

Chase Home Fin. LLC v Chowdhury

2015 NY Slip Op 31318(U)

July 17, 2015

Supreme Court, Queens County

Docket Number: 10350/08

Judge: Allan B. Weiss

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This opinion is uncorrected and not selected for official publication.

M E M O R A N D U M

SUPREME COURT QUEENS COUNTY
CIVIL TERM PART 2

CHASE HOME FINANCE LLC,

Plaintiff,

-against-

MOMTAZ CHOWDHURY, KABIR AHMED,
JPMORGAN CHASE BANK, N.A., CITY OF
NEW YORK ENVIRONMENTAL CONTROL BOARD,
VALERIE COOTE, CARHAN COOTE, SHEBA
MILTON, KEISHA STRAIGHT,

Defendants.

HON. ALLAN B. WEISS

Index No: 10350/08

Motion Date: 4/13/15

Motion Seq. No.: 3

In this action to foreclose a mortgage, the plaintiff moves for an order vacating the Order of Reference and discharging the Referee appointed therein, entered on August 12, 2009; vacating the Judgment of Foreclosure and Sale entered on June 15, 2010; and, upon vacature, granting a default judgment as against the non-appearing defendants, appointing a referee and amending the caption by substituting CITIBANK, N.A. as plaintiff in place of the present plaintiff, CHASE HOME FINANCE LLC and substituting Valerie Coote, Carhan Coote, Sheba Milton and Keisha Straight in place of the defendants s/h/a Jane Doe #1, John Doe #1, Cara Coe #1 and Ruby Poe #1 respectively.

The defendant, MOMTAZ CHOWDHURY, opposes and cross-moves pursuant to CPLR 5015(a)(4) and (1) for an Order vacating the Judgment of Foreclosure and Sale, Order of Reference both obtained on default, and pursuant to CPLR 3211(8) dismissing the

complaint insofar as it is asserted against her, or in the alternative pursuant to CPLR 3012(d) and/or 2004 granting defendant an extension of time to interpose an answer.

When a defendant moves to vacate a default judgment and raises a jurisdictional objection pursuant to CPLR 3211(8) and CPLR 5015(a)(4) and, alternatively, seeks discretionary vacatur pursuant to CPLR 5015(a)(1), the court must resolve the jurisdictional question before determining whether to grant a discretionary vacatur of the default under CPLR 5015(a)(1) (see HSBC Bank USA, Nat. Ass'n v. Miller, 121 AD3d 1044, 1045 [2014]; Canelas v. Flores, 112 AD3d 871, 871 [2013]). In the absence of personal jurisdiction, a default judgment is a nullity (see Segway of New York, Inc. v. Udit Group, Inc., 120 AD3d 789, 792 [2014]).

The defendant failed to demonstrate his entitlement to dismissal or vacatur pursuant to CPLR 5015 (a)(4) or CPLR 3211(8) for lack of personal jurisdiction. A process server's affidavit of service constitutes prima facie evidence of proper service (see U.S. Bank N.A. v. Hasan, 126 AD3d 683, 684 [2015]; Deutsche Bank Natl. Trust Co. v. Quinones, 114 AD3d 719 [2014]).

The affidavit of service, dated June 18, 2008, avers that the defendant Momtaz Chowdhury was served by delivery of the summons and complaint to "John Smith" a person of suitable age and discretion on June 13, 2008 at 12:35 p.m. at 155-20 107th

Ave., Jamaica, N.Y. and by mailing an additional copy on June 18, 2008 to the same address. The affidavit of service establishes, prima facie, that the defendant was properly served pursuant to CPLR 308 (2) (see F.I. duPont, Glore Forgan & Co. v. Chen, 41 NY2d 794, 797 [1977]; Youngstown Tube Co. v. Russo, 120 AD3d 1409 [2014] Bank of Am., N.A. v. Grufferman, 117 AD3d 508 [2014])).

In support of her motion the defendant submitted her affidavit asserting that she was never served with papers and did not receive notice of this action until she received the plaintiff's instant motion. She asserts that since June 13, 2008 up to the present she has never resided at 150-20 107th Ave., Jamaica, N.Y., but rather at 25-24 78th Street, East Elmhurst, N.Y. Further, she claims that she does not know anyone named "John Smith" allegedly a co-tenant at the 107th Ave. address.

Generally, a defendant's sworn denial of service containing specific factual details in conflict with the contents of the affidavit of service rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing (see Skyline Agency v. Coppotelli, Inc., 117 AD2d 135, 139 [1986]). The defendant's affidavit stating that she did not live at 150-20 107th Ave. on the alleged date of service is insufficient to rebut the presumption of proper service since service was made at 155-20 107th Ave. Even if the court were to

assume that the address 150-20 107th Ave. in the defendant's affidavit is a typographical error¹, she has failed to submit any documentary evidence to support her conclusory claim that she resided at 25-24 78th Street on the date of service so as to require a hearing (see Chichester v. Alal-Amin Grocery & Halal Meat, 100 AD3d 820, 821 [2012]; Toyota Motor Credit Corp. v. Lam, 93 AD3d 713, 714 [2012]; U.S. Bank, N.A. v. Arias, 85 AD3d 1014, 1016 [2011]).

In opposition to the plaintiff's cross-motion, the plaintiff submitted an address verification from the U.S. Postal Office regarding defendant's mailing address, dated May 7, 2008 which state that 155-20 107th Ave., Jamaica, N.Y. as defendant's residence and place for receiving mail and the report from the Department of Motor Vehicles(DMV), dated April 29, 2008 which are sufficient to establish, prima facie that the address on record with the DMV and the US Post Office is the address where service of process was made. Since the defendant failed to notify the DMV of her change of residence, as required by Vehicle and Traffic Law(VTL) § 505(5), she is estopped from raising a claim of defective service (see Hidalgo v. Cruiser Taxi Corp., supra at 951; Labozzetta v. Fabbro, 22 AD3d 644, 645 [2005]; Ortiz v. Santiago, 303 AD2d 1 [2003]; Burke v. Zorba Diner, 213 AD2d 577

¹The defendant's reply does not mention that such might be the case.

[1995]). Chowdhury did not submit any explanation for her failure to comply with VTL and her attorney's claim that estoppel does not apply in this case is without merit. Contrary to defense counsel's claim, estoppel based upon the failure to comply with the VTL has been extended to cases which do not arise out of an automobile accident (see Stillman v. City of New York, 39 AD3d 301 [2007]; Burke v. Zorba Diner, 213 AD2d 577 [1995]; RBC Capital Markets Corp. v. Bittner, 24 Misc.3d 728 [2009]).

In view of the above, the court finds that service of process was properly made upon Momtaz Chowdhury pursuant to CPLR 308(2) and personal jurisdiction has been acquired.

A defendant seeking to vacate judgment entered upon his default pursuant to CPLR 5015(a)(1) must demonstrate both a reasonable excuse for the default in appearing and answering the complaint and a meritorious defense to the action (see; Eugene Di Lorenzo, Inc. v. A.C. Dutton Lbr. Co., 67 NY2d 138, 141 [1986] ; Gray v. B.R. Trucking Co., 59 NY2d 649 [1983]). When relying upon CPLR 317 the defendant must demonstrate that she did not personally receive notice of the summons in time to defend and she has a meritorious defense (see Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co., supra). A defendant seeking leave to interpose a late answer pursuant to CPLR 2004 and 3012(d) for leave to interpose a late answer, CPLR 3012(d) and CPLR 2004, must provide a reasonable excuse for the delay or default and

demonstrate a potentially meritorious defense to the action (see HSBC Bank USA, N.A. v. Lafazan, 115 AD3d 647 [2014]; Community Preserv. Corp. v. Bridgewater Condominiums, LLC, 89 AD3d 784, 785 [2011]). The showing of reasonable excuse that a defendant must establish to be entitled to serve a late answer under CPLR 3012(d) is the same as that which a defendant must make to be entitled to the vacatur of a default under CPLR 5015(a)(1) (see Stephan B. Gleich & Associates v. Gritsipis, 87 AD3d 216 [2011]).

