

<b>Wells Fargo Bank, NA v Stein</b>
2015 NY Slip Op 31676(U)
May 29, 2015
Supreme Court, Suffolk County
Docket Number: 21575/2013
Judge: Thomas F. Whelan
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**COPY**

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

**PRESENT:**

retaliative  
Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 3/6/15  
SUBMIT DATE: 5/15/15  
Mot. Seq. # 001- MG  
Mot. Seq. # 002 - XMD  
CDISP: No

-----X  
WELLS FARGO BANK, NA :  
 :  
 :  
 Plaintiff, :  
 :  
 -against- :  
 :  
 MICHAEL STEIN a/k/a MICHAEL A. STEIN, :  
 ELLEN STEIN a/k/a ELLEN A. STEIN, TARGET :  
 NATIONAL BANK, GE MONEY BANK, NEW :  
 YORK STATE DEPARTMENT OF TAXATION :  
 AND FINANCE, MIDLAND FUNDING, LLC :  
 d/b/a in New York - MIDLAND FUNDING OF :  
 DELAWARE, LLC, BANK OF AMERICA, NA, :  
 and "JOHN DOE #1" to "JOHN DOE #10" the :  
 last 10 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. :  
-----X

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Upon the following papers numbered 1 to 3 read on this motion for an order fixing defaults, among other things, and cross motion for an extension of time to serve a late answer, Notice of motion and supporting papers 1 - 6; Notice of Cross Motion & Supporting papers 7-9; Opposing papers; \_\_\_\_\_; Reply papers 10-11; Other \_\_\_\_\_; it is,

**ORDERED** that this motion (#001) by the plaintiff for an order fixing the defaults in answering of all defendants served with process and the appointment of a referee to compute amounts due under the note and the mortgage that are the subject of this foreclosure action is considered under CPLR 3215, RPAPL § 1321 and is granted; and it is further

**ORDERED** that the cross motion (#002) by the obligor/mortgagor defendants, Michael A. Stein and Ellen A. Stein, for an extension of time to serve a late answer is considered under CPLR 3012(d) and is denied.

The plaintiff commenced this action to foreclose the lien of a July 13, 2009 mortgage given by the Stein defendants to secure a mortgage note of the same date executed by defendant Ellen Stein in favor of the plaintiff. The Stein defendants defaulted in their obligations under the terms of the loan documents in April of 2011 and such default remains uncured. In May of 2011, the defendants filed a petition in bankruptcy and obtained a discharge by order dated September 11, 2011.

Following service of the summon, complaint and other papers in August of 2013, the Stein defendants and all others served with process failed to appear herein by way of answer. However, the Stein defendants appeared at three settlement conferences conducted by quasi-judicial personnel assigned to the specialized mortgage foreclosure conference part of this court on February 10, 2014, May 13, 2014 and July 8, 2014. The Steins were allegedly represented by lawyers for "LIH", a non-profit housing counseling agency from the commencement of the action until four days prior to the second settlement conference date when their present counsel appeared herein as their attorney of record. On the last conference date of July 8, 2014, the action was marked "not settled" and released from the conference part and assigned to the case inventory of this court.

By the instant motion (#001), the plaintiff seeks an order of reference on default against all defendants served with process and the deletion of the unknown defendants listed in the caption who were not likewise served. The Stein defendants oppose the plaintiff's motion in cross moving papers in which they seek leave to vacate their defaults in answering upon the granting of an extension of their time to serve an answer as contemplated by CPLR 3012(d). The plaintiff opposes the cross motion in papers that further serve as a reply to its moving papers. For the reasons stated, the plaintiff's motion is granted, while the cross motion (#002) of the moving defendants, is denied.

First considered is the defendants' cross motion (#002) for leave to serve a late answer as the court's determination thereof may render the plaintiff's motion-in-chief, academic. "A defendant who has failed to appear or answer the complaint must generally provide a reasonable excuse for the default and demonstrate a potentially meritorious defense to the action to avoid the entering of a default judgment or to extend the time to answer" (*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, 986 NYS2d 578 [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 Mtge. 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]).

