

Bank of Am., N.A. v Uvino
2015 NY Slip Op 31142(U)
June 22, 2015
Supreme Court, Suffolk County
Docket Number: 29470-09
Judge: Thomas F. Whelan
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 5/15/14
SUBMIT DATE: 5/8/15
Mot. Seq. # 006 - MD
Mot. Seq. # 007 - Mot D
CDISP Y N X

-----X
BANK OF AMERICA , N.A. :
 :
 : Plaintiff, :
 :
 : -against- :
 :
 JOSEPH UVINO, WENDY UVINO, POOLS BY :
 PAUL GUILLO, INC., KOLB MECHANICAL :
 CORPORATION, J. BARROWS, INC., :
 EXCELSIOR P&H, INC., and "JOHN DOE" said :
 name being fictitious and intended to include any :
 plaintiff, intended as being persons, entities :
 and all parties having or claiming an interest or lien :
 upon the mortgaged premises and not otherwise :
 identified above, :
 :
 : Defendants. :
 :
 -----X

BUCHANAN, INGERSOLL et al
Attys. For Plaintiff
1290 Avenue of the Americas
New York, NY 10104

DEVITT, SPELLMAN, BARRETT
Attys. For Defendants Uvino
50 Route 111
Smithtown, NY 11787

Upon the following papers numbered 1 to _____ read on this motion for the appointment of a receiver, among other things and additional motion for dismissal of the action
_____; Notice of Motion/Order to Show Cause and supporting papers 1 - 5; 6-10 ; Notice of Cross Motion and supporting papers _____; Answering papers 11-12; 13 _____; Reply papers 14-15 _____; Other 16-17 (sur-reply) _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (now numbered 006) by the plaintiff for a substitution of its purported assignee and for the appointment of receiver is considered under CPLR 1018 and Article 64 and is denied; and it is further

ORDERED that the separate motion (now numbered 007) by the Uvino defendants for an order dismissing this action as abandoned pursuant to CPLR 3215(c) is denied but its alternative demands for an order vacating any technical default in answering or for leave to serve a late answer

is considered under CPLR 320 and 3012(d) and is granted to the extent that any default in answering on the part of the Uvino defendants was waived by the plaintiff's failure to reject the answer served in December of 2012; and it is further

ORDERED that the plaintiff is hereby afforded 45 days from the date of this order to file a reply to the defendants' counterclaim or to undertake such other proceedings it deems advisable with respect thereto.

The plaintiff commenced this action in July of 2009, to foreclose the lien of two mortgages, consolidated under the terms of a May 9, 2008 Consolidation, Modification and Extension Agreement ["CEMA"], encumbering a luxury vacation home in East Hampton, which the Uvino defendants use, in part, for income generation. The first mortgage loan that was the subject of the CEMA is evidenced by a gap note and mortgage executed by the Uvino defendants on September 25, 2007 in favor of City National Bank in the principal amount of \$2,150,000.00, both of which were assigned to the plaintiff on May 7, 2008. Two days thereafter, the plaintiff extended the Uvino's new funds in the amount \$638,000.00 under the terms of a "new money mortgage note" which defendant Joseph Uvino executed, personally and as attorney-in-fact for his co-defendant wife Wendy Uvino. That note is secured by a mortgage containing a custom home rider and a second home rider that was likewise executed by the Uvino's in favor of the plaintiff on May 9, 2008. The 2007 note and mortgage and the 2009 new money note and mortgage are the subject of the May 9, 2008 CEMA as evidenced by the schedule of Notes and Mortgages that is attached as Exhibit A to the CEMA which bears the signature of Joseph Uvino on his own behalf and as attorney-in-fact for his wife.

