

US Bank Natl. Assn. v Tavares
2015 NY Slip Op 32196(U)
October 30, 2015
Supreme Court, Suffolk County
Docket Number: 11/28698
Judge: Jr., Andrew G. Tarantino
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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.

US Bank v Tavares
Index No. 11-28698
Page No. 2

ORDERED that this motion (003) by Ruth Tavares for, *inter alia*, an order vacating the order of reference granted on April 18, 2014 and dismissing the foreclosure action, or in the alternative, permitting the moving defendant an extension of time to answer the complaint is denied; and it is further

ORDERED that this motion (004) by plaintiff US Bank for a judgment of foreclosure and sale is granted; and it is further

ORDERED that this cross motion (005) by Ruth Tavares for, *inter alia*, dismissal based upon plaintiff's untimely motion for a judgment of foreclosure and sale and for failure to make a showing of sufficient cause for the delay in seeking an order of reference pursuant to CPLR 3215(c) is denied.

This is an action to foreclose a mortgage on premises known as 21 Stacy Drive, Port Jefferson Station, New York. On June 2, 2006, Ruth Tavares and Daniel Tavares executed a fixed rate note in favor of BNC Mortgage, Inc. (BNC) agreeing to pay the sum of \$400,000.00 at the yearly rate of 6.900 percent. On the same date, Ruth Tavares and Daniel Tavares also executed a mortgage in the principal sum of \$400,000.00 on the subject property. The mortgage indicated BNC to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of BNC as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on June 9, 2006 in the Suffolk County Clerk's Office. Thereafter, the note and mortgage were transferred by assignment of mortgage dated March 6, 2008 from MERS, as nominee for BNC, to plaintiff US Bank. The assignment of mortgage was recorded on March 26, 2008 with the Suffolk County Clerk's Office. On September 1, 2011, the mortgage was transferred by a corrective assignment of mortgage from MERS, as nominee for BNC, to plaintiff US Bank.

In its complaint, plaintiff alleges in pertinent part that defendant Ruth Tavares breached her obligations under the terms of the note and mortgage by failing to make monthly payments commencing with the November 1, 2008 payment. Moving defendant failed to appear or interpose an answer in the action.

The Court's computerized records indicate that foreclosure settlement conferences were held on April 2, 2012, June 6, 2012, August 1, 2012, October 1, 2012, and December 12, 2012, at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conferences are required.

Plaintiff was granted an order of reference by order of this Court dated April 18, 2014, upon the default of the defendants. Ruth Tavares now moves for an order vacating the order of reference and dismissing the foreclosure action, or in the alternative granting her an extension of time to answer. Notwithstanding this request for leave to serve a late answer and defend on the merits, movant seeks an immediate dismissal of the complaint pursuant to CPLR 3215(c) upon grounds that plaintiff failed to take proceedings for the entry of judgment within one year of defendant's default. The plaintiff opposes the motion on various grounds.

First considered is the contention that the plaintiff abandoned its claims under CPLR 3215(c). CPLR 3215(c) requires that a plaintiff commence proceedings for the entry of a default judgment within

US Bank v Tavares
Index No. 11-28698
Page No. 3

one year after the default or demonstrate sufficient cause why the complaint should not be dismissed. Where the plaintiff has made an application to the court for the entry of a default judgment within one year of the defendant's default, even if unsuccessful, the court may not later dismiss the complaint as abandoned pursuant to CPLR 3215(c) (*see Bono v DuBois*, 121 AD3d 932, 995 NYS2d 153 [2d Dept 2014]; *US Bank N.A. v Poku*, 118 AD3d 980, 989 NYS2d 75 [2d Dept 2014]; *Jones v Fuentes*, 103 AD3d 853, 962 NYS2d 263 [2d Dept 2013]; *see also Mortgage Elec. Registration Sys., Inc. v Smith*, 111 AD3d 804, 975 NYS2d 121 [2d Dept 2013]). In mortgage foreclosure actions, it is well settled law that foreclosing plaintiffs may not be deemed to have abandoned their foreclosure actions under CPLR 3215(c) when they take the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference under RPAPL 1321(1) within one year of the defendant's default (*Wells Fargo Bank, N.A. v Combs*, 128 AD3d 812, 10 NYS3d 121 [2d Dept 2015]; *citing Klein v St. Cyprian Props., Inc.*, 100 AD3d 711, 954 NYS2d 170 [2d Dept 2012]).

