ORT FORM ORDER

INDEX NO. 47484-2009

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 49 SUFFOLK COUNTY

PRESENT: HON. C. RANDALL HINRICHS
Justice of the Supreme Court

Motion Date: 001 : 10-23-2014
002 : 12-23-2015
Motion Sequence.: 001 : MG / 002: MD

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WELLS FARGO BANK, NATIONAL ASSOCIATION ON BEHALF OF MORGAN STANLEY ABS CAPITAL I INC. TRUST 2005-WMC6 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-WMC6
400 Countrywide Way, Simi Valley, CA 93065,

Plaintiff,

- against -

JOHN KENNEDY, CHARLENE KENNEDY, BROOKHAVEN MEMORIAL HOSPITAL, CAPITAL ONE BANK, CYPRESS FINANCIAL RECOVERIES LLC, FORD MOTOR CREDIT COMPANY D/B/A PRIMUS FINANCIAL SERVICES, HOUSEHOLD FINANCE REALTY CORPORATION OF NEW YORK, KEITH A LAVALLEE, LIPA D/B/A LONG ISLAND LIGHTING COMPANY, LVNV FUNDING LLC, MIDLAND FUNDING LLC, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NORTH STAR CAPITAL LLC A/A/O PROVIDIAN, NSMG OF MT. SINAI SCHOOL OF MEDICINE, PEOPLE OF THE STATE OF NEW YORK, UNIFUND CCR PARTNERS ASSIGNEE OF FIRST USA BANK,

JOHN DOE (Said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgaged premises.)

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion for Order of Reference by the plaintiff dated September 23, 2014, and supporting papers; (2) Notice of Cross-Motion by defendants John Kennedy and Charlene Kennedy, dated November 26, 2014, and supporting papers; (3) Affirmation in Opposition to Defendants' Cross-Motion and in Further Support of Plaintiff's Motion, dated January 28, 2015, and supporting papers, it is

ORDERED the motion by the plaintiff for, inter alia, an order pursuant to CPLR 3215 fixing the defaults of the non-answering defendants, pursuant to RPAPL §1321 appointing a referee to compute, and amending the caption, is granted; and it is further

ORDERED that the cross-motion by defendants John Kennedy and Charlene Kennedy to dismiss the complaint or, alternatively, to extend their time to answer and to allow for foreclosure conferences and discovery, is denied.

This is an action to foreclose a mortgage on premises known as 236 Sea Cliff Street, Islip Terrace, in Suffolk County, New York. On April 8, 2005, defendant John Kennedy executed a note in the principal amount of $350,000.00. To secure said note, on the same date, John and Charlene Kennedy ("the defendants") executed a mortgage on the property. The defendants allegedly defaulted on the note and mortgage by failing to make monthly payments due on June 1, 2008 and thereafter. The plaintiff commenced the instant action on December 1, 2009. The defendants did not interpose an answer.

The plaintiff now moves to fix the defaults of the defendants and to appoint a referee to compute the amounts due under the subject mortgage. The defendants, through their attorney, oppose the plaintiff's motion and cross-move to dismiss the action or, alternatively, to extend their time to answer and to allow for foreclosure conferences and discovery. The defendants argue (1) that the plaintiff's instant application for an Order of Reference is untimely pursuant to CPLR 3215(c); (2) that service of process was defective; (3) that the plaintiff lacks standing; (4) that no foreclosure conference was held and that the plaintiff failed to negotiate in good faith; and (5) that the plaintiff submitted a defective affidavit under Administrative Order 431-11.

