To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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US BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR LEHMAN XS TRUST MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-7N,

Plaintiff,

-against-

ESTELLE KING-CRAWFORD AKA ESTELLE R. CRAWFORD, INDIVIDUALLY AND AS SURVIVING JOINT TENANT OF JEFFREY KING, HILLARY J. CLARKSON, MIDLAND FUNDING LLC, PEOPLE OF THE STATE OF NEW YORK, THE DARTMOUTH PLAN, INC., JOHN DOES (being fictitious, the names unknown to Plaintiff intended to be tenants, occupants, persons or corporations having or claiming an interest in or lien upon the property described in the complaint or their heirs at law, distributees, executors, administrators, trustee, guardians, assignees, creditors or successors.)

Defendants.

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DECISION & ORDER

Index No. 58329/2015
Sequence No. 2

WOOD, J.

The following papers were read in connection with defendant Estelle King-Crawford aka Estelle R. Crawford, pro se -motion ("defendant"):

Defendant's Notice of Motion, Defendant's Answer in Support, Proposed Answer, Exhibits.
Bank's Notice of Rejection.
Bank's Counsel's Affirmation in Opposition, Exhibits.

This is a foreclose action on a note and mortgage executed by Jeffrey King on real property known as 27 Mechanics Avenue in Tarrytown. The defendant attended seven foreclosure settlement

conferences, but a settlement could not be reached, and on August 12, 2016 the matter was released from the conference part, and the Bank was advised it could proceed with the instant action. Defendant failed to file an answer, did not appear in the action, and the time to do so was never extended. Defendant now requests that the court extend her time to answer, appear or otherwise move with respect to the summons and complaint.

Now, defendant seeks in effect to vacate her default, and to have the court dismiss this action on the grounds that the court lacks personal jurisdiction over her due to the fact that she was never personally served with any notice in this action. In opposition, the Bank contends, *inter alia,* that defendant is in default; and was properly served with the summons and complaint. Based upon the foregoing, the motion is decided as follows:

As a general rule, a defendant seeking to vacate a default in appearing and answering the complaint and to compel the plaintiff to accept a late answer is required to provide a reasonable excuse for the default and demonstrate the existence of a potentially meritorious defense to the action (U.S. Bank Nat. Ass'n v Sachdev, 128 AD3d 807 [2d Dept 2015]). The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the court (Khanal v Sheldon, 74 AD3d 894 [2d Dept 2010]). Moreover, for the meritorious cause of action requirement, a moving party is only required to demonstrate the existence of a possibly meritorious defense that merely set forth facts sufficient to make out a prima facie showing (Quis v Bolden, 298 AD2d 375 [2d Dept 2002]). If the moving party fails to establish a reasonable excuse for the default, the court need not determine whether the party has established the merits of the claim or defense (Lutz v Goldstone, 31 AD3d 449, 450 [2d Dept 2006]).

As a threshold matter, the court will examine the propriety of service upon defendant. CPLR 308 requires that service be attempted by personal delivery of the summons "to the person to be served" (CPLR 308 [1]), or by delivery "to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode" (CPLR 308[2])."Jurisdiction is not acquired pursuant to CPLR 308(2) unless both the delivery and mailing requirements have been strictly complied with (Washington Mut. Bank v Murphy, 127 AD3d 1167, 1174 [2d Dept 2015])."A person's 'actual place of business' must be where the person is physically present with regularity, and that person must be shown to regularly transact business at that location" (1136 Realty, LLC v 213 Union St. Realty Corp., 130 AD3d 590, 591 [2d Dept 2015]).

If there is a sworn denial that defendant was served with process, a hearing must be held whereby plaintiff has the burden of establishing jurisdiction by a preponderance of the evidence (Mortgage Access Corp. v Webb, 11 AD3d 592, 593 [2d Dept 2004]). However, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavits (Chichester v Alal-Amin Grocery & Halal Meat, 100 AD3d 820 [2d Dept 2012]). A mere denial of receipt is insufficient to rebut the presumption of proper service created by a properly executed affidavit of service (Malik v Noe, 54 AD3d 733, 734 [2d Dept 2008]).Where the validity of service of the summons and complaint is challenged, the plaintiff has the burden of proving proper service by a preponderance of the evidence (Munoz v Reyes, 40 AD3d 1059 [2d Dept 2007]). In those instances in which process has not been served upon a defendant, all subsequent proceedings will be rendered null and void (Washington Mut. Bank v Murphy, 127 AD3d 1167, 1174 [2d Dept. 2015]). Further, a defendant's eventual awareness of pending litigation will not affect

the absence of jurisdiction over him or her where service of process is not effectuated in compliance with CP LR 308 (Washington Mut. Bank v Murphy, 127 AD3d 1167, 1174 [2d Dept 2015]).

Here, the court finds that the affidavit of the process server constitutes prima facie evidence of proper service pursuant to CPLR 308(1). The Affidavit of Service recites that on May 19, 2015, at 3:54 P.M., defendant was served with the foreclosure pleading by delivering a true copy thereof to said defendant personally, as described as a female with brown skin, covered hair, age 75, height 5'4-5'7 and 125 pounds to 149 pounds at the mortgaged premises.

Defendant asserts that she is in fact 90 years of age and will be 91 in March of this year. She does not recall being personally served with a copy of the foreclosure proceedings. She claims at the time of service, she was 89 years of age and weighed approximately 210 pounds. She claims that the affidavit of service does not describe her accurately.

However, these minor differences in defendant's description, do not rise to rebut the prima facie showing of service. Accoridngly, defendant has not established a reasonable excuse for her default in answering. Defendant does not deny being served, but alleges she does not recall being personally served.

Next, defendant has moved to compel the Bank to accept her late answer months after the release of the action from the settlement conference part. Defendant filed this motion approximately 19 months after her initial time to answer expired. Specifically, this action was released from the settlement conference part in August 2016, and defendant filed this motion seven months after in March 2017.

While the court recognizes that CPLR 3408 has been amended to permit a defendant to serve and file an answer without any substantive defenses deemed to have been waived within thirty days

of the initial appearance at the settlement conference, defendant does not even meet this more lenient standard.

"A defendant who appears at the settlement conference but who failed to file a timely answer, pursuant to rule 320 of the civil practice law and rules, shall be presumed to have a reasonable excuse for the default and shall be permitted to serve and file an answer, without any substantive defenses deemed to have been waived within thirty days of initial appearance at the settlement conference. The default shall be deemed vacated upon service and filing of an answer" (CPLR. 3408)

The amended version of CPLR 3408 is effective on December 20, 2016.. Since the initial settlement conferences in this matter took place in September 2015, over a year and a half ago, and defendant seeks to compel plaintiff to accept a late answer, well past thirty days of the initial appearance at the settlement conference, defendant's motion is denied.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

Accordingly, based upon the totality of the circumstances presented, and the equities involved, the court orders the following relief: It is hereby

ORDERED, that defendant's motion is denied; and it is further

ORDERED, that the Bank shall serve a copy of this order with notice of entry upon all of the parties to this action within ten (10) days of entry, and file proof of service within five (5) days of service in accordance with the protocols of the NYSCEF.

Dated: **August 15, 2017**
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

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