The Uvino's further executed a "Consolidated Adjustable Rate Note" [hereinafter "consolidated note"] in favor of the plaintiff in the amount of \$3,150,000.00 on May 9, 2008, which amount reflected the aggregate amount of the monies advanced by the plaintiff under the \$638,000.00 new money note and the existing indebtedness of \$2,512,000.00 which was owed by the Uvino defendants under the terms of the September 25, 2007 gap note and mortgage in favor of City National Bank. This consolidated note was attached as Exhibit C to the CEMA of May 9, 2008. Attached as Exhibit D to the CEMA was a May 9, 2008 mortgage in the amount of \$3,150,000.00. This mortgage, though not denominated as a consolidated mortgage, by its terms, secures the May 9, 2008 consolidated note in the amount of \$3,150,000.00, which amount represented the aggregate amounts of the principal owing under both loans. This second mortgage indenture of May 9, 2008 is subscribed to by Joseph Uvino in his own right and as attorney-in-fact for his co-defendant wife, only on the Second Home Rider attached thereto.

Within a month of the filing of the summons and complaint and prior to the time within which the Uvino's were required to answer the summons and complaint, they filed a petition under Chapter 11 of the Bankruptcy Code which stayed the instant action. The plaintiff appeared therein and asserted secured and unsecured claims \$3,189,698.63. These claims were approved in an order dated February 15, 2012 which conditionally confirmed the Uvino's Second Amended Plan of Reorganization. The plaintiff was therein classified as a Class 1 creditor with respect to its allowed

secured claim that encumbered the East Hampton property. However, the plaintiff was designated as an unsecured creditor Class 7 with respect to its allowed claim for a deficiency judgment against the Uvinos and as to certain other unsecured claims. In addition, the plaintiff's rights to prosecute its state claim for foreclosure and sale were expressly reserved onto it and the plaintiff's claims, and both secured and unsecured, were confirmed. The order further provided that within 90 days of the effective date of the plan, or sooner if directed by the court, the debtors were required to submit a Final Decree showing compliance with all conditions imposed. That order became final on March 2, 2012 (*see* FRBP § 8002[a]) and the Plan, under its terms, became effective 90 days thereafter, on June 2, 2012.

According to the plaintiff, the Uvino defendants had thirty days from the June 2, 2012 effective date of plan, to answer the summons and complaint served in this action pursuant to CPLR 320(a), since their time to do so following service of the summons and complaint had not expired due to the application of the automatic stay that arose on August 27, 2009, the date of the bankruptcy filing. That date also served as the date on which the plaintiff's service of process upon the Uvinos pursuant to CPLR 308(2) was complete. No answer was served by the Uvino defendants within this thirty day period.

In July of 2012, the plaintiff moved, *ex parte*, for an order extending the notice of pendency filed with the complaint. That application was granted by order dated July 2, 2012 [Emerson, J.].

On December 12, 2012, an associate of the firm of Woolmuth, Maher & Deutsche, LLP advised counsel for the plaintiff by letter of the firm's representation of the Uvino defendants in this action and that the Uvino's were prepared to "file" an answer in the form of the one attached to the letter in the event that the plaintiff's counsel did not explain and eviscerate perceived defects in the documentation on which the plaintiff's foreclosure claim was based. The record is devoid of any response to this letter and the attached answer by the plaintiff's counsel.

By correspondence dated July 1, 2013, the plaintiff submitted an *ex parte* application for the appointment of a referee to the office of special term. That application was entered in the court's electronic filing system as received on July 8, 2013 and forwarded by such office to the specialized mortgage foreclosure part of the courts on July 19, 2013 where it languished until December 13, 2013 when the application was forwarded to the chambers of the assigned Justice. On April 28, 2014, the application was denied with leave to renew.

On April 30, 2014, the plaintiff submitted an Order to Show Cause by which the first motion listed above and now sequenced 006 was interposed. Therein, the plaintiff seeks the appointment of a receiver and the substitution of the plaintiff by its purported assignee. The issuing court entered a May 15, 2014 return date in the April 30, 2014 order to show cause and directed that service of the Order to Show cause and supporting papers be effected upon the Uvino defendants by overnight delivery on or before May 7, 2014, with which directive the plaintiff complied on May 1, 2014. On May 13, 2014, the plaintiff renewed its previously denied application for an order of reference in a motion (#004) interposed by Order to Show Cause dated May 13, 2014 that was returnable on May

22, 2014. The service directives set forth therein were complied with and the motion was marked submitted on the return date.

