# M E M O R A N D U M

SUPREME COURT - QUEENS COUNTY
I.A.S. PART 14

U.S. BANK NATIONAL ASSOCIATION, etc.,
Plaintiff(s),

-against-

RAMLA BIBI, et al.,
Defendant(s).

Index No. 10870/2010

By: **ELLIOT, J.**

Date: March 15, 2016

Motion Cal. No. 216

Motion Seq. No. 3

Motion Date: November 30, 2016

Conference Date: January 20, 2016

This is an action to foreclose a mortgage against real property known as 246-68 87th Avenue, Bellerose, New York, given by defendant Ramla Bibi (defendant) on July 26, 2005, to America's Wholesale Lender, to secure a note, bearing the same date, in the amount of $524,160.00. According to the complaint, upon defendant's failure to make the payment due on April 1, 2008, plaintiff-assignee elected to accelerate the debt by commencing the instant action. Though all defendants were served with process, none appeared nor answered the complaint within the time prescribed by statute, nor was their time to do so extended by order or stipulation.

On December 1, 2010, a Residential Foreclosure Conference was held; however defendant did not appear. As such, the matter was released from the Residential

Foreclosure Part on that date.

On April 22, 2015, defendant appeared by counsel by filing a Notice of Appearance with the County Clerk. On May 5, 2015, defendant filed a motion for an order dismissing the complaint and canceling the *lis pendens* on the grounds of: (1) failure to proceed for entry of a default judgment against her within one year after her default occurred (CPLR § 3215 [c]); (2) improper service of process; and (3) plaintiff's failure to demonstrate its standing to commence the action. By order dated June 18, 2015, the court denied defendant's motion. The court first held that defendant had not established that she was not properly served with process herein. Second, with respect to defendant's contention that CPLR § 3215 (c) warranted dismissal, the court determined that plaintiff had set forth sufficient cause as to its delay in taking proceedings for the entry of judgment against her. Finally, to the extent defendant set forth substantive reasons as to why the complaint was to be dismissed (to wit: lack of standing), it was determined that, by failing to timely either interpose an answer to the complaint or move to dismiss on that ground, defendant waived such defense, noting that defendant did not move to vacate her default nor compel the acceptance of a late answer. Notwithstanding, though, that branch of plaintiff's separate motion for an order appointing a referee to compute was denied by the same order, but with leave to renew within 45 days from its entry date, as there was a question as to whether the affiant detailing, *inter alia*, defendant's default in payment had the authority to execute affidavits on plaintiff's behalf.

Plaintiff has now renewed its motion in accordance with the June 18, 2015 order. Defendant cross moves for an order, *inter alia*, vacating her default pursuant to CPLR 5015 (a) (1) and allowing her to interpose an answer. No proposed answer has been attached to the cross motion papers as an exhibit.

As to the cross motion, in order to vacate her default in answering the complaint, defendant must demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the action (CPLR 5015 [a] [1]; *see Deutsche Bank Nat. Trust Co. v Ramirez*, 117 AD3d 674 [2014]; *Wells Fargo Bank, NA v Joshi*, 114 AD3d 936 [2014]; *JP Morgan Mtge. Acquisition Corp. v Hayles*, 113 AD3d 821 [2014]). Moreover, the court may extend the time to appear or plead upon such terms as may be just and upon a showing of a reasonable excuse for the delay or default (CPLR 3012 [d]). The showing of a reasonable excuse is the same under both CPLR provisions (*see Stephan B. Gleich & Assoc. v Gritsipis*, 87 AD3d 216 [2011]).

Particularly, if illness is the basis for the excuse, a defendant must state with specificity when then illness occurred and how such illness was the direct cause of the default by submitting affidavits or affirmations of treating physicians as to the nature and affects of the illness; conclusory allegations are not enough to demonstrate a reasonable excuse (*see Colagioia v Colagioia*, 129 AD3d 955 [2015]; *Dimopoulou v Caposella*, 118 AD3d 739 [2014]; *Wells Fargo Bank, N.A. v Cean Owens, LLC*, 110 AD3d 872 [2013]; *Farm Credit Leasing Servs. Corp. v Rubashkin*, 107 AD3d 663 [2013]; *Simpson v Town of*

*Southampton*, 42 AD3d 1033 [2007]). Defendant alleges that, during the first few years of this action, severe illness prevented her from participating in her defense of this action. Defendant discusses an unspecified illness that occurred during an unspecified time in 2010, lasting through an unspecified time in 2013. No evidence was initially offered to substantiate the claim that said illness was the cause of her default in filing an answer to the complaint after having been served on May 12, 2010.

