

<b>Bank of N.Y. Mellon v Cordovano</b>
2017 NY Slip Op 30414(U)
January 9, 2017
Supreme Court, Suffolk County
Docket Number: 16356/2010
Judge: Thomas F. Whelan
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**COPY**

SUPREME COURT - STATE OF NEW YORK  
IAS PART 33 - SUFFOLK COUNTY

**PRESENT:**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE: 10/19/16  
SUBMIT DATE: 10/21/16  
Mot. Seq. # 003 - MD  
CASE DISP: YES

-----X

BANK OF NEW YORK MELLON f/k/a THE :  
 BANK OF NEW YORK, as Trustee for the :  
 CWABS, Inc., Asset Backed Certificates, Series :  
 2007-1, :  
 :  
 Plaintiff, :  
 :  
 - against - :  
 :  
 DIANE CORDOVANO, MORTGAGE :  
 ELECTRONIC REGISTRATION SYSTEMS, INC. :  
 acting solely as nominee for AMERICA'S :  
 WHOLESALE LENDER, its successors and :  
 assigns, CELGO BONILLIA, DIEGO CONDO, :  
 ANGEL CONDO, "NELI" and "ROSA", :  
 :  
 Defendants. :  
 -----X

DAVIDSON - FINK  
Atty. for Plaintiff  
28 E. Main St. - Ste. 1700  
Rochester, NY 14614  
  
PETER D. TAMSEN, P.C.  
Atty. for Defendant Cordovano  
260 Montauk Hwy. - Ste. 14  
Bay Shore, NY 11706

Upon the following papers numbered 1 to 10 read on this motion by the mortgagor defendant to stay the sale ; vacate the judgment and dismiss the complaint or vacate the default in answering and grant leave to appear by answer; Notice of Motion/Order to Show Cause and supporting papers 1 - 6 ; Notice of Cross Motion and supporting papers        ; Answering papers 7-8 ; Reply papers        ; Other 9 (Stipulation dated January 6, 2011); 10 (Notice of Appearance for defendant dated February 9, 2011)        ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that those portions of this motion (#003) by defendant, Diane Cordovano, for an order staying the public sale of the premises, vacating the judgment and order of reference previously issued and dismissing the complaint are considered under CPLR 5015(a)(4) and are denied; and it is further

**ORDERED** that those portions of this motion (#003) by defendant, Diane Cordovano, for an order vacating her default in answering and all proceedings taken thereon and granting her leave to appear in this action by service of a late answer is considered under CPLR 5015(a)(1) and CPLR 3012(d) and is denied; and it is further

**ORDERED** that the remaining portions of this motion (#003) wherein defendant, Diane Cordovano, seeks an award of “actual, compensatory, punitive and statutory damages” and other relief are denied; and it is further

**ORDERED** that the Chief Clerk of this Court, or his designee, is directed to transmit copies of this order, the papers filed with the court on this motion and copies of all other papers maintained by the Clerk of the court in the file of this action to the Suffolk County District Attorney, at his offices in the Arthur F. Cromarty Criminal Court building at 210 Center Drive, River head, New York 11901, and to the Attorney Grievance Committee, Second Department, Tenth Judicial District, at its offices located at 150 Motor Parkway, Suite 102, Hauppauge, New York 11788.

The plaintiff commenced this action in May of 2010 to foreclose the lien of a December 1, 2006 mortgage given by defendant, Diane Cordovano, to America’s Wholesale Lender to secure a mortgage note in the amount of \$262,000.00 likewise given on that date. The mortgage encumbers residential real property located at 71 Norton Street, Patchogue, New York 11772. The loan went into default on November 1, 2008 and the plaintiff commenced this action on May 11, 2010, at which time the mortgage premises were not occupied by the obligor/mortgagor defendant but rented to others.

The obligor/mortgagor defendant was served with process pursuant to CPLR 308(2) by delivery thereof together with the complaint and other initiatory papers to Brian Cordovano, on May 26, 2010 at 638 Ocean Avenue, Bohemia, New York, which address Mr. Cordovano identified as the defendant’s dwelling place/usual place of abode. The plaintiff also served the defendant on May 27, 2010 by delivery of the summons, complaint and other initiatory papers to Michelle Cordovano at 1 Shore Place, Lindenhurst, New York, who indicated that said address was the defendant’s dwelling place/usual place of abode.

On September 24, 2010, the plaintiff filed its last affidavit of service and purchased a Request for Judicial Intervention which was processed by the office of Special Term on October 8, 2010. At the initial settlement conference date of November 4, 2010 scheduled by personnel assigned to the specialized mortgage foreclosure settlement conference part, said conference was adjourned to January 10, 2011. By stipulation dated January 6, 2011, executed by the plaintiff’s original counsel and the defendant’s current counsel, the conference was further adjourned to January 26, 2011. Three further conferences were held by quasi judicial personnel assigned to the settlement conference part on February 9, 2011, April 7, 2011, and April 28, 2011, at which, the defendant appeared by her counsel, who had filed a notice of appearance with the court on February 9, 2011. At the conclusion of the sixth and last conference, the matter was released from said part as the parties could not agree on a resolution.

In September of 2013, the plaintiff moved for an order of reference upon the default in answering of all defendants served with process. The motion was served by mail upon defendant Cordovano at the two addresses at which she had been served with process and upon all others served with process. The plaintiff’s unopposed motion was granted by order of this court on January 8, 2014. In February of 2016, the plaintiff moved ex-parte for a judgment of foreclosure and sale, which

judgment was granted by this court on March 16, 2016, which was served upon defendant Cordovano on July 28, 2016 with notice of its entry.

By the instant motion, defendant Cordovano seeks an order staying any impending sale of the premises under the terms of the judgment of foreclosure and sale and the following additional relief; a vacatur of the judgment and of the order of reference previously issued herein together with a dismissal of the complaint pursuant to CPLR 5015(a)(4). Alternatively, defendant Cordovano seeks a discretionary vacatur of her default in answering pursuant to CPLR 5015(a)(1) and the judgment and order of reference entered thereon and an order pursuant to CPLR 3012(d) granting her leave to appear herein by answer in the form of the one attached to the moving papers. The motion is opposed by the plaintiff. For the reasons stated, the motion is denied.

CPLR 5015(a) provides both jurisdictional and discretionary grounds for the vacatur of a judgment or order entered upon the default of a party. The successful invocation of a jurisdictional defense is a complete defense to the complaint and where it is established the dismissal of an action against a defendant is warranted without any demonstration of his or her possession of a meritorious defense or other elemental showing (*see Prudence v Wright*, 94 AD3d 1073, 943 NYS2d 185 [2d Dept 2012]; *see also Emigrant Mtge. Co., Inc. v Westervelt*, 105 AD3d 896, 964 NYS2d 543 [2d Dept 2013]; *Deutsche Bank Natl. Trust Co. v Pestano*, 71 AD3d 1074, 899 NYS2d 269 [2d Dept 2010]). Where a claim for vacatur rests upon both a jurisdictional defense and a claim for a discretionary vacatur based upon excusable default grounds, appellate case authorities have instructed that the trial court must consider the efficacy of such defense prior to determining whether discretionary grounds for a vacatur of the default exist under CPLR 5015(a)(1) or CPLR 3012(d) (*see Community West Bank, N.A. v Stephen*, 127 AD3d 1008, 9 NYS3d 275 [2d Dept 2015]; *E\*Trade Bank v Vasquez*, 126 AD3d 933, 934, 7 NYS3d 285, 286 [2d Dept 2015]; *HSBC Bank USA Natl. Ass'n v Miller*, 121 AD3d 1044, 995 NYS2d 198 [2d Dept 2014]; *Youngstown Tube Co. v Russo*, 120 AD3d 1409, 993 NYS2d 146 [2d Dept 2014]; *Canelas v Flores*, 112 AD3d 871, 977 NYS2d 362 [2d Dept 2013]).

“A process server's affidavit of service constitutes prima facie evidence of proper service” (*Scarano v Scarano*, 63 AD3d 716, 716; 880 NYS2d 682 [2d Dept 2009]; *see Bank of NY Mellon v Scura*, 102 AD3d 714, 715, 961 NYS2d 185 [2d Dept 2013]; *NYCTL 2009–A Trust v Tsafatinos*, 101 AD3d 1092, 1093, 956 NYS2d 571 [2d Dept 2012]). “Although 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, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavits” (*Countrywide Home Loans Serv., LP v Albert*, 78 AD3d 983, 984–985, 912 NYS2d 96 [2d Dept 2010; internal quotation marks and citation omitted]; *see Wells Fargo Bank, N.A. v Walter*, 142 AD3d 992, 37 NYS3d 446 [2d Dept 2016]; *Mortgage Elec. Registration Sys., Inc. v Losco*, 125 AD3d 733, 5 NYS3d 112 [2d Dept 2015]; *Community West Bank, N.A. v Stephen*, 127 AD3d 1008, 2015 WL 1810590 [2d Dept 2015]; *Emigrant Mtge. Co., Inc. v Westervelt*, 105 AD3d 896, 897, 964 NYS2d 543 [2d Dept 2013]; *Countrywide Home Loans Serv., LP v Albert*, 78 AD3d 983, 984–985, *supra*). “Bare and unsubstantiated denials are insufficient to rebut the presumption of proper service” (*Wachovia Mtge. Corp. v Toussaint*, 144 AD3d 1132, 2016 WL 6991426 [2d Dept 2016]; *see Wachovia Bank N.A. v Greenberg*, 138 AD3d 984, 985, 31 NYS3d 110 [2d Dept 2016]; *Wachovia Bank, Natl. Ass'n v*

