

<b>Suffolk Fed. Credit Union v Schultes-Smith</b>
2017 NY Slip Op 31081(U)
April 26, 2017
Supreme Court, Suffolk County
Docket Number: 12109/2013
Judge: Howard H. Heckman, Jr.
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SUPREME COURT - STATE OF NEW YORK  
IAS PART 18 - SUFFOLK COUNTY

**PRESENT:**  
**HON. HOWARD H. HECKMAN, JR., J.S.C.**

INDEX NO.: 12109/2013  
MOTION DATE: 01/06/2017  
MOTION SEQ. NO.: 003 MD

-----X  
SUFFOLK FEDERAL CREDIT UNION,

Plaintiffs,

-against-

CYNTHIA J. SCHULTES-SMITH, CHRISTOPHER  
E. SMITH, SR.,

Defendants.  
-----X

**PLAINTIFFS' ATTORNEY:**  
CAMPASANO LAW FIRM  
2000 DEER PARK AVENUE  
DEER PARK, NY 11729

**DEFENDANT'S ATTORNEY:**  
GENEVIEVE LANE LOPRESTI, ESQ.  
3958 MERRICK ROAD  
SEAFORD, NY 11783

Upon the following papers numbered 1 to 40 read on this motion ; Notice of Motion/ Order to Show Cause and supporting papers 1-15 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 16-36 ; Replying Affidavits and supporting papers 37-38 ; Other Sure-reply 35-40 ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by defendant Cynthia J. Schultes-Smith brought on by Order to Show Cause (Baisley, J.) dated December 21, 2016 seeking an order pursuant to CPLR 2004, 2005, 3012, 3211, 3408, 5015 & 6301: 1) setting aside the sale of the foreclosed premises; 2) vacating the Judgment of Foreclosure and Sale (Budd, J.) dated December 18, 2015 and the Order (Budd, J.) dated October 16, 2014 granting a default judgment in favor of the plaintiff; 3) dismissing the complaint for failure to obtain personal jurisdiction over the defendant; 4) granting leave for defendant to serve and file a late answer; 5) remanding the action to the foreclosure settlement part; 6) compelling the mortgage lender to offer a loan modification 7) sanctioning the plaintiff including awarding reasonable attorneys fees, costs and disbursements and scheduling a bad faith hearing; 8) voiding the referee's deed transferring title to the plaintiff; 9) reinstating the mortgage and staying acceleration of the amounts due under the mortgage; 10) compelling the plaintiff to sell the premises to the defendant; 11) enjoining eviction proceedings and permitting the defendant and her animals to continue to reside at the mortgaged premises without further interference; and 12) substituting incoming counsel Genevieve Lane-Lopresti as defendant's attorney in place and stead of Frank Blangiardo, Esquire is denied.; and it is further

**ORDERED** that the stay imposed as a result of the Court's (Baisley, J.) execution of the December 21, 2016 Order to Show Cause is hereby vacated.

Plaintiff commenced this action to foreclose a mortgage in the original sum of \$248,000.00 executed by defendants Cynthia J. Schultes-Smith and Christopher E. Smith Sr. in favor of Suffolk Federal Credit Union. On the same date both defendants executed a promissory note promising to re-

pay the entire amount of the indebtedness to the mortgage lender. The defendants defaulted in making timely monthly mortgage payments beginning October 1, 2012 and thereafter defaulted in appearing in the action by failing to timely serve an answer. By Order (Budd, J.) dated October 16, 2014 plaintiff's unopposed default judgment motion was granted and a referee was appointed to compute the sums due and owing to the plaintiff. A Judgment of Foreclosure and Sale (Budd, J.) was granted on December 18, 2015. The foreclosure sale was held on September 13, 2016 and title to the premises was conveyed to the Suffolk Federal Credit Union by the referee on the same date. A ten day notice to quit was personally served on the defendant on December 10, 2016. Defendant submitted this motion seeking injunctive and plenary relief on December 21, 2016. The motion has been adjourned on consent of the parties until April 25, 2017 and the defendant continues to reside in the premises.

