

U.S. Bank Trust, N.A. v Zaidi
2017 NY Slip Op 32288(U)
October 12, 2017
Supreme Court, Suffolk County
Docket Number: 25094/2009
Judge: Howard H. Heckman Jr.
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

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

COPY

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

INDEX NO.: 25094/2009
MOTION DATE: 08/15/2017
MOTION SEQ. NO.: 005 MG
006 MD

-----X
U.S. BANK TRUST, N.A.,

Plaintiffs,

-against-

BINA ZAIDI, INDIVIDUALLY AND AS
ADMINISTRATOR OF THE ESTATE OF NADEEM
NOORMOHAMMED a/k/a NADEEM NOOR, a/k/a
NADEME NOOR,

Defendants.

-----X

PLAINTIFF'S ATTORNEY:
FEIN, SUCH & CRANE, LLP
1400 OLD COUNTRY RD., STE. C103
WESTBURY, NY 11590

DEFENDANT'S ATTORNEY:
KATERINA N. ARVANITAKIS, ESQ.
150-39 14TH AVE., 2ND FLOOR
WHITESTONE, NY 11357

Upon the following papers numbered 1 to 33 read on this motion ___; Notice of Motion/ Order to Show Cause and supporting papers 1- 21 (#006); Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 22-33 ___; Replying Affidavits and supporting papers ___; Other ___; (and after hearing counsel in support and opposed to the motion) it is,

By Order dated January 27, 2017 plaintiff's motion for an order granting a default judgment and appointing a referee to compute the sums due and owing to the mortgage lender was granted without opposition. Defense counsel has submitted sufficient proof to show that plaintiff's notice of motion dated August 29, 2016 was never properly served upon defendant's attorney since defense counsel had previously served and filed a Notice of Change of Address of the attorney's law office dated March 1, 2016 upon all parties to this foreclosure action. Plaintiff's affidavit of service attached to the motion papers indicates that the motion was erroneously served upon defense counsel at her former address. Under these circumstances defendant Zaidi has provided a reasonable excuse for her failure to oppose the prior motion and in the interest of justice the defendant is entitled to submit opposition to the motion, which has been accomplished by the defendant's submission of her motion (seq # 006). Accordingly it is

ORDERED that the January 27, 2017 Order granting plaintiff's unopposed motion is hereby vacated; and it is further

ORDERED that upon re-submission and consideration of both motions submitted by the parties, the motion by U.S. Bank Trust, N.A., seeking an order: 1) granting a default judgment; 2) discontinuing this action against the defendants designated as "John Doe #1" through "John Doe #5" and "Jane Doe #1" through "Jane Doe #5"; 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 motion by defendant Bina Zaidi, Individually and as Administrator of the Estate of Nadeem Noormohammed seeking an order pursuant to CPLR 2221, 3012(d), 3211(a)(1)(3)&(8), 3408 & 5015 is granted solely to the extent that defendant's application seeking leave to renew and re-argue this Court's prior Order dated January 27, 2017 and upon such renewal and reargument vacating the prior order is granted; and it is further

ORDERED that defendant's remaining requests for relief seeking an order dismissing plaintiff's complaint based upon lack of personal jurisdiction over the defendants, based upon lack of standing and based upon documentary evidence requiring dismissal or, in the alternative, denying plaintiff's motion and granting leave to permit defendant to serve and file a late answer and directing a hearing to determine whether the plaintiff acted in bad faith by delaying prosecution of this action are 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 \$442,500.00 executed by Nadeem Noormohammed on June 26, 2007 in favor of Washington Mutual Bank, F.A. 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 May 13, 2014. Plaintiff claims that the mortgage has been in default since October 1, 2008. Plaintiff commenced this action by filing a notice of pendency, summons and complaint in the Suffolk County Clerk's Office on June 30, 2009. Defendant Bina Zaidi and Nadeem Noormohammed defaulted in timely serving an answer. Plaintiff's unopposed motion for an order granting a default judgment and for the appointment of a referee was granted by Order (Pitts, J.) dated October 13, 2009. The sole borrower/mortgagor Nadeem Noormohammed died on December 9, 2009.