*Carcano*, 106 AD3d 726, 964 NYS3d 246 [2d Dept 2013]; *ACT Prop., LLC v Garcia*, 102 AD3d 712, 957 NYS2d 884 [2d Dept 2013]; *Bank of NY v Espejo*, 92 AD3d 707, 708 [2d Dept 2012]; *US Natl. Bank Assn. v Melton*, 90 AD3d 742, 743, 934 NYS2d 352 [2d Dept 2011]).

CPLR 308(2) provides, in part, that personal service upon a natural person shall be made “by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by ... mailing the summons to the person to be served at his or her last known residence” (*see 1136 Realty, LLC v 213 Union Street Realty Corp.*, 130 AD3d 590 12 NYS3d 294 [2d Dept 2015]). Here, defendant Cordovano admits that on May 26, 2010, she resided at 638 Ocean Avenue, Bohemia, New York, as asserted by Brian Cordovano, the person to whom process was delivered on behalf of the defendant pursuant to CPLR 308(2), in his response to an inquiry by the plaintiff’s process server. The court thus finds that the affidavit of the plaintiff’s process server constituted prima facie evidence of proper service upon defendant Cordovano on May 26, 2010 at said address.

The court further finds that the affidavits of defendant Cordovano and of Brian Cordovano were insufficient to rebut the presumption of due service arising from the affidavit of the plaintiff’s process server. The alleged discrepancies in the physical description of Brian Cordovano, to whom the summons, complaint and other initiatory papers were delivered over six years ago, are minor, slight and insufficiently substantiated to warrant a dismissal of the complaint or a traverse hearing on the issue of service (*see U.S. Bank Nat. Ass’n v Cherubin*, 141 AD3d 514, 36 NYS3d 154 [2d Dept 2016]; *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]; *Indymac Federal Bank, FSB v Hyman*, 74 AD3d 751, 901 NYS2d 545 [2d Dept 2010]; *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]).

Those portions of the defendant’s motion wherein she seeks, in effect, a vacatur of her default in timely answering an extension of time to serve an answer pursuant to CPLR 5015(a)(1) and 3012(d) are also lacking in merit. To be entitled to this relief, it was incumbent upon the defendant Cordovano to 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 Izmirilgil*, 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]).

The determination of that which constitutes a reasonable excuse lies within the discretion of the Supreme Court (*see Mannino Dev., Inc. v Linares*, 117 AD3d 995, *supra*; *Mellon v Izmirilgil*,

88 AD3d 930, *supra*; *Star Indus. Inc. v Innovative Beverages, Inc.*, 55 AD3d 903, 904, 866 NYS2d 357 [2d Dept 2008]). Although a defect in service may, under some circumstances, constitute a reasonable excuse for a default (see *Equicredit Corp. of Am. v Campbell*, 73 AD3d 119, 900 NYS2d 907 [2d Dept 2010]; *Ramirez v Romualdo*, 25 AD3d 680, 808 NYS2d 733 [2d Dept 2006]; see also *ACT Prop., LLC v Garcia*, 102 AD3d 712, *supra*; *Dupps v Betancourt*, 99 AD3d 855, 952 NYS2d 585 [2d Dept 2012]), where a claim of defective service is not established and the defendant relies entirely upon such claim as the justification for the default, an excusable default under CPLR 5015(a)(1) or 3012(d) is not established (see *U.S. Bank, Natl. Ass'n. v Smith*, 132 AD3d 848, 19 NYS3d 62 [2d Dept 2015]; *Summitbridge Credit Inv., LLC v Wallace*, 128 AD3d 676, 9 NYS3d 320 [2d Dept 2015]; *Community W. Bank, N.A. v Stephen*, 127 AD3d 1008, *supra*; *U. S. Bank Natl. Assoc. v Harding*, 124 AD3d 766, 998 NYS2d 667 [2d Dept 2015]; *HSBC Bank USA, Nat. Assoc. v Miller*, 121 AD3d 1044, *supra*; *Bank of New York v Samuels*, 107 AD3d 653, 968 NYS2d 93 [2d Dept 2013]; *Deutsche Bank Natl. Trust Co. v Pietranico*, 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]).

Here, no reasonable excuse was advanced by the moving defendant in support of her application to vacate her default in answering and for leave to extend the time to answer under CPLR 3012(d). The defendant's claim of improper service of process has been found by this court to be lacking in merit and thus cannot serve as a reasonable excuse for her default in answering (see *U.S. Bank, Natl. Ass'n. v Smith*, 132 AD3d 848, *supra*; *Community W. Bank, N.A. v Stephen*, 127 AD2d 1008, *supra*; *U.S. Bank Nat. Ass'n v Harding*, 124 AD3d 766, *supra*). Since no other reasonable excuse is advanced in the moving papers, the defendant failed to establish the first prong of the two prong test necessary for the establishment a vacatur of her default in answering. Even if it were otherwise, no meritorious defense is discernable from the facts alleged in the proposed answer or in the moving papers.

The remaining portions of the instant motion, including the defendant's demands for a permanent stay of any foreclosure sale and an award of "actual, compensatory, punitive and statutory damages" are wholly lacking in merit and are thus denied. While the court considers these demands to be frivolous as that term is defined in 22 NYCRR Part 130-1.1(c), more troubling are certain factual allegations set forth in the affidavit of defendant, Diane Cordovano, and the affirmation of her counsel, Peter D. Tamsen, Esq., which are flatly contradicted by the record maintained by the court in this action.

In her affidavit in support of the instant motion, defendant Diane Cordovano, being duly sworn under oath, states as follows: "That, I became aware of the Foreclosure action when I received a Notice of Sale in the mail at my home address, 638 Ocean Avenue, Bohemia, New York 11716, from the law firm of Davidson Fink on September 13, 2016" (see ¶ 27 of the affidavit of Diane Cordovano, sworn to on September 23, 2016). Defendant Cordovano further states "That, after I received the Notice of Sale, I immediately contacted the Law Offices of Peter D. Tamsen, P.C., and asked how could this happen if I never received any notice of the bank starting a foreclosure action against me." (see *id.*, at ¶ 28).

These statements are patently misleading, if not false, as defendant Cordovano appeared in this mortgage foreclosure action by her counsel, Peter D. Tamsen, Esq., back in January of 2011, when he

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executed a stipulation to adjourn the foreclosure settlement conference from January 11, 2011 to January 26, 2011, and thereafter, more formally appeared by the filing of a notice of appearance on February 9, 2011, the date the third settlement conference was held by quasi judicial personnel assigned to the specialized mortgage foreclosure conference part of this court. By virtue of the foregoing, the court directs the Chief Clerk of this court or his designee to transmit a copy of this order, the papers submitted on the instant motion as well as all papers maintained by the Clerk of this court in this action to the Suffolk County District Attorney, at his offices in the Arthur F. Cromarty Criminal Court Building, 210 Center Drive, River head, New York 11901.

Also misleading, if not false, are the following assertions of fact set forth by defense counsel in his affirmation in support of the instant motion: "That, I have recently been retained to represent the interests of Diane Cordovano, the defendant herein in connection with the above captioned action" and "That, I was recently contacted by defendant, Diane Cordovano, who informed me that her home located at 71 Norton Street, Patchogue, New York 11722 was the subject of a Foreclosure action under the above reference index number herein" (*see* ¶¶ 1 and 3 of the affirmation of Peter D. Tamsen, Esq., dated September 23, 2016). Defense counsel goes on to assert "That, the defendant first became aware of this foreclosure action when she received a Notice of Sale in the mail from the law firm of Davidson Fink on September 13, 2016 which stated that her home located at 71 Norton Street, Patchogue, New York 11722 was going to be sold at public auction on September 27, 2016" (*see id.*, at ¶ 63). These factual assertions go well beyond over zealous or even irresponsible advocacy thereby warranting a referral thereof to the Attorney Grievance Committee for the Second Department, Tenth Judicial District. The court thus directs the Chief Clerk of this Court, or his designee to transmit a copy of this order, the papers submitted on the instant motion as well as all papers maintained by the Clerk of this court in this action to the offices of the Attorney Grievance Committee, Second Department, Tenth Judicial District, at its offices located at 150 Motor Parkway, Suite 102, Hauppauge, New York 11788.

DATED: 11/9/17

  
THOMAS F. WHELAN, J.S.C.