Bank of N.Y. Mellon v Taranto
2015 NY Slip Op 30882(U)
January 7, 2015
Supreme Court, Suffolk County
Docket Number: 10-05792
Judge: Joseph A. Santorelli
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SHORT FORM ORDER

INDEX NO.: 10-05792

SUPREME COURT - STATE OF NEW YORK
IAS PART 10 - SUFFOLK COUNTY

ORIGINAL

PRESENT: Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 001 (10-16-13)
002 (12-4-13)
ADJ. DATE _____
Mot. Seq. #001 - MG
002 - XMD

The Bank of New York Mellon f/k/a the Bank of New York, as Trustee and on behalf of CIT Mortgage Loan Trust 2007-1,

Plaintiff,

-against-

Patricia G. Taranto a/k/a Patricia G. King; Sean King; Diane Renner and "JOHN DOE #1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the Plaintiff, the persons or parties intended being the person or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the complaint,

Defendants.

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Upon the following papers numbered 1 to 26 read on this motion for an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18; Notice of Cross Motion and supporting papers 19 - 26; ~~Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers _____; Other _____; (and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#001) by plaintiff, The Bank of New York Mellon f/k/a the Bank of New York, as Trustee and on behalf of CIT Mortgage Loan Trust 2007-1 (Bank of NY) for, *inter alia*, leave to amend the caption of this action pursuant to CPLR 3025 (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 cross motion (#002) by defendants Patricia G. Taranto and Sean King (collectively referred to as defendants) to, *inter alia*, dismiss the complaint or to vacate their default in answering and for leave to file a late answer is considered under CPLR 317 and 5015(a)(1)(4) and is denied; and it is further

ORDERED that the caption is hereby amended by substituting Diane Renner in place of "John Doe #1", Elysia Weckenmann in place of "John Doe #2" and by striking therefrom the names of defendants "John Doe #3" 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

The Bank of New York Mellon f/k/a the Bank of New York, as Trustee and on behalf of CIT Mortgage Loan Trust 2007-1,

Plaintiff,

-against-

Patricia G. Taranto a/k/a Patricia G. King; Sean King; Diane Renner; Elysia Weckenmann,

Defendants.

This is an action to foreclose a mortgage on property known as 2290 Feureisen Avenue, Ronkonkoma, New York. On April 10, 2007, defendants executed a fixed rate note in favor of Wilmington Finance, Inc. (Wilmington) agreeing to pay the sum of $450,500.00 at the yearly interest rate of 7.625 percent. On said date, defendants also executed a mortgage in the principal sum of $450,500.00 on the subject property. The mortgage indicated Wilmington to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Wilmington as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on April 27, 2007 in the Suffolk County Clerk's Office. Thereafter, the note and mortgage were transferred by assignment of mortgage dated January 14, 2010 from MERS, as nominee for Wilmington, to Bank of NY, the plaintiff herein. The assignment of mortgage was recorded on February 17, 2010 with the Suffolk County Clerk's Office.

Vericrest Financial sent notices of default dated December 4, 2009 to defendants stating that they had defaulted on their mortgage loan and that the amount past due was $27,579.35. As a result of defendants' continuing default, plaintiff commenced this foreclosure action on February 11, 2010. In its complaint, plaintiff alleges in pertinent part that defendants breached their obligations under the terms and conditions of the note and mortgage by failing to make the monthly payments. Neither of the defendants appeared in the action by service of an answer.

The Court's computerized records indicate that a foreclosure settlement conference was held on August 25, 2010 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.

Initially addressing defendants' cross motion (#002), 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 defendants pursuant to CPLR 308 (2) and defendants' 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]). The defendants' affidavits do not specifically dispute the physical description set forth in the process server's affidavit and only state in pertinent part that Elysia Weckenmann could not have been served pursuant to CPLR 308 (2) as she was not residing in the home in 2010. All that is offered is a general denial of service (*cf.* ***US Bank, NA v Arias***, 85 AD3d 1014, 927 NYS2d 362 [2d Dept 2011]). Accordingly, those portions of the defendants' application seeking a vacatur of their defaults for lack of personal jurisdiction is denied.

The moving defendants' alternative claim 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 defendants were 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 defendants was improper service which has been found to be unmeritorious. Since the defendants offered no other excuse for their default, they are 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 defendants' claim to one or more meritorious defenses are thus inconsequential and the Court need not determine whether defendants demonstrated a meritorious defense (*see* ***Development Strategies Co., LLC v Astoria Equities, Inc.***, 71 AD3d 628).

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).

The defendants have also cross-moved seeking to restore the instant matter to the court's residential mortgage foreclosure settlement conference calendar. Defendants, in pertinent part, contend that their attorney has informed them that they are viable candidates for a loan modification after reviewing their financials and that they will be reapplying for a loan modification. However, defendants have failed to submit any evidence or documentation in support of their assertions that they

had previously submitted a loan modification package which was never approved and or that they had reapplied for a loan modification. As such, it would appear that no efforts have been made by the defendants to attempt to obtain a loan modification based upon the evidence before this Court. Furthermore, the court's computerized records indicate that this matter appeared on the foreclosure settlement conference calendar on four occasions and was referred to this Court on August 25, 2010. Here, the evidence in support of the cross-motion as offered by defendants is patently insufficient to warrant the relief requested. As such, the Court denies such application.

In any event, " '[o]n a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing' " (***Dupps v Betancourt***, 99 AD3d 855, 855, 952 NYS2d 585 [2d Dept 2012], quoting ***Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.***, 89 AD3d 649, 651, 932 NYS2d 109 [2d Dept 2011]; *see* CPLR 3215[f]; ***Green Tree Serv., LLC v Cary***, 106 AD3d 691, 692, 965 NYS2d 511 [2d Dept 2013]). Here, plaintiff has met all of the requirements with respect to the non-appearing, non-answering defendants (*see id.*).

Based upon the foregoing, plaintiff's request for an order fixing the defaults of the non-answering, non-appearing defendants and 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, 965 NYS2d 511 [2d Dept 2013]; ***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]).

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

Dated: JAN 07 2015

HON. JOSEPH A. SANTORELLI
J.S.C.

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