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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

U.S. BANK NATIONAL ASSOCIATION, etc.,
Plaintiff(s),

- against -

RAMLA BIBI, et al.,
Defendant(s).

Index
No. 10870 2010

Motion
Dates May 13 & June 3, 2015

Motion
Cal. Nos. 166 & 165

Motion
Seq. Nos. 1 & 2

The following papers numbered 1 to 17 read on this motion by plaintiff for an order, *inter alia*, appointing a referee to compute; and by separate motion by defendant Ramla Bibi (defendant) for an order dismissing the complaint and cancelling the *lis pendens*.

	Papers Numbered
Notices of Motion - Affirmations - Exhibits.....	1-12
Answering Affirmation - Exhibits.....	13-15
Reply.....	16-17

Upon the foregoing papers it is ordered that the motions are determined as follows:

Plaintiff commenced this action to foreclose a mortgage against real property known as 246-68 87th Avenue, Bellerose, New York, given by defendant on July 26, 2005, to secure a note in the amount of $524,160.00. Plaintiff alleges it is the owner of the note and mortgage, that defendant defaulted under the terms thereunder by failing to make the monthly installment payment due on April 1, 2008 and all subsequent payments and, as a result, it elected to accelerate the debt by virtue of the filing of the summons and complaint and *lis pendens* on April 30, 2010. Though all defendants were served with process, none answered

or otherwise appeared herein within the time prescribed by statute or beyond such time as permitted by stipulation of the parties or court order.

On July 26, 2010, plaintiff filed a Request for Judicial Intervention to request a foreclosure settlement conference pursuant to CPLR 3408. The matter appeared in the Foreclosure Conference Part on December 1, 2010, and was released on that date by Residential Foreclosure Conference Order (Florio, CA-R) due to defendant's default in appearing therefor. A second *lis pendens* was filed on July 26, 2013. Plaintiff then filed the instant motion on February 2, 2015. Defendant separately moves to dismiss the complaint, primarily pursuant to CPLR § 3215 (c).

To the extent defendant seeks dismissal on the ground that she was not properly served with process, in general, a process server's affidavit constitutes prima facie evidence of proper service of process (*see City of New York v Miller*, 72 AD3d 726 [2010]; *Scarano v Scarano*, 63 AD3d 716 [2009]). According to the affidavit of service, the process server indicates that he served defendant with process on May 12, 2010 by delivering same to Ali Imran, her son, a person of suitable age and discretion, at her residence, followed by a mailing on May 19, 2010. The affidavit of service was filed on May 20, 2010.

The fact that defendant indicates in her affidavit that she never received any court papers from her son is irrelevant, since the law does not require guaranteed receipt of process, and failure to receive same does not constitute a jurisdictional defect (*see Bossuk v Steinberg*, 58 NY2d 916 [1983]; *Weill v Erickson*, 49 AD2d 895 [1975], *affd* 37 NY2d 851 [1975]; *Melton v Brotman Foot Care Group*, 198 AD2d 481 [1993]). Further, it is unclear whether defendant asserts that her son was not a person of suitable age and discretion by stating that he "was only 20 years old at the time of the alleged 'substituted service' and attending college"; but, to the extent that she does, her son is certainly such a person of suitable age and discretion (*see Bossuk*, 58 NY3d at 918; *Karlin v Avis*, 326 F Supp 1325 [EDNY 1971]) absent some issue other than age, none having been alleged here.

To the extent defendant seeks dismissal on substantive grounds, all of which sound in plaintiff's lack of standing, defendant waived that defense upon her failure to timely answer the complaint or move to dismiss on that ground (*see Wells Fargo Bank, N.A. v Combs*, 128 AD3d 812 [2015]; *Southstar III, LLC v Enttienne*, 120 AD3d 1332 [2014]). The court notes that defendant does not move to vacate her default in failing to timely appear, nor does she move to compel the acceptance of a late answer.

The primary focus of defendant's motion is to seek dismissal for plaintiff's failure to proceed for the entry of a default against her within one year after her default and for plaintiff's failure to offer a reasonable excuse for same. Defendant avers that plaintiff's

justifications for its excuse – that the delay was due to Administrative Order of the Chief Administrator of the Judge, and several holds due to Hurricane Irene, Superstorm Sandy, and possible loss mitigation workouts – are insufficient to explain the lengthy delay. In support, defendant cites to the case of *US Bank National Association, etc. v Stuart, et al.*, Index No. 31439/2009, decided on March 30, 2015 by Justice Robert J. McDonald of this court, wherein Justice McDonald granted the co-borrower's motion for an order dismissing the complaint against her pursuant to CPLR 3215 (c), since: (1) "plaintiff has not provided a sufficient and substantiated reason for not being able to review its records . . .to confirm the accuracy of its pleadings so as to comply with [Administrative Order 431/11]"; and (2) "although there was a 90 period [sic] during which foreclosures were stayed due to Superstorm Sandy that still does not explain the inordinate delay in moving for a default judgment."

