Consumer Solutions, LLC v Pryam
2016 NY Slip Op 30600(U)
April 7, 2016
Supreme Court, Queens County
Docket Number: 23618/10
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

CONSUMER SOLUTIONS, LLC,

Plaintiff,

-against-

ANICE PRYAM, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as Nominee For NEW CENTURY MORTGAGE CORP., It's Successor and Assigns, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU,

Defendants.

Index No.: 23618/10

Motion Date: 2/2/16

Motion Seq. No.: 4

The following papers numbered 1 to 12 read on this motion by defendant, ANICE PRYAM, to vacate the default Judgement of Foreclosure and Sale and the Order of Reference pursuant to CPLR 5015(a)(1),(3) and /or (4) and in the interest of justice, and to vacate her default in appearing or answering and for leave to serve a late answer pursuant to CPLR 3012(a) and 2004.

	PAPERS NUMBERED
Order to Show Cause-Affidavits-Exhibits	1 - 6
Answering Affidavits-Exhibits.....	7 - 9
Replying Affidavits.....	10 - 12

Upon the foregoing papers it is ordered that this motion is denied.

This is an action to foreclose a mortgage, dated August 4, 2006 executed and delivered to New Century Mortgage Corporation (New Century) by defendant, Anice Pryam, encumbering the property located at 95-30 147th Place, Jamaica, NY, to secure repayment of a note dated August 4, 2006, evidencing a loan in the principal amount of $336,000.00, with interest. Plaintiff alleges that the defendant defaulted under the terms of the mortgage and note by

failing to make the monthly installment payment due and owing beginning on October 1, 2006, and continuing to the present, and that as a consequence, it elected to accelerate the entire mortgage debt.

Plaintiff obtained a Judgment of Foreclosure and Sale dated July 22, 2015. A foreclosure sale of the premises scheduled for November 20, 2015 was stayed when the defendant, Pryam moved by the instant Order to Show Cause to vacate the default Judgement of Foreclosure and Sale and the Order of Reference pursuant to CPLR 5015(a)(1),(3) and /or (4) and in the interest of justice, and to vacate her default in appearing or answering and for leave to serve a late answer pursuant to CPLR 3012(a) and 2004.

In support of her motion defendant submitted, inter alia, her affidavit and asserts lack of personal jurisdiction, and essentially, plaintiff's lack of capacity and standing to bring this action.

When a defendant seeking to vacate a default judgment pursuant to CPLR 5015(a)(1) raises a jurisdictional objection "the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacature of the default under CPLR 5015(a)(1) (see HSBC Bank USA, Nat. Ass'n v Miller, 121 AD3d 1044, 1045 [2014] quoting Canelas v Flores, 112 AD3d 871, 871 [2013]).

A defendant seeking to vacate judgment entered upon his default pursuant to CPLR 5015(a)(1) and for leave to interpose a late answer pursuant to CPLR 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] ; Gray v. B.R. Trucking Co., 59 NY2d 649 [1983]). When relying upon CPLR 317 the defendant must demonstrate that he did not personally receive notice of the summons in time to defend and he has a meritorious defense (see Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co., supra). However, when moving to vacate a judgment entered on default pursuant to CPLR 5015(a)(4) lack of personal jurisdiction, the movant need not demonstrate a reasonable excuse for the default and a potentially meritorious defense (see Toyota Motor Credit Corp. v Lam, 93 AD3d 713, 713-714 [2012]; Deutsche Bank Natl. Trust Co. v Pestano, 71 AD3d 1074 [2010]; Harkless v Reid, 23 AD3d 622, 622-623 [2005]). Loaiza v Guzman, 111 AD3d 608 [2013]).

According to the affidavit of service, the defendant was served on September 8, 2010 at 7:40 a.m. at 286 Albany Ave., Apt

2B, Brooklyn, NY by delivery of the summons and complaint and required notices to Angie Walker, co-occupant, a person of suitable age and discretion, at the defendant's actual dwelling place, which Angie Walker, when asked, confirmed that defendant resides there. An additional copy of the same papers was mailed to the defendant at the same address on September 30, 2010.

The affidavit of service constituted prima facie evidence that the defendant was validly served pursuant to CPLR 308 (2) (see Washington Mut. Bank v Holt, 71 AD3d 670 [2010]; Wells Fargo Bank, NA v Chaplin, 65 AD3d 588, 589 [2009]). Although a sworn denial of receipt 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 affidavit (see NYCTL 2009-A Trust v Tsafatinos, 101 AD3d 1092 [2012]; Countrywide Home Loans Servicing, LP v Albert, 78 AD3d 983, 984-985 [2010]).

Here, the defendant, in her affidavit, admits that she resided at the address stated in the affidavit of service, but asserts that "If someone knocked on my door, I would have answered". She further asserts that no one gave her any documents and she did not receive any documents in the mail in time to answer.

The defendant's affidavit lacks the factual specificity and detail required to rebut the prima facie proof of proper service set forth in the affidavit of service (see Abdelqader v Abdelqader, 120 AD3d 1275 [2014]; Roberts v Anka, 45 AD3d 752 [2007] lv. dismissed, 10 NY3d 789 and 10 NY3d 851 [2008]; compare Wells Fargo Bank, N.A. v Final Touch Interiors, LLC, 112 AD3d 813, 815 [2013]; Emigrant Mortgage Co. v Westervelt, 105 AD3d 896, 897-98 [2013]; Christiana Bank & Trust Co. v Eichler, 94 AD3d 1170 [2012]; Engel v Boymelgreen, 80 AD3d 653, 655 [2011]). The defendant does not claim that Angie Walker does not exist, was not present at her apartment on the date and time service was made, that she does not physically resemble the person described in the affidavit of service, or is not a person of suitable age and discretion. Nor does defendant swear to specific facts to rebut the statements in the process server's affidavit regarding the subsequent mailing of the copy of the summons and complaint (see Engel v Lichterman, 62 NY2d 943 [1984], aff'g 95 AD2d 536 [1983]). The affidavit contains no probative facts to raise an issue of fact that no person fitting Angie Walkers' description was or could have been at the premises or to contradict any other

material factual allegation in the affidavit of service which would warrant a traverse hearing (see Christiana Bank & Trust Co. v Eichler, supra; Public Adm'r of County of N.Y. v Markwoitz, 163 AD2d 100 [1990]). Accordingly, the court finds that personal jurisdiction exists and the defendant's motion based on CPLR 5015(a)(4) is denied.

Since the only excuse offered by the defendant is the inadequacy of service, which the court has found to be without merit, defendant has failed to establish a reasonable excuse for her default and is not entitled to vacature or to file a late answer pursuant to CPLR 3012(d) (see Hall v Wong, 119 AD3d 897, 898 [2014]; Pezolano v. Inc. City of Glen Cove, 71 AD3d 970 [2010]).

Nor is defendant entitled to vacature of the default judgment if the defendant's motion is treated as one made pursuant to CPLR 317 (see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co., supra at 143; Irwin Mtge. Corp. v Devis, 72 AD3d 743 [2010]; Mann-Tell Realty Corp. v Cappadora Realty Corp., 184 AD2d 497 [1992])since she failed to demonstrate that she did not receive notice of the summons and complaint in time to defend the action (see Irwin Mtge. Corp. v Devis, 72 AD3d 743 [2010]; Sturino v Nino Tripicchio & Son Landscaping, 65 AD3d 1327 [2009]). The plaintiff's evidence that a copy of the summons and complaint was mailed to defendant at the address which she admitted was her actual dwelling place, creates a presumption of proper mailing and of receipt (see Engel v Lichterman, supra; Cavalry Portfolio Servs., LLC v Reisman, 55 AD3d 524 [2008]). The mere denial of receipt, without more, does not rebut the presumption of proper mailing and receipt(see Kihl v Pfeffer, 94 NY2d 118, 122 [1999]; C & H Import & Export, Inc. v MNA Global, Inc., 79 AD3d 784, 786 [2010]; Emigrant Mtge. Co., Inc. v Persad, 117 AD3d 676, 677 [2014]]).

Having failed to demonstrate a reasonable excuse for her default, or that she did not receive notice in time to defend the court need not determine whether she has a potentially meritorious defense (see Aurora Loan Servs., LLC v Lucero, 131 AD3d 496 [2015] lv dismissed 26 NY3d 1056 [2015]; Emigrant Bank v O. Carl Wiseman, 127 AD3d 1013, 1013 [2015]).

In any event the only defense raised by the defendant is plaintiff's standing. However, the defense of standing if not raised in an answer or pre-answer motion is waived pursuant to CPLR 3211(e) (see Countrywide Home Loans, Inc. v. Delphonse, 64 AD3d 624 [2009]) and may not be asserted by a party in default in support of a motion to vacate such default under CPLR 5015(a)(1)

(see JPMorgan Mtge. Acquisition Corp. v Hayles, 113 AD3d 821 [2014]; Citibank, N.A. v Swiatkowski, 98 AD3d 555 [2012]).

Nor is vacature of the judgment in the interest of substantial justice warranted in this case (see Woodson v Mendon Leasing Corp., 100 NY2d 62 [2003]; Katz v Marra, 74 AD3d 888 [2010]). The court file reflects that the court by letter dated September 2, 2011 notified defendant of the residential foreclosure settlement conference, but defendant failed to appear. The file also shows that the plaintiff served defendant, at the mortgaged premises and at her admitted dwelling place, with a Notice of Motion for Appointment of a Referee on May 14, 2012, and Notice of Entry of the Order of Reference on October 18, 2012, and the Notice of Motion for a Judgment of Foreclosure and Sale on January 7, 2014 which documents defendant has not denied receiving[1]. Defendant did not oppose the plaintiff's motions or move to vacate her default until the foreclosure sale was scheduled for November 20, 2015[2]. The note and mortgage are dated August, 2006 and the defendant defaulted in making the payment due on the loan commencing October 1, 2006, almost ten years ago. The defendant's conduct of making no payments on the loan for almost ten years and ignoring this action for over five years without offering a reasonable excuse for her exorbitant delay in moving to vacate her default, and waiting until the eve of the foreclosure sale to do so, evinces an intentional default rather than inadvertence or excusable neglect (see Abdul v Hirschfield, 71 AD3d 707 [2010]; Ujeta v Wu, 303 AD2d 676 [2003]; Jamieson v. Roman, 36 AD3d 861 [2007]; Merwitz v Dental Care Services, P.C., 155 AD2d 748 [1989]; Perellie v Crimson's Restaurant, Ltd., 108 AD2d 903 [1985]; Trotman v Aya Cab Corp., 300 AD2d 573 [2002]; Kyriacopoulos v Mendon Leasing Corp., 216 AD2d 532 [1995]).

Dated: April 7,2016
D# 54

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J.S.C.

[1]Defendant merely asserts in her affidavit that she did not receive any documents in the mail in time to answer.

[2]Presumably upon receiving the Notice of Sale.