Fifth Third Mtge. Co. v Wiedemuth
2015 NY Slip Op 31394(U)
April 8, 2015
Supreme Court, Suffolk County
Docket Number: 15404-13
Judge: Thomas F. Whelan

[* 1]

SHORT FORM ORDER

COPY

INDEX No. 15404-13

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 10/9/14
SUBMIT DATE: 3/20/15
Mot. Seq. # 001 - MG
Mot. Seq. # 002 - MD
CDISP: No

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FIFTH THIRD MORTGAGE COMPANY,

Plaintiff,

-against-

ANTHONY WIEDEMUTH a/k/a ANTHONY M. WIEDEMUTH, BOARD OF MANAGERS OF THE PINE NECK LANDING, "JOHN DOE #1" to "JOHN DOE #10", the last ten names being fictitious and unknown to plaintiff, the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint,

Defendants.

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Upon the following papers numbered 1 to 14 read on this motion by the plaintiff and separate order to show cause, Notice of motion and supporting papers 1 - 6; Order to Show Cause and supporting papers 7-10; Opposing papers; 11-12; Reply papers 13-14; Other ___; it is,

ORDERED the motion (#001) by the plaintiff for an order of reference on default is granted; and it is further

ORDERED that the separate motion (#002) by defendant, Anthony Wiedemuth, for dismissal of the complaint pursuant to CPLR 3211(a)(8) or, in the alternative, relief pursuant to CPLR 317 and a dismissal of the complaint pursuant to RPAPL § 1304 compliance, is considered thereunder and is denied.

The plaintiff commenced this action on June 13, 2013 to foreclose the lien of an October 29, 2009 mortgage given by defendant Anthony Wiedemuth to secure a mortgage note executed by him on the same date to the plaintiff in the principal amount of $441,849.00. The mortgage encumbers residential real property located in East Quogue, New York where defendant Wiedemuth resides.

The plaintiff purportedly effected service of the summons and complaint and CPLR 1303 notice upon defendant, Anthony Wiedemuth, at the mortgaged premises on June 29, 2013 pursuant to CPLR 308(2) by delivery of such papers to Amanda Almada, a family member of the defendant and a person of suitable age and discretion (*see* plaintiff's Exhibit F, Affidavit of service upon defendant Wiedemuth by delivery of summons, complaint and RPAPL 1303 notice to "Amanda Almada", sworn to by Ken Vega on July 3, 2013). Proof of service of a first class mailing of such papers on July 5, 2013 by Raymond Bercse is attested to by Mr. Bercse in his July 8, 2013 affidavit of mailing (*see* plainstiff's Exhibit F). Service of the summons and complaint was effected upon Michele Wiedemuth, the wife of the moving defendant who was served as John Doe #2 , by delivery to Amanda Almada at the mortgaged premises on June 29, 2013 by Mr. Vega (*see id.*). A first class mailing of the summons and complaint to Michele Wiedemuth, as "John Doe #2, was made by Mr. Bercse on July 5, 2013 who also served the RPAPL 1303 notice upon her by certified mail and first class mail that same day (*see* second separte affidavit of mailing by Mr. Bresce on Michele Wiedmeuth attached as plaintiff's Exhibit F). Amanda Almada, who is identified as the sister of Michelle Wiedemuth was served as John Doe #1, by personal delivery of the summons and complaint by Mr. Vega pursuant to CPLR 308(2) on June 29, 2013 (*see* plaintiff's Exhibit F) and by first class mail on July 5, 2013 as attested to in an affidavit of service by Mr. Bercse dated July 8, 2013. Mr. Bercse further served Ms. Almada with the RPAPL 1303 notice by certified mail and first class mail on July 5, 2013 (*see id*).

On August 14, 2014, the plaintiff interposed its motion (#001) for an order of reference upon the default of all persons served with process and incidental relief regarding the identification of those served as unknown defendants, John Doe #1 and John Doe #2, as Amanda Almada and Michelle Wiedemuth and the deletion of the remaining unknown defendants together with caption amendments to reflect such changes. Following receipt of a copy of the plaintiff's moving papers, defendant Wiedemuth retained his current counsel who interposed the defendant's separate motion (#002) to dismiss the complaint.

In support of his application to dismiss the complaint pursuant to CPLR 3211(a)(8), defendant Wiedemuth asserts that on the date that service of the summons, complaint and RPAPL 1303 notice was effected pursuant to CPLR 308(2), he and his wife, Michele, were in Italy (*see* Exhibit A attached to the defendant's moving papers). In addition, he claims that he has "a sister-in-law named Amanda Amy Carrie Almeyda, not "Amanda Almada" and that she lives in Yonkers, New York and "has never lived with me in my home". Defendant Wiedemuth further asserts that his sister-in-law never told him about being "personally served with any foreclosure papers or receiving any foreclosure papers by mail" and that she assured him that she was never served with nor received papers by mail".

Defendant Wiedemuth proffers the affidavit of his sister-in-law, Amanda Amy-Carrie Almeyda, who asserts that she was "never personally served, instead and/or on behalf of Anthony M. Wiedemuth with the plaintiff's foreclosure summons and complaint at 9 Sanderling Lane, East Quogue, New York 11942 on June 29, 2013 at 2:20 p.m" (*see* Exhibit E of the defendant's moving papers). Proof of this assertion is alleged to be found in the discrepancies in the description of her physical features between her actual features and those set forth in Mr. Vega's affidavit of in hand delivery on June 29, 2013.

Defendant Wiedemuth also challenges the July 5, 2013, Certified mail service of the RPAPL 1303 notices served upon Michelle Wiedemuth and Amanda Almada, as tenants, by the plaintiff by certified mail on July 5, 2013. These challenges rest upon claims that such notices were returned to the Melville post-office which is where the plaintiff's counsel and its process server have offices.It is well settled that where a party seeks dismissal on jurisdictional grounds and advances other non-jurisdictional grounds for relief, the court is required to resolve the jurisdictional issue prior to determining the other non-jurisdictional grounds asserted (*see* ***Youngstown Tube Co. v Russo***, 120 AD3d 1409, 993 NYS2d 146 [2d Dept 2014]; ***Emigrant Mtge. Co., Inc. v Westervelt***, 105 AD3d 896, 897, 964 NYS2d 543 [2d Dept 2013]).

The cross moving papers are opposed by the plaintiff on subtantive and procedural grounds, to which, the moving defendant has replied. The court shall first consider the defendant's motion for dismissal of the complaint pursuant to CPLR 3211(a)(8) as determination thereof may render all remaining issues before the court on these motions, academic.

"A process server's affidavit of service constitutes prima facie evidence of proper service" (***Scarano v Scarano***, 63 AD3d 716, 716, 880 NYS2d 682 [2d Dept 2009]; *see* ***NYCTL 2009–A Trust v Tsafatinos***, 101 AD3d 1092, 1093, 956 NYS2d 571 [2d Dept 2012]). "Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavits" (***Countrywide Home Loans Serv., LP v Albert***, 78 AD3d at 984–985, 912 NYS2d 96 [2d Dept 2010]; internal quotation marks and citation omitted]; *see* ***Mortgage Elec. Registration Sys., Inc. v Losco***, 125 AD3d 733, 2015 WL 542795 [2d Dept 2015]; ***JPMorgan Chase v Todd***, 125 AD3d 953, 2015 WL 775077 [2d Dept 2015]; ***Emigrant Mtge. Co., Inc. v Westervelt***, 105 AD3d 896, *supra*; ***Countrywide Home Loans Serv., LP v Albert***, 78 AD3d 983, 984–985, *supra*).

