Short Form Order

SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

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

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GMAC MORTGAGE, LLC,

Plaintiffs,

-against-

BRIAN EBERLE, DOUGLAS EBERLE, BEN FINE, GREEN OFFICE SYSTEMS INC., LAURA A. EBERLE, LONG ISLAND CESSPOOL CO. INC.,

Defendants.

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INDEX NO.: 50055/2009
MOTION DATE: 05/02/2017
MOTION SEQ. NO.: 004 MG
005 MD

PLAINTIFF'S ATTORNEY:
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DEFENDANTS' ATTORNEYS:
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Upon the following papers numbered 1 to 23 read on this motion ; Notice of Motion/ Order to Show Cause and supporting papers 1- 14 ; Notice of Cross Motion and supporting papers 15-19 ; Answering Affidavits and supporting papers 20-21 ; Replying Affidavits and supporting papers 22-23 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

By Order dated April 20, 2017 plaintiff's motion for an order restoring this action, granting a default judgment and appointing a referee to compute the sums due and owing to the mortgage lender was granted without opposition. Court records indicate that timely opposition was submitted by defendant Brian Eberle by service of a cross motion seeking to dismiss the complaint which was received by the Clerk's Office on April 13, 2017 and made returnable by the defendant on April 18, 2017. Plaintiff's motion was thereafter submitted on this Court's motion calendar on April 18, 2017 without opposition. Defendant's cross motion was adjourned for submission until May 2, 2017. The Court signed plaintiff's proposed order restoring the action and granting a default judgment without knowledge of the defendant's cross motion which included opposition to plaintiff's motion. Under such circumstances, it is

ORDERED that the April 20, 2017 Order granting plaintiff's unopposed motion is hereby vacated; and it is further

ORDERED that upon re-submission and consideration of both applications, the motion by GMAC Mortgage, LLC, seeking an order: 1) granting a default judgment; 2) discontinuing this action against the defendants designated as "John Doe"; 3) deeming all non-appearing defendants in default; 4) amending the caption; and 5) appointing a referee to compute the sums due and owing to the plaintiff in this mortgage foreclosure action is granted; and it is further

ORDERED that the cross motion by defendant Brian Eberle seeking an order pursuant to

CPLR 3211(a)(8) & 3404 dismissing plaintiff's complaint as abandoned and for failure to obtain personal jurisdiction over him and cancelling the notice of pendency filed by the plaintiff is denied; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of the Court; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared and not waived further notice pursuant to CPLR 2103(b)(1),(2) or (3) within thirty days of the date of this order and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff's action seeks to foreclose a mortgage in the original sum of $306,000.00 executed by defendant Brian Eberle on November 29, 2001 in favor of Coastal Capital Corp. On that same date the defendant executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. The plaintiff became the owner and holder of the promissory note and mortgage as a result of an assignment dated December 11, 2009. Plaintiff claims that the defendant has defaulted in making timely monthly mortgage payments since July 1, 2009. Plaintiff's motion seeks an order restoring this action as an active case, granting a default judgment based upon defendant Eberle's failure to serve an answer and for the appointment of a referee.

In support of the cross motion and in opposition to plaintiff's motion, defendant Brian Eberle submits an affidavit and two attorney affirmations claims that Eberle was not personally served with the summons and complaint in this foreclosure action and therefore the action must be dismissed for lack of personal jurisdiction. Defendant also claims that the lender's delay in prosecuting this foreclosure action requires that plaintiff's motion to restore this action must be denied and the complaint be dismissed as abandoned. Defendant contends that he has been significantly prejudiced by plaintiff's delay in prosecuting this action.

In response, the plaintiff submits an attorney's affirmation and argues that the process server's affidavit of service provides sufficient evidence to establish jurisdiction over the defendant and that defendant's conclusory denials fail to overcome the plaintiff's prima facie showing that jurisdiction was acquired over defendant Eberle. Plaintiff also claims that there was never an intent to abandon prosecution of this action and no legal basis exists to dismiss the action on those grounds. Plaintiff claims that the delay in prosecution was caused by prior counsel's unintended delay in transferring the file to incoming counsel and that the action should be restored. Plaintiff claims that the mortgage lender has a meritorious claim against the defendant/mortgagor based upon his undisputed failure to make mortgage payments for the past eight years and that the delay in seeking a default judgment has clearly not prejudiced the defendant as he has continued to reside in the premises without making any payments required under the terms of the note and mortgage. Plaintiff also claims that there is sufficient evidence, in the form of an affidavit from the mortgage servicer's representative, to establish the plaintiff's right to foreclose.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material question of fact from the case. The grant of summary judgment is appropriate only when it is clear that no material and triable issues of fact have been presented (*Sillman v. Twentieth Century-Fox*

Film Corp., 3 NY2d 395 (1957)). The moving party bears the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851 (1985)). Once such proof has been proffered, the burden shifts to the opposing party who, to defeat the motion, must offer evidence in admissible form, and must set forth facts sufficient to require a trial of any issue of fact (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 (1979)).

Entitlement to summary judgment in favor of the foreclosing plaintiff is established, prima facie by the plaintiff's production of the mortgage and the unpaid note, and evidence of default in payment (*see Wells Fargo Bank N.A. v. Erobobo*, 127 AD3d 1176, 9 NYS3d 312 (2nd Dept., 2015); *Wells Fargo Bank, N.A. v. Ali*, 122 AD3d 726, 995 NYS2d 735 (2nd Dept., 2014)).

With respect to the jurisdictional issue, ordinarily a process server's affidavit of service constitutes a prima facie showing of proper service (*FV-1, Inc. v. Reid,* 138 AD3d 922, 31 NYS3d 119 (2nd Dept., 2016); *Wachovia Bank, N.A. v. Greenberg,* 138 AD3d 984, 31 NYS3d 110 (2nd Dept., 2016); *Mortgage Electronics Registrations Systems, Inc. v. Losco,* 125 AD3d 733, 5 NYS3d 112 (2nd Dept., 2015)). A defendant may rebut the process server's affidavit by submitting an affidavit containing specific and detailed contradictions of the allegations in the process server's affidavit, but bare, conclusory and unsubstantiated denials are insufficient to rebut the presumption of service (*U.S Bank, N.A. v. Peralta,* 142 AD3d 988, 37 NYS3d 308 (2nd Dept., 2016); *Washington Mutual Bank v. Higgins,* 140 AD3d 858, 35 NYS3d 127 (2nd Dept., 2016); *Wells Fargo Bank, N.A. v. Christie,* 83 AD3d 824, 921 NYS2d 127 (2nd Dept., 2011); *U.S. Bank, N.A. v. Tate,* 102 AD3d 859, 958 NYS2d 722 (2nd Dept., 2013); *Beneficial Homeowners Service Corp., v. Girault,* 60 Ad3d 984, 875 NYS2d 815 (2nd Dept., 2009)).

Based upon this record the process server's affidavit constitutes prima facie evidence of proper service pursuant to CPLR 308(1). Having established jurisdiction over the defendant it is incumbent upon Eberle to rebut the prima facie showing by submission of specific and substantive evidence regarding lack of service. Defendant's affidavit, submitted more than seven years after service was made, is incredible and wholly fails to rebut the presumption of due service upon him. Defendant's affidavit provides a contradictory, conclusory statement which is insufficient to provide legal grounds to dismiss the complaint. The affidavit consists of a bare denial of service, with no explanation of where he resided at the time service was made. Moreover, defendant fails to provide any details which would provide a reasonable explanation concerning why the process server chose to serve Eberle at the location where service was made. Defendant also fails to provide any disinterested witness affidavits to corroborate any facts asserted in his affidavit and does not submit any documentary proof, in the form of a driver's license or other identification papers, containing a photograph of Eberle, which could corroborate his unsubstantiated and self-serving description of himself and include confirmation of his age and details of his appearance which would conflict with the details provided by the process server. Absent such proof the defendant's motion seeking to dismiss the complaint for failure to obtain personal jurisdiction lacks any credible admissible proof in opposition to the process server's affidavit and must therefore be denied (*see Wells Fargo Bank, N.A. v. Tricarico,* 139 AD3d 722, 32 NYS3d 213 (2nd Dept., 2016); *IndyMac Bank v. Hyman,* 74 AD3d 751, 901 NYS2d 545 (2nd Dept., 2010)).

With respect to the issue of "abandonment" raised initially by the plaintiff in its motion to "restore" and again asserted by the defendant in his cross motion seeking to dismiss the complaint, a review of official court records indicates that this action has remained active within the court system since its inception by filing on Christmas Eve, 2009. Those official court records reveal that an affidavit of service was filed claiming that the defendant was personally served with the summons and complaint pursuant to CPLR 308(1) on January 18, 2010. Defendant defaulted in appearing in this action by failing to serve an answer. Court records indicate that court mandated settlement conferences were thereafter held on November 4, 2011, February 14, 2012, May 10, 2012 and July 19, 2012. Defendant appeared for each conference but was not represented by counsel. At the conclusion of the July 19, 2012 conference the court attorney/referee marked the action as "not settled". Court records further indicate that plaintiff's motion for an order of publication was granted by Order (Spinner, J.) dated September 27, 2010 and that plaintiff's motion seeking a substitute guardian ad litem was withdrawn by letter dated September 20, 2011. The Court has reviewed the county clerk file which contains a "Consent to Change Attorney" stipulation which was signed by a representative of the outgoing attorneys' firm (Rosicki, Rosicki & Associates, P.C.) on January 14, 2014 and countersigned by a representative of plaintiff's present law firm (Leopold & Associates) on January 29, 2014. Case management records reveal that the "Consent to Change Attorney" was filed with the County Clerk on February 7, 2014. Although plaintiff claims that the clerk's office "purged" this action from the active calendar on October 9, 2015 (citing records from an unofficial source identified as "e-Courts"), there is no proof in either the county clerk file or case management court records to prove that this action was ever purged or marked inactive, or to show that there was ever an order rendered by the court to dismiss this action as "abandoned".

With respect to plaintiff's application to restore this action as an active foreclosure case, official court records show that this action has remained active since the summons, complaint and notice of pendency were filed and therefore plaintiff's motion seeking to "restore" an active foreclosure action must be denied as moot. Moreover, even were this court to accept an unofficial entry indicating that this action was administratively purged by the clerk on October 9, 2015, such administrative activity cannot dismiss an action pursuant to CPLR 3404 where no note of issue has been filed since such pre-note cases are the subject of the requirements of CPLR 3216 (*see Deutsche National Bank Trust Co. v. Cotton,* 147 AD3d 1020, 46 NYS3d 913 (2nd Dept., 2017); *BankUnited v. Kheyfets,* 2017 WL 2126424, 2017 NY Slip Op 03923 (2nd Dept., 2017)). No basis therefore exists to dismiss plaintiff's action as "abandoned" particularly in view of the fact that there has been no prejudice resulting from the delay in case activity based upon defendant's more than eight year breach in making any payments to the mortgage lender.

With respect to plaintiff's motion for a default judgment and the appointment of a referee, plaintiff has submitted evidence to prove the bank's entitlement to a default judgment. The submission of an affidavit from the mortgage servicer's vice president satisfies the business records exception to the hearsay rule and establishes the fact that the defendant has defaulted under the terms of the mortgage by failing to make timely monthly mortgage payments since July 1, 2009 (*see SRMOF II 2012-I Trust v. Tella,* 139 Ad3d 599, 33 NYS3d 25 (1st Dept., 2016); *Bank of New York Mellon v. Traore,* 139 AD3d 1009, 32 NYS3d 283 (2nd Dept., 2016)). The bank, having proven entitlement to a default judgment, it is incumbent upon the defendant to submit relevant, evidentiary proof sufficiently substantive to raise genuine issues of fact concerning why the lender is not entitled to foreclose the mortgage. Defendant has wholly failed to do so and therefore plaintiff's motion must be granted.

Accordingly, defendant's cross motion is denied and plaintiff's motion seeking an order granting a default judgment and for the appointment of a referee must be granted. Plaintiff is directed to submitted another proposed Order of Reference forthwith.

Dated: September 7, 2017

HON. HOWARD H. HECKMAN, JR.

J.S.C.