

Bank of Am., N.A. v Tatou
2017 NY Slip Op 31879(U)
September 5, 2017
Supreme Court, Queens County
Docket Number: 17591/13
Judge: Allan B. Weiss
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M E M O R A N D U M

SUPREME COURT QUEENS COUNTY
CIVIL TERM PART 2

BANK OF AMERICA, N.A., SUCCESSOR BY
MERGER TO BAC HOME LOANS SERVICING, LP
FKA COUNTRYWIDE HOME LOANS SERVICING, LP

Plaintiff,

-against-

ABDELAZIZ TATOU, If he be living,
or if he be dead, the respective
heirs-at-law, next of kin, distributees,
executors, administrators, trustees,
devises, legatees, assignees, lienors,
creditors, successors in interest
and generally all persons having or
claiming under, by or through said
defendant who may be deceased, by purchase,
inheritance, lien or inheritance
lien or otherwise any right, title or
interest in or to the real property
described in the complaint,
BHANMATTIE RAGUNANDAN, et al.

Defendants.

HON. ALLAN B. WEISS

Index No.: 17591/13

Motion Date: 6/15/17

Motion Seq. No.: 2

This is an action to foreclose a mortgage, dated April 25, 2008 given by defendant, Bhanmattie Ragunandan (hereinafter the defendant), who was then the fee owner of the premises known as 111-27 169th St., Jamaica, NY, to Countrywide Bank, FSB, to secure repayment of a note, evidencing a loan in the principal amount of \$ \$445,000.00, with interest. Plaintiff alleges that the defendant defaulted under the terms of the mortgage and note by failing to make the monthly installment payments due and owing beginning on April 1, 2010, and continuing to the present, and

that as a consequence, it elected to accelerate the entire mortgage debt.

The plaintiff now moves for an Order amending the caption by substituting FEDERAL NATIONAL MORTGAGE ASSOCIATION ("FANNIE MAE") as plaintiff in place of Bank of America, N.A., Successor by Merger to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing, LP; appointing a referee to ascertain and compute the amounts due plaintiff; and, in effect, for an Order pursuant to CPLR 306-b extending its time to serve the defendant, ABDELAZIZ TATOU, by publication with the first date of publication to be made on August 26, 2016 and upon granting the extension deeming the service upon ABDELAZIZ TATOU timely made.

The defendant opposes and cross-moves to dismiss the complaint pursuant to CPLR 3215(c) or to dismiss the complaint insofar as it is asserted against her for lack of personal jurisdiction pursuant to CPLR 5015(a)(4), or in the alternative, for an Order vacating the defendant's default in failing to appear or answer the complaint pursuant to CPLR 317 and CPLR 5015(a)(1) &(3).

The branch of the defendant's motion pursuant to CPLR 3215(c) to dismiss the complaint insofar as asserted against her as abandoned is denied. Although the plaintiff failed to seek leave to enter a default judgment within one year after defendant's default in answering, it demonstrated a reasonable excuse and the

existence of a meritorious causes of action and the lack of prejudice to the defendant (see CPLR 3215 [c]; Maspeth Fed. Sav. & Loan Assn. v Brooklyn Heritage, LLC, 138 AD3d 793 [2016]; LNV Corp. v Forbes, 122 AD3d 805, 806-07 [2014]; Countrywide Home Loans, Inc. v Brown, 19 AD3d 638 [2005]; see also HSBC Bank USA v Clayton, 146 AD3d 942, 944 [2017], lv to appeal denied sub nom. HSBC Bank USA, Nat. Ass'n v Clayton, 29 NY3d 1073 [2017]).

When a defendant seeking to vacate her default raises both a jurisdictional objection pursuant to CPLR 5015 (a) (4) and seeks a discretionary vacature pursuant to CPLR 5015 (a) (1), "the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacature of the default under CPLR 5015 (a) (1)" (HSBC Bank USA, Nat. Ass'n v Miller, 121 AD3d 1044, 1045 [2014] quoting Canelas v Flores, 112 AD3d 871, 871 [2013]).

"A process server's affidavit of service constitutes prima facie evidence of proper service" (Countrywide Home Loans Servicing, LP v Albert, 78 AD3d 983, 984 [2010]). Although generally a defendant's sworn denial of receipt of service 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 [1986]), no hearing is required where the defendant fails to swear to 'specific facts to rebut the statements in the process server's

affidavits' " (Scarano v Scarano, 63 AD3d 716, 716 [2009] quoting Simonds v Grobman, 277 AD2d 369, 370 [2000]).

The affidavit of service with respect to the defendant avers that the defendant was served in accordance with CPLR 308(1) on September 24, 2013 at 101-68 121st St., South Richmond Hill, NY 11419 by delivering the summons and complaint and required notices to the defendant herself who represented to the process server that she was Bhanmattie Ragunandan. The affidavit of service also described the person to whom delivery was made as a female, brown skin, black hair, 50 years old, 5'-5'3" tall and weighing 125-149lbs.

