

Bank of Am., N.A. v Labita
2016 NY Slip Op 31824(U)
June 25, 2016
Supreme Court, Suffolk County
Docket Number: 09-36811
Judge: Ralph T. Gazzillo
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 6-11-15
ADJ. DATE _____
Mot. Seq. #002- MG
#003- XMD

-----X
BANK OF AMERICA, NATIONAL
ASSOCIATION, AS SUCCESSOR BY
MERGER TO LASALLE BANK NATIONAL
ASSOCIATION, AS TRUSTEE UNDER THE
TRUST AGREEMENT FOR STRUCTURED
ASSET INVESTMENT LOAN TRUST SERIES
2004-8,

Plaintiff,

- against -

GASPAR LABITA,

Defendant.
-----X

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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 plaintiff, dated May 4, 2015, and supporting papers (~~including Memorandum of Law dated _____~~); (2) Notice of Cross Motion by the defendant, dated June 3, 2015, supporting papers; (3) Affirmation in Opposition by the plaintiff, dated July 10, 2015, and supporting papers; (4) Reply Affirmation by the defendant, dated July 22, 2015 ~~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 the motion (002) by plaintiff Bank of America, National Association, as Successor by Merger to LaSalle Bank National Association, as Trustee under the Trust Agreement for Structured Asset Investment Loan Trust Series 2004-8 JP (plaintiff) for, *inter alia*, a judgment of foreclosure and sale and the cross motion (003) by defendant Gaspar Labita (defendant) for, *inter alia*, an order vacating defendant's default pursuant to CPLR 317 and CPLR 5015(a)(1), (2) or (4), are consolidated for purposes of this determination; and it is further

ORDERED that this motion (002) by plaintiff for an order granting it a judgment of foreclosure and sale is granted; and it is further

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ORDERED that this cross motion (003) by defendant, for an order dismissing the action pursuant to CPLR 3211 and 3404 and in the alternative, vacating the order of reference and all prior proceedings and granting him leave to appear by answer is considered under CPLR 5015(a)(1),(2), (4) and 317 and, is denied.

This is an action to foreclose a mortgage on a premises known as 38 Joline Road, Port Jefferson, New York. On June 22, 2004, defendant executed an adjustable rate note in favor of BNC Mortgage, Inc. agreeing to pay the sum of \$249,050.00 at the yearly starting rate of 7.740 percent. On the same date, defendant executed a mortgage in the principal sum of \$249,050.00 on the subject property. The mortgage indicated BNC Mortgage, Inc. to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of BNC Mortgage, Inc. as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on November 5, 2004 in the Suffolk County Clerk's Office. Thereafter, on July 31, 2009, the mortgage was transferred by assignment of mortgage from MERS, as nominee for BNC Mortgage, Inc., to the plaintiff herein. The assignment of mortgage was recorded on September 3, 2009 in the Suffolk County Clerk's Office.

After the commencement of this action by filing, defendant was served with the summons and complaint on September 22, 2009 pursuant to CPLR 308(1). No timely appearance by answer or otherwise was made by the moving defendant. The Court's computerized records indicate that a foreclosure settlement conference was held on June 10, 2010 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 RPAPL 1321 by an unopposed motion returnable before this Court. The application was granted by order dated August 27, 2010 (Gazzillo, J.). Now, plaintiff moves for a judgment of foreclosure and sale. Plaintiff's submissions in support of its motion include its attorney's affirmation, the Referee's oath and report of amounts due dated December 16, 2013 indicating the amount due to be \$364,631.25, plaintiff's affidavit of amounts due from Glenn Dalton, vice president loan documentation of Wells Fargo Bank, N.A. d/b/a Americas Servicing Company, the servicing agent for plaintiff, the order of reference dated August 27, 2010 (Gazzillo, J.), the note, mortgage, assignment of mortgage, the pleadings, and the affidavits of service of process. Defendant has submitted a cross motion opposing plaintiff's motion and seeking an order dismissing the complaint on the grounds that plaintiff does not have standing.

Addressing defendant's cross motion (003), 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]).

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]; *Deutsche Bank Natl. Trust Co. v Hussain*, 78 AD3d 989, 912 NYS2d 595 [2d Dept 2010]). 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 (1) and defendant's conclusory and unsubstantiated denial of receipt of the summons and complaint is insufficient to rebut the presumption of proper service created by said affidavit (see *Beneficial Homeowner Service Corp. v Girault*, 60 AD3d 984, 875 NYS2d 815 [2d Dept 2009]). The defendant's affidavit does not specifically dispute the physical description set forth in the process server's affidavit and merely states that "[he] was never served with a copy of the Notice of Pendency, Summons and Complaint and Notice of Help for Homeowners in this action. . . The affidavit of Costantinos Philippou dated September 24, 2009 claims he served me at 3493 Hempstead Turnpike, Levittown, NY 11756 which is the address where I am employed as a barber, but I was never served." In sum, all that is offered in defendant's affidavit is a general denial of service (cf. *US Bank, NA v Arias*, 85 AD3d 1014, 927 NYS2d 362 [2d Dept 2011]). Accordingly, the portions of the defendant's application seeking a vacatur of his default for lack of personal jurisdiction is denied.

