

Deutsche Bank Natl. Trust Co. v Begum
2017 NY Slip Op 32349(U)
September 27, 2017
Supreme Court, Queens County
Docket Number: 704976/2016
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR HSI ASSET LOAN
OBLIGATION TRUST 2006-2, MORTGAGE
PASS-THOROUGH CERTIFICATES, SERIES
2006-2,

Index No.: 704976/2016
Motion Date: 9/25/17
Motion No.: 41
Motion Seq.: 5

Plaintiff,

- against -

KULSUM BEGUM, RES11053 CORP., AMERICAN
BROKERS CONDUIT, THE CITY OF NEW YORK
DEPARTMENT OF HOUSING PRESERVATION &
DEVELOPMENT OFFICE OF HOUSING
PRESERVATION, CITY OF NEW YORK
ENVIRONMENTAL CONTROL BOARD,

Defendants.

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The following electronically filed documents read on this Order to Show Cause by defendants KULSUM BEGUM and RES11053 CORP. (collectively hereinafter defendants) for an Order granting defendants' motion to renew and reargue an Order to Show Cause filed by defendants' prior counsel dated January 12, 2017 based upon new evidence and law office failure; and upon renewal and/or reargument vacating the default judgment of foreclosure and sale entered on May 15, 2017 pursuant to CPLR 5015 and dismissing this action as a matter of law because personal jurisdiction was not obtained over defendants and due to plaintiff's failure to comply with RPAPL 1303 and 1304 and due to the existence of excusable default and meritorious defenses, or, in the alternative, permitting defendants to file a late answer pursuant to CPLR 3012(d) and CPLR 2004:

	Papers <u>Numbered</u>
Order to Show Cause-Affidavits-Exhibits.....	EF 97 - 124
Affirmation in Opposition.....	EF 127
Affirmation in Reply.....	EF 128

This mortgage foreclosure action pertains to the property located at 145-42 106th Avenue, Jamaica, New York 11435.

Plaintiff commenced this action by filing a notice of pendency, summons and complaint on April 27, 2016. Defendants interposed a late answer, which was rejected by plaintiff as untimely. A settlement conference was held on August 8, 2016. Defendants appeared through their attorneys Petroff Amshen LLP, and this matter was released from the conference part. The Residential Foreclosure Conference Order notes that "defendant wants to litigate and is not seeking a loan modification." Plaintiff was granted an ex parte Order of Reference on October 14, 2016. Defendants filed an Order to Show Cause seeking to, inter alia, dismiss the complaint and vacate the Order of Reference. By Short Form Order dated April 6, 2017, this Court denied defendants' application on the grounds that defendants failed to offer any reasonable excuse for the default in answering the complaint. By memorandum decision dated May 9, 2017, this Court granted plaintiff, without opposition, a Judgment of Foreclosure and Sale without opposition. Defendants now seek to renew and reargue the prior Order of this Court dated April 6, 2017 and entered on April 18, 2017.

Pursuant to CPLR 2221(d), a motion to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." It is well established that motions for reargument are addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the facts or the law or for some other reason mistakenly arrived at its determination (see Everhart v County of Nassau, 65 AD3d 1277 [2d Dept. 2009]; McDonald v Strah, 44 AD3d 720 [2d Dept. 2007]).

As grounds for reargument, defendants contend that the Court overlooked facts and applicable law. Defendants argue that the Court failed to address any of defendants' submitted meritorious defenses. Defendants contention that the court overlooked the meritorious defenses is misplaced as defendants never met their initial burden of showing a reasonable excuse for the delay to warrant an analysis of a meritorious defense (see Park Lane North Owners, Inc. v Gengo, 151 AD3d 874 [2d Dept. 2017] ["In view of the lack of a reasonable excuse, it is unnecessary to consider whether the defendant demonstrated the existence of a potentially meritorious defense"]; Deutsche Bank Natl. Trust Co. v Conway, 99 AD3d 755 [2d Dept. 2012]; Indymac Fed. Bank FSB v Quattrochi, 99 AD3d 763 [2d Dept. 2012]). Accordingly, defendants' branch of the motion to reargue is denied.

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and . . . shall contain reasonable justification for the failure to present such facts on the prior motion." (CPLR 2221[e][2], [3]; see Coll v Padilla, 5 AD3d 716 [2d Dept. 2004]; Rizzotto v Allstate Ins. Co., 300 AD2d 562 [2d Dept. 2002]). A motion to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation (see May v May, 78 AD3d 667 [2d Dept. 2010]; Renna v Gullo, 19 AD3d 472 [2d Dept. 2005]). The question of what constitutes a reasonable justification and the answering of this question is within the Supreme Court's discretion (see Rowe v NYCPD, 85 AD3d 1001 [2d Dept. 2011]). Leave to renew should be denied unless the moving party offers a reasonable excuse as to why the additional facts were not submitted on the original application (see Fardin v 61st Woodside Assoc., 125 AD3d 59 [2d Dept. 2015]; Singh v Avis Rent A Car Sys., Inc., 119 AD3d 76 [2d Dept. 2014]; Commisso v Orshan, 85 AD3d 845 [2d Dept. 2011]).