On June 6, 2014, the Uvino defendants served an answer with counterclaims to the plaintiff's complaint that was prepared jointly by their first retained counsel and their current counsel. The plaintiff rejected this answer as untimely on June 13, 2014. Thereafter, on August 21, 2014, current counsel to the Uvinos, who identify themselves as "additional counsel" appeared herein by the presentation of an Order to Show Cause by which the current motion, now numbered #007, for dismissal of this action pursuant to CPLR 3215(c), or in the alternative, for leave to serve a late answer was interposed. That motion was marked submitted to the assigned Justice on the August 28, 2014, the return date thereof.

Although no decision on any of the three motions described above issued following their submission dates in 2104 through the end of that year, this action was administratively assigned to the case inventory of this court on January 2, 2015. On January 28, 2015, the above described motions were administratively referred back to the formerly assigned Justice pursuant to CPLR 2217 and 2221. By order dated April 1, 2015, the renewed motion for an order of reference was denied by Justice Emerson and the two motions that are the subject of this order were referred back to this court and calendared for submission on May 8, 2015.

The court shall first consider the motion (now sequenced #007) by the Uvino defendants for an order dismissing the complaint as abandoned pursuant to CPLR 3215(c) or for leave to serve a late answer, as determination thereof may render determination of the plaintiff's motion, academic.

CPLR 3215(c) requires that a plaintiff commence proceedings for the entry of a default judgment within one year after the default or demonstrate sufficient cause why the complaint should not be dismissed. Where the plaintiff has made an application to the court for the entry of a default judgment within one year of the defendant's default, even if unsuccessful, the court may not later dismiss the complaint as abandoned pursuant to CPLR 3215(c) (see *Bono v DuBois*, 121 AD3d 932, 995 NYS2d 153 [2d Dept 2014]; *U.S. Bank Natl. Ass'n v Poku*, 118 AD3d 980, 989 NYS2d 75; *Jones v Fuentes*, 103 AD3d 853, 962 NYS2d 263 [2d Dept 2013]; see also *Mortgage Elec. Registration Sys., Inc. v Smith*, 111 AD3d 804, 975 NYS2d 121 [2d Dept 2013]; *Norwest Bank Minnesota, N.A. v Sabloff*, 297 AD2d 722, 747 NYS2d 559 [2d Dept 2002]; *Brown v Rosedale Nurseries, Inc.*, 259 AD2d 256, 686 NYS2d 22 [1st Dept 1999]; *Home Sav. of America, F.A. v Gkanios*, 230 AD2d 770, 646 NYS2d 530 [2d Dept 1996]).

In mortgage foreclosure actions, is well settled law that foreclosing plaintiffs may not be deemed to have abandoned their foreclosure action under CPLR 3215(c) when they take "the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference" under RPAPL § 1321(1) within one year of the defendant's default (*Klein v St. Cyprian Prop., Inc.*, 100 AD3d 711, 954 NYS2d 170 [2d Dept 2012]; see *Wells Fargo Bank, N.A. v Combs*, 128 AD3d 812, 2015 WL 2214013 [2d Dept 2015]; *HSBC Bank USA, N.A. v Alexander*, 124 AD3d 838, 2015 WL 361008 [2d Dept 2015]; *U.S. Bank Natl. Ass'n v Poku*, 118 AD3d 980,

supra; **Home Sav. of Am., F.A. v Gkanios**, 230 AD2d 770, 646 NYS2d 530 [2d Dept 1996]). “Where application is made to the court for the entry of a default judgment within one year of the defendant’s default, the court may not refuse to enter judgment or dismiss the complaint as abandoned pursuant to CPLR 3215(c)” (**Nowicki v Sports World Promotions**, 48 AD3d 435, 851 NYS2d 270 [2d Dept 2008]; *see also* **Wells Fargo Bank, N.A. v Combs**, 128 AD3d 812, *supra*). The outcome of such application is irrelevant because it is the mere interposition of an application for a default judgment within one year of the default that suffices for purposes of CPLR 3215(c) (*see* **U.S. Bank Natl. Ass’n v Poku**, 118AD3d 980, *supra*; **Brown v Rosedale Nurseries, Inc.**, 259 AD2d 256, *supra*; **Home Sav. of Am., F.A. v Gkanios**, 230 AD2d 770, *supra*).

