

<b>US Bank Trust, NA v Romano</b>
2016 NY Slip Op 30865(U)
May 5, 2016
Supreme Court, Suffolk County
Docket Number: 13-20919
Judge: Carol MacKenzie
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 22 - SUFFOLK COUNTY

**PRESENT:**

Hon. CAROL MacKENZIE  
Justice of the Supreme Court

MOTION DATE 3-14-16  
MOTION DATE 3-9-16  
ADJ. DATE \_\_\_\_\_  
Mot. Seq. # 004 - MD

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US BANK TRUST, NA., AS TRUSTEE FOR  
LSF9 MASTER PARTICIPATION TRUST

Plaintiff,

- against -

PHILIP ROMANO, TSUELI-YI LIN

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) ~~Notice of Motion/~~ Order to Show Cause by the defendant, dated February 23, 2016, and supporting papers (~~including Memorandum of Law dated \_\_\_\_\_~~); (2) ~~Notice of Cross Motion by the , dated , supporting papers;~~ (3) ~~Affidavit in Opposition by the , dated , and supporting papers;~~ (4) ~~Reply Affirmation by the plaintiff, and supporting papers;~~ (5) ~~Other \_\_\_\_\_ (and after hearing counsels' oral arguments in support of and opposed to the motion); and now,~~ it is

**ORDERED** that this motion (#004) by the defendant, Philip Romano, for an order staying the foreclosure that was scheduled and dismissing the complaint and in the alternative, vacating the judgment of foreclosure and all prior proceedings and granting him leave to appear by answer is considered under CPLR 5015(a)(1), 317, 3012 (d), 2004 and 2005 and, is denied.

This is an action to foreclose a mortgage on a premises known as 81 Liberty Avenue, North Babylon, New York. On April 20, 2012, defendant executed a fixed rate note in favor of Home Loan Center Inc. agreeing to pay the sum of \$279,972.00 at the yearly rate of 3.750 percent. On the same date, defendant executed a mortgage in the principal sum of \$279,972.00 on the subject property. The mortgage indicated Home Loan Center Inc. to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Home Loan Center Inc. as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on May 4, 2012 in the Suffolk

County Clerk's Office. Thereafter, on June 3, 2013, the mortgage was transferred by assignment of mortgage from MERS, as nominee for Home Loan Center Inc., to JPMorgan Chase Bank, N.A. Subsequently, on July 19, 2014, the mortgage was transferred by assignment of mortgage from JPMorgan Chase Bank, N.A. to the Secretary of Housing and Urban Development. The assignment of mortgage was recorded on October 6, 2014 in the Suffolk County Clerk's Office. Thereafter, on December 18, 2014, the mortgage was transferred by assignment of mortgage from the Secretary of Housing and Urban Development to U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust, the plaintiff herein. The assignment of mortgage was recorded on January 14, 2015 in the Suffolk County Clerk's Office.

After the commencement of this action by filing, defendant Romano was allegedly served with the summons and complaint on August 29, 2013 pursuant to CPLR 308(4)<sup>1</sup>. No timely appearance by answer or otherwise was made by the moving defendant or any other defendants joined by service of process. The Court's computerized records indicate that a foreclosure settlement conference was held on March 18, 2014 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 thereafter moved for an order of reference pursuant to RPAPI 1321 by motion returnable before this Court. The application was granted by order dated November 24, 2014 (MacKenzie, J). Thereafter, the plaintiff moved for a judgment of foreclosure and sale upon confirmation of the report of the referee to compute. The motion was granted by order dated November 9, 2015 (MacKenzie, J).