As grounds for renewal, defendants contend that prior counsel's law office failures should serve as an excuse for failure to present facts supporting a defense of lack of personal jurisdiction. While the court has discretion to accept law office failure as a reasonable excuse, the excuse must be supported by detailed allegations of fact explaining the law office failure (see Cantor v Flores, 94 AD3d 936 [2d Dept. 2012]; Matter of Esposito, 57 AD3d 894 [2d Dept. 2008]; Gazetten Contr., Inc. v HCO, Inc., 45 AD3d 530 [2d Dept. 2007]). Here, defendants' allegations of their prior attorneys' neglect, errors and omissions are insufficient to constitute a reasonable excuse (see Vardaros v Zapas, 105 AD3d 1037 [2d Dept. 2013]; Heidari v First Advance Funding Corp., 55 AD3d 669 [2d Dept. 2008]; Ortega v Bisogno & Meyerson, 38 AD3d 510 [2d Dept. 2007]). Furthermore, where there is a pattern of willful default and neglect, as defendants' current counsel contends occurred here, the negligence of the attorney is properly imputed to the client (see Carillon Nursing and Rehabilitation Center, LLP v Fox, 118 AD3d 933 [2d Dept. 2014]; Santiago v Santana, 54 AD3d 929 [2d Dept. 2008]). Accordingly, this Court finds that defendants failed to offer a reasonable excuse as to why additional facts pertaining to defendants' allegations of improper service were not supplied on the original application.

Even if this Court were to accept defendants' allegations of law office failure as a reasonable justification for failure to supply additional facts pertaining to the lack of personal

jurisdiction over defendants, defendants failed to rebut the process server's affidavit constituting prima facie evidence of proper service.

A process server's affidavit stating proper service in accordance with CPLR 308 constitutes prima facie evidence of proper service (see Bank, Natl. Assn. v Arias, 85 AD3d 1014 [2d Dept. 2011]; Wells Fargo Bank, NA v. Chaplin, 65 AD3d 588 2d Dept. 2009]; Scarano v Scarano, 63 AD3d 716 [2d Dept. 2009]). However, a defendant's sworn denial of receipt of service, containing specific facts to rebut the statements in the process server's affidavit, "generally rebuts the presumption of proper service established by a process server's affidavit and necessitates an evidentiary hearing" (City of New York v Miller, 72 AD3d 726 [2d Dept. 2010]; see Wells Fargo Bank, N.A. v Christie, 83 AD3d 824 [2d Dept. 2011]; Associates First Capital Corp. v Wiggins, 75 AD3d 614 [2d Dept. 2010]; Washington Mut. Bank v Holt, 71 AD3d 670 [2d Dept. 2010]).

Here, the process server's affidavit of service alleges that defendant Kulsum Begum was served pursuant to CPLR 308(2) on May 7, 2016 at 7:08 p.m. at her dwelling place/usual place of abode located at 622 Marlbolugh Rd Apt 2B, Brooklyn, NY 11226. Process was delivered to Mohammed Islam, defendant's spouse and a person of suitable age and discretion. The mailing component was completed on May 16, 2016.

In support of this application defendant submits her own affidavit dated July 13, 2017 affirming, inter alia, that Mohammed Islam, her spouse, "does not speak English well and denied receiving service when I asked him."

Here, this Court finds Ms. Begum's denial of service lacks the factual specificity and detail required to rebut the prima facie proof of proper service set forth in the process server's affidavits of service (see ACT Props., LLC v Garcia, 102 AD3d 712 [2d Dept. 2013]; Bank of N.Y. v Espejo, 92 AD2d 707 [2d Dept. 2012]; Deutsche Bank Natl. Trust Co. v Hussain, 78 AD3d 989 [2d Dept. 2010]). Ms. Begum does not dispute the physical description of her spouse or that she resides at the address contained in the affidavit of service. Moreover, there is no affidavit from Mr. Islam stating that he did not understand the papers, did not receive the papers, or did not provide the papers to Ms. Begum. Thus, defendants failed to demonstrate that Mr. Islam was not a person of suitable age and discretion for the purpose of receiving process (see Ralph C. Sutro Co. v Valenzuela, 113 AD2d 793 [2d Dept. 1985]). The attorney affirmation submitted on behalf of defendants lacks personal knowledge of the essential

facts offered in support of defendants' argument that they were not served (see Walkes v Benoit, 257 AD2d 508 [1st Dept. 1999][finding that to rebut an affidavit of service, a defendant must personally contest the service on motion]).

Accordingly, based on the above reasons, it is hereby

ORDERED, that defendants KULSUM BEGUM and RES11053 CORP.'s application to renew and reargue is denied, and the original decision is adhered to in its entirety. The remainder of the application is likewise denied.

Dated: September 27, 2017
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.