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SHORT FORM ORDER INDEX NUMBER: 026698-2012

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

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

Motion Date: 05-21-2015
Submit Date: 05-28-2015
Motion No.: 002 MD

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE ON BEHALF OF THE HOLDERS OF TERWIN MORTGAGE TRUST 2006-3, ASSET BACKED CERTIFICATES SERIES 2006-3,

Plaintiff,

- against -

CINDY G. BENTOV, et al.,

Defendants,

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Attorney for Plaintiff
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Attorney for Defendant
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Court Appointed Referee
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This is an action to foreclose a mortgage on the property known as 10 Gorham Lane, Dix Hills, New York ("the premises"). The record reveals that on August 31, 2005, defendant Cindy Bentov ("defendant") executed a note in favor of First Suffolk Mortgage Corp. ("First Suffolk"), agreeing to pay the sum of $679,000 at a yearly interest rate at 7.5 percent. The note was transferred via two allonges: in the first allonge was endorsed by First Suffolk in favor of Lancaster Mortgage Bankers LLC ("Lancaster") without recourse; the second allonge was endorsed in blank by Lancaster without recourse. The note was lost in transit via Fed-Ex from plaintiff's servicer, Specialized Loan

Servicing, LLC, to the custodian of records, Deutsche Bank on January 29, 2009. The Lost Note Affidavit, dated August 8, 2012, reveals that Deutsche Bank never received the file and although several searches were made by Fed-Ex, the file was never recovered. Also on August 31, 2005, defendant executed a first mortgage in favor of First Suffolk, in the principal sum of $679,000 on the subject property. The mortgage was recorded on December 27, 2005 with the Suffolk County Clerk's Office. On August 31, 2011, First Suffolk assigned the mortgage to Lancaster Mortgage Bankers LLC ("Lancaster"). A second assignment occurred on September 7, 2011 at which time Lancaster assigned the mortgage to the plaintiff. The record reveals that defendant failed to make a payment of $4,243.75, which became due on November 1, 2008 and all subsequent monthly payments thereafter.

The action was commenced by filing on September 25, 2012. The defendants failed to timely appear in this action by the service of an answer. The defendant did not appear at the first scheduled foreclosure settlement conference. The second conference scheduled for December 3, 2013 was adjourned until December 20, 2013, at which time defendant's husband, non-party Ariel Bentov, appeared. Inasmuch as no mortgage modification documents had been completed and settlement was not reached, the matter was referred to an IAS Part. By order dated March 23, 2015 (Pines, J.), this court granted plaintiff's unopposed motion (mot. seq. 001) for the appointment of a referee to compute the amounts due.

Defendant now moves by order to show cause (mot. seq. 002) 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. Plaintiff opposes the motion.

In support of the motion, defendant contends that the court lacks personal jurisdiction over her inasmuch as she was improperly served with process. Defendant submits, inter alia, a copy of the affidavit of service, the personal affidavit of Ariel Bentov, defendant's personal affidavit, and a proposed answer. The affidavit of service reveals that defendant was served with process pursuant to CPLR 308 (2). On October 11, 2012 at 11:24 a.m., Thomas Steidel, the process server, served the Summons and Complaint and other papers upon a person of suitable age and discretion. The affidavit further states that the person served was Eric Arielo, who stated that he was defendant's husband, and also stated that the premises were the defendant's residence. Thereafter, the Summons and Complaint and other papers were mailed on October 18, 2012 to defendant at the premises. The description of Eric Arielo is as follows: male, white, brown hair, age 42, height five feet nine inches, weight 180 pounds. The affidavit of service was duly filed with the Suffolk County Clerk's Office on October 19, 2012. Ariel Bentov avers in his personal affidavit that he is defendant's husband and denies service of process on the ground that he would not be at home on a weekday morning, but would normally be at work. In addition, his name was stated incorrectly and his physical characteristics differ from those listed on the affidavit of service. The defendant's affidavit supports Mr. Bentov's affidavit.

In opposition, plaintiff submits a copy of the note and mortgage, assignments of mortgage, affidavit of lost note, and evidence of note assignments. In addition, plaintiff submits its attorney's affirmation which states that on the day of service, defendant's husband called counsel's office seeking a loan modification. In addition, within one month of service upon defendant, plaintiff's counsel received a telephone call from an attorney on behalf of defendant. Plaintiff's counsel contends that defendant had notice of this action, inasmuch as her husband appeared for her at one

foreclosure settlement conference. Moreover, although defendant retained the services of another attorney in November, 2014, no answer was filed.

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). Claimed discrepancies between the appearance of the person served and the description of such person set forth in the process server's affidavits that are unsubstantiated and of a minor, slight or inconsequential nature are likewise insufficient to warrant a hearing on the issue of service. See *Indymac Fed. Bank, FSB v Hyman*, 74 AD3d 751, 901 NYS2d 545 (2d Dept 2010).

Here, Ariel Bentov's conclusory and unsubstantiated excuse that he is not usually at home on a weekday morning 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, and there is no evidence in the record that they were returned as undeliverable. In addition, the claimed discrepancies between Mr. Bentov's physical appearance, which is premised

upon allegations that he wears eye glasses, and the omission of that characteristic from the description of him, and the minor discrepancies in his height and weight set forth in the affidavits of service, are too minor, slight and inconsequential to warrant a hearing on the issue of service. Also insufficient to implicate a jurisdictional defect in service is the misspelled version of Mr. Bentov's name set forth in the process server's affidavit. Mr. Bentov was unknown to the plaintiff prior to the time of service, as he was not a signatory to either the note or the mortgage. Under these circumstances, the court finds that the service effected was compliant with the dictates of CPLR 308 (2) and sufficient to provide the court with personal jurisdiction over defendant Cindy Bentov. Therefore, those portions of this motion wherein the mortgagor defendant seeks to vacate her default due to a lack of personal jurisdiction and dismissal of the complaint or a traverse hearing on the issue of service of process are denied.

The remaining portions of the motion are denied. 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 she 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 offered no excuse for her default in answering other than her 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 her unsuccessful attempt to secure a vacatur of her default in answering, the absence of an answer raising such defense and her 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 Bentov is not entitled to a further foreclosure settlement conference.

Accordingly, it is

ORDERED that the defendant's motion (002) is denied in its entirety.

Dated: June 29, 2015
Riverhead, New York

Emily Pines
EMILY PINES
J. S. C.

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[x] NON FINAL