

Deutsche Bank Natl. Trust Co. v Milone

2016 NY Slip Op 32562(U)

December 9, 2016

Supreme Court, Suffolk County

Docket Number: 13935/2013

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 DATE: 9/30/16
SUBMIT DATE: 11/18/16
Mot. Seq. - 002 - MOTD
Mot. Seq. - 003 - XMD
CDISP: NO

-----X
DEUTSCHE BANK NATIONAL TRUST CO.
AS TRUSTEE, FOR RBSGC MORTGAGE
LOAN TRUST, 2007-B

Plaintiff,

-against-

JOHN MILONE, STATE OF NEW YORK
ON BEHALF OF UNIVERSITY HOSPITAL
and "JOHN DOE"

Defendants.
-----X

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Upon the following papers numbered 1 to 11 read on this motion by the plaintiff for default judgments and other relief and cross motion by defendant Milone to compel acceptance of answer or leave to serve late answer; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers 5-8; Answering papers 9-10; Reply papers ; Other 11 (memorandum); ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that those portions of this motion (#002) by the plaintiff for an order identifying the true name of an unknown defendant served with process at the mortgaged premises, relieving the duly appointed guardian ad litem/military attorney from his further representation of the defendant obligor/mortgagor who was served by publication pursuant to CPLR 308(5) and 316 and an order of reference on default, are considered under CPLR 1024, 1003 and 3215 and RPAPL 1321 and is granted; and it is further

ORDERED that the compensation of Kenneth Seidell, Esq, the guardian ad litem/military attorney for John Milone, who has since appeared herein by counsel is hereby fixed in the amount of \$250.00, which amount the plaintiff shall remit within forty-five (45) days from the date of this order to Kenneth Seidell, Esq.; and it is further

ORDERED that the those portions of the plaintiff's motion (#002) wherein it seeks an order deeming service of process of the supplemental summons and complaint "valid and effective, *nunc pro tunc*", is considered under CPLR 306-b and 316 and denied; and it is further

ORDERED that the remaining portions of the plaintiff's motion (#002) for, in effect, an order excusing its delay in moving for default judgments beyond the one year time limitation period set forth in CPLR 3215(c) is considered thereunder and is granted; and it is further

ORDERED that the cross motion (#003) by defendant, John Milone, for, in effect, an order compelling acceptance of his August 15, 2016 answer or to vacate his default in timely answering the summons and complaint and for leave to appear herein by answer in the form of the one attached to the moving papers is considered under CPLR 320, 2004, 2005 and 3012(d) and is denied.

In May of 2013, the plaintiff commenced this action to foreclose the lien of a November 15, 2006 mortgage given by defendant, John Milone, to Wells Fargo Bank, N.A., to secure a mortgage note in the amount of \$402,500.00 likewise given on that date. The plaintiff effected service of the summons and complaint in June of 2013 upon, Rose Saccento, a tenant found at the mortgaged premises, who was named herein as an unknown defendant. Also served in June of 2013 was the defendant, the State University of New York.

In contrast, the plaintiff was unable to effect service of process and of the other initiatory papers upon on the obligor/mortgagor defendant Milone pursuant to CPLR 308(1) - (4). Although the Lindenhurst property encumbered by the mortgage was and remains "investment property", which defendant Milone leases to others rather than occupy it or any portion thereof as his residence, the mortgaged premises so encumbered were identified in the mortgage indenture as the address to which all notices were to be sent to defendant Milone. Nevertheless, the plaintiff's process server was unable to effect service of the summons and complaint upon defendant Milone at the mortgaged premises.

According to the affidavit of the plaintiff's process server issued after service was effected upon the tenant found at the mortgaged premises, the tenant advised that the owner did not reside at the mortgaged premises and was unknown to her as she paid her rent to an insurance company.

The plaintiff's process server then attempted to serve defendant Milone at rental properties purportedly owned by him or his insurance and real estate companies located in Farmingdale and West Babylon without success. A post office box, #339, in West Islip, N.Y. 11795 was identified as one associated with the defendant Milone but was found to be owned by his wife and attempts to obtain information from her about defendant Milone's residence or business address were unsuccessful. The plaintiff then located a residence address of 130 Wagstaff Lane, West Islip, N.Y., as a potential residence address for defendant Milone. However, an attempt to effect service there in August of 2013 was unsuccessful as the process server found the house uninhabited due to construction renovations. The plaintiff's inquiries to the Surrogate's Court in Suffolk County were negative and its search of New York State Department of Motor Vehicles records listed the 339 Post Office Box in West Islip as the defendant's address, which was owned by his wife.

After undertaking the above described due and diligent searches to ascertain the whereabouts of defendant Milone and engagement in the various unsuccessful service attempts at residence and business addresses uncovered in that search, the plaintiff moved (#001) for an order pursuant to CPLR 308(5) for an alternate means of service. That application, which included demands for leave to serve a supplemental summons with notice upon the defendant Milone by publication pursuant to CPLR 316 and service of the supplemental summons and the original complaint upon all those previously served by mail, the appointment of a guardian ad litem for defendant Milone and other relief, was granted by order dated January 8, 2014. Therein, the court directed that such order, together with the supporting papers which included the supplemental summons with notice, be filed prior to the date of the first publication and that service also be effected upon defendant Milone by service upon Kenneth Seidell, Esq., who was appointed guardian ad litem and military attorney for said defendant. The court further directed that all those previously served with the summons and complaint be served by mail with the supplemental summons and re-served with the original complaint, as no supplemental or amended complaint was attached to the moving papers, within 120 days of the date of the order.

In accordance with the terms of the January 8, 2014 order, the plaintiff filed said order and the supporting papers on which it was based with the Clerk on January 17, 2014 and thereafter effected due and timely service of the supplemental summons with notice by publication in two newspapers pursuant to CPLR 316 upon defendant Milone. The plaintiff failed, however, to effect service of the original complaint upon defendant Milone by publication as contemplated by the January 8, 2014 order and service of the supplemental summons and original complaint upon the guardian ad litem/military attorney and the defendants previously served with process within the 120 day time period directed by the court. Instead, the plaintiff separately filed the supplemental summons and exhibits with the Clerk on July 13, 2016, in response to which, the guardian ad litem/military attorney appeared herein on behalf of defendant Milone.

On July 27, 2016, the plaintiff mailed the original complaint to defendant Milone at the West Islip Post Office Box address, together with the supplemental summons, and mailed the supplemental summons and complaint to those served with the original summons and complaint and to the guardian ad litem/military attorney. In response to such service, defendant Milone served an answer dated August 15, 2016, which was filed with the Clerk on August 16, 2016. Said answer was rejected as untimely by the plaintiff by notice dated and served on August 25, 2016.

By its motion (#002), the plaintiff seeks an order of reference upon the default of all those served with process, together with an order relieving the guardian ad litem/military attorney of his fiduciary office and the other relief outlined above. Defendant Milone cross moves (#003) for leave to compel acceptance of his answer pursuant to CPLR 2004 and 2005 and/or for leave to appear herein by service of a late answer upon a vacatur of his default in answering pursuant to CPLR 3012(d).

First considered is the cross motion (#003) by defendant Milone for the relief demanded in his cross motion. In support thereof, defendant Milone contends that he first received notice of this action following receipt of the plaintiff's mailing of the supplemental summons and original complaint to him at his residence address in West Islip, New York on July 27, 2016. Defendant Milone further contends that service of his answer on August 15, 2016 was thus timely and that the plaintiff should be compelled to accept it. Alternatively, defendant Milone claims that his default in answering should be vacated on excusable default grounds for several reasons including that the plaintiff should have known defendant Milone's residence address since he was allegedly engaged in loan modification talks with the plaintiff in August of 2014 and again in January of 2015. In connection with this alternative application, defendant Milone submits papers allegedly forwarded to the plaintiff in connection with loan modification discussions in which the address at 130 Wagstaff Lane, West Islip, New York was identified as his residence. Defendant Milone also contends that he has many potentially meritorious defenses to the plaintiff's claim for foreclosure and sale as evidenced by the sixteen affirmative defenses set forth in the August 15, 2016 answer, verified, filed and served by his counsel. The plaintiff opposes the cross motion.

