

Countrywide Home Loans Servicing, L.P. v Crespo

2015 NY Slip Op 31770(U)

June 23, 2015

Supreme Court, Suffolk County

Docket Number: 15304/2009

Judge: Thomas F. Whelan

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This opinion is uncorrected and not selected for official publication.

The plaintiff commenced this action to foreclose the lien of a mortgage given by defendants Crespo and Lopez to secure a mortgage note executed by defendant Crespo in favor of a predecessor-in-interest of the plaintiff in January of 2006. Following service of process, none of the defendants served with process appeared herein by service of answer.

In March of 2010, this court referred the action to the specialized mortgage foreclosure conference part for purposes of scheduling and holding a settlement conference of the type codified in CPLR 3408. On April 15, 2010, a conference screening was conducted by staff assigned to the specialized part at which defendant Crespo appeared. The conference was then adjourned to June 14, 2010, at which time, defendant Crespo appeared herein by counsel. Over the next fifteen months, seven more settlement conferences were conducted in the specialized mortgage foreclosure conference part. On September 13, 2011, the matter was marked "conference held" without an agreed to resolution.

Following a substitution of the plaintiff's counsel in January of 2012, the plaintiff moved for an order of reference in August of 2013. That application was withdrawn in December of 2013 as reflected in the January 8, 2014 order of this court. Following a substitution of counsel for defendant Crespo, she moved for a dismissal of the complaint pursuant to CPLR 3215(c). That motion was denied by order dated March 4, 2015.

The plaintiff now moves for an order of reference on default pursuant to CPLR 3215 and RPAPL § 1321 and an order identifying the six persons found at the mortgaged premises who were served herein as unknown defendants, together with a caption amendment to reflect same. The plaintiff further seeks an order amending the caption to reflect the new name of the plaintiff which evolved through a series of mergers with the originally named plaintiff.

Defendant Crespo opposes the plaintiff's motion-in-chief in cross moving papers in which she seeks by first demanding a dismissal of the complaint on the grounds of defective service of process. She then challenges the plaintiff's entitlement to summary judgment by reason of the plaintiff's purported failure to comply with a contractual condition precedent requiring issuance of a notice of default with time to cure and a dismissal of the complaint on that basis. Defendant Crespo alternately requests leave to vacate her default with leave to file a late answer and dismissal of the complaint on the grounds that the court lacks jurisdiction over her person and because of the plaintiff's purported failure to comply with that above described contractual condition precedent requiring issuance of a notice of default and notice to cure.

First considered is the cross motion (#005) by defendant Crespo as determination thereof may render the plaintiff's motion-in-chief, academic. Therein, defendant Crespo first seeks dismissal of the complaint on the grounds that the court lacks in personam jurisdiction over her due to improper service of the process upon her which was effected pursuant to CPLR 308(2). Defendant Crespo does not deny that the person of suitable age and discretion [Janet Once], to whom the plaintiff's process server delivered the summons, complaint and other initiatory papers at the mortgaged premises, resided with defendant Crespo there at the time of such service. Instead, she claims that Ms. Once's failure to re-deliver the papers so served renders the service jurisdictionally deficient. Defendant Crespo further claims that she was out of the country at the time such service was effected and that Ms. Once never told

her that she was served with legal papers. However, the court finds that these claims are wholly lacking in merit.

It is axiomatic that “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]; *Countrywide Home Loans Serv., LP v Albert*, 78 AD3d 983, 984–985, *supra*). Here, the affidavit of the plaintiff's process server demonstrates a prima facie case of due service of the summons and complaint upon defendant Crespo.

It was thus incumbent of defendant Crespo to advance allegations of specific facts that rebut the statements in the process server's affidavit. Review of her cross moving papers reveals, however, that they contain no such facts. Indeed, in her supporting affidavit, defendant Crespo does not deny that Ms. Once resided with defendant Crespo at the mortgaged premises on the date of service nor does she deny that said premises were her dwelling place or usual place of abode. Instead, defendant Crespo merely alleges that she was in Ecuador at the time of service and that Ms. Once never told her about the delivery of process nor did she re-deliver the papers served to defendant Crespo. For the reasons stated, these claims are wholly unavailing as they lack any basis in fact or law.