The Appellate Division, Second Department has instructed that in cases wherein no motion is interposed within the one year time limitation period, avoidance of a dismissal of the complaint as abandoned requires the plaintiff to offer a reasonable excuse for the delay in moving for leave to enter a default judgment and must demonstrate a potentially meritorious cause of action (*see* **Giglio v NTIMP, Inc.**, 86 AD3d 301, 308, 926 NYS2d 546 [2d Dept 2011]; *see also* **Kohn v Tri-State Hardwoods, Ltd.**, 92 AD3d 642, 937 NYS2d 865, 866 [2d Dept 2012]; **115-41 St. Albans Holding Corp. v Estate of Harrison**, 71 AD3d 653, 894 NYS2d 896 [2d Dept 2010]; **Cynan Sheetmetal Prods., Inc. v B.R. Fries & Assoc., Inc.**, 83 AD3d 645, 919 NYS2d 873 [2d Dept 2011]; **First Nationwide Bank v Pretel**, 240 AD3d 629, 659 NYS2d 291 [2d Dept 1997]). In addition, appellate cases authorities have established that a moving defendant’s failure to show prejudice by the plaintiff’s delay in moving for the default may tip the balance in favor of a finding of sufficient cause to excuse the delay *provided* an explanation of the delay is advanced which evinces no intent to abandon the action and a meritorious cause of action is shown to exist (*see* **LVN Corp. v Forbes**, 122 AD3d 805, 996 NYS2d 696 [2d Dept 2014]; **Brooks v Somerset Surgical Assocs.**, 106 AD3d 624, 966 NYS2d 65 [2d Dept 2013]; **Laourdakis v Torres**, 98 AD3d 892, 950 NYS2d 703 [1st Dept. 2012]; **LaValle v Astoria Constr. & Paving Corp.**, 266 AD2d 28, 697 NYS2d 605 [1st Dept 1999]; **Hinds v 2461 Realty Corp.**, 169 AD2d 629, 632, 564 NYS2d 763 [1st Dept 1991]). Delays attributable to the parties’ engagement in mandatory settlement conference procedures, or in litigation communications, notices of pendency filings, motion practice and discovery or other pre-trial proceedings have been held to negate any intention to abandon the action and are thus excusable under CPLR 3215(c) (*see* **Brooks v Somerset Surgical Assocs.**, 106 AD3d 624, *supra*; **Laourdakis v Torres**, 98 AD3d 892, *supra*).

Here, the court finds that the plaintiff timely filed its first application for an order of reference on default by the mailing of its ex parte application therefor on July 1, 2013 to the office of special term. The court agrees with the plaintiff’s contention that the date of June 2, 2012, the effective date of the Second Amended Plan for Reorganization, served as the date on which the automatic stay was lifted (*see* 11 USC 362[c]; **In re St. Vincent’s Catholic Med. Ctrs. of New York**, 2014 WL 3545581 [SDNY 204]). The court finds that the plaintiff was precluded from moving for a default judgment prior to July 2, 2013 since the thirty day time period imposed upon appearances by the applicable provisions of CPLR 320(a), which time period was stayed by the automatic stay that arose on August 27, 2009, didn’t expire until July 2, 2013. Any application for a default judgment prior to that date

would have been premature as the time within which the defendants were required to serve their answer would not have expired (*see* CPLR 3215[f]; *Khan v Hernandez*, 122 AD3d 802, 996 NYS2d 667 [2d Dept 2014]; *Pipinias v J. Sackaris & Sons, Inc.*, 116 AD3d 749, 983 NYS2d 587 [2d Dept 2014]). Accordingly, the one year time period within which plaintiff was required to move for a default judgment expired on July 2, 2013.