Rejected as unmeritorious are defendant Milone's claim that service of his August 15, 2016 answer on that date was timely because he first received notice of this action in late July of 2016 following the plaintiff's mailing of the supplemental summons and complaint to defendant Milone at the Post Office Box #339 in West Islip on July 27, 2016. Jurisdiction over the person of defendant was obtained by the plaintiff's service of the supplemental summons with notice by publication in the two newspapers designated by the court in its January 8, 2014 order. Such service was complete 28 days after the first publication which occurred in January of 2014 (*see* CPLR 316), and, pursuant

to the January 8, 2014 order, the filing of proof of publication which occurred on February 21, 2014. Defendant's Milone's answer was thus due on or before March 22, 2014.

The fact that the original complaint was not so served did not deprive the court of jurisdiction over defendant Milone nor did it extend his time to answer. The service of a complaint is optional and is thus not necessary to effect jurisdiction over the person of a defendant (*see* CPLR 316; 320; 3012[b]). It is the service of a summons with a complaint or with notice, not the service of any pleading which may accompany the summons, that effects the jurisdictional joinder of a defendant to a lawsuit. Defendant Milone was not yet in default when service of the supplemental summons was effected upon him by publication as he had never been served with the original summons. The label "supplemental" summons reflected the addition of the notice content required by CPLR 316 that did not appear on the original summons. However, the complaint remained the same as no new or additional claims were interposed by the plaintiff. Accordingly, service of the original complaint upon defendant Milone by publication and by mail upon those previously served as directed in the January 8, 2014 order, was superfluous as no supplemental nor amended complaint was prepared or put before the court at any time prior or subsequent to the issuance of the January 8, 2014 order (*cf.*, CPLR 3012[a]). Accordingly, jurisdiction was duly obtained over defendant Milone upon the completion of service of the supplemental summons with notice by publication on March 22, 2014. Service of the defendant's answer in July of 2016 was untimely and the plaintiff's immediate rejection of said answer as late obviated any notion of waiver.

The remaining portions of the defendant's cross motion wherein he seeks, in effect, a vacatur of his default in timely answering or an extension of time to serve his answer pursuant to CPLR 2004, 2005 and/or 3012(d) are also lacking in merit. To be entitled to this relief, it was incumbent upon the defendant to demonstrate a reasonable excuse for the default and a meritorious defense to the action to demonstrate "excusable default" which requires a showing of a reasonable excuse for the default and a demonstration of a potentially meritorious defense (*see Federal Natl. Mtge. Ass'n v Zapata*, 143 AD3d 857, 2016 WL 6089221 [2d Dept 2016]; *US Bank Natl. Ass'n v Dorestant*, 131 AD3d 467, 15 NYS3d 142 [2d Dept 2015]; *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]; *Mellon v Izmirligil*, 88 AD3d 930, 931 NYS2d 667 [2d Dept 2011]; *Wells Fargo Bank, N.A. v Cervini*, 84 AD3d 789, 921 NYS2d 643 [2d Dept 2011]). The material facts constituting 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]).

A review of the cross moving papers of defendant Milone reveals that the material facts necessary to constitute each of the elements necessary for the granting of leave to serve a late answer upon a vacatur of the defendant's default in answering are not set forth therein. Moreover, the answer attached to the moving papers is verified by defense counsel and no facts constituting potentially meritorious defenses are advanced in defendant Milone's affidavit in support of the cross motion. Accordingly, the cross motion (#003) interposed by defendant Milone is in all respects denied.

Those portions of the plaintiff's motion-in-chief (#002) in which it seeks an order identifying the true name of the unknown defendant John Doe as Rose Saccante is granted pursuant to CPLR 1024. Also granted are those portions of the plaintiff's motion (#002) wherein it seeks an order discharging Kenneth Seidell, Esq., from his fiduciary office as Guardian Ad Litem/Military Attorney for defendant Milone. With respect thereto, and in accordance with the January 8, 2014 order appointing attorney Seidell, the court hereby fixes the compensation for the services he rendered in such capacity in the amount of \$250.00, which amount represents the reasonable value of such services. The plaintiff shall remit said sum to Mr. Seidell within forty five (45) days of the date of this order.