By Order (Pitts, J.) dated August 31, 2015 plaintiff's unopposed motion for an order vacating the prior October 13, 2009 Order of Reference and granting a new Order of Reference was granted. Thereafter by Order (Pitts, J.) dated April 6, 2016 the August 31, 2015 Order of Reference was vacated on the basis of a clerical error. Justice Pitts' April 16, 2016 Order granted amendment of the caption to substitute Bina Zaida as Administrator of the Estate of Nadeem Noormohammed as a named party defendant in place and stead of decedent Nadeem Noormohammed and granted leave for both parties to renew their motions including plaintiff's motion for a default judgment and the appointment of a referee and defendant's motion for dismissal of the complaint or, in the alternative, granting defendant leave to serve a late answer.

Plaintiff thereafter served its motion seeking a default judgment and for the appointment of a

referee which was not served upon defendant's counsel resulting in this Court's Order of Reference dated January 27, 2017. Having vacated that Order the motions submitted by the parties include plaintiff's motion seeks an order granting a default judgment and for the appointment of a referee and defendant's motion seeking dismissal of plaintiff's complaint based upon lack of personal jurisdiction over the defendants, plaintiff's lack of standing and documentary evidence requiring dismissal or, in the alternative, permitting Zaida to serve a late answer and requiring a CPLR 3408 bad faith hearing to determine the damages to be awarded the defendant.

Among the defenses asserted by defendant Zaida to plaintiff's motion and in support of her motion to dismiss are plaintiff's alleged failure to serve defendant Zaida and decedent Noormohammed with the summons and complaint thereby failing to obtain personal jurisdiction over them and plaintiff's lack of standing to prosecute this action. Defendant also claims that even if the complaint is not dismissed, Zaida should be granted leave to serve an answer and that sanctions should be imposed after conducting a "bad faith" hearing required under the terms of CPLR 3408 based upon the plaintiff's prolonged delay in prosecuting this action.

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. Eroboho*, 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)).

A defendant seeking to vacate a default in appearing and answering a complaint must demonstrate both a reasonable excuse for the default and the existence of a potentially meritorious defense (*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 (2nd Dept., 2013); *U.S. Bank, N.A. v. Samuel*, 138 AD3d 1105, 30 NYS3d 305 (2nd Dept., 2016); *TCIF REO GCM, LLC v. Walker*, 139 AD3d 704, 32 NYS3d 223 (2nd Dept., 2016); CPLR 317 & 3012(d)). However, absent proper service of the summons and complaint upon a defendant, a court lacks jurisdiction and the complaint must be dismissed without the need to demonstrate an arguably meritorious defense (CPLR 5015(4); *Prudence v. Wright*, 94 AD3d 1073, 943 NYS2d 185 (2nd Dept., 2012); *Emigrant Mortgage Co., Inc. v. Westervelt*, 105 AD3d 896, 964 NYS2d 543 (2nd Dept., 2013); *Deutsche Bank National Trust Co. v. Pestano*, 71 AD3d 1074, 899 NYS2d 269 (2nd Dept., 2010)).

With respect to the jurisdictional issue, ordinarily a process server's affidavit of service

constitutes a prima facie showing of proper service (*FV-I, 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(2). Having established jurisdiction over the defendants it is incumbent upon Zaida to rebut the prima facie showing by submission of specific and substantive evidence regarding lack of service. Defendant's affidavit, submitted more than six years after service was made, is conclusory, self-serving and not credible, and wholly fails to rebut the presumption of due service upon the defendants. Defendant's affidavit describes irrelevant, minute details concerning how her late husband's appearance differs from the description of the individual served by the process server even though there is no claim whatsoever by the process server that he personally served her husband with the summons and complaint. The affidavit of service does attest to service upon an individual identified as David Morrison whose appearance is described in detail Defendant's only relevant contradiction to the process server's affidavit is therefore a claim that the individual described by the process server is "fictitious" since "no David Morrison exists". The remainder of defendant's affidavit does not provide any further explanation concerning why substituted service could not have been made at the premises where she and her husband resided, and fails to provide any disinterested witness affidavits to corroborate any facts asserted in her affidavit which would provide an evidentiary basis to raise any genuine issue of fact to contradict the process server's affidavit. . Absent such evidence 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 defendant's application seeking leave to serve a late answer, the law requires proof to establish a reasonable excuse for the defendants' failure to timely serve an answer and a showing of an arguably meritorious defense (*see Deutsche National Trust Company v. Gutierrez, supra.*; *Deutsche Bank National Trust Co. v. Karlis*, 138 AD3d 915, 30 NYS3d 228 (2nd Dept., 2016); *U.S. Bank, N.A. v. Cherubin*, 141 AD3d 514, 36 NYS3d 154 (2nd Dept., 2016)). Defendant has wholly failed to provide any reasonable excuse for her failure to serve a timely answer to plaintiff's complaint. And the absence of a reasonable excuse renders it unnecessary to determine whether the defendant demonstrated the existence of a potentially meritorious defense (*see Summitbridge Credit Investments, LLC v. Wallace*, 128 AD3d 676, 9 NYS3d 320 (2nd Dept., 2015); *Deutsche Bank National Trust Co. v. Rudman*, 80 AD3d 651, 914 NYS2d 672 (2nd Dept., 2011); *Deutsche Bank National Trust Co. v. Gutierrez, supra.*; *Deutsche Bank National Trust Co. v. Pietranico*, 102 AD3d 724, 957 NYS2d 868 (2nd Dept., 2013); *Wells Fargo Bank, N.A. v. Russell*, 101 AD3d 860, 955 NYS2d 654 (2nd Dept., 2010)).