The court rejects the defendants' contention that the plaintiff's initial ex parte motion for a default judgment was late, when measured under the one year time period imposed by CPLR 3215(c), since it could not have reached the courthouse on or before July 1, 2013 because it was mailed on or after that date by the plaintiff's counsel rather than hand delivered. This claim rests upon the fact that the plaintiff's motion was marked received in the office of special term on July 8, 2013, which was beyond the one year time period imposed by CPLR 3215(c) when measured by the plaintiff's July 2, 2013 deadline. However, CPLR 2211 provides that a motion on notice is made when served and not when received or calendared by the clerk of the court or by the office of special term. This court sees no impediment to applying the rule to ex parte applications when measuring their timeliness under CPLR 3215(c). Since the plaintiff's initial application for an order fixing the defaults of the Uvino defendants and for the appointment of a referee pursuant to RPAPL § 1321 was mailed, and thus made within one year after they defaulted in answering on July 1, 2012, there is no basis for the dismissal of this action pursuant to CPLR 3215(c), as the plaintiff timely took the initial step of taking proceedings for obtaining a default judgment within the purview of that statute (*see U.S. Bank Natl. Ass'n v Poku*, 118 AD3d 980, *supra*; *Klein v St. Cyprian Prop., Inc.*, 100 AD3d 711, *supra*; *Home Sav. of Am., F.A. v Gkanios*, 230 AD2d 770, *supra*).

Even if it were otherwise, the court finds no entitlement to a dismissal of this action pursuant to CPLR 3215(c) on the part of the Uvino defendants. The plaintiff's opposing papers sufficiently demonstrated its possession of a reasonable excuse for a delay of a few days, if any, in moving to fix the defaults in answering and of a meritorious claim for foreclosure and sale. The absence of any intention to abandon its claim is clearly evident from the plaintiff's appearances in the bankruptcy proceeding and its filing of successive notices of pendency in this action. These circumstances coupled with the absence of any claim of demonstrable prejudice to the defendants, clearly warrant a denial of the defendants' motion to dismiss (*see LNV Corp. v Forbes*, 122 AD3d 805, *supra*; *Brooks v Somerset Surgical Assocs.*, 106 AD3d 624, *supra*; *Laourdakis v Torres*, 98 AD3d 892, *supra*; *Countrywide Home Loans Servicing, L.P. v Crespo*, 46 Misc.3d 1226(A), 2015 WL 1036390 [Sup. Ct. Suffolk Cty. 2015]). Those portions of the defendants' motion wherein they seek dismissal of the complaint as abandoned are thus denied.

The Uvino defendants next seek an order vacating any default in answering and for leave to serve a late answer in the form of the one attached to the moving papers or to compel acceptance of their first served answer. It is well established that a defendant may defeat an application for a default judgment or obtain a vacatur of a apparent default in answering if he or she can establish that no default occurred (*see Wells Fargo Bank, N.A. v Krauss*, ___ AD3d ___, 2015 WL 2214001 [2d Dept 2015]; *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 970 NYS2d 260 [2d Dept 2013]), or any