The provisions of CPLR 3215(c) require a plaintiff to move for judgment within one year after a default in answering to avoid dismissal due to abandonment, except in those cases wherein "sufficient cause is shown why the complaint should not be dismissed" (CPLR 3215[c]). Sufficient cause is measured by the proffer of a reasonable excuse for the delay in moving and a showing of the meritorious nature of the complaint (*see Gigilo v NTIMP, Inc.*, 86 AD3d 301 [2d Dept 2011]). That which constitutes a reasonable excuse is within the discretion of the trial court. In the instant action, the plaintiff has demonstrated a reasonable excuse for not moving for judgment within one year after the defendants' default in answering. Specifically, contrary to the defendants' contentions, the case was first calendared in the settlement part on August 3, 2010, and settlement conferences in which the defendants participated were held on October 5, 2010 and on December 14, 2010. Another foreclosure conference was scheduled for February 22, 2011, but the defendants failed to appear on such date. The plaintiff also indicates that it had to comply with new affirmation requirements and contend with a suspension of foreclosure prosecution following Hurricane Sandy in 2012. Additionally, further delay was apparently caused by the closing of the firm that had previously represented the plaintiff, and their subsequent change of attorney in 2012. Finally, the defendants filed for bankruptcy in 2013, staying prosecution of the matter for several months. The Court finds that all of these factors, when considered together with the meritorious nature of the complaint, constitute sufficient cause as to why the complaint should not be dismissed. Additionally, the defendants' failure to show prejudice by the plaintiff's delay in moving for the default tips the balance in favor of the plaintiff (*see Countrywide Home Loan Servicing, L.P. v Crespo*, 46 Misc.3d 1226[A], 13 NYS3d 849 [Table] [Sup Ct., Suffolk County, Whelan, J., 2015]).

Preliminarily, the court notes that a party may not move for affirmative relief of a non-jurisdictional nature, such as dismissal of a complaint pursuant to CPLR 3211, without successfully moving to vacate its default (*see HSBC Mtge. Corp. v Morocho*, 106 AD3d 875 [2d Dept 2013]; *U.S. Bank NA. v Gonzalez*, 99 AD3d 694 [2d Dept 2012]).

It is well settled that a "defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action when...moving to extend the time to answer or to compel the acceptance of an untimely answer" (*Maspeth Fed. Sav. & Loan Assn. v McGown*, 77 AD3d 890 [2d Dept 2010], *quoting Lipp v Port Auth. of N.Y. & N.J.*, 34 AD3d 649 [2d Dept 2006]; *see also Karalis v New Dimensions HR, Inc.*, 105 AD3d 707 [2d Dept 2013]; *Midfirst Bank v Al-Rahman*, 81 AD3d 797 [2d Dept 2011]). This standard governs applications made both prior and subsequent to a formal fixing of a default on the part of the defendants by the court (*see Bank of New York v Espejo*, 92 AD3d 707 [2d Dept 2012]; *Integon Natl. Ins. Co. v Norterile*, 88 AD3d 654 [2d Dept 2011]; *Ennis v Lema*, 305 AD2d 632 [2d Dept 2003]). The determination as to what constitutes a reasonable excuse lies within the sound discretion of the trial court (*see Segovia v Delcon Constr. Corp.*, 43 AD3d 1143 [2d Dept 2007]; *Matter of Gambardella v Ortov Light*, 278 AD2d 494 [2d Dept 2000]).

The defendants claim that they were not served with the summons and complaint. A process server's sworn affidavit of service constitutes prima facie evidence of proper service (*see ACT Prop., LLC v Garcia*, 102 AD3d 712 [2d Dept 2013]; *Deutsche Bank Natl. Trust Co. v Pietranico*, 102 AD3d 724 [2d Dept 2013]). 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 AD 3d 707 [2d Dept 2012]*; Bankers Trust Co. of California, NA v Tsoukas,* 303 AD2d 343 [2d Dept 2003]). 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 (*see U.S. Bank Natl. Assn. v Tate,* 102 AD3d 859 [2d Dept 2013]*; Irwin Mtge. Corp. v Devis,* 72 AD3d 743 [2d Dept 2010]). Here, the defendants' claims are insufficient to rebut the prima facie proof of proper service.

The sworn Affidavits of Service indicate that Charlene Kennedy was served personally pursuant to CPLR 308(1) on Dec. 7, 2009, and that John Kennedy was served pursuant to CPLR 308(2), on a person of suitable age and discretion, namely his wife Charlene Kennedy, at the defendants' residence and by a subsequent mailing. The affidavits of the defendants denying service are insufficient to rebut the *prima facie* showing of proper service created by the process server's affidavits. The defendants claim that the process server's description of Charlene Kennedy is inaccurate, as the affidavit indicates her weight to be 175-199 pounds, when she actually weighed 140 pounds, and also indicates that she was between 40-49 years of age, when in fact she was 55 years old on the date in question. Additionally, while not denying being home on the date of service, the defendants claim that they would not have opened the door because their dogs would have barked uncontrollably and also because of security concerns. Neither these self-serving claims nor the alleged minor discrepancies in Charlene Kennedy's weight and age are sufficient to warrant a hearing on the issue of service (*see Simmons First Nat. Bank v Mandracchia*, 248 AD2d 375 [2d Dept 1998]). Accordingly, the defendants cannot rely on improper service as a ground to vacate their default, either through CPLR 5015(a)(4) or as a "reasonable excuse" under CPLR 5015(a)(1) or CPLR 3012(d).