Here, the affidavit of the plaintiff's process servers establish that the moving defendant was served pursuant to CPLR 308(2) on June 29, 2013 by delivery of the summons, complaint and RPAPL §1303 to Amanda Almada, a person of suitable age and discretion, who was present at the mortgaged premises on that date and by the first class mailing of the summons and complaint to the defendant on July 5, 2015, in accordance with the requirements of CPLR 308(2) and RPAPL § 1303. It was thus incumbent upon the moving defendant to rebut this presumption by due proof.

The moving defendant's challenges to the certified mailings of the RPAPL § 1303 notices to his co-defendant wife (Michelle Wiedemuth) and sister-in-law (Amanda Amy Carrie Almeyda) on July 5, 2013 are rejected as lacking in merit. Claims for dismissal of a complaint due to a lack of service or some jurisdictional infirmity are personal in nature and thus may only be interposed by the person who was the intended target of such service (*see* ***Gray-Joseph v Shuhai Liu***, 90 AD3d 988, 934 NYS2d 868 [2d Dept 2011]; ***Wells Fargo Bank, N.A. v Bowie***, 89 AD3d 931, 932 NYS2d 702 [2d Dept 2011]; ***NYCTL 1996–1 Trust v King***, 304 AD2d 629, 758 NYS2d 374 [2d Dept 2003]; ***Home Sav. of Am. v Gkanios***, 233 AD2d 422, 423, 650 NYS2d 756 [2d Dept 1996]). Defects in the service of a RPAPL § 1303 notice are not jurisdictional in nature (*see* ***Pritchard v Curtis*** 101 A.D.3d 1502, 957 N.Y.S.2d 440 [3d Dept 2012]) .

Here, the record reflects that the plaintiff effected due service of RPAPL§ 1303 upon the moving defendant via personal delivery of such notice to his sister-in-law, defendant Almeyda, at the time of the like delivery of the summons and complaint to her pursuant to CPLR 308(2) on June 29, 2013 and that no further service of such notice upon the moving defendant was required. His complaints about infirmities in the service of such notice upon his co-defendants are unavailing as he is without standing to raise them. In addition, the record reflects that the plaintiff effected due service of the RPAPL § 1303 notices upon the defendants, Michelle Wiedemuth and her sister, Amanda Amy Carrie Almeyda, pursuant to RPAPL § 1303(4) on July 5, 2013 as attested to in the affidavits of service by Raymond Bercse who, on July 8, 2013 posted them with U.S. Postal Service's outlet in Melville, New York. The record reflects that physical delivery of the certified mailings at the mortgaged premises was attempted on July 8, 2013 by the U.S. Postal Service and a notice thereof left at such premises. The fact that such mailings were left unclaimed by the defendants and thereafter so marked and returned to the sender does not invalidate the plaintiff's service thereof. Under these circumstances, the court finds all of defendant Wiedemuth's challenges to the plaintiff's service of the RPAPL § 1303 notices upon his co-defendants, to be wholly lacking in merit.

The court likewise rejects the moving defendant's claim of a jurisdictional infirmity in the plaintiff's service of process upon him pursuant to CPLR 308(2) because such defendant was allegedly in Italy on the date on which the physical delivery and/or the mailing of the summons and complaint were made. All that is required to effect the jurisdictional joinder of a defendant pursuant to CPLR308(2) is delivery of the summons "within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend 'personal and confidential'" (*see* CPLR 308[2]). Accordingly, the fact that the defendant so served wasn't physically present at the place of service is of no consequence. All of the claims relating to the defendant's whereabouts overseas on the date of service and mailing are thus unavailing.

Similarly rejected is the moving defendant's nuanced claim that the service of process effected upon him pursuant to CPLR 308(2) was jurisdictionally infirm because, Ms. Almeyda, the moving defendant's sister-in-law and the person served with three copies of the summons and complaint and one copy of the RPAPL § 1303 notice by delivery on June 29, 2015 at the mortgaged premises, did not re-deliver such papers to the moving defendant nor did she ever reveal that she was so served. There is no statutory requirement that any such re-delivery or reveal take place (*see* CPLR 308[2]; *see also* Vincent C. Alexander, Practice Commentaries McKinney's ConsLaws of NY Book 7B CPLR 317:1)

Also irrelevant are the moving defendant's claims that Ms. Almeyda did not reside at the mortgaged premises on the date of service or that "she never resided with the moving defendant" at such premises. Appellate case authorities have instructed that "[v]alid service pursuant to CPLR 308(2) may be made by delivery of the summons and complaint to a person of suitable age and discretion who answers the door at a defendant's residence, but is not a resident of the subject property" (*see* ***Bank of New York v Espejo***, 92 AD3d 707, 939 NYS2d 105 [2d Dept 2012]). Notably, there are no allegations by the either the moving defendant or Ms. Almeyda that she was not present at the premises on the date

of service. The allegations that Ms. Almeyda didn't live there nor reside there with the moving defendant are irrelevant.

That which is relevant to the court's determination are the denials by defendant, Amanda Amy-Carrie Almeyda, that she was not served on June 29, 2013 at the mortgaged premises with the papers attested to in the affidavit of service executed by the plaintiff's process server, Ken Vega, on July 3, 2013. As proof of this contention, defendant Almeyda a/k/a Almada alleges that the physical description of her set forth in the affidavit of service is not consistent with her actual physical attributes.

It is well established that claimed discrepancies between the appearance of the person served and the description of such person set forth in the process server's affidavits may constitute the assertion of specific facts sufficient to rebut those set forth in the affidavit of a process server thereby warranting a traverse hearing on the issue of service (*see* ***Wells Fargo Bank, NA v Chaplin***, 65 AD3d 588, 884 NYS2d 254 [2d Dept 2009]; ***Deutsche Bank Natl. Trust Co. v Pestano***, 71 AD3d 1074, 899 NYS2d 269 [2d Dept 2010]). Where the person to whom process was delivered asserts a claim substantiated by documentary and other proof that such person was elsewhere on the date of service and that the physical description of such person set forth in the affidavit of service significantly differs from the actual appearance of such person, a hearing on the issue of service is warranted (*see* ***Wells Fargo Bank, NA v Chaplin***, 65 AD3d 588, *supra; see also* ***HSBC Bank USA, Natl. Ass'n v Hamilton***, 116 AD3d 663, 983 NYS2d 585 [2 Dept 2014]; ***Washington Mutual Bank v Holt***, 113 AD3d 755, 979 NYS2d 612 [2d Dept 2014]). Where, however, claimed discrepancies are unsubstantiated and of a minor, slight or inconsequential nature are 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]; ***Cavalry Portfolio Serv., LLC v Reisman***, 55 AD3d 524, 865 NYS2d 286 [2d Dept. 2008]; ***Wells Fargo Bank, N.A. v McGloster***, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]; ***NYCTL 1997–1 Trust v Nillas***, 288 AD2d 279, 732 NYS2d 872 [2d Dept 2001]; ***Simmons First Natl. Bank v Mandracchia***, 248 AD2d 375, 669 NYS2d 646 [2d Dept 1998]).

Here, Ms. Almeyda's denial of service is not supported by specific allegations of facts or proof as to her whereabouts on the date of service and the discrepancies in her physical attributes complained of are minor, slight and inconsequential. These deficiencies, coupled with the deficiencies in the affidavit of the moving defendant with respect to his denials of service that are outlined above, warrant a denial of those portions of this motion wherein the moving defendant seeks dismissal of the complaint pursuant to CPLR 3211(a)(8).

Also denied is defendant Wiedemuth's alternative application for an order vacating his default in answering pursuant to CPLR 317. This statutory provision provides that "[a] person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318, within or without the state, who does not appear may be allowed to defend the action within one year after he obtains knowledge of entry of the judgment, but in no event more than five years after such entry, upon a finding of the court that he did not personally receive notice of the summons in time to defend and has a meritorious defense" (CPLR 317). Like CPLR 3012(d) and 5015(a)(1), this statute provides for a discretionary vacatur of a default, not one that is jurisdictional in nature, as the statutory provisions of CPLR 317 presumes due and proper service other than by personal delivery was effected

in a jurisdictionally proficient manner but that the defendant served did not receive notice of the summons in time to defend (*see* Vincent C. Alexander, Practice Commentaries McKinney's ConsLaws of NY Book 7B CPLR 317:1, *supra*). In effect, this statute provides a defendant in default with a reasonable excuse for such default, namely, no notice of the summons in time to defend. It requires, however, an affirmative showing of the absence of such notice and, like CPLR 3012(d) and 5015(a)(1), due proof of the moving defendant's possession of a potentially meritorious defense to the action.

CLR 317, which has due process undertones, may fairly be characterized as providing a hybrid remedy for a discretionary vacatur of a default which differs from non-discretionary jurisdictional grounds and the discretionary grounds for vacatur that are available to parties in default under CPLR 3012(d) and/or 5015(a)(1). A party in default possessed of a jurisdictional defense need only show the absence of subject matter jurisdiction or a lack of jurisdiction over his or her person without any showing of an excuse or meritorious defense to successfully obtain a dismissal (*see* CPLR 3211(a)(2);(8); ***CPLR 5015(a)(4); Deutsche Bank Natl. Trust Co. v Pestano***, 71 AD3d 1074, *supra*; ***Prudence v Wright***, 94 AD3d 1073, 943 NYS2d 185 [2d Dept. 2012]). Under CPLR 3012(d) and 5015(a)(1), a party in default may obtain a discretionary vacatur provided he or she demonstrates a reasonable excuse and a meritorius defense (*see* ***Southstar III, LLC v Enttienne***, 120 AD3d 1332, 992 NYS2d 548, 549 [2d Dept 2014]; ***JP Morgan Mtge. Acquisition Corp. v Hayles***, ***Mannino Dev., Inc. v Linares***, 117 AD3d 995, 986 NYS2d 578 [2d Dept 2014]; ***HSBC Bank USA, N.A. v Lafazan***, 115 AD3d 647, 983 NYS2d 32 [2d Dept 2014]; 113 AD3d 821, 979 NYS2d 620 [2d Dept 2014]; ***Schwartz v Reisman***, 112 AD3d 909, 976 NYS2d 883 [2d Dept 2013]; ***Equicredit Corp. of Am. v Campbell***, 73 AD3d 1119, 1120, 900 NYS2d 907 [2d Dept 2010]). The granting of a discretionary vacatur of a default under CPLR does not require the establishment of a reasonable excuse, as the statute itself provides that so long as the defaulting defendant demonstrates a lack of notice of the summons in time to defend. However, a demonstration of a meritorious defense is required by the express language of CPLR 317.

Here, the court finds that the moving defendant failed to demonstrate his failure to receive notice of the summons and complaint in time to defend. His conclusory and unsubstantiated allegations of his lack of notice are insufficient to establish the statutory requirement (*see* ***U.S. Bank Natl. Ass'n v Mohamad Hasan***, ___ AD3d ____, 2015 WL 894566 [2d Dept 2015]; ***Capital Source v AKO Med., P.C.***, 110 AD3d 1026, 973 NYS2d 794 [2d Dept 2013]; ***Bank of New York v Samuels***, 107 AD3d 653, 968 NYS2d 93 [2d Dept 2013]). The allegation by Ms. Almeyda that had she been served with process, personally or by mail, she would have given them to the moving defendant or to his wife, the sister of Ms. Almeyda (*see* Exhibit E of the defendant's moving papers), is insufficient to establish the moving defendant's lack of notice of the summons in time to defend. In addition, the moving defendant failed to demonstrate a potentially meritorious defense to the plaintiff's claims pursuant to RPAPL § 1304, as none of his contentions demonstrate any non-compliance with the statutory requirements imposed upon the service of the RPAPL § 1304 notice (*see* ***Deutsche Bank Natl. Trust Co. v Quinn***, 120 AD3d 609, 990 NYS2d 885 [2d Dept 2014]).

In view of the foregoing, the defendant's motion (#002) for dismissal of the complaint is in all respects denied.

Next considered is the motion (#001) by the plaintiff for an order of reference on default and the incidental relief outlined above. The motion is opposed by defendant Wiedemuth who asserts a failure

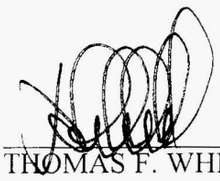
on the part of the plaintiff to demonstrate an entitlement to such relief. For the reasons stated, the motion is granted.

It is well settled law that a party moving for a default judgment must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to answer or appear (*see* CPLR 3215[f]; ***Woodson v Mendon Leasing Corp.***, 100 NY2d 62, 71, 760 NYS2d 727 [2003]; ***Todd v Green***, 122 AD3d 831, 997 NYS2d 155 [2d Dept 2014]; ***U.S. Bank Natl. Ass'n v Poku***, 118 AD3d 980, 989 NYS2d 75 [2d Dept 2014]; ***U.S. Bank Natl. Assn. v Razon***, 115 AD3d 739, 981 NYS2d 571, 572 [2d Dept 2014]; ***Diederich v Wetzel***, 112 AD3d 883, 979 NYS2d 605 [2d Dept 2013]; ***Loaiza v Guzman***, 111 AD3d 608, 609, 974 NYS2d 282 [2d Dept 2013]; ***Green Tree Serv., LLC v Cary***, 106 AD3d 691, 692, 965 NYS2d 511 [2d Dept 2013]; ***Dupps v Betancourt***, 99 AD3d 855, 952 NYS2d 585 [2d Dept 2012]). In the mortgage foreclosure arena, a claim for foreclosure is further governed by RPAPL § 1321 and appellate case authorities. Pursuant thereto, the claim is established by the plaintiff's production of the note and mortgage together with evidence of default in payment or a default in other obligations giving right to the remedy of foreclosure and sale which the mortgagor willingly conferred upon the lender in exchange for the advancement of the mortgage loan monies (*see* ***Citimortgage, Inc. v Chow Ming Tung***, ___ AD3d ____, 2015 WL 1213591 [2d Dept 2015]; ***One West Bank, FSB v DiPilato***, 124 AD3d 735, 998 NYS2d 668 [2d Dept 2015]; ***U.S. Bank Natl. Assn. v Razon***, 115 AD3d 739, *supra*).

Here, the moving papers sufficiently established the plaintiff's entitlement to an order of reference upon default as it included due proof of service of the summons and complaint, defaults in answering on the part of the mortgagor defendant and all other defendants joined herein by service of the summons and complaint and the existence of facts that constitute the plaintiff's possession of viable claims for foreclosure and sale as required by RPAPL § 1321 and CPLR 3215(f) (*see* ***Citimortgage, Inc. v Chow Ming Tung***, ___ AD3d ____, 2015 WL 1213591 [2d Dept 2015], *supra*; ***One West Bank, FSB v DiPilato***, 124 AD3d 735, *supra*; ***U.S. Bank Natl. Assn. v Razon***, 115 AD3d 739, *supra*; ***Green Tree Serv., LLC v Cary***, 106 AD3d 691, *supra*). None of the contentions advanced in the opposition by defendant Wiedemuth demonstrated any grounds for denial of the plaintiff's motion.

In view of the foregoing, the plaintiff's motion (#001) is granted. The proposed order of reference attached to the moving papers, modified by the court to reflect the terms of this memo decision and order, has been marked signed.

DATED: 4/8/15



THOMAS F. WHELAN, J.S.C.