Inasmuch as the court has determined that service pursuant to CPLR 308(2) was proper, and the defendant's only excuse for her default was that she was not served with process, she has failed to establish a reasonable excuse for her default (see HSBC Bank USA, N.A. v. Miller, 121 AD3d 1044, 1046 [2014]; Bank of N.Y. v. Samuels, 107 AD3d 653, 654 [2013]). The absence of a reasonable excuse makes it unnecessary to consider whether defendant has a meritorious defense (see Community West Bank, N.A. v. Stephen, 127 AD3d 1008, 1009 [2015]; Wells Fargo Bank, N.A. v. Cervini, 84 AD3d 789, 790 [2011]). In addition, since defendant has failed to establish a reasonable excuse for her default she has no further remedy under CPLR 3012(d) (see Mannino Development, Inc. v. Linares, 117 AD3d 995 [2014]; Fried v. Jacob Holding, Inc., 110 AD3d 56, 65-66 [2013]; Wells Fargo Bank, N.A. v. Cervini, 84 AD3d 789 [2011]).

To the extent that defendant relies upon CPLR 317 she has

failed to establish that she did not personally receive notice of the summons in time to defend and has a potentially meritorious defense (see Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co., 67 NY2d 138, 141-142 [1986]; Avila v. Distinctive Dev. Co., LLC, 120 AD3d 449, 451; cf. HSBC Bank USA v. Dammond, 59 AD3d 679, 680). She admitted having received the plaintiff's instant motion which was served at the 107th Avenue address as were the prior mailings including Notice of Entry of the Judgment of Foreclosure and Sale on June 29, 2010.

Nor has defendant demonstrated even an arguably meritorious defense. Defendant does not deny that she is in default under the terms of the mortgage, and essentially asserts standing as a defense. However, defendant waived her right to challenge the plaintiff's standing by failing to raise it in her answer or in a pre-answer motion to dismiss (see CPLR 3211[a][3];[e]; Capital One, N.A. v. Knollwood Properties II, LLC, 98 AD3d 707 [2012]; U.S. Bank, Nat. Ass'n v. Sharif, 89 AD3d 723, 724 [2011]; Wells Fargo Bank Minn., N.A. v. Mastropaolo, 42 AD3d 239, 240 [2007]). A waived standing defense cannot be asserted by a party in default in support of an application to vacate such default under CPLR 5015(a)(1) or CPLR 317 (see JPMorgan Mtge. Acquisition Corp. v. Hayles, 113 AD3d 821[2014]; Citibank, N.A. v. Swiatkowski, 98 AD3d 555 [2012]; HSBC Bank, USA v. Dammond, 59 AD3d 679 [2009]). The remainder of the affirmative defenses in

the proposed answer containing conjecture and surmise and based upon information or belief are insufficient to demonstrate a meritorious defense. Although the defendant does not have to establish her alleged defenses, she must allege evidentiary facts capable of being established at trial (see Figueroa v. Luna, 281 AD2d 204, 206 [2001]; Rodriguez v. Middle Atl. Auto Leasing, 122 AD2d 720, 722 [1986] appeal dismissed 69 NY2d 874 [1987]).

Finally, the defendant's inordinate delay in moving to vacate her default, i.e. over six years after her default and five years after being served with notice of entry of the Judgment of Foreclosure and Sale, without any reasonable explanation, evinces a wilful default under the circumstances of this case which cannot be excused (see Abdul v. Hirschfield, 71 AD3d 707 [2010]; Diamond Truck Leasing Corp. v. Cross Country Ins. Brokerage, Inc., 62 AD3d 745 [2009]).

Accordingly, the defendant's cross-motion is denied in its entirety.

The plaintiff has established, prima facie, its entitlement to the relief requested, including a default judgment as to liability, by producing proof of service of the summons and complaint, the assignments of mortgage, a copy of the mortgage and unpaid note, together with evidence of the defendant mortgagor's default (see Citibank, N.A. v. Van Brunt Properties, LLC, 95 AD3d 1158 [2012]; Capstone Bus. Credit, LLC v Imperia

Family Realty, LLC, 70 AD3d 882 [2010]).

Accordingly, the plaintiff's motion is granted.

Settle Order.

Dated: July 17, 2015

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J. S. C.