By the instant motion (#004), the mortgagor defendant, Philip Romano (defendant), moves for injunctive relief and/or a stay of the public sale of the mortgaged premises directed in the judgment dated November 9, 2015 and, for a vacatur of said judgment, the order of reference and his default in answering together and leave to file a late answer. Here, the moving defendant's demands for vacatur of the judgment of foreclosure and sale, the order of reference and his default in answering on the grounds of excusable default pursuant to CPLR 5015(a)(1) and CPLR 3012(d) are denied. It is well established that relief pursuant to CPLR 5015(a)(1) and CPLR 3012(d) (leave to serve a late answer) are available only upon a showing of a reasonable excuse for the default in answering and a meritorious defense to the claims (*see Eugene DiLorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 501 NYS2d 8 [1986]; *Deutsche Bank Natl. Trust Co. v Gutierrez*, 102 AD3d 825, 958 NYS2d 472 [2d Dept 2013]). The determination of that which constitutes a reasonable excuse for a default lies within the sound discretion of the trial court (*see Hodges v Sidal*, 48 AD3d 633, 852 NYS2d 340 [2d Dept 2008]; *Savino v "ABC Corp."*, 44 AD3d 1026, 845 NYS2d 789 [2d Dept 2007]; *Juseinoski v Board of Educ. of the City of N.Y.*, 15 AD3d 353, 790 NYS2d 162 [2d Dept 2005]). Since a successful motion pursuant to CPLR 5015(a)(1) and CPLR 3012(d) results in a vacatur of the default and an opportunity to answer and defend on the merits (*see David v Barnes*, 130 AD2d 703, 515 NYS2d 817 [2d Dept 1987]), the moving papers should include a demand for leave to serve and file a proposed, verified answer and a copy of such answer (*see Gershman v Ahmad*, 131 AD3d 1104, 16 NYS3d 836 [2d Dept 2015]; *citing Bekker v*

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<sup>1</sup> Moving defendant has neither supplied a copy of the summons and complaint nor a copy of the affidavit of service for the summons and complaint with his application.

*Fleischman*, 35 AD3d 334, 825 NYS2d 270 [2d Dept 2006]). This standard governs applications made on grounds of excusable default that are made both prior and subsequent to a formal fixation of a default on the part of the defendants by the court pursuant to CPLR 5015(a)(1) or 3012(d) (see *Bank of N.Y. v Espejo*, 92 AD3d 707, 939 NYS2d 105 [2d Dept 2012]; *Integon Natl. Ins. Co. v Noterile*, 88 AD3d 654, 930 NYS2d 260 [2d Dept 2011]; *Ennis v Lema*, 305 AD2d 632, 760 NYS2d 197 [2d Dept 2003]). Where the application successfully results in a vacatur of the default, the moving defendant will be afforded the opportunity to appear by answer and defend by contesting the merits of the plaintiff's claims. Consequently, motions pursuant to CPLR 5015(a)(1) and/or 3012(d) should include a proposed answer verified by one having knowledge of facts constituting a potentially meritorious defense (see CPLR 3012[d]; *Gershman v Ahmad*, 131 AD3d 1104; *Ogman v Mastrantonio Catering, Inc.*, 82 AD3d 852, 918 NYS2d 375 [2d Dept 2011]). Where the motion is supported only by an affirmation of counsel or a proposed answer that is verified only by counsel without first hand knowledge of the facts alleged, no showing of a meritorious defense is made (see *Gershman v Ahmad*, 131 AD3d 1104).

The excuse defendant proffers rests upon the unsubstantiated claim that when he retained his former attorney, he believed that his attorney would defend him in the action and file an answer. Defendant in his affidavit further acknowledges that his attorney's "retention was solely for the appearance at the foreclosure conferences." Here, the vague, nonspecific and uncorroborated factual assertions, upon which a claim of a reasonable excuse for a default are predicated, are insufficient to satisfy the reasonable excuse requirements (see *Vardaros v Zapas*, 105 AD3d 1037, 963 NYS2d 408 [2d Dept 2013]; *Wells Fargo Bank v Linzenberg*, 50 AD3d 674, 853 NYS2d 912 [2d Dept 2008]; *Canty v Gregory*, 37 AD3d 508 [2d Dept 2007]). Confusion or ignorance about legal procedures have been likewise held not to constitute reasonable excuses for the failure to answer or otherwise appear (see *Wells Fargo Bank, NA v Besemer*, 131 AD3d 1047, 16 NYS3d 819 [2d Dept 2015]; citing *U.S. Bank N.A. v Slavinski*, 78 AD3d 1167, 912 NYS2d 285 [2d Dept 2010]). Since the facts underlying defendant's claim of a reasonable excuse for his default are vague, unsubstantiated and based upon his confusion as to the parameters of his attorney's representation, defendant has no viable claim of a reasonable excuse for his failure to answer or otherwise appear in this action.

As the defendant has failed to offer a reasonable excuse, it is unnecessary to consider whether he demonstrated the existence of a potentially meritorious defense (see *Deutsche Bank Natl. Trust Co. v Rudman*, 80 AD3d 651, 914 NYS2d 672 [2d Dept 2011]). In any event, the defendant mortgagor failed to demonstrate possession of any meritorious defenses. Here, the Romano affidavit did not address the merits of any defense, and the proposed answer was verified by counsel, who had no personal knowledge of the facts (see *Gershman v Ahmad*, 131 AD3d 1104, 16 NYS2d 836 [2d Dept 2015]; citing *Gross v Kail*, 70 AD3d 997, 893 NYS2d 891 [2d Dept 2010]). While defendant Romano's counsel contended in his affirmation that triable issues of fact existed, without more, same does not demonstrate a potentially meritorious defense (see *Gershman v Ahmad*, 131 AD3d 1104; citing *King v. King*, 99 A.D.3d 672, 673, 951 N.Y.S.2d 565 [2d Dept 2012]). Accordingly, defendant has failed to demonstrate a reasonable excuse for his failure to answer and, in any event, has failed to demonstrate a potentially meritorious defense.

Defendant's alternative claim for vacatur of his default under CPLR 317 is likewise denied. This statute affords a defendant not served by delivery in hand pursuant to CPLR 308(1) with an excusable

default ground, namely, the non-receipt of personal notice of the summons in time to defend (*see* CPLR 317). As in the case of other excusable default grounds, the moving defendant must demonstrate his or her possession of a meritorious defense to the claims asserted (*see* CPLR 317; *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 501 NYS2d 8 [1986]). Due proof of the claimed non-receipt of personal notice of the summons in time to defend is required (*see Jackson v Professional Transp. Corp.*, 81 AD3d 602, 916 NYS2d 159 [2d Dept 2011]; *Essex Credit Corp. v Theodore Tarantini*, 179 AD2d 973, 579 NYS2d 235 [3d Dept 1992]), as a mere denial of receipt and/or an unsubstantiated claim of lack of service of the summons and complaint are insufficient to establish a lack of personal notice of the action in time to defend (*see Bank of New York v Samuels*, 107 AD3d 653, 968 NYS2d 93 [2d Dept 2013]).

Here, the court finds that the moving defendant's affidavit is devoid of any facts demonstrating that he did not receive actual notice of the summons and complaint in time to defend in the action (*see Citimortgage, Inc. v Kowalski*, 130 AD3d 558, 13 NYS3d 468 [2d Dept 2015]; *citing Bank of New York v Samuels*, 107 AD3d 653). It is further noted that defendant has not included a copy of the affidavit of service with his application and as such has not established defendant was not served by delivery in hand pursuant to CPLR 308(1). In addition, as stated above, the inclusion of an unverified proposed answer in the defendant's moving papers, replete with numerous affirmative defenses, is unavailing since it was not verified by defendant and was not accompanied by an affidavit of merit as to the asserted defenses (*see Karalis v New Dimensions HR, Inc.*, 105 AD3d 707, 962 NYS2d 647 [2d Dept 2013]). Defendant's demand for a vacatur of his default pursuant to CPLR 317 and leave to serve an answer in the form of the one attached to his moving papers is thus denied.

Defendant's alternate claim that plaintiff failed to negotiate with him in good faith is rejected by the Court. 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]; *US Bank v Sarmiento*, 121 AD3d 187, 991 NYS2d 68 [2d Dept 2014]; *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). Here, defendant asserts that he was given one foreclosure conference and "[a]t the time of the conference [he] did not have sufficient income for a modification..."

In light of defendant's affidavit and guided by the foregoing principles, the Court finds that under the totality of the circumstance, defendant's submission does not establish that plaintiff failed to negotiate in good faith in an attempt to reach a mutually agreeable resolution.

Defendant's assertion that the plaintiff lacks standing is also rejected by the Court. The defense of standing was waived by the defendant due to his unsuccessful attempt to secure a vacatur of his default in answering, the absence of an answer raising such defense and his failure to timely move for dismissal under CPLR 3211 (*see* CPLR 3211(e); *Countrywide Home Loans Servicing, LP v Albert*, 78 AD3d 983, 912 NYS2d 96 (2d Dept 2010)).

The branch of defendant's motion for an order granting him leave to reargue and/or renew is considered under CPLR 2221 and is denied. It is well established that motions for reargument are addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the facts or the law or for some other reason, mistakenly arrived at its determination (*see McDonald v Stroh*, 44 AD3d 720, 842 NYS2d 727 [2d Dept 2007]; *see also Everhart v County of Nassau*, 65 AD3d 1277, 885 NYS2d 765 [2d Dept 2009]). CPLR 2221 provides that a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reassert or propound the same arguments previously advanced or to present arguments different from those already presented (*see V. Veeraswamy Realty v Yenom Corp.*, 71AD3d 874, 2010 WL 963675 [2d Dept 2010]; *Woody's Lumber Co., Inc. v Jayram Realty Corp.*, 30 AD3d 590, 817 NYS2d 391 [2d Dept 2006]). Here, the court denies the moving defendant's application for reargument since the moving papers failed to establish that the court misapprehended or overlooked material facts presented on the prior application or that it misapplied controlling principles of law in arriving at its determination of said prior application (*see Pryor v Commonwealth Land Tit. Ins. Co.*, 17 AD3d 434, 793 NYS2d 452 [2d Dept 2005]; *McGill v Goldman*, 261 AD2d 593, 691 NYS2d 75 [2d Dept 1999]).

Renewal is also denied. Pursuant to CPLR 2221 (e), a motion for leave to renew "shall be based upon new facts not offered on prior motion that would change the prior determination" and it "shall contain reasonable justification for the failure to present such facts on the prior motion" (*Siegel v Morsey New Sq. Trails Corp.*, 40 AD3d 960, 836 NYS2d 678 [2d Dept 2007]). To the extent that the new material relied upon by the plaintiff here to support his application for renewal constitutes a presentation of "new facts" within the contemplation of CPLR 2221 (e), said new facts do not warrant any change in the court's prior determination (*see Peycke v Newport Media Acquisition II, Inc.*, 40 AD3d 722, 837 NYS2d 167 [2d Dept 2007]; *Siegel v Morsey New Sq. Trails Corp.*, 40 AD3d 960, 836 NYS2d 678 [2d Dept 2007]).

Lastly, it is well settled that a party in default may not seek affirmative relief such as dismissal of an action or injunctive relief absent the vacatur of such default unless the vacatur application is premised upon jurisdictional grounds of the type that render a judgment or order issued in the action a nullity (*see US Bank N.A. v Gonzalez*, 99 AD3d 694, 952 NYS2d 59 [2d Dept 2012]; *Deutsche Bank Trust Co., Ams. v Stathakis*, 90 AD3d 983, 935 NYS2d 651 [2d Dept 2011]; *Holubar v Holubar*, 89 AD3d 802,

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934 NYS2d 710 [2d Dept 2011]; *McGee v Dunn*, 75 AD3d 624, 624, 906 NYS2d 74 [2d Dept 2010]). Here, moving defendant Romano defaulted in answering the summons and complaint served upon him and such default was fixed and determined in the order of reference issued on November 24, 2014. In light of his status as a party in default, the moving defendant is not entitled to affirmative relief of a non-jurisdictional nature such as a dismissal of the plaintiff's complaint pursuant to CPLR 3211 or injunctive relief of any kind absent the vacatur of his default upon the grounds enumerated in CPLR 5015, 317, 3012(d) or others available to him, if any (see *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 760 NYS2d 727 [2003]; *Bay Crest Assn., Inc. v. Paar*, 99 AD3d 744, 952 NYS2d 211 [2d Dept 2012]).

Thus, the court finds that the defendant is not entitled to any of the injunctive relief demanded by him since he has no asserted claim that would provide the jurisdictional predicate necessary to support a demand for injunctive relief (see CPLR 6301; *BSI, LLC v Toscano*, 70 AD3d 741, 896 NYS2d 102 [2d Dept 2010]). In view of the foregoing, the instant motion (#004) by defendant Romano for injunctive relief in the form of a stay of the impending sale of the mortgaged premises, a vacatur of his default and other relief is denied in its entirety.

Dated: May 5, 2016



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J.S.C.