Since the defendants have failed to offer a reasonable excuse, it is unnecessary to consider whether they have sufficiently demonstrated the existence of a potentially meritorious defense (*see U.S. Bank N.A. v Stewart*, 97 AD3d 740 [2d Dept 2012]). Having failed to demonstrate a reasonable excuse for their default, the defendants are not entitled to extend their time to answer (*see Midfirst Bank v Al-Rahman*, 81 AD3d 797 [2d Dept 2011]).

The defendants' challenge to the plaintiff's standing is unavailing since the defendants waived such defense by failing to assert it in timely pre-answer motion to dismiss or as an affirmative defense in an answer (*see HSBC Bank, USA v Dammond*, 59 AD3d 679 [2d Dept 2009]; *Wells Fargo Bank Minn. N.A. v Mastropaolo*, 42 AD3d 239 [2d Dept 2007]).

As indicated previously, contrary to the defendants' contentions, the court records indicate that foreclosure conferences were held in this matter on October 5, 2010 and December 14, 2010 and that the defendants appeared at both of these conferences. Another conference was scheduled for February 22, 2011 but the defendants failed to appear. The defendants have provided no evidence of bad faith, and the plaintiff is under no duty to modify the defendants' mortgage obligation (*see JP Morgan Chase Bank, N.A. v Illardo*, 36 Misc3d 359, 940 NYS2d 829 [Sup Ct., Suffolk County, March 5, 2012, Whelan, J.]).

With regard to the defendants' request for discovery, the defendants have not made a satisfactory showing of the evidence sought which would create an issue of fact. Mere hope and speculation that additional discovery might yield evidence sufficient to raise a triable issue of fact is not a basis for denying summary judgment (*Lee v T.F. DeMilo Corp.*, 29 AD3d 867, 868 [2d Dept 2006]; *Sasson v Setina Mfg. Co., Inc.*, 26 AD3d 487, 488 [2d Dept 2006]).

Finally, the defendants cannot rely on alleged deficiencies in counsel's affirmation in an effort to forestall the plaintiff's entitlement to the remedy of foreclosure and sale *(Deutsche Bank Nat. Trust Co. v Espinoza*, 39 Misc.3d 1238[A], 977 NYS2d 666 [Sup Ct., Suffolk County, June 5, 2013, Whelan, J.]).

The plaintiff has established its entitlement to summary judgment by producing the mortgage and the note, and evidence of the default in payment (*see Wells Fargo Bank, N.A. v. Erobobo*, 127 AD3d 1176 [2d Dept 2015]; *Wells Fargo Bank, N.A. v. DeSouza*, 126 AD3d 965 [2d Dept 2015]; *OneWest Bank, FSB v. DiPilato*, 124 AD3d 735 [2d Dept 2015]; *Wells Fargo Bank, N.A. v. Ali*, 122 AD3d 726 [2d Dept 2014]).

By its moving papers, the plaintiff established the default in answering on the part of the defendants (*see* RPAPL § 1321; *HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566 [2d Dept 2011]). Accordingly, the defaults of all such defendants are fixed and determined and the plaintiff is entitled to an order appointing a referee to compute the amounts due under the subject note and mortgage (see RPAPL § 1321; *Green Tree Servicing, LLC v Cary*, 106 AD3d 691 [2d Dept 2013]; *Ocwen Fed. Bank FSB v Miller*, 18 AD3d 527 [2d Dept 2005]).

Those portions of the instant motion wherein the plaintiff seeks an order excising as party defendants the unknown defendants listed in the caption as "John Doe #1" through "John Doe #10," and an amendment of the caption to reflect the same is granted (*see PHH Mtge. Corp. v Davis*, 111 AD3d 1110 [3d Dept 2013]).

The proposed order of reference is signed simultaneously herewith as modified by the court.

DATED: June 23, 2016

C. RANDALL HINRICHS
J.S.C.

[ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION