SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

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DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR NOVASTAR MORTGAGE FUNDING TRUST, SERIES 2006-5 NOVASTAR HOME EQUITY LOAN ASSET-BACKED CERTIFICATES, SERIES 2006-5,

Plaintiff,

Index No.: 708530/2014

Motion Date: 2/17/17

Motion No.: 23

Motion Seq.: 1

- against -

IVERINE WILLIAMS, COMMISSIONER OF SOCIAL SERVICES OF THE CITY OF NEW YORK SOCIAL SERVICES, LVNV FUNDING LLC APO CITIFINANCIAL INC, NY STATE DEP'T OF TAXATION AND FINANCE,

"JOHN DOE #1" through "JOHN DOE #12," the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint,

Defendants.

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The following papers read on this motion by plaintiff for an Order declaring defendants to be in default, appointing a Referee to compute, and amending the caption; and on this cross-motion by defendant IVERINE WILLIAMS for an Order vacating her default and dismissing the action or vacating the default and permitting her leave to file a late answer and remanding this action to the Residential Foreclosure Settlement Conference Part:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits-Memo. of Law..	EF 30 - 28
Notice of Cross-Motion-Affidavit-Exhibits.....	1 - 4
Affirmation in Opp. to Cross-Motion & in Reply.....	EF 29 - 33

This is an action to foreclose a mortgage encumbering real property located at 240-30 144th Avenue, Rosedale, New York 11422.

Based on the record before this Court, on August 21, 2006, Iverine Williams (defendant) executed a note in the principal amount of $432,000, secured by a mortgage given to Novastar Mortgage Inc., Corporation. Thereafter, the mortgage was assigned to plaintiff. On February 15, 2011, the loan was modified. A second Loan Modification Agreement was executed on July 3, 2012. Plaintiff alleges that it is the holder of the note and mortgage, and defendant defaulted pursuant to the terms of the note and mortgage when she failed to make the monthly mortgage payment beginning on April 1, 2013 and continuing thereafter. Plaintiff subsequently accelerated the mortgage, and commenced this action by filing a lis pendens, summons and complaint on November 13, 2014. Plaintiff submits affidavits of service on all defendants, including Ivy Day Care. All defendants are in default.

This matter was released from the residential foreclosure settlement conference part on August 12, 2016. The Residential Foreclosure Conference Order notes that defendant is attempting a reinstatement and is waiting for Mortgage Assistance Program funding to become available. The parties also consented to release this matter from the Residential Foreclosure Settlement Conference Part and to a 60 day stay. Plaintiff now moves for an Order of Reference.

Defendant cross-moves to vacate her default, for leave to submit a late answer, and to dismiss this action on the grounds that the Court lacks personal jurisdiction.

To vacate a default, the moving party must demonstrate a reasonable excuse and the existence of a potentially meritorious defense (see CPLR 5015[a][1]; Brown v Eley, 137 AD3d 1024 [2d Dept. 2016]; Wells Fargo, N.A. v Cervini, 84 AD3d 789 [2d Dept. 2011]). The determination of what constitutes a reasonable excuse lies within the trial court's sound discretion, and if no reasonable excuse is found, the court need not consider whether meritorious opposition was sufficiently shown (see Tribeca Lending Corp. v Correa, 92 AD3d 770, 771 [2d Dept. 2012]; Maida v Lessing's Rest. Servs., Inc., 80 AD3d 732, 733 [2d Dept. 2011]; Diaz v Ralph, 66 AD3d 819 [2d Dept. 2009]).

As a reasonable excuse, defendant contends that she was never served with the summons and complaint. Specifically, defendant affirms that no paper was attached to her door and that she is usually home in the evening. The filed affidavit of service states that defendant was served on December 4, 2014 at

7:40 p.m. pursuant to CPLR 308(4) by affixing a copy of the summons and complaint on the door of the address at 240-30 144th Ave, Rosedale, NY 11422. The affidavit of service also states that prior attempts to make personal delivery of the summons and complaint were made on November 19, 2014 at 6:57 p.m. and November 21, 2014 at 7:04 p.m.

"It is axiomatic that the failure to serve process in an action leaves the court without personal jurisdiction over the defendant, and all subsequent proceedings are thereby rendered null and void" (Emigrant Mtge. Co., Inc. v Westervelt, 105 AD3d 896 [2d Dept. 2013], quoting Krisilas v Mount Sinai Hosp., 63 AD3d 887[2d Dept 2009]).