In cases where no motion has been interposed within the one year time limitation period, avoidance of a dismissal of the complaint as abandoned requires the plaintiff to offer a reasonable excuse for the delay in moving for leave to enter a default judgment and to demonstrate a potentially meritorious cause of action (*see Giglio v NTIMP, Inc.*, 86 AD3d 301, 926 NYS2d 546 [2d Dept 2011]; *see also Kohn v Tri-State Hardwoods, Ltd.*, 92 AD3d 642, 937 NYS2d 865 [2d Dept 2012]).

Appellate case authorities have established that a moving defendant's failure to show prejudice by the plaintiff's delay in moving for the default may tip the balance in favor of a finding of sufficient cause to excuse the delay provided an explanation of the delay is advanced which evinces no intent to abandon the action and a meritorious cause of action is shown to exist (*see LNV Corp. v Forbes*, 122 AD3d 805, 996 NYS2d 696 [2d Dept 2014]; *Brooks v Somerset Surgical Assocs.*, 106 AD3d 624, 966 NYS2d 65 [1st Dept 2013]). Delays attributable to the parties' engagement in mandatory settlement conference procedures, or in litigation communications, notices of pendency filings, motion practice and discovery or other pretrial proceedings have been held to negate any intention to abandon the action and are thus excusable under CPLR 3215(c) (*see Brooks v Somerset Surgical Assocs.*, 106 AD3d 624; *Laourdakis v Torres*, 98 AD3d 892, 950 NYS2d 703 [1st Dept 2012]).

Here, the court finds that the plaintiff has sufficiently demonstrated that since defendant was served on September 13, 2011, it has not abandoned its action in foreclosure. Pursuant to CPLR 3408, settlement conferences were conducted on April 2, 2012, June 6, 2012, August 1, 2012, October 1, 2012, and December 12, 2012. On December 12, 2012, the matter was marked "default" and referred to this IAS part. Plaintiff submitted an order of reference on September 16, 2013, which was subsequently granted by this Court on April 18, 2014. Lastly, moving defendant has failed to show any prejudice by the plaintiff's delay in moving for an order of reference on default. Under the circumstances presented, the court finds that plaintiff has met its burden of demonstrating a reasonable excuse for its delay in proceeding in this case as well as a meritorious claim. Accordingly, the motion to dismiss pursuant to CPLR 3215(c) is denied.

The moving defendant's request for leave to serve and file a late answer is equally unavailing. In seeking to vacate a default, a defendant is required to demonstrate a reasonable excuse for the delay in appearing and answering the complaint and a potentially meritorious defense to the action (*see CPLR*

5015 [a] [1]), or, under the circumstances of this case, that service of the summons and complaint was defective (*see* CPLR 5015[a] [4]; *Sime v Ludhar*, 37 AD3d 817, 830 NYS2d 775 [2d Dept 2007]). When a defendant seeking to vacate a default raises a jurisdictional objection pursuant to CPLR 5015 (a) (4), the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5015 (a) (1) (*see Roberts v Anka*, 45 AD3d 752, 846 NYS2d 280 [2d Dept 2007]; *Marable v Williams*, 278 AD2d 459, 718 NYS2d 400 [2d Dept 2000]; *Taylor v Jones*, 172 AD2d 745, 569 NYS2d 131 [2d Dept 1991]). Under CPLR 317, a defendant is not required to offer a reasonable excuse for his or her default (*see Eugene Di Lorenzo, Inc. v A C. Dutton Lbr. Co.*, 67 NY2d 138, 141, 501 NYS2d 8 [1986]), but must demonstrate that he or she did not personally receive notice of the summons in time to defend the action (*id.* at 143, 501 NYS2d 8; *see Fleisher v Kaba*, 78 AD3d 1118, 1119, 912 NYS2d 604 [2d Dept 2010]; *see also Clover M. Barrett, P.C. v Gordon*, 90 AD3d 973, 2011 NY Slip Op 09581 [2d Dept 2011]).