Though for the first time in her reply defendant proffered evidence to show that she underwent treatment and surgery in 2012 for a particular illness, this was two years after plaintiff commenced the action, long after she had defaulted (*see Chery v Anthony*, 156 AD2d 414 [1989]; *Pedone v Avco Fin. Servs. of N.Y.*, 102 AD2d 885 [1984]). Further, the two doctors' reports – aside from the fact that they are not in the form of affirmations (CPLR 2106) – dated September 5, 2012 and November 5, 2015, merely indicate that defendant was diagnosed with another particular illness, leaving the court to speculate, among other things, when she received treatment therefor or how said illness prevented her from appearing in this action within the time frame set forth in CPLR 320 (a). The website printouts detailing side effects from, *inter alia*, treatment of said illness, aside from not having been submitted in admissible form, they are not proof that defendant herself suffered these side effects. Finally, counsel's affirmations are without evidentiary support with regard to these issues (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Consequently, while it is unfortunate that defendant was ill during the pending

foreclosure action, she does not offer any detailed evidence to substantiate her claim that her medical conditions hindered her from timely participating in this case after being served in May 2010. In any event, it must be noted that the illness accounts for only part of the lengthy delay in this action, rendering her unable to establish a reasonable excuse (*see Hargett v Health & Hosps. Corp. of City of N.Y.*, 88 AD2d 633 [1982]).

Defendant next asserts that she reasonably believed the foreclosure action had been stayed during the time she was engaged in settlement negotiations with plaintiff. However, same cannot constitute a reasonable excuse for her default inasmuch as she admits to having commenced such negotiations in 2013. While those negotiations evinced a desire to save her home, the participation in those negotiations after a substantial amount of time to answer has expired does not provide a reasonable excuse (*see HSBC Bank USA, N.A. v Lafazan*, 115 AD3d647 [2014]). Moreover, it is noted that defendant previously urged on her prior motion that, *inter alia*, engaging in loan modification negotiations was insufficient cause for plaintiff having delayed in taking proceedings to enter judgment against her (CPLR § 3215 [c]); it appears incongruous for her now to assert that she believed such negotiations placed a stay on foreclosure proceedings against her such that she did not know she had to file an answer.

Inasmuch as defendant has failed to offer a reasonable excuse for her default, the court need not consider whether she has established the existence of a potentially meritorious defense (*see Morgan Stanley Mtge. Loan Trust 2006-17XS v Waldman*, 131

AD3d 1140 [2015]; *Wells Fargo Bank, NA v Besemer*, 131 AD3d 1047 [2015]).

The remaining branches of defendant's motion must be denied. Since defendant is in default in answering the complaint, she is not entitled to discovery. To the extent defendant asks that this court order a settlement conference, the matter already appeared in the Residential Foreclosure Part on December 1, 2010, defendant having failed to appear therefor. In any event, defendant has presented no evidence as to her financial status or other documentation that would otherwise warrant another conference; this is so particularly in light of the fact that it appears that defendant's loan modification request was declined by correspondence dated February 24, 2015. It is noted that defendant is certainly permitted to continue to privately attempt settlement prior to judgment herein.

Turning to plaintiff's renewed motion, it has established its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default (*see BAC Home Loans Serv., LP v Reardon*, 132 AD3d 790[2015]; *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895 [2013]; *Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753 [2010]; *Argent Mtge. Co., LLC v Mentesana*, 79 AD3d 1079 [2010]). Moreover, plaintiff has now annexed the relevant power of attorney evidencing the servicer's authority to execute affidavits on plaintiff's behalf.

Accordingly, defendant's cross motion is denied. Plaintiff's motion is granted. Plaintiff is granted leave to submit an order of reference. The caption is amended by reflecting plaintiff's complete un-truncated name, to wit: "US Bank, NA as trustee for the

Certificateholders of SARM 2005-19XS."

Submit order on notice to counsel for defendant Bibi.

J.S.C.