Defendant's motion seeks an order setting aside the sale of the premises; vacating the prior order granting a default judgment and the judgment of foreclosure and sale; dismissing plaintiff's complaint or, in the alternative granting leave to serve a late answer and to remand the action to the foreclosure settlement conference part; imposing sanctions based upon the plaintiff's claimed bad faith; and granting various forms of injunctive and equitable relief including voiding the referee's deed, enjoining eviction proceedings, reinstating the mortgage, compelling the lender to issue a loan modification, compelling the Credit Union to sell the premises to the defendant and scheduling a bad faith hearing based upon the plaintiff's unreasonable refusal to deal fairly with the borrower. Defendant submits two affidavits and two affirmations of counsel and claims that she has a reasonable excuse for her failure to serve an answer based upon the fact that she was never personally served with the summons and complaint. Defendant also claims that she has a meritorious defense to plaintiff's action since the mortgage documents are "contradictory" and were never fully explained to her. Defendant states that the affidavit of service of the summons and complaint is "patently false" since: 1) she retains a specific, independent recollection of the date service was claimed to have been made upon her personally approximately 3 and ½ years ago and recalls that she was riding her tractor taking care of the fields for her horses until 9:00 p.m on that day accompanied by a friend who was assisting her.; 2) the area where she lived was "dense" "gated" and inaccessible to the process server; and 3) the description provided by the process server was inaccurate as she did not have brown and grey hair, was not 58 years of age, was 20 pounds lighter than described, and never spoke with the process server about her military service. Defendant claims numerous other affidavits of service of documents including motion papers, the judgment of foreclosure and sale, and the 10 day notice to quit submitted by the mortgage lender are false since she was never served with these records and documents. Defendant asserts that she is entitled to equitable relief and seeks to pay a "fair share for what is mine" and claims that she is being "ripped off". Defendant also claims that the bank official and the court attorney/referee did not treat her fairly during settlement discussions claiming that the court attorney granted her only one settlement conference despite begging for one simple adjournment. Defendant states that both the referee and her then attorney refused to afford her an opportunity to complete the process of filling out forms for a loan modification, with counsel yelling at her to: "sell everything and drive around in a little car...". Defendant seeks another opportunity to pay the mortgage as she claims she "always (has) as evidenced by my payment history".

In opposition, the plaintiff submits an attorney's affirmation and claims that no legal basis exists to justify granting the defendant's motion. Plaintiff contends that the defendant defaulted in appearing by failing to serve an answer to the complaint and has provided neither a reasonable

excuse for her default, nor an arguably meritorious defense to the foreclosure action. Plaintiff claims that the affidavit of service executed by the process server provides sufficient proof that the mortgage lender has obtained jurisdiction over the defendant and contends that absent the submission of any credible proof to deny such service the defendant's motion must be denied. Plaintiff also claims that counsel for the credit union has acted in good faith during the two settlement conferences conducted in court and that no basis exists to grant injunctive relief or to vacate any of the prior orders and judgments granted by the court based upon the defendant's default.

Initially, it should be noted that court records indicate that the defendant continues to represent herself as a pro se litigant. It remains counsel's duty to file a notice of appearance with the Clerk of the Court to reflect incoming counsel's representation of the defendant in this action.

A defendant seeking to vacate a default in appearing in an action pursuant to CPLR 5015 must provide a reasonable excuse for the default and demonstrate a potentially meritorious defense (see *Eugene DiLorenzo, Inc. v. A.C. Dutton Lbr., Co.*, 67 NY2d 138, 501 NYS2d 8 (1986); *Deutsche Bank National Trust Co. v. Gutierrez*, 102 AD3d 825, 958 NYS2d 472 (2<sup>nd</sup> Dept., 2013)). However absent proper service of the summons and complaint a default judgment is a nullity since a court lacks in personam jurisdiction over the defendant (CPLR 5015(a) *Prudence v. Wright*, 94 AD3d 1073, 943 NYS2d 185 (2<sup>nd</sup> Dept., 2012); *Emigrant Mortgage Company, Inc. v. Westervelt*, 105 AD3d 896, 964 NYS2d 543 (2<sup>nd</sup> Dept., 2013); *Deutsche Bank National Trust Co. v. Pestano*, 71 AD3d 1074, 899 NYS2d 269 (2<sup>nd</sup> Dept., 2010)).