A process server's affidavit stating proper service in accordance with CPLR 308, constitutes prima facie evidence of proper service (see Bank, Natl. Assn. v Arias, 85 AD3d 1014 [2d Dept. 2011]; Wells Fargo Bank, NA v Chaplin, 65 AD3d 588 [2d Dept. 2009]; Scarano v Scarano, 63 AD3d 716 [2d Dept. 2009]). Generally, a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing (see Skyline Agency v Coppotelli, Inc., 117 AD2d 135, 139 [2d Dept. 1986]). However, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavit (see Scarano v Scarano, 63 AD3d 716 [2d Dept. 2009]).

Here, this Court finds defendant's conclusory denial of service lacks the factual specificity and detail required to rebut the prima facie proof of proper service set forth in the process server's affidavits of service (see ACT Props., LLC v Garcia, 102 AD3d 712 [2d Dept. 2013]; Bank of N.Y. v Espejo, 92 AD2d 707 [2d Dept. 2012]; Deutsche Bank Natl. Trust Co. v Hussain, 78 AD3d 989 [2d Dept. 2010]).

As a second reasonable excuse, defendant alleges that she was engaged in settlement negotiations with plaintiff since 2012. She further affirms that during negotiations with various representatives of the loan servicer, she was told that she should only follow the instructions of her single point of contact who told her to disregard other notices because she was involved in settlement negotiations.

A good faith belief in settlement negotiations with a justifiable reliance thereon constitutes a reasonable excuse for default (see Performance Constr. Corp. v Huntington Bldg., LLC, 68 AD3d 737 [2d Dept. 2009]; Armstrong Trading Ltd. v MBM

Enters., 29 AD3d 835 [2d Dept. 2006]; Scarlett v McCarthy, 2 AD2d 623 [2d Dept. 2003]; Lehrman v Lake Katonah Club, 295 AD2d 322 [2d Dept. 2002]). Based on defendant's affidavit, this Court finds that she established a reasonable excuse for her default in answering.

As a meritorious defense, defendant contends that plaintiff lacks standing.

A plaintiff has standing where it is both the holder or assignee of the subject mortgage and the underlying note at the time the action is commenced (see Aurora Loan Services, LLC v. Taylor, 114 AD3d 627 [2d Dept. 2014]; Deutsche Bank Natl. Trust Co. v Whalen, 107 AD3d 931 [2d Dept. 2013]; Bank of N.Y. v Silverberg, 86 AD3d 274 [2d Dept. 2011]). "A plaintiff may demonstrate that it is the holder or assignee of the underlying note 'by showing either a written assignment of the underlying note or the physical delivery of the note'" (Aurora Loan Servs., LLC v Mercius, 138 AD3d 650, 651 [2d Dept. 2016] quoting U.S. Bank N.A. v Guy, 125 AD3d 846 [2d Dept. 2015]).

Here, the note is indorsed to plaintiff and was included with plaintiff's certificate of merit at the commencement of the action. Thus, plaintiff established its standing as a holder of the note at the time the action was commenced by demonstrating, prima facie, that plaintiff was in possession of the original note, specifically indorsed to plaintiff, at the time the action was commenced (see U.S. Bank Nat. Ass'n v Cruz, 2017 NY Slip Op 01400 [2d Dept. 2017]; Nationstar Mortg., LLC v Catizone, 127 AD3d 1151 [2d Dept. 2015]).

Accordingly, plaintiff failed to demonstrate a meritorious defense to this action.

It is well settled that a plaintiff in a mortgage foreclosure action establishes a prima facie case of entitlement to foreclose through submission of proof of the existence of the underlying note, mortgage and default in payment after due demand (see Witelson v Jamaica Estates Holding Corp. I, 40 AD3d 284 [1st Dept. 2007]; Marculescu v Ouanez, 27 AD3d 701 [2d Dept. 2006]; US. Bank Trust National Assoc. v Butti, 16 AD3d 408 [2d Dept. 2005); Layden v Boccio, 253 AD2d 540 [2d Dept. 1998); State Mortgage Agency v Lang, 250 AD2d 595[2d Dept. 1998]).

Plaintiff demonstrated proper service of the summons and complaint. Plaintiff also demonstrated that it was the holder of the note when the action was commenced. Based upon its submission of the note, mortgage, loan modification agreements, and the

affidavit of Elaine Alexander, Contract Management Coordinator of plaintiff's loan servicer, stating that there was in fact a default under the terms of the note and mortgage, plaintiff established its prima facie case.

Accordingly, for the reasons stated above, plaintiff's motion is granted in its entirety and defendant's cross-motion is denied in its entirety.

However, the granting of the within motion does not in any way eliminate the possibility that in the future a short sale, loan modification, forbearance, reinstatement and/or workout agreement may be entered into should defendant so qualify.

Order of Reference signed contemporaneously herewith.

Dated: January 10, 2017
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.