By statutory provision, all that is required to effect the jurisdictional joinder of a defendant pursuant to CPLR 308(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]; Vincent C. Alexander, Practice Commentaries McKinney's ConsLaws of NY Book 7B CPLR 317:1). There is thus no statutory requirement that the person served with process reveal or re-deliver the papers so served to the targeted defendant (CPLR 308[2]; see also Vincent C. Alexander, Practice Commentaries McKinney's ConsLaws of NY Book 7B CPLR 317:1). The fact that the defendant so served wasn't physically present at the place and time of service is of no consequence nor is the fact that the person served with the process does not reside there (see *Bank of New York v Espejo*, 92 AD3d 707, 939 NYS2d 105 [2d Dept 2012]). Those portions of the cross motion instant motion wherein defendant Crespo seeks the dismissal of the complaint due to improper service of process are thus denied.

Defendant Crespo's next demand is for a denial of the plaintiff's motion for summary judgment and a dismissal of the complaint due to the plaintiff's purported failure to serve defendant Crespo with the contractual notice of default and cure that is required by certain provisions of the mortgage indenture. This claim is an affirmative defense that must be asserted by a defendant possessed thereof in a timely

pre-answer motion to dismiss or answer (*see* CPLR 3018). The failure to do so transforms the defense into an admission of the satisfaction of the condition by the plaintiff and results in a waiver of the defense by the defendant in default (*see* CPLR 3015[a]; *see also* **US Bank Natl. Ass'n v Weinman**, 2013 WL 1625138 [Sup. Ct. Suffolk County 2013]; **Onewest Bank FSB v Berry**, 25 Misc3d 1218[A], 901 NYS2d 908 [Sup. Ct. Suffolk County 2009]). A direct and immediate dismissal of the complaint is thus not available to defendant Crespo.

In addition, it is well established that in the absence of 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 Enttienne**, 120 AD3d 1332, 992 NYS2d 548, 549 [2d Dept 2014]; **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 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]; **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]). Since defendant Crespo's default in answering has not been vacated, a failure, if any, on the part of the plaintiff to comply with the contractual condition precedent requiring the issuance of a notice of default and cure is not an available defense nor ground for dismissal of the complaint due to the effect of her uncured default in answering as outlined above.

Defendant Crespo's final demand for relief is a vacatur of her default on excusable default grounds and leave to serve a late answer. These demands are governed by CPLR 3012(d), and upon a most liberal reading of her cross moving papers, by CPLR 317. To be entitled to the discretionary vacatur afforded by CPLR 3012(d), the moving defendant must demonstrate a reasonable excuse and a demonstration of a potentially meritorious defense both having been engrafted as conditions for the granting of this relief by appellate case authorities (*see* **Emigrant Bank v Wiseman**, 127 AD3d 1013, 6 NYS3d 670 [2d Dept 2015]; **Deutsche Bank Trust Co. Am. v Marous**, 127 AD3d 1012, 5 NYS3d 883 [2d Dept 2015]; **E*Trade Bank v Vasquez**, 126 AD3d 933, 7 NYS2d 285 [2d Dept 2015]; **Wells Fargo Bank, N.A. v Mazzara**, 124 AD3d 875, 2 NYS3d 553 [2d Dept 2015]; **Southstar III, LLC v Enttienne**, 120 AD3d 1332, *supra*; **Mannino Dev., Inc. v Linares**, 117 AD3d 995, *supra*; **HSBC Bank USA, N.A. v Lafazan**, 115 AD3d 647, *supra*; **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]; **Mellon v Izmirligil**, 88 AD3d 930, 931 NYS2d 667 [2d Dept 2011]; **Wells Fargo Bank, N.A. v Cervini**, 84 AD3d 789, 921 NYS2d 643 [2d Dept 2011]).

Here, defendant Crespo advances both the lack of due service and the absence of compliance with the contractual condition precedent as the justification for her failure to timely appear in response to the plaintiff's service of process some six years ago. However, neither of these grounds support her claim of a reasonable excuse.