Equally without merit is defendant's assertion that plaintiff's complaint must be dismissed for lack of standing. Defendant defaulted in serving an answer and remains in default while contesting the plaintiff's motion. Case law is legion that a defendant in default waives any right she might have had to contest standing as a result of her default in serving an answer or her default in serving a motion to dismiss prior to expiration of the time to answer (*HSBC Bank USA v. Angeles*, 143 AD3d 671, 38 NYS3d 580 (2nd Dept., 2016); *Nationstar Mortgage, LLC v. Avella*, 142 AD3d 594, 36 NYS3d 679 (2nd Dept., 2016); *Bank of New York Trust Co. v. Chiejina*, 142 AD3d 570, 36 NYS3d 679 (2nd Dept., 2016); *Chase Home Finance, LLC v. Garcia*, 140 AD3d 820, 31 NYS3d 894 (2nd Dept., 2016); *U.S. Bank, N.A. v. Gulley*, 137 AD3d 1008, 27 NYS3d 601 (2nd Dept., 2016)). Moreover, even were this court to consider the merits of defendant's lengthy standing argument, plaintiff has submitted sufficient evidence in the form of an affidavit from a representative of the mortgage servicer (which qualifies as admissible pursuant to the business records exception to the hearsay rule (CPLR 4518)) to prove that it has standing to maintain this action since the mortgage assignee had physical possession of the note prior to commencement of this action. Substitution of a party which obtains or receives a transfer of ownership interest in the mortgage during the pendency of the foreclosure action provides no grounds to dismiss the complaint once standing has been established (CPLR 1018; *Buywise Holding, LLC v. Harris*, 31 AD3d 681, 821 NYS2d 213 (2nd Dept., 2006)).

With respect to defendant's request for a "bad faith" hearing, CPLR 3408 quite clearly only applies only to a borrower who "is a resident of the property subject to foreclosure". The facts are undisputed that neither this defendant (nor her late husband) ever resided in the mortgaged premises and therefore there is no legal basis to warrant a "CPLR 3408" hearing. Nor has there been credible proof submitted to show that sanctions are warranted based upon the plaintiff's delay in prosecuting this foreclosure action. Plaintiff has failed to submit proof that the mortgage lender knew or should have known of her husband's demise and it would seem that the extended delay in seeking judgment would have a likely benefit to the defendant given the wholesale failure to make any mortgage, insurance or real estate tax payments for years with the likely added benefit of rental income during this extended period of time.

Finally, with respect to plaintiff's motion for a default judgment and the appointment of a referee, plaintiff has submitted sufficient evidence to prove the bank's entitlement to a default judgment. The submission of an affidavit from the mortgage servicer's authorized signatory satisfies the business records exception to the hearsay rule and establishes the fact that there has been a default under the terms of the mortgage by a failure to make timely monthly mortgage payments since October 1, 2008 (*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 Trust, 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, the remaining requests for relief set forth in defendant's motion are 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 submit another proposed Order of Reference within twenty days..

Dated: October 12, 2017

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