Where a default in answering has occurred, but no judgment or other adjudication of the default has been fixed by the court, a party in default may oppose a motion for a default judgment and seek dismissal on jurisdictional grounds or under CPLR 3215(c), or may seek to vacate the default and appear in the action pursuant to CPLR 3012(d) (*see HSBC Bank USA, Natl. Ass'n v Rotimi*, 121AD3d 855, 995 NYS2d 82 [2d Dept 2014]; *Karalis v New Dimensions HR, Inc.*, 105 AD3d 707, 962 NYS2d 647 [2d Dept 2013]; *Wassertheil v Elburg, LLC*, 94 AD3d 753, 753, 941 NYS2d 679 [2d Dept 2012]; *Swedbank, AB v Hale Ave. Borrower, LLC*, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]). Notably, recent appellate case authorities have instructed that a party in default who opposes a motion for a default judgment may have the default vacated and obtain leave to serve and file a late answer pursuant to CPLR 3012(d) without benefit of the service of a notice of cross motion seeking leave to extend the time to answer, *provided*, the opposing papers establish the requisite reasonable excuse for the delay and a meritorious defense and a copy of the proposed answer is attached to the moving papers (*see Fried v Jacob Holding, Inc.*, 110 AD3d 56, 970 NYS2d 260 [2d Dept 2013]; *see also Schwartz v Reisman*, 112 AD3d 909, *supra*; *Blake v U. S.*, 109 AD3d 504, 970 NYS2d 465 [2d Dept 2013]). To do so by way of motion or cross motion, the defendant must likewise establish that he or she has a reasonable excuse for the delay in answering and a potentially meritorious defense (*see Citimortgage, Inc. v Stover*, 124 AD3d 575, 2 NYS2d 147 [2d Dept 2015]; *HSBC Bank USA, N.A. v Lafazan*, 115 AD3d 647, 648, *supra*; *Swedbank, AB v Hale Ave. Borrower, LLC*, 89 AD3d 922, *supra*; *Chase Home Fin., LLC v Minott*, 115 AD3d 634, 981 NYS2d 757 [2d Dept 2014]; *Wells Fargo Bank, N.A. v Cervini*, 84 AD3d 789, 789, 921 NYS2d 643 [2d Dept 2011]).

Here, the Stein defendants assert, via an affirmation of their counsel, that their default should be excused by the court due to the inexplicable failure to file an answer on the part of their first retained counsel who was allegedly supplied by "LIH", the non-profit housing counselor group the Stein defendants first retained to assist them in obtaining a loan modification or other settlement. Defense counsel further asserts that the failure to answer is excusable due to the ongoing settlement negotiations with the plaintiff or its agents for a two month period following the release of this action from the conference part in June of 2014 (*see* ¶¶ 18-21 of the Affirmation of defense counsel in support of cross motion).

However, the court finds that these assertions are insufficient to establish a reasonable excuse for the defendants' default in answering. Recent appellate case authorities have held that conclusory and unsubstantiated allegations of neglect by prior retained counsel do not constitute a reasonable excuse for a delay in answering the complaint (*see One West Bank, FSB v Valdez*, \_\_\_ AD3d \_\_\_ 2015 WL 2077797 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Cervini*, 84 AD3d 789, 921 NYS2d 843 [2d Dept 2011]). Moreover, no justification for the lengthy delay in moving to vacate the default following the substitution of the defendants' first retained counsel by their current counsel was advance in the moving papers (*see Mannino Development, Inc. v Linares*, 117 AD3d 995, 986 NYS2d 578 [2d Dept 2014]).

The defendants' reliance upon and their participation in statutorily mandated settlement conferences without serving a timely answer is also unavailing, since participation in such settlement conferences, which are scheduled by court personnel after the time in which an answer is due, may not serve as a de facto extension of the time to answer and/or a reasonable excuse for a default (*see Chase Home Fin., LLC v Minott*, 115 AD3d 634, 981 NYS2d 757 [2d Dept 2014]; *HSBC Bank USA, Natl.*

*Ass'n v Lafazan*, 115 AD3d 647, *supra*). To hold otherwise would effect an unfounded judicial transformation of the limited scope and objectives of the simple settlement conference procedures legislatively imposed by CPLR 3408 into a revocation of longstanding rules and laws governing defaults which the legislature chose not to alter (*see e.g.*, CPLR 320; *cf.*, L.2008, c. 472, § 3, eff. Aug. 5, 2008; Amended L.2009, c. 507, § 9, eff. Feb. 13, 2010; L.2013, c. 306, § 2, eff. Aug. 30, 2013).

In addition, other case authorities have instructed that the mere fact that parties to a foreclosure action engage in pre-action and/or post-action loan modification discussions is alone insufficient to constitute a reasonable excuse for a default in answering, especially where the default in answering remains unchallenged by the party in default for a lengthy period of time (*see Deutsche Bank Natl. Trust Co. v Gutierrez*, 102 AD3d 825, 958 NYS2d 472 [2d Dept 2013]; *Community Preserv. v Corp. v Bridgewater Condominiums, LLC*, 89 AD3d 784, 785, *supra*; *Mellon v Izmirligil*, 88 AD3d 930, 931 NYS2d 667 [2d Dept 2011], *supra*; *Onewest Bank, FSB v Navarro*, 41 Misc3d 1238[A], 2013 WL 6500194, \*3\*; [Sup. Court, Suffolk County 2014]; *Onewest Bank FSB v Berry*, 25 Misc3d 1218[A], 901 NYS2d 908 [Sup Ct. Suffolk County 2009]).

The court further finds that the cross moving papers failed to establish the defendants' possession of any bona fide defense to the plaintiff's claims for foreclosure and sale. Defense counsel's reliance upon a variance between the date on the note and the date affixed on the mortgage indenture has not been shown to provide a defense to the plaintiff's claim for foreclosure and sale. This failure alone warrants a denial of the defendants' cross motion. Accordingly, the defendants' cross motion (#002) for relief pursuant to CPLR 3012(d) is denied.

Next considered is the plaintiff's motion-in-chief (#001) for an order of reference upon default and the relief incidental thereto described above. 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]; *Todd v Green*, 122 AD3d 831, 997 NYS2d 155 [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]). 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 defendants 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 Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71, 760 NYS2d 727 [2003]; *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, *supra*; *Green Tree Serv., LLC v Cary*, 106 AD3d 691, *supra*; *King v King*, 99 AD3d 672, 951 NYS2d 565 [2d Dept 2012]; *Integon Natl. Ins. Co. v Noterile*, 88 AD3d 654, 930 NYS2d 260 [2d Dept 2011]).

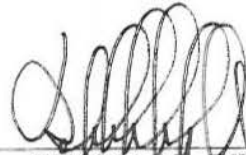
To successfully defeat the plaintiff's motion, the defendants were required to demonstrate that they are not in default or that they possess a jurisdictional defense or grounds for vacatur of their default (*see Wells Fargo Bank, N.A., v Krauss*, \_\_\_ AD3d \_\_\_, 2015 WL \_\_\_\_\_ [2d Dept 2015];

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*Mannino Dev., Inc. v Linares*, 117 AD3d 995, *supra*; *HSBC Bank USA, N.A. v Lafazan*, 115 AD3d 647, *supra*; *Fried v Jacob Holding, Inc.*, 110 AD3d 56, *supra*; *Maspeth Fed. Sav. & Loan Assn. v McGown*, 77 AD3d 889, *supra*; *Equicredit Corp. of Am. v Campbell*, 73 AD3d 1119, *supra*). A review of the opposing papers submitted by the defendants reveals a failure to demonstrate any jurisdictional or abandonment defenses or any entitlement to a vacatur of their default in answering as outlined above.

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

Dated: May 29, 2015



THOMAS F. WHELAN, J.S.C.