

Deutsche Bank Natl. Trust Co. v Viera

2016 NY Slip Op 32534(U)

November 4, 2016

Supreme Court, Suffolk County

Docket Number: 10-11647

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATES: 9/8/16
SUBMIT DATE: 10/21/16
Mot. Seq. # 003 - MG
Mot. Seq. # 004 - XMD
CDISP YES

-----X

DEUTSCHE BANK NATIONAL TRUST :
COMPANY, AS TRUSTEE OF THE :
RESIDENTIAL ASSET SECURITIZATION :
TRUST 2007-A3, Mortgage Pass-Through :
Certificates Series 2007-C, under the Pooling and :
Servicing Agreement dated February 1, 2007, :
:
Plaintiff, :
:
-against- :
:
RICARDO VIERA, ANA VIERA a/k/a ANA A. :
VIERA, MARLENIS FONSECA, BANK OF :
AMERICA, NA, ELMO MARTINEZ, THOMAS :
VIERA and ANN VIERA, :
:
Defendants. :
-----X

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Upon the following papers numbered 1 to 9 read on this motion For judgment of foreclosure and sale and cross motion to dismiss the complaint; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers 5-7; Answering papers 8-9; Replying papers _____; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (#003) by the plaintiff an order confirming the report of the referee to compute and for issuance of a judgment of foreclosure and sale is considered under RPAPL Article 13 and is granted; and it is further

ORDERED that the cross motion (#004) by defendant, Marlenis Fonseca, for dismissal of the complaint or vacatur of the order of reference and her underlying default in answering with leave to serve a late answer is considered under CPLR 5015(a)(4) and (a)(1), CPLR 3012, CPLR 2004 and CPLR 4403 and is denied.

The plaintiff commenced this action in March of 2010 to foreclose the lien of a September 15, 2006 mortgage given by the first three defendants named in the caption above to secure a note in the amount of \$276,500.00. None of the defendants served with process appeared herein by answer nor did any appear for a settlement conference conducted by the court on August 26, 2010. By motion made in January of 2012, the plaintiff applied for an order of reference on default and said application was granted by order dated July 30, 2013 [La Salle, J.].

The plaintiff now moves (#003) for confirmation of the report of the referee to compute and for the issuance of a judgment foreclosing the lien of the mortgage and directing a sale of the mortgaged premises. The motion is opposed by defendant Fonseca in cross moving papers (#004) in which she seeks dismissal of the complaint on jurisdictional grounds. Alternatively, the cross moving defendant seeks a discretionary vacatur of her default in answering pursuant to CPLR 5015(a)(1) and the order of reference issued thereon, the immediate dismissal of the complaint due to a purported failure to comply with the notice requirements of RPAPL § 1304 and the notice of default provisions contained in the mortgage or leave to appear herein by service of a late answer. Finally, defendant Fonseca seeks a denial of this motion due to the referee's failure to hold a hearing prior to calculating amounts due.

For the reasons stated, the plaintiff's motion (#003) is granted while the cross motion (#004) by defendant Fonseca is denied.

Those portions of motion by defendant Fonseca wherein she seeks a dismissal of the complaint pursuant to CPLR 5015(a)(4) is considered thereunder and is denied. The alleged discrepancies in the physical description of said defendant, who was served pursuant to CPLR 308(1) by personal delivery of the summons, complaint and other initiatory papers over six years ago, are minor and insufficiently substantiated to warrant a dismissal of the complaint or a traverse hearing on the issue of service (*see Wells Fargo Bank, N.A. v Tricarico*, 139 AD3d 722, 32 NYS3d 213 [2d dept 2016]; *Wells Fargo Bank, N.A. v Moza*, 129 AD3d 946, 947, 13 NYS3d 127 [2d Dept 2015]; *Wells Fargo Bank, N.A. v McGloster*, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]; *NYCTL 1997-1 Trust v Nillas*, 288 AD2d 279, 732 NYS2d 872 [2d Dept 2001]).

Also denied are those portions of the defendant's cross motion wherein she seeks a discretionary vacatur of her default in answering and a vacatur of the order of reference issued thereon pursuant to CPLR 5015, 2004 and 3012(d) with leave to serve a late answer. To be entitled to this relief, it was incumbent upon defendant Fonseca to demonstrate a reasonable excuse for the default and a meritorious defense to the action. For leave to serve a late answer pursuant to CPLR 3012(d), the moving defendant must demonstrate "excusable default grounds" which require a showing of a reasonable excuse for the default and a demonstration of a potentially meritorious defense (*see Mellon v Izmiriligil*, 88 AD3d 930, 931 NYS2d 667 [2d Dept 2011], *quoting, Wells Fargo Bank, N.A. v Cervini*, 84 AD3d 789, 921 NYS2d 643 [2d Dept 2011]; *HSBC Bank USA, Natl. Ass'n v Rotimi*, 121 AD3d 855, 995 NYS3d 81 [2d Dept 2014]; *Mannino Dev., Inc. v Linares*, 117 AD3d 995, 986 NYS2d 578 [2d Dept 2014]; *Diederich v Wetzel*, 112 AD3d 883, 979 NYS2d 605 [2d Dept 2013]; *Community Preserv. Corp. v Bridgewater Condominiums, LLC*, 89 AD3d 784, 785, 932 NYS2d 378

[2d Dept 2011]). The material facts of the asserted meritorious defense must be advanced in an affidavit of the defendant or a proposed verified answer attached to the moving papers (*see Gershman v Ahmad*, 131 AD3d 1104, 16 NYS3d 836 [2d Dept 2015]; *Karalis v New Dimensions HR, Inc.*, 105 AD3d 707, 962 NYS2d 647 [2d Dept 2013]).

This two prong standard is applicable to applications made prior or subsequent to the issuance of either an order adjudicating the defendant's default in answering or a final judgment in favor of the plaintiff (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141, 501 NYS2d 8 [1986, judgment issued]; *Bac Home Loans Serv., LP v Reardon*, 132 AD3d 790, 18 NYS2d 664 [2d Dept 2015, no judgment or order of reference issued]; *Wells Fargo Bank v Besemer*, 131 AD3d 1047, 16 NYS3d 819 [2d Dept 2015, judgment issued]; *Morgan Stanley Mtge. Loan Trust 2006-17XS v Waldman*, 131 AD3d 1140, 16 NYS2d 331 [2d Dept 2015, order of reference issued]; *U.S. Bank N.A. v Alba*, 130 AD3d 715, 11 NYS3d 864, 11 NYS2d 864 [2d Dept 2015, judgment issued]; *U.S. Bank Natl. Ass'n, v Sachdev*, 128 AD3d 807, 9 NYS3d 337 [2d Dept 2015; order of reference issued]; *HSBC Bank USA v Desrouilleres*, 128 AD3d 1013, 11 NYS2d 93 [2d Dept 2015, judgment issued]; *Citimortgage, Inc. v Stover*, 124 AD3d 575, 2 NYS2d 147 [2d Dept 2015, order of reference issued]; *JP Morgan Chase Bank v Palma*, 114 AD3d 645, 979 NYS2d 832 [2d Dept 2014, no order of reference or judgment issued]; *Bank of New York v Espejo*, 92 AD3d 707, 939 NYS2d 105 [2d Dept 2012; judgment issued]).

The only excuse offered by the defendant here was her claim of a lack of service of process which has been found to be unmeritorious. Since the defendant offered no other excuse for her default, she is not entitled to the relief demanded pursuant to CPLR 5015(a)(1) (*see U.S. Bank, Natl. Ass'n v Smith*, 132 AD3d 848, 19 NYS3d 62 [2d Dept 2015]; *Community W. Bank, N.A. v Stephen*, 127 AD3d at 1009, 9 NYS3d 275 [2d Dept 2015]; *U. S. Bank Natl. Assoc. v Harding*, 124 AD3d 766, 998 NYS2d 667 [2d Dept 2014]; *HSBC Bank v Miller*, 121 AD3d 1044, 995 NYS2d 198 [2d Dept 2014]; *Deutsche Bank Natl. Trust Co. v Pietrnaico*, 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]; *Tadco Constr. Corp. v Allstate Ins. Co.*, 73 AD3d 1022, 900 NYS2d 687 [2d Dept 2010]). The moving defendant's claims to one or more meritorious defenses are thus immaterial and the Court need not determine whether the defendant demonstrated a meritorious defense (*see Wells Fargo Bank, N.A. v Gioia*, 114 AD3d, 766, 980 NYS2d [2d Dept 2014]; *Deutsche Bank Natl. Trust Co. v White*, 110 AD3d at 760, 972 NYS2d 664 [2d Dept 2013]). Even if it were otherwise, no potentially, viable meritorious defense to the plaintiff's claims for foreclosure were advanced in a proposed amended answer verified by the defendant Fonseca nor in her affidavit in support of her cross motion.

Nor did defendant Fonseca demonstrate facts and circumstances which may be considered sufficient to constitute "good cause" within the contemplation of CPLR 2004 (*see Southstar III, LLC v Enttienne*, 120 AD3d 1332, 992 NYS3d 548 [2d Dept 2014]; *see also Chase Home Fin., LLC v Garcia*, 140 AD3d 820, 31 NYS3d 894 [2d Dept 2016]; *Citimortgage, Inc. v Stover*, 124 AD3d 575, 2 NYS3d 147 [2d Dept 2016]; *USA, Natl. Ass'n v Rotimi*, 121 AD3d 855, 995 NYS2d 81 [2d Dept 2014]).

The defendant's failure to establish grounds for a vacatur of her default on either jurisdictional or excusable default grounds within the contemplation of CPLR 5015(a) or 3012, or to establish good cause under CPLR 2004, precludes the immediate dismissal of the complaint pursuant to CPLR 3211 due to any non-compliance with the pre-action notice requirements imposed by CPLR 1304. This claim is a defense, that is not jurisdictional in nature (*see Citimortgage, Inc. v Espinal*, 134 AD3d 876, 23 NYS3d 251 [2d Dept 2015], *citing Pritchard v Curtis*, 101 AD3d 1502, 1504, 957 NYS2d 440 [3d Dept 2012]), which was waived by defendant Fonseca's default in answering and it remains unavailable to her in the absence of a discretionary vacatur of her default, which she failed to demonstrate an entitlement thereto (*see Emigrant Bank v Marando*, ___ AD3d ___ 2016 WL 6089224 [2d Dept 2016]; *Duprat v BMW Fin. Serv., NA, LLC*, 142 AD3d 946, 38 NYS3d 32 [2d Dept 2016]; *PHH Mtge. Corp. v Celestin*, 130 AD3d 703, 11 NYS3d 871 [2d Dept 2015]; *see also Flagstar Bank v Jambelli*, 140 AD3d 829, 332 NYS3d 625 [2d Dept 2016]; *U.S. Bank v Carey*, 137 AD3d 894, 28 NYS3d 68 [2d Dept 2016]).