The moving defendant's alternative claim for leave to serve and file a late answer is equally unavailing. To be entitled to such relief pursuant to CPLR 5015 (a)(1), the moving defendant was required to set forth a justifiable excuse for his 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 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 be unmeritorious. Since the defendant offered no other excuse for his default, he 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 thus inconsequential and the Court need not determine whether defendant has demonstrated a

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meritorious defense (*see Development Strategies Co., LLC v Astoria Equities, Inc.*, 71 AD3d 628, 896 NYS2d 396 [2d Dept 2010]).

Defendant's applications pursuant to CPLR 5015 (a)(2) is addressed to the sound discretion of the trial court. In order to vacate a judgment pursuant to CPLR 5015 (a) (2) on the grounds of newly-discovered evidence, the movant must establish, *inter alia*, that the evidence could not have been discovered earlier through the exercise of due diligence (*see Matter of State Farm Ins. Co. v Colangelo*, 44 AD3d 868, 843 NYS2d 667 [2d Dept 2007]; *Matter of Gartmond v Conway*, 40 AD3d 1094, 1095, 837 NYS2d 268 [2d Dept 2007]). In this regard, defendant has failed to set forth sufficient evidentiary facts that would warrant relief from the order of reference granted by this court on August 27, 2010. Likewise, defendant has not established that the purported new material could not have been discovered earlier through the exercise of due diligence. Accordingly, defendant is not entitled to vacatur of the prior order based upon newly-discovered evidence (*see* CPLR 5015 [a][2]).

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, defendant's conclusory denial of receipt of notice of the summons and complaint and RPAPL 1303 notice, attested to by the plaintiff's process server, are unsubstantiated. The foregoing circumstances, coupled with the inordinate delay in the interposition of this motion¹, warrant the denial of the defendant's application for relief pursuant to CPLR 317 without consideration of the issue of the defendant's possession of any meritorious defense. In any event, the inclusion of an unverified proposed answer in the defendant's moving papers, replete with numerous affirmative defenses, is unavailing since it was not executed or verified by the 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]).

Addressing defendant's assertion 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*

¹ Defendant's cross motion was made in excess of five years from the date he was required to interpose an answer in this action.

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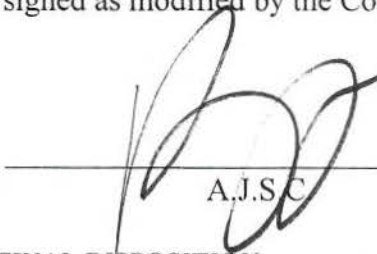
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Bank Minnesota Natl. Assn. v Mastropaolo, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). The Second Department further reasoned that “an argument that a plaintiff lacks standing, if not asserted in the defendant’s answer or in a pre-answer motion to dismiss the complaint, is waived pursuant to CPLR 3211(c)” [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]; *US Bank, NA v Emmanuel*, 83 AD3d 1047, 921 NYS2d 320 [2d Dept 2011]; *Deutsche Bank Natl. Trust Co. v Hussain*, 78 AD3d 989, 912 NYS2d 595 [2d Dept. 2010]; *Countrywide Home Loans Serv., LP v Albert*, 78 AD3d 983, 912 NYS2d 96 [2d Dept 2010]). Since the moving defendant’s default has not been vacated, he may not seek the affirmative relief of dismissal on his waived standing defense (*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]). Based upon the foregoing, defendant’s assertion of a standing defense is unavailing.

Lastly, in light of defendant’s status as a party in default, he is not entitled to affirmative relief of a non-jurisdictional nature. Since the defendant has failed to establish that he is entitled to an order vacating his default in appearing or answering the complaint and compelling the plaintiff to accept a late answer, he is not entitled to affirmative relief of a non-jurisdictional nature. Accordingly, the defendant’s contentions, which are non-jurisdictional in nature, are summarily rejected by the Court.

Based upon the foregoing, plaintiff’s motion is granted and defendant’s cross motion is denied in its entirety. The proposed judgment of foreclosure and sale is signed as modified by the Court.

Dated: 6/27/16


 A.J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION