

Wells Fargo Bank, N.A. v Singh
2016 NY Slip Op 32772(U)
January 11, 2016
Supreme Court, Queens County
Docket Number: 700826/2013
Judge: David Elliot
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MEMORANDUM

SUPREME COURT - QUEENS COUNTY
I.A.S. PART 14

WELLS FARGO BANK, N.A.,
Plaintiff(s),

Index No. 700826/2013

By: **ELLIOT, J.**

-against-

Date: January 11, 2016

Motion Cal. No. 188

JASPAL SINGH, et al.,
Defendant(s).

Motion Seq. No. 1

Motion Date: December 3, 2015

FILED
JAN 13 2016
COUNTY CLERK
QUEENS COUNTY

Plaintiff commenced this action to foreclose a mortgage by electronically filing a copy of the summons and complaint and notice of pendency on March 8, 2013. Based on the affidavit of service sworn to on March 21, 2013, defendant Jaspal Singh (defendant) was served with process by personal delivery on March 20, 2013 (CPLR § 308 [1]). Thus, defendant's time to answer expired on April 9, 2013 (CPLR 320 [a]). Defendant first appeared by his counsel's e-filing of a Notice of Appearance on January 28, 2015. Two residential foreclosure conferences were held on January 14, 2015 and April 23, 2015, and the matter was released from the Residential Foreclosure Part on the latter date, as a modification was not "financially viable." Per the Residential Foreclosure Conference Order of that date (Cimino, CA-R), plaintiff consented to a 45-day stay and was directed to file an application seeking an order of reference by February 2, 2016. The instant motion ensued.

With respect to said motion, plaintiff has established its entitlement to, *inter alia*, an order of reference by producing the loan documents and evidence of default (*see e.g. US Bank Nat. Assn. v Madero*, 125 AD3d 757 [2015]; *Emigrant Mtge. Co., Inc. v Beckerman*, 105 AD3d 895 [2013]). Plaintiff has also demonstrated that all defendants were timely served herein, including Tawana Dawson, s/h/a as “John Doe#1,” and that none answered or appeared, nor was their time extended by stipulation or court order, except for defendant, who appeared by counsel, as noted, *supra*.

Defendant opposes the motion and cross-moves for an order, *inter alia*, granting him summary judgment dismissing the complaint, pursuant to CPLR 3212, on the ground that plaintiff failed to demonstrate strict compliance with RPAPL § 1304. That branch of the motion for summary judgment must be denied, inasmuch as defendant has admittedly failed to answer the complaint (CPLR 3212 [a] [“Any party may move for summary judgment in any action, *after issue has been joined*”). In any event, it is noted that defendant is not entitled to outright dismissal for an alleged failure to comply with RPAPL § 1304 since defendant must first seek vacatur of his default, otherwise he is “precluded from raising the plaintiff’s alleged failure to comply with the notice provisions of RPAPL 1304 as a defense to this action” (*PHH Mortg. Corp. v Celestin*, 130 AD3d 703 [2015]; *see TD Bank, N.A. v Spector*, 114 AD3d 933 [2014]; *Pritchard v Curtis*, 101 AD3d 1502 [2012]).

In the alternative, defendant cross-moves, in effect, for an order vacating his default and compelling plaintiff to accept his late answer pursuant to CPLR § 3012 (d). To

prevail on that branch of his cross motion, defendant must provide a reasonable excuse for his default and a potentially meritorious defense to the action (*id.*; CPLR 5015 [a] [1]; *see BAC Home Loans Servicing, LP v Reardon*, 132 AD3d 790 [2015]; *Morgan Stanley Mtge. Loan Trust 2006-17XS v Waldman*, 131 AD3d 1140 [2015]; *First Republic Bank v Salander*, 131 AD3d 668 [2015]). The determination of what constitutes a reasonable excuse rests within the sound discretion of this court (*see BAC Home Loans Servicing, LP*, 132 AD3d at 790; *Citimortgage, Inc. v Kowalski*, 130 AD3d 558 [2015]).

Defendant has failed to offer a reasonable excuse for his two and one-half year delay in making his cross motion.¹ First, his assertion that he is unfamiliar with the litigation process does not constitute a reasonable excuse for his default (*see Wells Fargo Bank, NA v Besemer*, 131 AD3d 1047 [2015]; *Stevens v Charles*, 102 AD3d 763 [2013]; *U.S. Bank Natl. Assn. v Slavinski*, 78 AD3d 1167 [2010]).

Second, defendant contends that, upon receipt of the summons and complaint, he “did nothing in response because I was advised by Rushmore [Loan Management Services, LLC, the servicer for plaintiff’s assignee] that a modification approval would eliminate any pending foreclosure proceeding, therefore, I believed that I was just to continue working with Rushmore on obtaining modification approval.” It was not until receiving the Residential Foreclosure Part notice dated December 9, 2014 that he retained counsel to represent him. Defendant’s excuse that he believed he was going to modify his loan,

1. This includes a nine month delay after having retained counsel to represent him in this matter.

however, is vague and unsubstantiated and does not constitute a reasonable excuse (*see Wells Fargo Bank, NA*, 131 AD3d at 1049; *Emigrant Bank v Wiseman*, 127 AD3d 1013 [2015]; *HSBC Bank USA, Natl. Assn. v Rotimi*, 121 AD3d 855 [2014]; *Deutsche Bank Natl. Trust Co. v Gutierrez*, 102 AD3d 825 [2013]). That he thought he did not need to answer the complaint because of same is belied by the express warning contained on the face of the summons, of which he does not deny receipt (*see Emigrant Bank*, 127 AD3d at 1014; *HSBC Bank USA, Natl. Assn.*, 121 AD3d at 856; *HSBC Bank USA, Natl. Assn. v Lafazan*, 115 AD3d 647 [2014]). It should further be noted that, generally, a good faith belief in settlement must be supported by substantial evidence in order to constitute a reasonable excuse for a default (*Armstrong Trading, Ltd. v MBM Enters.*, 29 AD3d 835 [2006]; *see Performance Constr. Corp. v Huntington Bldg., LLC*, 68 AD3d 737 [2009]; *Scarlett v McCarthy*, 2 AD3 623 [2003]).

Since defendant failed to establish a reasonable excuse for his default, the court need not address whether he has demonstrated a potentially meritorious defense to this action (*see Emigrant Bank*, 127 AD3d at 1014; *HSBC Bank USA, Natl. Assn.*, 115 AD3d at 648; *Deutsche Bank Natl. Trust Co.*, 102 AD3d at 825).

Accordingly, defendant's cross motion is denied. Plaintiff's motion is granted. Plaintiff is granted leave to submit an order of reference. The caption is amended by substituting "U.S. Bank, N.A., as Legal Title Trustee for Truman 2012 SC2 Title Trust" as plaintiff herein and by substituting "Tawana Dawson" in the place and stead of "John Doe

#1,” and by striking “John Doe #2 through John Doe #10.”

Submit Order.

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a series of loops and a horizontal line at the end.

J.S.C.

FILED
JAN 13 2016
COUNTY CLERK
QUEENS COUNTY