The asserted standing defense and the asserted contractual notice of default defense suffers from the same fate, as both are affirmative defenses under CPLR 3018 which were waived by the defendant's failure to timely appear herein by motion or answer (*see OneWest Bank, FSB v Vanderhorst*, 131 AD3d 1028, 16 NYS3d 460 [2d Dept 2015]; *JP Morgan Chase Bank, N.A. v Butler*, 129 AD3d 777, 780, 12 NYS3d 145 [2d Dept 2015]; *Wells Fargo Bank, N.A. v Combs*, 128 AD3d 812, 10 NYS3d 121 [2d Dept 2015]). As such, they may not be used to support an untimely motion to dismiss the complaint pursuant to CPLR 3211 (*see Nationstar Mtge. LLC v Avella*, 142 AD3d 594, 36 NYS3d 679 [2d Dept 2016]; *Chase Home Fin., LLC v Garcia*, 140 AD3d 820, *supra*; *Southstar III, LLC v Enttienne*, 120 AD3d 1332, *supra*; *U.S. Bank N.A. v Gonzalez*, 99 AD3d 694, 694-695, 952 NYS2d 59 [2d Dept 2012]; *Holubar v Holubar*, 89 AD3d 802, 934 NYS2d 710 [2d Dept 2011]; *McGee v Dunn*, 75 AD3d 624, 625, 906 NYS2d 74 [2d Dept 2010]). Nor may these waived defenses be used to open up an adjudicated default in answering such as the one in place here (*see Wells Fargo Bank Natl. Assoc. v Laviolette*, 128 AD3d 1054, 10 NYS2d 538 [2d Dept 2015]; *U.S. Bank, N.A. v Bernabel*, 125 AD3d 541, 2015 WL 752831 [1st Dept 2015]; *JP Morgan Mtge. Acquisition Corp. v Hayles*, 113 AD3d 821, 979 NYS2d 620 [2d Dept 2014]; *Citibank, N.A. v Swiatkowski*, 98 AD3d 555, 949 NYS2d 635 [2d Dept 2012]; *CitiMortgage, Inc. v Rosenthal*, 88 AD3d 759, 931 NYS2d 638 [2d Dept 2011]; *HSBC Bank, USA v Dammond*, 59 AD3d 679, 875 NYS2d 490 [2d Dept 2009]).

The cross moving defendant's challenges to the nature and quality of the proof submitted by the plaintiff in support of its prior motion for an order of reference on default are without merit. Such challenges are untimely as the plaintiff's motion was granted over three years ago. In any event, it is well settled law that a failure to comply with the proof requirements imposed by CPLR 3215(f), which are less stringent than those imposed upon motions for summary judgment (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 760 NYS2d 727 [2003]), may not be used to open up a previously adjudicated default (*see Manhattan Telecommunications Corp. v H & A Locksmith, Inc.*, 21 NY3d 200, 969 NYS2d 424 [2013]; *Hill v Stone*, 113 AD3d 595, 977 NYS3d 906 [2d Dept 2014]; *U.S. Bank v Tate*, 102 AD3d 859, 958 NYS2d 722 [2d Dept 2013]).

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The court has considered the remaining contentions of defendant Fonseca and her counsel and finds them all to be lacking in merit, including that the referee's failure to give notice of and to hold a hearing prior to computing amounts due under the note and mortgage warrant a denial of the plaintiff's motion (*see Wachovia Mtge. Corp. v Lopa*, 129 AD3d 830, 13 NYS3d 97 [2d Dept 2015] *Deutsche Bank Natl. Trust Co. v Jackson*, 68 AD3d 805, 889 NYS3d 447 [2d Dept 2009]). Accordingly, the cross motion (#004) by defendant Fonseca for the relief outlined above is in all respects denied.

The plaintiff's motion (#003) for confirmation of the report of the referee to compute and for the issuance of a judgment foreclosing the lien of the subject mortgage, directing a public sale of the premises and awarding the other relief applied for herein by the plaintiff is granted. The moving papers sufficiently demonstrated the plaintiff's entitlement to such relief (*see Cafaro v Tineo*, 135 AD3d 887, 22 NYS3d 909 [2d Dept 2016]; *HSBC Bank USA, Natl. Assoc. v Simmons*, 125 AD3d 930, 5 NYS3d 175 [2d Dept 2015]). The opposing papers failed to demonstrate any grounds for a denial of the plaintiff's motion (*see Wachovia Mtge. Corp. v Lopa*, 129 AD3d 830, *supra*; *Deutsche Bank Natl. Trust Co. v Jackson*, 68 AD3d 805, *supra*).

Proposed Judgment, as modified by the court to reflect the issuance and terms of this order, has been marked signed.

DATED: 11/4/16



THOMAS F. WHELAN, J.S.C.