OneWest Bank, FSB v Corrales
2018 NY Slip Op 30488(U)
March 23, 2018
Supreme Court, Suffolk County
Docket Number: 18263/2013
Judge: Howard H. Heckman, Jr.
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Short Form Order

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

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

INDEX NO.: 18263/2013
MOTION DATE: 02/09/2018
MOTION SEQ. NO.: 001 MG
002 MD

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ONEWEST BANK, FSB,

Plaintiff,

-against-

OSWALDO CORRALES,

Defendants.

---X

PLAINTIFF'S ATTORNEY:
McCABE, WEISBERG & CONWAY, P.C.
145 HUGUENOT ST., STE. 210
NEW ROCHELLE, NY 10801

DEFENDANT'S ATTORNEY:
RONALD D. WEISS, P.C.
734 WALT WHITMAN RD.
MELVILLE, NY 11747

Upon the following papers numbered 1 to 43 read on this motion : Notice of Motion/ Order to Show Cause and supporting papers 1-13 ; Notice of Cross Motion and supporting papers 14-41 ; Answering Affidavits and supporting papers 42-43 ; Replying Affidavits and supporting papers ____; Other ___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff OneWest Bank, FSB, seeking an order: 1) granting a default judgment; 2) substituting Federal National Mortgage Association as the named party plaintiff in place and stead of plaintiff OneWest Bank, FSB; 3) substituting Paul Lachance and Dana Carbone as named party defendants in place and stead of defendants designated as "John Doe" and "Jane Doe"; 4) deeming all defendants in default; 5) amending the caption; and 6) 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 Oswaldo Corrales, seeking an order pursuant to CPLR 3211(a)(3)&(7), 3212, 3012(d), 3215(c), 3408 & 5015 & RPAPL 1304 denying plaintiff's motion and dismissing plaintiff's complaint or, in the alternative, granting defendant leave to vacate his default in serving an answer and permitting defendant leave to serve a late answer 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 $310,500.00 executed

by defendant Oswaldo A. Corrales on June 1, 2005 in favor of BNY Mortgage Company, LLC. On the same date Corrales executed a promissory note promising to re-pay the entire amount of the indebtedness to the lender. Defendant Corrales executed a Home Affordable Modification Agreement (HAMP) on December 22, 2010 creating a single lien in the sum of $331,259.86. The mortgage and note were later assigned to plaintiff OneWest on December 22, 2009. The mortgages and note were subsequently assigned to Federal National Mortgage Association on December 9, 2015. Plaintiff claims that the defendant defaulted in making timely monthly mortgage payments beginning May 1, 2012 and continuing to date. Plaintiff commenced this action by filing the notice of pendency, summons and complaint in the Suffolk County Clerk's Office on July 12, 2013. Defendant thereafter defaulted in serving an answer. Plaintiff's motion seeks an order granting a default judgment and for the appointment of a referee to compute the sums due and owing to the lender. Defendant's cross motion seeks an order dismissing plaintiff's complaint for failure to seek judgment within one year of Corrales' default or, in the alternative, granting defendant permission to serve a late answer.

Among the defenses asserted by the defendant are: 1) plaintiff's complaint must be dismissed as abandoned for failure to seek judgment within one year of his default in answering; 2) plaintiff failed to negotiate a loan modification in good faith; 3) defendant's unintentional failure to serve an answer based upon his belief that he would be offered a loan modification excuses his default; 4) defendant should be entitled to serve a late answer based upon defenses including plaintiff's lack of standing and plaintiff's failure to serve statutorily required pre-foreclosure 90-day notices

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 sufficient facts to require a trial on any issue of fact (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted in favor of the movant 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 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)). Where the plaintiff's standing is placed in issue by the defendant's answer, the plaintiff must also establish its standing as part of its prima facie showing (*Aurora Loan Services v. Taylor*, 25 NY3d 355, 12 NYS3d 612 (2015); *Loancare v. Firshing*, 130 AD3d 787, 14 NYS3d 410 (2nd Dept., 2015); *HSBC Bank USA, N.A. v. Baptiste*, 128 AD3d 77, 10 NYS3d 255 (2nd Dept., 2015)). In a foreclosure action, a plaintiff has standing if it is either the holder of, or the assignee of, the underlying note at the time that the action is commenced (*Aurora Loan Services v. Taylor, supra.*; *Emigrant Bank v. Larizza*, 129 AD3d 94, 13 NYS3d 129 (2nd Dept., 2015)). Either a written assignment of the note or the physical transfer of the note to the plaintiff prior to the commencement of the action is sufficient

