*, 90 AD3d 983, 935 NYS2d 651 [2d Dept 2011]; *Holubar v Holubar*, 89 AD3d 802, 934 NYS2d 710 [2d Dept 2011]).

Accordingly, plaintiff's application for a judgment of foreclosure and sale is granted. Defendant's cross motion is denied in its entirety.

The proposed judgment of foreclosure is signed simultaneously herewith as modified by the court.

Dated: MARCH 2, 2015

  
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**JOHN H. ROUSE** A.J.S.C.

\_\_\_\_ FINAL DISPOSITION     X  NON-FINAL DISPOSITION