such default was waived by the plaintiff's retention of a late answer without objection prior to applying for a default judgment (*see Glass v Captain Hulbert House, LLC*, 103 AD3d 607, 959 NYS2d 247 [2d Dept 2013]; *Vazquez v Beharry*, 82 AD3d 649, 919 NYS2d 336 [1st Dept 2011]; *Cole v Young*, 28 AD3d 702, 814 NYS2d 224 [2d Dept 2006]). Alternatively, a defendant who has failed to appear or answer may avoid the entry of a default judgment or be granted an extension of time to answer the complaint providing "a reasonable excuse for the default and demonstrate a potentially meritorious defense to the action" (*Mellon v Izmirligil*, 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]; *see Mannino Dev., Inc. v Linares*, 117 AD3d 995, 2014 WL 2198432 [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]; *Diederich v Wetzel*, 112 AD3d 883, 979 NYS2d 605 [2d Dept 2013]; *Community Preserv. Corp. v Bridgewater Condominiums, LLC*, 89 AD3d 784, 785, 932 NYS2d 378 [2d Dept 2011]; *Maspeth Fed. Sav. & Loan Assn. v McGown*, 77 AD3d 889, 890, 909 NYS2d 403 [2d Dept 2010]; *HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]; *Equicredit Corp. of Am. v Campbell*, 73 AD3d 1119, 1120, 900 NYS2d 907 [2d Dept 2010]). Absent a valid jurisdictional or abandonment defense, a party in default may not appear in the action and contest the plaintiff's right to relief unless the defaulter can establish grounds for the vacatur of his or her default (*see Southstar III, LLC v Entienne*, 120 AD3d 1332, 992 NYS2d 548, 549 [2d Dept 2014]; *JP Morgan Mgt. Acquisition Corp. v Hayles*, 113 AD3d 821, 979 NYS2d 620 [2d Dept 2014]; *Schwartz v Reisman*, 112 AD3d 909, 976 NYS2d 883 [2d Dept 2013]; *U.S. Bank N.A. v Gonzalez*, 99 AD3d 694, 694-695, 952 NYS2d 59 [2d Dept 2012]; *McGee v Dunn*, 75 AD3d 624, 625, 906 NYS2d 74 [2d Dept 2010]).

Here, the Uvino defendants' first claim for vacatur of their default in answering rests not upon a claim of excusable neglect, but instead, but upon allegations that they are not in default because they appeared herein on December 12, 2012 by service of an answer that was retained without rejection by the plaintiff. On that date, the defendants' first retained counsel corresponded with the plaintiff's counsel by letter with an attached answer and therein advised of their appearance in this action. While the plaintiff now challenges both the timeliness and form of such answer which was undated, unsigned and unverified, the plaintiff does not dispute that it received the answer without rejecting it and retained for some six months prior to moving for a default judgment against the defendants. The plaintiff does, however, point out that the nature and tenor of the words employed by defense counsel in his letter was equivocal with respect to the attached answer and that it served merely as an advisement of the position the defendants would take if the matter was not resolved by the filing of such answer. In addition, the plaintiff complains that the service of a second answer by the defendants on June 6, 2014 is inconsistent with their claim of waiver and their failure to move for relief with respect to such waiver until the interposition of their present motion warrants a denial of same.

For the reasons stated, the court rejects these contentions of the plaintiff and sustains the defendants' claim that any default in timely answering was waived by plaintiff.

CPLR 320 governs appearances by defendants and provides that a defendant may appear in an action in one of three ways: (1) by serving an answer, (2) by serving a notice of appearance, or (3) by making a motion which has the effect of extending the time to answer (*see Tsionis v Eriora Corp.*, 123 AD3d 694, 998 NYS2d 117 [2d Dept 2014]). There is thus no requirement that an answer or a notice of appearance be filed with the clerk of the court effect an appearance in an action (*see Goonan v New York City Tr. Auth.*, 74 AD3d 747, 902 NYS2d 159 [2d Dept 2010]; *see also Tsionis v Eriora Corp.*, 123 AD3d 694, *supra*). In cases wherein the plaintiff accepts a late answer without objection, the plaintiff will be deemed to have waived the right to object to the timeliness of the answer and the plaintiff's right to proceed against the defendant as if he or she were in default (*see Glass v Captain Hulbert House, LLC*, 103 AD3d 607, *supra*; *Vazquez v Beharry*, 82 AD3d 649, *supra*; *Cole v Young*, 28 AD3d 702, *supra*; *Ligotti v Wilson*, 287 AD2d 550, 731 NYS2d 473 [2d Dept 2001]). It is only in those cases where the defendant serves a late answer in response to a motion for a default judgment or after notice from the plaintiff that an application for that relief shall be made will a failure to reject an untimely answer not serve as a waiver of the default (*see Bennett v Patel Catskills, LLC*, 120 AD3d 458, 990 NYS2d 594 [2d Dept 2014]).

