

<b>Wells Fargo Bank, N.A. v Kahn</b>
2015 NY Slip Op 30958(U)
June 1, 2015
Supreme Court, Suffolk County
Docket Number: 10092-2012
Judge: Emily Pines
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SHORT FORM ORDER

INDEX NUMBER: 10092-2012

**SUPREME COURT - STATE OF NEW YORK**  
**I.A.S. TERM, PART 23, SUFFOLK COUNTY**

**Present:** **HON. EMILY PINES**  
 J. S. C.

**Motion Date:** 04-21-2012  
**Submit Date:** 04-30-2015  
**Motion No.:** 003-MD

FINAL  
 NON FINAL

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**WELLS FARGO BANK, N.A., SUCCESSOR BY  
 MERGER TO WACHOVIA MORTGAGE, FSB,**

**Plaintiff,**

- against -

**JOHN KAHN, GWEN GEISLER, EMIL NORSIC  
 AND SON, INC., TRENA GINON, BRIAN  
 MORAN, GIANDANO BENTACORTE,  
 PATRICE BENTACORTE,**

**Defendants,**

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 Lisa Browne, Esq.  
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 Westbury, New York 11590

Attorney for Defendant John Kahn  
 Deutsch & Schneider, LLP  
 Joshua Deutsch, Esq.  
 79-37 Myrtle Ave  
 Glendale, New York 11385

This is an action to foreclose a mortgage on premises known as 71 Walnut Street, Southampton, New York. The record reveals that on March 3, 2008, defendant John Kahn ("Kahn") executed an adjustable rate note in favor of Wachovia Mortgage, FSB ("Wachovia"), agreeing to pay the sum of \$600,000 at the starting yearly interest rate at 7.150 percent. On the same day, Kahn

executed a first mortgage in favor of Wachovia, in the principal sum of \$600,000 on the subject property. The mortgage was recorded on May 22, 2008 with the Suffolk County Clerk's Office. On November 1, 2009, Wachovia was merged into plaintiff Wells Fargo Bank, National Association. Thereafter, plaintiff became the owner and holder of the Note and Mortgage by virtue of a bank merger with the original lender. The record reveals that defendant failed to make a payment of \$3,191.48, which became due on April 15, 2010 and all subsequent monthly payments thereafter.

The action was commenced by filing on March 12, 2012. The defendants failed to timely appear in this action by the service of an answer. A foreclosure settlement conference was scheduled by the court on January 11, 2013, but Kahn failed to appear. The matter was referred to an IAS Part. By order dated March 25, 2014, this court granted plaintiff's motion for the appointment of a referee to compute the amounts due, and by order dated November 25, 2014, this court granted plaintiff's application for a judgment of foreclosure.

Defendant Kahn now moves by order to show cause (mot. Seq. 003) for an order dismissing the action, staying the foreclosure sale scheduled for March 20, 2015, vacating the judgment of foreclosure, compelling plaintiff to accept an answer, and directing a settlement conference.

In support of the motion, Kahn contends that he was never served with the summons and complaint inasmuch as he does not live at the premises. He submits, inter alia, his personal affidavit, a copy of a 2012 tax return, a copy of the January, 2015 monthly mortgage loan statement, a copy of the complaint, a proposed answer, a copy of the affidavit of service. Kahn states in his affidavit

that he was not served with any papers in this action and he had no notice of foreclosure. Although Kahn learned from his attorney that plaintiff tried to serve him with the summons and complaint at the premises, Kahn does not live there and did not live there on the date of service. He was not aware that the property was in foreclosure. He states that he has been living at 78-05 74<sup>th</sup> Street in Glendale, New York for years. The premises is occupied by tenants. He states that his Glendale address is printed on his monthly Wells Fargo loan statement. Kahn further states that he knows he is behind in his payments and has the money to work out a settlement with plaintiff. The 2012 tax return reveals an address of 78-05 74<sup>th</sup> Street, Glendale, New York. The January 2015 mortgage loan statement reveals a mailing address in Glendale, New York and a printed message, which states:

“Your loan has been referred to foreclosure. The amount to bring it current may vary daily: prior to sending funds, call us for a reinstatement or payoff quote. This does not change a sale date that may be scheduled.”

The affidavit of service reveals that Kahn was served with process pursuant to CPLR 308 (4). The process server made three attempts to personally serve Kahn at the premises on March 28, 2012, April 13, 2012, and Saturday, April 28, 2012, at different times of day. The process server confirmed the address with a neighbor residing at 73 Walnut Street, and with the United States Postal Service. Thereafter the summons and complaint were affixed to the door of the premises and mailed to Kahn at the premises on June 19, 2012.

In opposition, plaintiff submits a copy of the mortgage and note, notice of bank merger with plaintiff, the summons and complaint, and copies of affidavits of service made to four of the

defendants, who are tenants at the premises. The affidavits of service reveal that the tenants were personally served on March 28, 2012. Plaintiff's counsel avers that defendant has failed to rebut the presumption of service, inasmuch as he did not swear to specific facts to rebut the statements in the process server's affidavit, and merely denied receiving service. In addition, plaintiff contends that Kahn offered no proof that he did not reside at the mortgaged premises at the time the action was commenced. Moreover, the mailed summons and complaint were not returned as undeliverable.

A "proper affidavit of a process server attesting to personal delivery upon a defendant constitutes prima facie evidence of proper service." *NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459, 460, 777 NYS2d 483 (1st Dept 2004). To defeat this prima facie showing, a defendant must provide a "sworn, nonconclusory denial of service" requiring a traverse hearing (*id.*). 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 N.A. v Tate*, 102 AD3d 859, 958 NYS2d 722 (2d Dept 2013); *Stevens v Charles*, 102 AD3d 763, 958 NYS2d 443 (2d Dept 2013). 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. *Chichester v Alal-Amin Grocery & Halal Meat*, 100 AD3d 820, 954 NYS2d 577 (2d Dept 2012). Here, the defendant's excuse that he was residing elsewhere and was not personally served is unavailing. Such a denial is insufficient to rebut the prima facie showing of proper service created by the process server's affidavit. The defendant did not deny receipt of the pleadings by mail. Under these circumstances, the court finds that the service effected was compliant with the dictates of CPLR 308 (4) and sufficient to provide the court with personal

jurisdiction over defendant Kahn.

A defendant seeking to vacate his 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. *Eugene Di Lorenzo, Inc. v A. C. Dutton Lumber Co.*, 67 NY2d 138, 501 NYS2d 8 (1986). 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. *ACT Props., LLC v Garcia*, 102 AD3d 712, 957 NYS2d 884 (2d Dept 2013). Here, defendant Kahn 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 defendant has a meritorious defense. *Deutsche Bank Natl. Trust Co. v Gutierrez*, 102 AD3d 825, 958 NYS2d 472 (2d Dept 2013).

The defendant's application for dismissal of the complaint on the ground that the plaintiff lacks standing is also denied. The defense of standing was waived by the defendant due to his unsuccessful attempt to secure a vacatur of his default in answering, the absence of an answer raising such defense and his failure to timely move for dismissal under CPLR 3211. See *Countrywide Home Loans Servicing, LP v Albert*, 78 AD3d 983, 912 NYS2d 96 (2d Dept 2010). Under the circumstances, defendant Kahn is not entitled to a further foreclosure settlement conference.

Accordingly, it is

**ORDERED** that the defendant's motion (003) is denied in its entirety.

Dated: June 1, 2015  
Riverhead, New York

  
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EMILY PINES  
J. S. C.