It is well established that a process server's sworn affidavit of service constitutes prima facie evidence of proper service (*see ACT Prop., LLC v Ana Garcia*, 102 AD3d 712, 957 NYS2d 884 [2d Dept 2013]; *Deutsche Bank Natl. Trust Co. v Pietranico*, 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]; *Bank of N.Y. v Espejo*, 92 AD3d 707, 939 NYS2d 105 [2d Dept 2012]). A defendant can rebut the process server's affidavit by a sworn denial of service in an affidavit containing specific and detailed contradictions of the allegations in the process server's affidavit (*see Bank of N.Y. v Espejo*, 92 AD3d 707; *Bankers Trust Co. of California, NA v Tsoukas*, 303 AD2d 343, 756 NYS2d 92 [2d Dept 2003]). However, bare, conclusory and unsubstantiated denials of receipt of process are insufficient to rebut the presumption of proper service created by the affidavit of the plaintiff's process server and to require a traverse hearing (*see U.S. Bank Natl. Assn. v Tate*, 102 AD3d 859, 958 NYS2d 722 [2d Dept 2013]; *Stevens v Charles*, 102 AD3d 763, 958 NYS2d 443 [2d Dept 2013]; *Irwin Mtge. Corp. v Devis*, 72 AD3d 743, 898 NYS2d 854 [2d Dept 2010]; *Beneficial Homeowner Serv. Corp. v Girault*, 60 AD3d 984, 875 NYS2d 815 [2d Dept 2009]). A defendant who fails to swear to specific facts to rebut the statements in the process server's affidavits is not entitled to a hearing on the issue of service (*see Chichester v Alal-Amin Grocery & Halal Meat*, 100 AD3d 820, 954 NYS2d 577 [2d Dept 2012]; *Bank of N.Y. v Espejo*, 92 AD3d 707; *US Natl. Bank Assoc. v Melton*, 90 AD3d 742, 934 NYS2d 352 [2d Dept 2011]).

Here, the process server's affidavit of service constituted prima facie evidence of proper service upon defendant pursuant to CPLR 308 (2) and defendant's self-serving, conclusory and unsubstantiated assertions are insufficient to rebut the presumption of proper service created by said affidavit (*see Beneficial Homeowner Service Corp. v Girault*, 60 AD3d 984, 875 BYS2d 815 [2d Dept 2009]). Notably, movant does not deny having received a copy of the summons and complaint however, she asserts that she was living at another residence in Coram, New York at the time the summons and complaint was purportedly served upon her 15 year old daughter. Accordingly, the branch of the defendant's motion for vacatur of her default for lack of personal jurisdiction is denied.

The moving defendant's alternative request for leave to serve and file a late answer is likewise denied. To be entitled to such relief pursuant to CPLR 5015 and CPLR 3012, the moving defendant was required to set forth a justifiable excuse for her default and a meritorious defense (*see Development Strategies Co., LLC v Astoria Equities, Inc.*, 71 AD3d 628, 896 NYS2d 396 [2d Dept 2010]; *Mora v*

US Bank v Tavares
Index No. 11-28698
Page No. 5

Scarpitta, 52 AD3d 663, 861 NYS2d 110 [2d Dept 2008]; *Grinage v City of New York*, 45 AD3d 729, 846 NYS2d 300 [2d Dept 2007]; *Yellow Book of New York, Inc. v Weiss*, 44 AD3d 755, 843 NYS2d 190 [2d Dept 2007]). Here, the only excuse offered by the defendant was improper service which has been found to lack merit. Since the defendant offered no other excuse for her default, she is not entitled to the relief demanded pursuant to CPLR 5015(a)(1) (see *Tadco Constr. Corp. v Allstate Ins. Co.*, 73 AD3d 1022, 900 NYS2d 687 [2d Dept 2010]; *Pezolano v Incorporated City of Glen Cove*, 71 AD3d 970, 896 NYS2d 685 [2d Dept 2010]). The moving defendant's claim to one or more meritorious defenses is not dispositive, and the Court need not determine whether defendant demonstrated a meritorious defense (see *Development Strategies Co., LLC v Astoria Equities, Inc.*, 71 AD3d 628).

Addressing that branch of the motion which raises an allegation of lack of standing, it is well established that "where a defendant does not challenge a plaintiff's standing, the plaintiff may be relieved of its obligation to prove that it is the proper party to seek the requested relief." (*Wells Fargo Bank Minnesota Natl. Assn. v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). The court further indicated that "an argument that a plaintiff lacks standing, if not asserted in the defendant's answer or in a pre-answer motion to dismiss the complaint, is waived pursuant to CPLR 3211(e)" [citations omitted] (see *Wells Fargo Bank Minn., NA v Mastropaolo*, 42 AD3d 239; see also *HSBC Bank, USA v Dammond*, 59 AD3d 679, 875 NYS2d 490 [2d Dept 2009] [waived standing issues does not constitute meritorious defense on application to vacate default]; *Deutsche Bank Natl. Trust Co. v Young*, 66 AD3d 819, 886 NYS2d 617 [2d Dept 2009] [standing issue unavailing on application to vacate default judgment]; *US Bank, NA v Emmanuel*, 83 AD3d 1047, 921 NYS2d 320 [2d Dept 2011]). Based upon the foregoing, movant's assertion of a standing defense is unavailing since the defendant waived such defense by failing to assert it in a timely pre-answer motion to dismiss or as an affirmative defense in an answer (see *Deutsche Bank Natl. Trust Co. v Young*, 66 AD3d 819).