The court considers under CPLR 306-b and 316 the plaintiff's request for an order deeming service of process of the supplemental summons and complaint "valid and effective, *nunc pro tunc*", and hereby denies it. As indicated above, the court acquired jurisdiction over defendant Milone upon the completion of the service of the filed supplemental summons with notice on March 22, 2014. Service thereof and service or re-service of the original complaint was non jurisdictional in nature and superfluous for the reasons set forth above. The court thus declines the plaintiff's invitation to "deem" the plaintiff's service of the supplemental summons and original complaint "valid and effective" *nunc pro tunc*.

The remaining portions of the plaintiff's motion-in-chief (#002) wherein it seeks an order fixing the defaults in answering of the defendants served with process and a separate order appointing a referee to compute amounts due under the terms of the subject note and mortgage are granted. The moving papers established that the plaintiff did not abandon the action within the contemplation of CPLR 3215(c) as it undertook proceedings within the one year time period from which an intent not to abandon the action is discernable (*see Aurora Loan Serv., LLC v Gross*, 139 AD3d 772, 32 NYS3d 249 [2d Dept 2016]). Even if it were otherwise, the plaintiff demonstrated good cause for the delay and a meritorious claim for foreclosure and sale (*see LNV Corp. v Forbes*, 122 AD3d 805, 996 NYS2d 696 [2d Dept 2014]).

In addition, the moving papers further established the plaintiff's entitlement to the default judgments as they included due proof of the plaintiff's service of the summons and complaint and the defaults in answering on the part of the defendants served with process, including the defendant mortgagor and the plaintiff's sufficient demonstration of the facts constituting the plaintiff's claim for foreclosure and sale (*see* CPLR 3215[f]; *U.S. Bank Natl. Ass'n v Wolnerman*, 135 AD3d 850, 24 NYS3d 343 [2d Dept 2016]; *U.S. Bank Natl. Ass'n v Alba*, 130 AD3d 715, 11 NYS2d 864 [2d Dept 2015]; *HSBC Bank USA, N.A. v Alexander*, 124 AD3d 838, 4 NYS3d 47 [2d Dept 2015]; *Todd v Green*, 122 AD3d 831, 997 NYS2d 155 [2d Dept 2014]; *U.S. Bank, Natl. Ass'n v Razon*, 115 AD3d 739, 981 NYS2d 571 [2d Dept 2014]; *Triangle Prop. #2, LLC, v Narang* 73 AD3d 1030, 903 NYS2d 424 [2d Dept 2010]).

To defeat the plaintiff's facially adequate motion, it was incumbent upon defendant Milone to establish that there was no default in answering, due to a jurisdictional defect or an abandonment of the plaintiff's claim, or that he possesses a reasonable excuse for the delay in answering and a potentially meritorious defense to the plaintiff's claims for foreclosure and sale (*see Deutsche Bank Natl. Trust Co. v Patrick*, 136 AD3d 970, 25 NYS3d 364 [2d Dept 2016]; *U.S. Bank Natl. Ass'n v Wolnerman*, 135 AD3d 850, *supra*; *US Bank Natl. Ass'n v Dorestant*, 131 AD3d 467, *supra*; *Wells Fargo Bank, N.A. v Krauss*, 128 AD3d 813, 10 NYS3d 257 [2d Dept 2015]; *Fried v Jacob Holding, Inc.*, 110 AD3d 56, 970 NYS2d 260 [2d Dept 2013]). Upon review of the opposing papers, the court finds that the defendant failed to establish any grounds for a denial of the plaintiff's motion.

In view of the foregoing, the plaintiff's motion (#002) for an order of reference is granted while the cross motion (#003) by defendant Milone is denied.

The proposed Order appointing a referee to compute, as modified by the court, has been marked signed.

Dated: December 9, 2016



THOMAS F. WHELAN, J.S.C.