to transfer the obligation and to provide standing (*Wells Fargo Bank, N.A. v. Parker*, 125 AD3d 848, 5 NYS3d 130 (2nd Dept., 2015); *U.S. Bank, N.A. v. Guy*, 125 AD3d 845, 5 NYS3d 116 (2nd Dept., 2015)). A plaintiff's attachment of a duly indorsed mortgage note to its complaint coupled with an affidavit or certification in which it alleges that it had possession of the promissory note prior to commencement of the action constitutes due proof of the plaintiff's standing to prosecute its claim for foreclosure and sale (*see Nationstar Mortgage, LLC v. Catizone*, 127 AD3d 1151, 9 NYS3d 315 (2nd Dept., 2015)).

CPLR 3215(c) provides that "if the plaintiff fails to take proceedings for the entry of judgment within one year after a default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion unless sufficient cause is shown why the complaint should not be dismissed." It is however not necessary for a plaintiff to actually obtain a default judgment within one year to avoid dismissal, but rather it is enough that the plaintiff timely takes preliminary steps toward a default judgment of foreclosure and sale (CPLR 3215(d); *Wells Fargo Bank, N.A. v. Combs*, 128 AD3d 812, 10 NYS3d 121 (2nd Dept., 2015)). "As long as proceedings are being taken which manifest an intent not to abandon the case but to seek a judgment, the action should not be subject to dismissal" (*Brown v. Rosedale Nurseries*, 259 AD2d 256, 686 NYS2d 22 (1st Dept., 1999); *Aurora Loan Services, LLC v. Gross*, 139 AD3d 772, 32 NYS3d 249 (2nd Dept., 2016)). Where no motion is interposed within one year a plaintiff is required to establish "sufficient cause" why the complaint should not be dismissed which requires a showing of a reasonable excuse for the delay and a potentially meritorious cause of action (*Wells Fargo Bank, N.A. v. Bonanno*, 146 AD3d 844, 45 NYS3d 173 (2nd Dept., 2017); *Maspeth Federal Savings & Loan Association v. Brooklyn Heritage, LLC*, 138 AD3d 793, 28 NYS3d 325 (2nd Dept., 2016); *Aurora Loan Services, LLC, v. Hiyo*, 130 AD3d 763, 13 NYS3d 554 (2nd Dept., 2015); *Pipinias v. J. Sackaris & Sons, Inc.*, 116 AD3d 749, 983 NYS2d 587 (2nd Dept., 2014); *Giglio v. NTIMP, Inc.*, 86 AD3d 301, 926 NYS2d 546 (2nd Dept., 2011); *Kohn v. Tri-State Hardwoods, Ltd.*, 92 AD3d 642, 937 NYS2d 865 (2nd Dept., 2012)). The determination of whether an excuse is reasonable in any given instance is committed to the discretion of the motion court (*HSBC Bank USA, N.A. v. Grella*, 145 AD3d 669, 44 NYS3d 56 (2nd Dept., 2016); *Maspeth Federal Savings & Loan Association v. Brooklyn Heritage, LLC, supra.*)). Delays attributable to the parties participation in mandatory settlement conferences or in litigation settlement negotiations have been held to negate any intention to abandon the action and are excusable under CPLR 3215(c) (*see HSBC Bank USA, N.A. v. Grella, supra.*; *Brooks v. Somerset Surgical Associates*, 106 AD3d 624, 966 NYS2d 65 (2nd Dept., 2013); *Laourdakis v. Torres*, 98 AD3d 892, 950 NYS2d 703 (1st Dept., 2012)).