In opposition to the motion, counsel for plaintiff delineates a time line with respect to this action which explains its client's delay in taking proceedings toward the entry of judgment: the Administrative Order issued on October 20, 2010 (AO 548/10), which placed an affirmative burden on plaintiff to "review and verify all of the documents and information for all of its foreclosure matters including the above entitled matter" by "developing and implementing a system to confirm the validity of all the necessary documents and information for all of the pending foreclosure actions across the entire state"; the foreclosure conference on December 1, 2010, the Administrative Order issued on March 2, 2011 (AO 431/11, amending AO 548/10); the FEMA hold as a result of Hurricane Irene; the receipt from its client of an affidavit of merit dated August 7, 2012; the 90-day foreclosure moratorium as a result of Superstorm Sandy effective October 30, 2012, the 90-day extension of the moratorium effective January 31, 2013; and several internal loss mitigation holds until the file's release on December 26, 2014. Plaintiff's motion was then filed within two months.

In reply, defendant argues that there is no reason why, following the release from the Foreclosure Conference Part, at which defendant defaulted, and before the other circumstances arose, plaintiff could not move for default. Moreover, defendant states that plaintiff is attempting to fill the gaps of time in proceeding by placing various "holds" on the file.

CPLR § 3215 (c) states that:

> "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.

A motion by the defendant under this subdivision does not constitute an appearance in the action."

Here, by virtue of the above explanation, plaintiff has demonstrated sufficient cause to warrant denial of defendant's motion. Contrary to defendant's contention, this case is not analogous to *Stuart*, *supra*, since plaintiff has provided several other reasons for the delay beyond its need to comply with AO 431/11 and the effects of Superstorm Sandy (*cf. Freedom Mtge. Corp. v Akther*, 40 Misc 3d 1203 [A][Sup Ct Queens County 2013]; *Onewest Bank, FSB v Ryes*, 37 Misc 3d 1202 [A][Sup Ct Queens County 2012]). Moreover, there is no indication that defendant was prejudiced in any way by this delay; the absence of prejudice, thus, "tip[s] the balance in favor of a finding of sufficient cause to excuse the delay" (*Countrywide Home Loans Servicing, L.P. v Crespo*, 46 Misc 3d 1226 [A] [Sup Ct Suffolk County 2015]; *see LNV Corp. v Forbes*, 122 AD3d 805 [2014]).

However, while the court finds that plaintiff has adequately demonstrated a potentially meritorious cause of action (*Giglio v NTIMP, Inc.*, 86 AD3d 301 [2011]), that branch of plaintiff's motion for an order appointing a referee to compute must be denied, as it is unclear whether Jessica Mitchell, Document Execution Specialist of Nationstar Mortgage LLC, the servicer of the loan, has authority to execute affidavits on plaintiff's behalf, being that plaintiff annexes, immediately following said affidavit, a limited power of attorney given by plaintiff to BAC Home Loans Servicing, LP. Further, it is unclear what relief plaintiff seeks with respect to the substitution of a new plaintiff, as counsel refers to an assignment into "U.S. Bank, National Association, as Trustee for the Certificateholders of SARM 2005-19XS," referring to an assignment which *predates* the commencement of this action (and, in any event, does not name said proposed plaintiff as the assignee of the loan documents), but then counsel seeks that the caption be amended to reflect the current holder of the note and mortgage, to wit: "U.S. Bank National Association as Trustee for SARM 05-19XS," which is already the named plaintiff herein (*see* counsel's affirmation at ¶ 11).

To the extent plaintiff seeks to amend the affidavit of service with respect to defendant Countrywide Bank, a Division of Treasury Bank, N.A. (Countrywide), to correct the scrivener's error, that branch of the motion is granted, and "Los Angelos" is substituted with "Los Angeles," *nunc pro tunc*.

Accordingly, defendant's motion for an order dismissing the complaint is denied. Plaintiff's motion is granted only to the extent that: defendants are in default in answering or appearing herein; the affidavit of service regarding defendant Countrywide is amended, *nunc pro tunc*, as indicated above; the caption is amended by substituting "Ali Imran" and "Ali Zar" for the respective "John Does" and by deleting the remaining "John Does"

therefrom. The motion is otherwise denied with leave to renew within 45 days from the entry date of this order.

Dated: June 18, 2015

J.S.C.