The defendant further asserts that plaintiff failed to negotiate with her in good faith. CPLR 3408(a) requires a mandatory settlement conference in every residential foreclosure action during which the plaintiff, through its servicer, and the defendant are required to negotiate in good faith to reach a mutually agreeable resolution, including a loan modification, if possible (see CPLR 3408[a], [f]). While the goal of CPLR 3408 negotiations is that the parties reach a mutually agreeable resolution to help the defendant avoid losing his or her home (see CPLR 3408[a]), the statute requires only that the parties enter into and conduct negotiations in good faith (see CPLR 3408 [f]; *Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638, 958 NYS2d 331 [1st Dept 2012]). In *Van Dyke*, the court noted that "there are situations in which the statutory goal is simply not financially feasible for either party" and that "the mere fact that plaintiff refused to consider a reduction in principal or interest rate does not establish that it was not negotiating in good faith. Nothing in CPLR 3408 requires plaintiff to make the exact offer desired by [the] defendant[] [mortgagors], and the plaintiff's failure to make that offer cannot be interpreted as a lack of good faith" (*Wells Fargo Bank, N.A. v Van Dyke*, 101 AD3d 638; see also *Wells Fargo Bank, N.A. v Meyers*, 108 AD3d 9, 966 NYS2d 108 [2d Dept 2013] ["it is obvious that the parties cannot be forced to reach an agreement, CPLR 3408 does not purport to require them to, and the courts may not endeavor to force an agreement upon the parties"]).

To conclude that a party failed to negotiate in good faith pursuant to CPLR 3408(f), a court must determine that "the totality of the circumstances demonstrates that the party's conduct did not constitute

a meaningful effort at reaching a resolution” (*US Bank N.A. v. Sarmiento*, 121 AD3d 187, 991 NYS2d 68 [2d Dept 2014]). Guided by the foregoing principles, the Court finds that the circumstances do not support a finding that plaintiff failed to negotiate in good faith. Furthermore, defendant did not request a “bad faith” hearing in this matter and in fact, failed to appear before this Court on December 12, 2012, for a scheduled settlement conference. Here, plaintiff has established that, under the totality of the circumstances, it engaged in a meaningful effort at reaching a resolution during the five settlement conferences.

The assertion that plaintiff failed to properly comply with the requirements of RPAPL 1304 and the notice of default requirements contained in the mortgage loan is rejected by the Court. Here, the plaintiff satisfied its burden that service of the RPAPL 1304 notice and notice of default were properly made. The affidavit of Angela Bribiesca-Mory contained in plaintiff’s application for an order of reference evidences that at least 90 days prior to the commencement of the instant action, plaintiff sent the 90 day pre-foreclosure RPAPL 1304 notice to defendant by first class and certified mail to her last known address. Bribiesca-Mory further avers that a notice of default was sent to defendant at her last known address. Defendant’s bald and unsupported assertion that “[t]here is no evidence that either letter was received by certified return receipt mail” is without merit. Furthermore, moving defendant has not submitted an affidavit in support of her motion denying the receipt of same. The affidavit of plaintiff’s servicer along with the annexed documentary evidence sufficiently established to this Court’s satisfaction proper service of the foregoing documents.

Plaintiff now moves (004) for an order granting it a judgment of foreclosure and sale. Plaintiff’s submissions in support of its motion includes its attorney’s affirmation of regularity; the Referee’s oath and report of amount due dated July 18, 2014 indicating the amount due to be \$596,985.72; plaintiff’s affidavit of amount due from Angela Bribiesca-Mory, vice president loan documentation, Wells Fargo Bank, N.A.; the order dated April 18, 2014 (Tarantino, J.), granting an order of reference; the note; mortgage; assignments; the pleadings; and, the affidavits of service of process.

Defendant cross moves (005) for an order dismissing plaintiff’s action on the basis that plaintiff failed to give an excuse for submission of a late order of reference and consideration of defendant’s motion (003) to vacate her default. The assertions by defendant in this cross motion have been fully addressed herein and are denied. Any remaining assertions not specifically addressed in this motion are denied as being without merit.

Based upon the foregoing, plaintiff’s motion (004) is granted and defendant’s motion (003) and cross motion (005) are denied in their entirety. The proposed judgment of foreclosure and sale is signed simultaneously herewith as modified by the Court.

Dated: 10.30.2015



A.J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION