

Citimortgage, Inc. v Sterling

2015 NY Slip Op 31748(U)

September 16, 2015

Supreme Court, Queens County

Docket Number: 23653/10

Judge: Allan B. Weiss

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

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

CITIMORTGAGE, INC f/k/a CITICORP
MORTGAGE, INC.,

Plaintiff,

-against-

CARLOS STERLING, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK
CITY PARKING VIOLATIONS BUREAU, NEW YORK
CITY ADJUDICATION BUREAU, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE, WALDEN
SAVINGS BANK, "JOHN DOE" AND "MARY DOE" ,
said names being fictitious, it being the
intention of Plaintiff to designate any and
all occupants, tenants, persons or
corporations, if any, having or claiming an
interest in or lien upon the premises being
foreclosed herein,

Defendants.

HON. ALLAN B. WEISS

Index No.: 23653/10

Motion Date: 6/25/15

Motion Seq.No.: 1

In this action to foreclose a mortgage, plaintiff moves for an Order appointing a referee to ascertain and compute the amounts due plaintiff and amending the caption by substituting, Alex Munoz as a defendant in place of the defendnat s/h/a John Doe and deleting Jane Doe from the caption.

A mortgagee establishes its prima facie entitlement to summary judgment in a foreclosure action where it produces both the mortgage and unpaid note, together with evidence of the 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]; U.S. Bank Natl. Assn. TR U/S 6/01/98 [Home Equity Loan Trust 1998-2] v Alvarez, 49 AD3d

711, 712 [2008]). The plaintiff established its prima facie entitlement to judgment as a matter of law by submitting the mortgage, the underlying note, and evidence of Carlos Sterlings' default.

To defeat the plaintiff's prima facie entitlement to a default judgment pursuant CPLR 3215 motion, the defendant must show either that there was no default, or that he has a reasonable excuse for the default and a potentially meritorious defense (see Fried v. Jacob Holding, Inc., 110 AD3d 56, 60 [2013]).

The defendant, Carlos Sterling opposes and cross-moves for an Order dismissing the complaint pursuant to CPLR 3215(c), CPLR 3211(a)(3) & (8) or for a traverse hearing, failure to comply with Real Property Actions and Proceedings Law (RPAPL) § 1304, or, in the alternative, pursuant to CPLR 3012(d) and CPLR 2004 for an Order vacating his default and permitting him to interpose a late answer.

The branch of the defendant's cross-motion based upon CPLR 3211(a)(8) is denied as untimely inasmuch as a motion based upon a ground contained in CPLR 3211(a) must be made before a responsive pleading is required (see CPLR 3211[e]; Clinkscale v Sampson, 74 AD3d 721 [2010]; Bennett v Hucke, 64 AD3d 529 [2009]). However, the court must resolve the personal jurisdictional issue, which can be raised at any time unless

waived, before determining whether it is appropriate to grant a discretionary vacature of the defendant's default (see Falvo v. Cerra, 127 AD3d 919[2015]; Youngstown Tube Co. v Russo, 120 AD3d 1409 [2014]; Canelas v Flores, 112 AD3d 871, 871 [2013]) or granting plaintiff's motion.

In support of his motion to dismiss on the basis of lack of personal jurisdiction, the defendant submitted his affidavit asserting that he was never served with the summons and complaint, that he owns and resides the mortgaged premises located at 136-11 220th Street, however, no person other than he was at, visiting or had access to the premises, he does not know anyone named Alex Munoz and he does not fit the description of Alex Munoz set forth in the affidavit of service.

The affidavit of service avers that the defendant, Carlos Sterling was served on September 22, 2010 at approximately 12:36 p.m. at 136-11 220th Street, Apt. 2 by delivering and leaving a copy of the summons and complaint and required notices in the form required by statute, with Alex Munoz, co-occupant, a person of suitable age and discretion, and contained a detailed description of the person to whom he delivered process. An additional copy of the papers was also mailed to the defendant at the same address.

"A process server's affidavit of service constitutes prima facie evidence of proper service" (Scarano v Scarano, 63 AD3d

716, 716 [2009]). "Although a defendant's sworn denial of service generally 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]), no hearing is required where the defendant fails to swear to 'specific facts to rebut the statements in the process server's affidavits' " (Scarano v Scarano, 63 AD3d 716, 716 [2009] quoting Simonds v Grobman, 277 AD2d 369, 370 [2000]).

The factual allegation in the defendant's affidavit amounts to no more than a bare, conclusory denial of service which is insufficient to rebut the prima facie proof of proper service pursuant to CPLR 308(2) created by the process server's affidavits and no hearing is required (see Citimortgage, Inc. v Phillips, 82 AD3d 1032, 1033 [2011]; C & H Import & Export, Inc. v MNA Global, Inc., 79 AD3d 784, 785 [2010]). Defendant admits that he resides at the premises where service was made and he does not deny being at home on the date of service (see NYCTL 1997-1 Trust v Nillas, 288 AD2d 279 [2001]). His assertions regarding Alex Munoz are insufficient to demonstrate that the person who identified himself as Alex Munoz was not the defendant himself. The claimed discrepancies in the description of the defendant's appearance and the description in the process server's affidavit of the person to whom process was delivered are minor, unsubstantiated and insufficient to warrant a hearing

(see Indymac Federal Bank, FSB v Hyman, 74 AD3d 751 [2010]; Wells Fargo Bank, N.A. v McGloster, 48 AD3d 457, 458 [2008]).

Accordingly, the court finds that personal jurisdiction over defendant exists.

A defendant seeking to vacate his default pursuant to CPLR 5015(a)(1) and for leave to serve a late answer pursuant to 3012(d) 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]; HSBC Bank USA, N.A. v. Lafazan, 115 AD3d 647 [2014]; Fried v Jacob Holding, Inc., 110 AD3d 56, 66 [2013] Development Strategies Co., LLC v. Astoria Equities, 71 AD3d 628 [2010]). The defendant has failed to do either in this case.

The defendant has failed to demonstrate a reasonable excuse for his default since the only excuse offered was that he was not served with process which the court has found to be without merit (see ACT Props., LLC v Garcia, 102 AD3d 712 [2013]).

Nor has defendant demonstrated even an arguably meritorious defense. Defendant does not deny that he is in default under the terms of the mortgage, and asserts standing as a defense. However, defendant waived the defense of standing by failing to assert it in an 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]). Once a standing defense is waived, it 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]). Nor is defendant entitled to dismissal based on plaintiff's alleged failure to comply with RPAPL 1304. The plaintiff has established that it complied with the RPAPL 1304 notice requirements, and the defendant has not denied that he received the notices.

The branch of the cross-motion to dismiss the complaint pursuant to CPLR 3215(c) is denied. CPLR 3215 provides that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after [a] default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed". The plaintiff met its burden of demonstrating both a reasonable excuse for the delay in timely moving for a default judgment, and a meritorious cause of action and lack of intent to abandon the action (see LNV Corp. v. Forbes, 122 AD3d 805 [2014]; Iorizzo v Mattikow, 25 AD3d 762, 764 [2006]).

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

The plaintiff's motion is granted.

Settle Order.

Dated: September 16, 2015.

D#52

.....

J. S. C.