Plaintiff's process server's affidavit of service states that defendant Corrales was personally served with a copy of the summons, complaint and RPAPL 1303 notice on July 18, 2013 at the mortgaged premises. Defendant thereafter defaulted in serving a timely answer. Court records show that defendant appeared for five CPLR 3408 court mandated settlement conferences beginning January 3, 2014 and ending October 14, 2014. At the conclusion of the October 14, 2014 conference the court attorney/referee responsible for conducting the conference marked the action "not settled" and the action was remanded to an IAS part. There is no indication in the records maintained by the court that the court attorney/referee considered the mortgage lenders's representatives who appeared for each of the conferences to have failed to act in good faith during the negotiations for a loan modification. This record also shows, through documents submitted by defendant's counsel, that negotiations for a loan modification continued after the five CPLR 3408 conferences well into the following year- 2015. (It also appears that this defendant was the subject of two separate foreclosure

actions- this action, and a second action which was discontinued which concerned mortgaged premises located in Selden, New York).

Based upon this record there is insufficient evidence submitted to support defendant's claims that the plaintiff ever intended to abandon prosecution of this action or that the plaintiff failed to negotiate in good faith. No legal basis therefore exists to dismiss the action as abandoned or to further delay prosecution of this action based upon claims of the lender's bad faith. The evidence of continuous negotiations beginning in January, 2014 and continuing well into 2015, coupled with the delay occasioned by certification requirements mandated by court rules requiring mortgage lenders to confirm the accuracy of all claims set forth in the complaint, provides sufficient evidence to prove plaintiff's lack of intent to abandon prosecution of this action. Nor is there any showing of prejudice to the defendant given the fact that he remains in default of his obligations under the terms of the loan modification agreement by defaulting in making payments since May, 2012.

With respect to defaulting defendant's application seeking leave to serve an answer, a defendant seeking to vacate his default in appearing in an action and seeking leave to serve a late answer must provide a reasonable excuse for the default and demonstrate a potentially meritorious defense (*see 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)). Defendant has provided no reasonable explanation for his failure to attempt to serve an answer for the more than three year period between personal service of the summons and complaint (July 18, 2013) and service of his cross motion seeking such relief on November 11, 2016. No legal grounds therefore exist to permit service of a late answer.

Having failed to provide any reasonable excuse for his delay in serving an answer, it is unnecessary to consider whether the defendant has demonstrated the existence of an arguably meritorious defense to the foreclosure complaint (*Deutsche Bank National Trust Co. v. Rudman*, 80 AD3d 651, 914 NYS2d 672 (2nd Dept., 2011); *Deutsche Bank National Trust Co. v. Gutierrez*, 102 AD3d 825, 958 NYS2d 472 (2nd Dept., 2013); *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., 2012)). Moreover, ever were the court to consider the proposed defenses sought to be asserted, none of the defenses (which include lack of standing and failure to serve pre-foreclosure notices of default) raised in opposition to plaintiff's motion are meritorious since defendant waived his lack of standing defense by defaulting in serving an answer (*see 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., N.A. v. Chiejina*, 142 AD3d 570, 36 NYS3d 512 (2nd Dept., 2016); *U.S. Bank, N.A. v. Gulley*, 137 AD3d 1008, 27 NYS3d 601 (2nd Dept., 2016); *FCDB FF1 2008-1 Trust v. Videjus*, 131 AD3d 1004, 17 NYS3d 54 (2nd Dept., 2015); *Southstar III, LLC v. Enttienne*, 120 AD3d 1332, 992 NYS2d 558 (2nd Dept., 2014); *BAC Home Loans Servicing, LP v. Reardon*, 132 AD3d 790, 18 NYS3d 664 (2nd Dept., 2015); *Wells Fargo Bank Minn., N.A. v. Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 (2nd Dept., 2007)). Moreover, even were the court to consider the underlying merits of defendant's standing argument, the evidence submitted in the form of an affidavit from the mortgage servicer's foreclosure specialist dated July 15, 2016 provides sufficient evidence to prove that the plaintiff had possession of the promissory note prior to the date the action was commenced on July 12, 2013.

[* 5]

This evidence provides ample proof of plaintiff's standing to prosecute this action (*see Wells Fargo Bank, N.A. v. Thomas*, 150 AD3d 1312, 52 NYS3d 894 (2nd Dept., 2017); *FNMA v. Yakaputrz II, Inc.*, 141 AD3d 506, 35 NYS3d 236 (2nd Dept., 2016); *JPMorgan Chase v. Weinberger*, 142 AD3d 643, 37 NYS3d 286 (2nd Dept., 2016); *Nationstar v. Cantizone*, 127 AD3d 1151, 9 NYS3d 315 (2nd Dept., 2015)).

With respect to defendant's claim concerning the plaintiff's alleged failure to serve statutory RPAPL 1304 pre-foreclosure notices, ordinarily service of such notices are considered conditions precedent to a mortgage foreclosure action (*Aurora Loan Services, LLC v. Weisblum*, 85 AD3d 95, 923 NYS2d 609 (2nd Dept., 2011); *First National Bank of Chicago v. Silver*, 73 AD3d 162, 899 NYS2d 256 (2nd Dept., 2010)). However the failure to comply with such provisions are not jurisdictional defects sufficient to provide independent grounds to vacate a default by a party who has otherwise defaulted in appearing in an action (*U.S. Bank, N.A. v. Carey*, 137 AD3d 894, 28 NYS3d 68 (2nd Dept., 2016); *PHH Mortgage Corp. v. Celestin*, 130 AD3d 703, 11 NYS3d 871 (2nd Dept., 2015); *Pritchard v. Curtis*, 101 AD3d 1502, 957 NYS2d 440 (3rd Dept., 2012); *Deutsche Bank National Trust Co. v. Posner*, 89 AD3d 674, 933 NYS2d (2nd Dept., 2011)). In this case, the defendant has failed to provide any reasonable excuse for his failure to timely serve an answer and the mere showing of an arguably meritorious defense (i.e. plaintiff's alleged failure to timely serve pre-foreclosure notices of default) is legally insufficient to provide grounds to set aside its continuing default in appearing in this action (*Flagstar Bank v. Jambelli*, 140 AD3d 829, 32 NYS3d 625 (2nd Dept., 2016); *Pritchard v. Curtis, supra.*; *Wassertheil v. Elburg*, 94 AD3d 753, 941 NYS2d 679 (2nd Dept., 2012)). Moreover, even were the court to also consider the merits of service of the RPAPL 1304 notice, since defendant obtained an "adjustment of debts" by entering into a HAMP agreement dated December 22, 2010, the 90-day notice requirement ceased to apply pursuant to RPAPL 1304 (3). Moreover on the merits, plaintiff has submitted sufficient evidence to establish that, even if the 90-day notice requirement remained in effect, such notices served on the defendant were timely and properly served pursuant to the requirements of RPAPL 1304.

With respect to plaintiff's motion for a default judgment and the appointment of a referee to compute the sums due and owing to the mortgage lender, plaintiff has submitted sufficient evidence in the form of submission of copies of the promissory note and the mortgages, together with an affidavit from the mortgage service provider, which satisfies the business records exception to the hearsay rule, and which shows that the defendant has defaulted under the terms of the parties mortgage loan agreement by failing to make timely monthly payments since May 1, 2012. As the Appellate Division, Second Department, most recently ruled in *Wells Fargo Bank, N.A. v. Thomas, supra.* (May 31, 2017), prima facie entitlement to judgment as a matter of law is established in a foreclosure action by submission of the mortgage, the promissory note and an affidavit from a mortgage loan servicer's employee attesting to the default in payment. Such testimony from the loan servicer's representative does not require personal knowledge of the plaintiff's record-keeping practices and procedures when the loan servicer's representative attests, pursuant to the business records exception to the hearsay rule (CPLR 4518), that the records reflect the defendant's default (*Wells Fargo Bank, N.A. v. Thomas, supra.*; *Citigroup vs. Kopelowitz*, 147 AD3d 1014, 48 NYS3d 223 (2nd Dept., 2017)).

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 mortgage lender is not entitled to foreclose. Defendant has not submitted any

evidence to contradict the fact that the original mortgagor, who has defaulted in appearing in this action, has failed to make timely mortgage payments since May 1, 2012. Accordingly the plaintiff is entitled to an award of judgment.

Defendant's cross motion is denied in its entirety, and plaintiff's motion for an order granting a default judgment and for the appointment of a referee to compute the sums due and owing to the plaintiff is granted. The proposed order appointing a referee has been signed simultaneously with the execution of this order.

Dated: March 23, 2018

HON. HOWARD H. HECKMAN, JR.

J.S.C.