Here, the court thus finds that the Uvino defendants are not in default as they appeared in December of 2012 by *service* of the answer attached to the correspondence of their counsel dated December 12, 2012. The court further finds that all objections to the answer, including those challenging its timeliness, were waived by the plaintiff's conduct in retaining said answer without objection for some six months prior to moving for a default judgment. The plaintiff's contentions otherwise asserted in opposition are rejected as unmeritorious as no conduct on the part of the defendants following the plaintiff's waiver of the defendants' default could eradicate the plaintiff's waiver. The defendants' December 12, 2012 answer is thus deemed timely served as of January 18, 2012, but the plaintiff shall be afforded 45 days from the date of this order to serve its reply to the counterclaim asserted in such answer or to move against it. It is thus unnecessary to determine the remaining portions of the Uvino defendants' motion which rest upon the excusable default grounds outlined above.

Next considered is the plaintiff's motion (#006) for the appointment of a temporary receiver to take possession of the premises for purposes of preserving same and, the substitution of the plaintiff's purported assignee for the plaintiff listed in the caption. For the reasons stated, the motion is denied.

Two different statutes govern the appointment of a receiver during the pendency of a mortgage foreclosure action. The first is RPL § 254(10) which is applicable only where a mortgage indenture contains a provision by which the mortgagor expressly confers the remedy of receivership upon the mortgagee which it may exercise without notice and without regard to the adequacy of security for the debt. Here, there are no allegations that the mortgages at issue in this action contain such a clause.

The plaintiff's application is thus governed by Article 64 of the CPLR in which the remedy of temporary receivership to certain parties is provided. To succeed on an application to appoint a

temporary receiver in a mortgage foreclosure proceeding, the plaintiff must establish, by clear and convincing proof, that the property is in danger of being materially injured or destroyed and that the appointment of a receiver is necessary to protect the parties' interests in the premises (*see* CPLR 6401; *Natoli v Milazzo*, 65 AD3d 1309, 886 NYS2d 205 [2d Dept 2009]). Where the property provides adequate security for the debt or where there has been no demonstration of actual and imminent risk to the premises such that it is the path of likely irreparable harm the application should be denied (*see In Re Armienti*, 309 AD2d 659, 767 NYS2d 2 [1st Dept 2003]; *Schachner v Sikowitz*, 94 AD2d 709, 462 NYS2d 49 [2d Dept 1983]; *Groh v Halloran*, 86 AD2d 30, 448 NYS2d 680 [1st Dept 1982]). Here, the plaintiff failed to meet this burden as it relies upon events that occurred over five years ago which allegedly resulted in significant damage to personalty belonging to the Uvino defendants and other less significant damage to the driveway, front gate and some windows. The plaintiff's further reliance upon the length and quantity of the defendants' purported defaults under the terms of the notes and mortgages are equally unavailing as these matters are neither relevant nor material to the court's determination of the receivership application.

Also denied is the application by plaintiff's counsel, acting as counsel for Lakeland West Capital XL, LLC, ["Lakeland"], for an order substituting Lakeland for the plaintiff in this action and amending the caption to reflect such substitution. This application is premised upon a purported transfer of the loan documents to Lakeland by the plaintiff by a writing dated November 20, 2013. This separate writing is attached as Exhibit 1 to the affidavit of Heywood Taylar, a principal of Lakeland and is entitled "ALLONGE". It reads as follows:

THIS ALLONGE IS AN ENDORSEMENT TO BE ATTACHED TO AND MADE A PARTY OF THAT CERTAIN CONSOLIDATED ADJUSTABLE RATE NOTE (TREASURY ARM) (together with any and all addenda, riders, exhibits, supplements, amendments, schedules and attachments(dated as of May 9, 2008, made by Joseph F. Uvino and Wendy M. Uvino, each an individual, payable to the order of Bank of America, NA, in the original principal amount of three Million One Hundred Fifty Thousand and 00/100 Dollars (\$3,150,000.00).

PAY TO THE ORDER OF LAKELAND WEST CAPITAL XI, LLC, AS TEXAS LIMITED LIABILITY COMPANY, AS IS, WHERE IS, WITH ALL FAULTS AND WITHOUT RECOURSE AND WITHOUT ANY REPRESENTATIONS OR WARRANTIES OF ANY KIND, WHETHER EXPRESS OR IMPLIED, ORAL OR WRITTEN, EXCEPT AS PROVIDED IN THAT CERTAIN LOAN SALE AGREEMENT #BOA-03-112013.

CPLR 1018 governs the substitution of parties upon a transfer of interest in the subject matter of the action and provides that "[u]pon any transfer of interest, the action may be continued by or

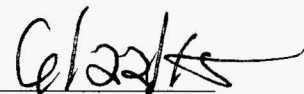
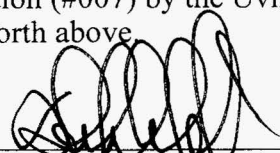
against the original parties unless the court directs the person to whom the interest is transferred to be substituted or joined in the action". Since this statute is permissive, rather than mandatory with respect to any proposed substitution upon a transfer of interest, the court may, in its discretion, decline to order such substitution and direct that action be continued by and against the original parties. Participation by both the original plaintiff and the proposed new plaintiff is necessary on an application substitution pursuant to CPLR 1018 since a substitution may not be accomplished upon a mere caption amendment (*see Onewest Bank, FSB v Davies*, 38 Misc3d 1230[A], 967 NYS2d 868 [Sup. Ct. Suffolk County 2013]; *Wells Fargo Bank, NA v Concepcion*, 38 Misc3d 1225[A], 969 NYS2d 807 [Sup. Court Suffolk County 2013]).

Here, the application is procedurally defective since it is made by Lakeland rather than the named plaintiff without its participation by express consent to the requested relief set forth in the moving papers. It is also substantively lacking in merit since the November 20, 2013 writing upon which Lakeland rests its claim of ownership of the loan documents is misplaced. To effect a valid transfer of a note by indorsement, such indorsement must be affixed to the face thereof or on an allonge so firmly affixed to the note as to become a part thereof (*see UCC § 3-202[2]*). Here, there is no evidence of the allonge's affixation to the note to which it speaks, which is limited to the consolidated adjustable rate note of May 9, 2008, as none of the copies of the consolidated note nor of the other two notes before the court contain any attached allonge.

In addition, the allonge speaks only to the consolidated note of May 9, 2008 and not to the first note of September 25, 2007 nor to the second note of May 9, 2008 in the amount of \$628,000.00. It is well established that where, as here, balances of first mortgage loans are increased with second mortgage loans and CEMAs are executed to consolidate the mortgages into single liens, the first notes and mortgages still exist and retain an independent nature and thus may be assigned or otherwise transferred to other lenders (*see Benson v Deutsche Bank Natl. Trust, Inc.*, 109 AD3d 495, 970 NYS2d 794 [2d Dept 2013]; *see also Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 109, 923 NYS2d 609 [2d Dept 2011]). This result is mandated by the fact that while a CEMA creates a single mortgage lien from two or more prior loans, "[a] consolidation of outstanding loans is a device intended for the convenience of only the contracting parties" and "cannot impair liens in favor of parties that are not the contracting parties, which retain their independent force and effect" (*Federal Deposit Ins. Corp. v Five Star Mgt.*, 258 AD2d 15, 22, 692 NYS2d 69 [1st Dept 1999]). Without a valid and effective transfer by the plaintiff to Lakeland of the September 25, 2007 and May 9, 2008 notes that were each secured by executed mortgages of the same dates, Lakeland is not a transferee of the subject of this action within the purview of CPLR 1018. The application for a substitution of Lakeland for the plaintiff is thus denied.

In view of the foregoing, the plaintiff's motion (#006) for the appointment of a receiver and a substitution of the plaintiff is denied, while the separate motion (#007) by the Uvino defendants to vacate defaults and other relief is granted to the extent set forth above.

DATED: _____

 THOMAS F. WHELAN, J.S.C.