In support of her motion, defendant asserts that she was not served and that she does not fit the description of the person allegedly served because she is a very light skinned female, over the age of 50, just over 5ft. tall and weighing less than 125lbs. The court finds that service was properly made pursuant to CPLR 308(1). The claimed discrepancies between the appearance of the defendant and the description in the process server's affidavit of service are too minor to warrant a hearing (see Indymac Federal Bank, FSB v Hyman, 74 AD3d 751 [2010]; Wells Fargo Bank, N.A. v McGloster, 48 AD3d 457, 458 [2008]; NYCTL 1997-1 Trust v Nillas, 288 AD2d 279 [2001]; Simmons First Natl. Bank v Mandracchia, 248 AD2d 375 [1998]).

The defendant's claim that the affidavit of service is

invalid as to her because the record owner was not served with process within 30 days of filing the Notice of Pendency is without merit. CPLR 6512 provides in pertinent part that a notice of pendency is effective only if, within thirty days after filing, a summons is served upon the defendant. Nothing in this statute has any effect on the service of process even if service is not made within 30 days of filing of the notice of pendency. Moreover, the defendant does not have standing to object to the validity of the notice of pendency since she is not a "person aggrieved" by the filing (CPLR 6514[a]). The defendant transferred title to the property to Abdelaziz Tatou by deed dated October 20, 2009 thereby divesting herself of all interest in the subject property (see Temple Bnai Shalom of Great Neck v Village of Great Neck Estates, 32 AD3d 391, 392 [2006]; Matter of Commercial Bank of Informatics & Computing Technique Dev. Bank Informtechnika v Ostashko, 274 AD2d 516, 517 [2000]).

Accordingly, the branch of the defendant's motion to dismiss the complaint pursuant to CPLR 3211(a)(8) insofar as it is asserted against her is denied.

The branch of defendant's motion to vacate her default pursuant to CPLR 317 and/or CPLR 5015(a)(1) is denied. Where, as here, the defendant was served by personal delivery, relief from her default in appearing pursuant to CPLR 317 unavailable (see CPLR 317; Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co., 67 NY2d

138, 142-143 [1986]).

A defendant seeking to vacate a default in appearing and answering the complaint and to compel the plaintiff to accept a late answer pursuant to CPLR 5015(a)(1) and CPLR 3012 is required to provide a reasonable excuse for the default and demonstrate the existence of a potentially meritorious defense to the action (see US Bank, N.A. v Samuel, 138 AD3d 1105, 1106 [2016]; U.S. Bank Nat. Ass'n v Sachdev, 128 AD3d 807 [2015]). The defendant failed to establish a reasonable excuse for her default, since the only excuse she proffered was that she was not served with process which the court has determined to be without merit (see U.S. Bank Nat. Ass'n v. Telford, ___ AD3d ___, 2017 WL 3611660; HSBC Bank USA, N.A. v Miller, 121 AD3d at 1046; Bank of N.Y. v Samuels, 107 AD3d 653, 654 [2013]; Reich v Redley, 96 AD3d 1038, 1039 [2012]). Thus, it is unnecessary to consider whether the defendant demonstrated a potentially meritorious defense (see HSBC Bank USA, N.A. v Lafazan, 115 AD3d 647, 648 [2017]; Wells Fargo Bank, N.A. v Cervini, 84 AD3d 789, 790 [2011], including the plaintiff's purported failure to comply with the notice requirements of RPAPL 1304 (see Bank of Am., N.A. v Agarwal, 150 AD3d 651 [2017]; HSBC Bank, USA, N.A. v Clayton, 146 AD3d 942 [2017])).

The defendant's claim that she was not served with the amended pleadings is also without merit. An examination of the

court file reveals that plaintiff filed the affidavit of service of the Order of Publication and the Supplemental Summons and Amended Complaint upon, inter alia, the defendant on July 13, 2016. A properly executed affidavit of service raises a presumption that a proper mailing occurred, and defendant's mere denial of receipt is not enough to rebut this presumption (Engel v Lichterman, 62 NY2d 943, 944-945 [1984]).

Furthermore, the defendant admitted in her affidavit that she was aware that this action and that she was named as a defendant and that she contacted co-defendant, Tatou, who said he would answer the complaint. Although defendant did not state exactly when she obtained such knowledge, she did admit that "after several years" when Tatou did not return her calls she became concerned and contacted an attorney. Defendant knew for "several years" of the pendency of this action, but failed to offer any excuse for waiting "several years" before moving to vacate her default. Her assertion that she is not a lawyer and was unaware that she had to defend this action is not a reasonable excuse for her protracted delay especially in view of the content and warning contained in the specialized summons served in this action to foreclose a residential mortgage (see RPAPL 1320; HSBC Bank USA, Nat. Ass'n v. Rotimi, 121 AD3d 855 [2014]; HSBC Bank USA, Nat. Ass'n v Lafazan, 115 AD3d 647, 648 [2014]).

Accordingly, the defendant's cross-motion is denied.

The branch of the plaintiff's motion, in effect pursuant to CPLR 306-b, for an Order extending the plaintiff's time to serve the defendant, Abdelaziz Tatou, is granted, nunc pro tunc, to the extent that the first publication shall be on August 26, 2016.

The remainder of the plaintiff's motion is granted.

Settle Order.

Dated: September 5, 2017
D#56

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J. S. C.