Ordinarily a process server's affidavit of service constitutes prima facie evidence of proper service (*U.S. Bank, N.A. v. Tauber*, 140 AD3d 1154, 36 NYS3d 144 (2<sup>nd</sup> Dept., 2016); *FV-I, Inc. v. Reid*, 138 AD3d 922, 31 NYS3d 119 (2<sup>nd</sup> Dept., 2016); *Wachovia Bank, N.A. v. Greenberg*, 138 AD3d 984, 31 NYS3d 110 (2<sup>nd</sup> Dept., 2016); *MERS v. Losco*, 125 AD3d 733, 5 NYS3d 112 (2<sup>nd</sup> Dept., 2015); *NYCTL v. Tsafatinos*, 101 AD3d 1092, 956 NYS2d 571 (2<sup>nd</sup> Dept., 2012)). A defendant may rebut the process server's affidavit by submitting an affidavit containing specific and detailed contradictions of the claims in the process server's affidavit, but bare, conclusory and unsubstantiated denials of service are insufficient to rebut the presumption of proper service (*U.S. Bank v. Peralta*, 142 AD3d 988, 37 NYS3d 308 (2<sup>nd</sup> Dept., 2016); *Washington Mutual Bank v. Huggins*, 140 AD3d 858, 35 NYS3d 127 (2<sup>nd</sup> Dept., 2016); *Wells Fargo Bank v. Christie*, 83 AD3d 824, 921 NYS2d 127 (2<sup>nd</sup> Dept., 2011); *U.S. Bank, N.A. v. Tate*, 102 AD3d 859, 958 NYS2d 722 (2<sup>nd</sup> Dept., 2013); *Beneficial Homeowners Serv. Corp. V. Girault*, 60 AD3d 984, 875 NYS2d 815 (2<sup>nd</sup> Dept., 2009)). A defendant's sworn affidavit denying service, together with claims of significant discrepancies between the appearance and the description of the person served by the process server will necessitate a hearing (see *Machovec v. Svoboda*, 120 AD3d 772, 992 NYS2d 279 (2<sup>nd</sup> Dept., 2013); *Emigrant Mortgage Services v. Westervelt, supra.*; *Wells Fargo Bank, N.A. v. Final Touch Interiors, LLC*, 112 AD3d 813, 977 NYS2d 351 (2<sup>nd</sup> Dept., 2013)). However, claimed discrepancies which are unsubstantiated and of a minor, slight or inconsequential nature are insufficient to warrant a hearing on the issue of service (*IndyMac Federal Bank, FSB v. Hyman*, 74 AD3d 751, 901 NYS2d 545 (2<sup>nd</sup> Dept., 2010); *Beneficial Homeowner Service Corp. v. Girault, supra.*)).

The record shows that the process server served the defendant Cynthia J. Schultes-Smith by personal delivery pursuant to CPLR 308(1) at the mortgaged premises on May 22, 2013 at 7:42 p.m. The description of the person served was a white female with brown/grey hair, approximately 58-62 years of age who was between 5 foot 3 inches and 5 foot 7 inches and weighed between 130 and 140

pounds. Defendant submits an affidavit claiming: 1) that she was never personally served with the summons and complaint; 2) that she was riding her tractor on that date until 9:00 p.m. and was therefore not able to receive papers; 3) that the area where she was allegedly served was gated and inaccessible; and 4) that the description of her appearance was inaccurate since she did not have brown and grey hair, was not 58 years of age, never spoke to anyone about military service and her weight was “totally off as it was in excess of 20 pounds”.

Based upon the evidence submitted, the affidavit of the process server provided prima facie evidence of proper service of the summons and complaint to establish jurisdiction over her pursuant to CPLR 308(1). It was thus incumbent upon the defendant to rebut the prima facie showing by submission of specific and substantiated claims regarding lack of service. Defendant’s affidavit wholly fails to rebut the presumption of due service upon her. Defendant’s claimed discrepancies of her appearance with respect to her age, weight and color of her hair are either minor (age) or are not substantiated by any relevant, admissible proof other than her own self serving estimates of her appearance at the time. There is no objective evidence submitted in the form of either confirming documentary proof in the form of a driver’s license or contemporaneous photo identification, or an affidavit of an independent observer who would support the defendant’s self description of her own appearance. Moreover, defendant’s affidavit states that on the evening of the alleged service, she had a friend assisting her while she worked, yet there is no affidavit from this individual to support the assertions made by Schultes-Smith denying service. Having submitted unsubstantiated and conclusory denials of service and receipt of papers, the defendant’s application to dismiss the complaint for failure to obtain personal jurisdiction over her is denied (*Wells Fargo Bank, N.A. v. Tricarico*, 139 AD3d 722, 32 NYKS3d 213 (2<sup>nd</sup> Dept., 2016); *IndyMac v. Hyman*, 74 AD3d 751, 901 NYS2d 545 (2<sup>nd</sup> Dept., 2010); *U.S. Bank, N.A. v. Peralta, supra.*; *Wells Fargo Bank, N.A. v. Walter*, 142 AD3d 992, 37 NYS3d 446 (2<sup>nd</sup> Dept., 2016)).

With respect to the defendant’s application seeking leave to serve a late answer, the law requires proof to establish a reasonable excuse for the defendant’s failure to timely serve an answer and a showing of an arguably meritorious defense (*Deutsche Bank National Trust Co. v. Gutierrez, supra.*; *Deutsche Bank National Trust Co. v. Karlis*, 138 AD3d 915, 30 NYS3d 228 (2<sup>nd</sup> Dept., 2016); *U.S. Bank v. Cherubin*, 141 AD3d 514, 36 NYS3d 154 (2<sup>nd</sup> Dept., 2016)). Defendant has wholly failed to submit any reasonable explanation for her prolonged default in timely serving an answer and to provide an arguably meritorious defense to plaintiff’s foreclosure action. Defendant’s only defense are her claims that the mortgage documents are “contradictory” and that the lender had a duty to explain the obligations she incurred as a result of signing the note and mortgage. Neither assertion provides the necessary showing of a meritorious defense.

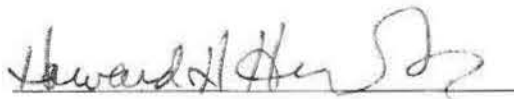
With respect to the defendant’s application seeking injunctive relief, the law is clear that in order to obtain a preliminary injunction the moving party must establish by clear and convincing evidence: 1) a likelihood of success on the merits; 2) irreparable injury absent a preliminary injunction; and 3) that the equities balance in her favor (*Chase Home Finance, LLC v. Cartelli*, 140 AD3d 911, 32 NYS3d 515 (2<sup>nd</sup> Dept., 2016); *Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 NY3d 839, 800 NYS2d 48 (2005); *Zoller v. HSBC Mortgage Corp.*, 135 AD3d 932, 24 NYS3d 168 (2<sup>nd</sup> Dept., 2016); *M.H. Mandelbaum Orthotic & Prosthetic Services, Inc. v. Werner*, 126 AD3d 859, 5 NYS3d 517 (2<sup>nd</sup> Dept., 2015)). The decision to grant or deny injunctive relief lies in the sound discretion of the trial court (*see Matter of Armanida Realty Corp. v. Town of Oyster Bay*, 126 AD3d 894, 3 NYS3d 612 (2<sup>nd</sup> Dept., 2015)). On the basis of this record defendant’s request for injunctive

relief must be denied. The defendant has failed to make any clear showing of a likelihood of success on the merits or to prove that the balancing of the equities weigh in her favor given the fact that mortgage payments have not been made since October 1, 2012.

Finally, with respect to the defendant's claims of bad faith and her contention that she is entitled to equitable relief, the law is clear that while a court retains inherent equitable power to ensure that foreclosure is not made an "instrument of injustice" (see *Alkaiji v. Celestial Church of Christ Calvary Parish*, 24 AD3d 476, 477, 808 NYS2d 230 (2<sup>nd</sup> Dept., 2005) quoting *Guardian Loan Co. v. Early*, 47 NY2d 515, 520, 419 NYS2d 56 (1992)), in this instance there has been no credible evidence of injustice submitted by the defendant warranting this court's further intervention. A foreclosing party has no obligation to modify the terms of a loan freely entered into by a borrower and the failure to offer a loan modification does not provide any defense to a mortgagor who has defaulted in making payments under the terms of the original agreement (see *Citibank, N.A. v. Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 (2<sup>nd</sup> Dept., 2012)). This record reveals that the defendant has defaulted in making payments for the past 54 months and there is no credible proof submitted to support defendant's assertions that the credit union has acted in bad faith or in excess of its jurisdiction. Defendant's claim of unfair treatment by the court attorney/referee is itself incredible and the balance of her contentions do not provide believable factual grounds sufficient to grant injunctive relief or to vacate any of the prior orders or judgment entered in this foreclosure action. Based upon these circumstances no legal grounds exist to further delay the defendant's eviction from the premises.

Accordingly, the defendant's motion is denied in its entirety and the stay imposed as a result of the execution of the order to show cause is hereby vacated.

Dated: April 26, 2017



J.S.C.