As indicated above, any failure to comply with a contractual condition precedent is not jurisdictional in nature as it is merely an affirmative defense which disappears by a failure to timely raise

it by motion or pleading (*see Deutsche Bank Trust Co. Americas v Shields*, 116 AD3d 653, 983 NYS2d 286 [2d Dept 2014]). In addition, defendant Crespo failed to show how any lack of receipt of the contractual notice caused or contributed to her default in answering and her six year delay in moving to vacate same (*see U.S. Bank N.A. v Gonzalez*, 99 AD3d 694, *supra*). Finally, defendant Crespo's conclusory and perfunctory denial of receipt of the contractual notice of default is unavailing (*see Grogg v South Rd. Assoc., L.P.*, 74 AD3d 1021, 907 NYS2d 22 [2d Dept 2010]).

The court is thus left with the defendant's claim that the plaintiff's purportedly defective service was the cause of her default in answering. However, appellate case authorities have repeatedly instructed that where the only excuse proffered is an unsuccessful claim of a purported lack of service or improper service, no reasonable excuse for a default in answering is established (*see Community West Bank, N.A. v Stephen*, 127 AD3d 1008, *supra*; *HSBC Bank USA, Natl. Ass'n v Miller*, 121 AD3d 1044, *supra*; *Bank of N.Y. v Samuels*, 107 AD3d at 654, 968 NYS2d 93 [2d Dept 2013]; *Reich v Redley*, 96 AD3d 1038, 1039, 947 NYS2d 564 [2d Dept 2012]).

While it is unnecessary to determine whether the cross moving defendant sufficiently established her possession of any bona fide defense to the plaintiff's claims for foreclosure and sale, all of the defenses asserted in the proposed answer attached to the moving papers have either been found herein to be without merit or were waived by defendant Crespo's default. As such, the waived defenses may not be resurrected in support of this application to vacate defendant Crespo's default (*see U.S. Bank, N.A. v Bernabel*, 125 AD3d 541, 2015 WL 752831 [1st Dept 2015]; *JPMorgan Mtge. Acquisition Corp. v Hayles*, 113 AD3d 821, *supra*; *Citibank, N.A. v Swiatkowski*, 98 AD3d 555, 949 NYS2d 635 [2d Dept 2012]; *CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]; *HSBC Bank, USA v Dammond*, 59 AD3d 679, 875 NYS2d 490 [2d Dept 2009]).

To the extent that defendant Crespo's cross motion may be fairly read as one for relief under CPLR 317, it is denied. CPLR 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 within the purview of CPLR 3211(a)(8) or CPLR 5015(a)(4) and the discretionary grounds for vacatur that are available to parties in default under CPLR 3012(d) and/or 5015(a)(1). The grant of a discretionary vacatur of a default under CPLR 317 does not require the establishment of a jurisdictional defect in service, since 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*). Nor does it require the establishment of a reasonable excuse, since this statute, in effect, provides a defendant in default with a reasonable excuse for such default, namely, no notice of the summons in time to defend. CPLR 317 does, however, require 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.

Here, defendant Crespo failed to allege, let alone, demonstrate that she failed to receive notice of the summons in time to defend. Her unsubstantiated and conclusory allegations that Ms. Once failed to reveal the delivery of the summons and complaint and other initiatory papers served and her alleged

failure to re-deliver those papers to defendant Crespo are insufficient to establish the statutorily provided lack of notice in time to defend that CPLR 317 requires (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, *supra*). Nor was there any demonstration of the defendant's possession of a potentially meritorious defense as indicated above.

In view of the foregoing, the cross-motion (#005) by defendant Crespo is in all respects denied.

The plaintiff's motion-in-chief (#004) for relief pursuant to CPLR 3215 and RPAPL § 1321 is granted. 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]). In a mortgage foreclosure action, the claim is established by the production of the executed note and mortgage and evidence of a default in payment or other terms that remains uncured (see *U.S. Bank N.A. v Poku*, 118 AD3d 980, 989 NYS2d 75 [2d Dept 2014]).

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, *supra*; *U.S. Bank, Natl. Assn. v Razon*, 115 AD3d 739, *supra*; *Green Tree Serv., LLC v Cary*, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; *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]). The plaintiff's motion for an order of reference on default and for the other incidental relief demanded is in all respects granted.

Proposed Order of Reference, as modified by the court to reflect the terms of this memo decision and order, has been marked signed.

Dated: June 23, 2015



THOMAS F. WHELAN, J.S.C.