

U.S. Bank N.A. v Werner
2018 NY Slip Op 30848(U)
May 8, 2018
Supreme Court, Suffolk County
Docket Number: 30552/2007
Judge: Howard H. Heckman, Jr.
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SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

PRESENT:

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

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

Plaintiff,

-against-

GLENN WERNER,

Defendants.
-----X

INDEX NO.: 30552/2007
MOTION DATE: 04/25/2018
MOTION SEQ. NO.: #003 MD
004 MG
#005 MD
CASE DISP

PLAINTIFF'S ATTORNEY:
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Upon the following papers numbered 1 to 59 read on this motion; Notice of Motion/ Order to Show Cause and supporting papers 1- 21 (#003), 22-28(#004); Notice of Cross Motion and supporting papers 29-51 (#005); Answering Affidavits and supporting papers 52-57; Replying Affidavits and supporting papers 58-59; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff U.S. Bank, N.A. seeking an order confirming the referee's report dated December 11, 2015 and granting a judgment of foreclosure and sale is granted; and it is further

ORDERED that the motion and cross motion by defendant Glenn Werner seeking an order pursuant to CPLR 317, 2004, 2005, 3211(a)(3)&(5), 3012(d), 3216, 3404, 3408, 5015(1) & 6513: 1) denying plaintiff's motion; 2) vacating the August 3, 2010 Order (Farneti, J.) granting a default judgment; 3) dismissing plaintiff's complaint for failure to obtain personal jurisdiction over the defendant; 4) dismissing plaintiff's complaint based upon abandonment and/or failure to prosecute; 5) vacating defendant's default and granting defendant leave to serve a late answer; 6) directing additional CPLR 3408 court mandated settlement conferences; 7) dismissing plaintiff's complaint based upon expiration of the notice of pendency; 8) dismissing plaintiff's action based upon expiration of the six year statute of limitations period; 9) permitting defendant to quiet title by expunging the mortgage lien; and 10) rejecting confirmation of the referee's report based upon plaintiff's failure to submit admissible proof to support the referee's calculations is denied.

Plaintiff's action seeks to foreclose a mortgage in the original sum of \$464,000.00 executed by defendant Glenn Werner on December 27, 2005 in favor of BNC Mortgage Inc. On that same date defendant Werner executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. The mortgage was subsequently assigned to the plaintiff by assignment dated November 8, 2007. Plaintiff claims that Werner defaulted in making timely monthly mortgage payments beginning June 1, 2007 and continuing to date. Plaintiff commenced this action by filing a notice of pendency, summons and complaint in the Suffolk County Clerk's

Office on December 4, 2007. Defendant defaulted in serving an answer. By Order (Farneti, J.) dated August 3, 2010 plaintiff's unopposed motion for an order granting a default judgment and for the appointment of a referee was granted.

Plaintiff's motion seeks an order confirming the referee's report and for a judgment of foreclosure and sale. Defendant Werner has submitted two motions seeking an order denying plaintiff's motion, vacating the prior Order granting a default judgment, dismissing plaintiff's complaint or, in the alternative, granting leave for defendant to serve a late answer, and remanding this action to the foreclosure settlement part for a CPLR 3408 conference. Defendant's second motion seeks additional relief in the form of an order denying plaintiff's motion for a judgment of foreclosure and sale.

In support of both motions and in opposition to plaintiff's motion, defendant Werner claims that plaintiff's complaint must be dismissed based upon the following grounds: 1) plaintiff's abandonment of prosecution of this action pursuant to CPLR 3404; 2) plaintiff's failure to prosecute this action pursuant to CPLR 3216; 3) plaintiff's failure to prove it has personal jurisdiction over defendant Werner; 4) expiration of the notice of pendency; and 5) expiration of the statute of limitations period for prosecuting this action. In addition defendant requests that this court *sua sponte* "quiet title" to the mortgaged premises after having dismissed plaintiff's complaint. In the alternative, defendant Werner seeks an order: 1) vacating Acting Justice Farneti's August 3, 2010 Order granting a default judgment based upon plaintiff's failure to correct defects set forth in Acting Justice Farneti's February 20, 2009 Order denying plaintiff's default judgment motion; 2) granting leave to permit defendant Werner to serve a late answer; and 3) remanding this action to the foreclosure settlement part for an additional CPLR 3408 court mandated conference. Defendant's second motion seeks additional relief in the form of an order denying plaintiff's motion based upon the mortgage lender's failure to submit sufficient admissible evidence in support of its application to confirm the referee's report of the amount of damages allegedly due the mortgage lender.

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 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)).

Ordinarily a process server's affidavit of service constitutes prima facie evidence of proper service (*U.S. Bank, N.A. v. Tauber*, 140 AD3d 1154, 36 NYS3d 144 (2nd Dept., 2016); *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); *MERS v. Losco*, 125 AD3d 733, 5 NYS3d 112 (2nd Dept., 2015); *NYCTL v. Tsafatinos*, 101 AD3d 1092, 956 NYS2d 571 (2nd Dept., 2012)). A defendant may rebut the process server's affidavit by submitting an affidavit containing specific and detailed contradictions of the claims in the process server's affidavit, but bare, conclusory and

unsubstantiated denials of service are insufficient to rebut the presumption of proper service (*U.S. Bank, N.A. v. Peralta*, 142 AD3d 988, 37 NYS3d 308 (2nd Dept., 2016); *Washington Mutual Bank v. Huggins*, 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 Homeowner Serv. Corp. v. Girault*, 60 AD3d 984, 875 NYS2d 815 (2nd Dept., 2009)).

The process server's affidavit states that the summons, complaint and RPAPL 1303 notice were attempted to be personally served upon defendant Glenn Werner by personal delivery at the mortgaged premises on October 3, 2007 at 7:00 a.m.; on October 6, 2007 at 7:00 p.m.; on October 10, 2007 at 3:30 p.m.; and at October 17, 2007 at 7:15 a.m.. As a result of no individual responding to these four attempts at service, the process server affixed a copy of the summons, complaint and RPAPL 1303 notice to the door of the premises and thereafter mailed a copy of the same papers marked "personal and confidential" by regular first-class mail to the residence on October 19, 2007. Defendant Werner's affidavit states that "I deny that I was served with process. I did not answer because *he* was unaware of the foreclosure action."

Based upon this record the affidavit of the process server constitutes prima facie evidence of proper service pursuant to CPLR 308(4). Having established a prima facie showing of jurisdiction over the defendant, it is incumbent upon the defendant to rebut this prima facie showing by submission of specific and substantive evidence regarding lack of service. The affidavit submitted on behalf of the defendant wholly fails to rebut the presumption of due service upon him. Defendant's affidavit fails to provide any details contradicting the process server's affidavit and merely provides a generalized, conclusory, and self-serving statement that defendant "could have reasonably been at work or in transit to or from work." Defendant provides no details concerning the type of work he was performing, his usual working hours, the approximate distance his work took him from the mortgaged premises or any other specific details to contradict the process server's affidavit. Nor has the defendant submitted an affidavit from a co-worker, employer, acquaintance or any documentary evidence which would provide contradictory proof to plaintiff's claims. Absent such evidentiary proof corroborating defendant's unsubstantiated and conclusory denial of service and receipt of papers, the defendant's application to dismiss plaintiff's complaint for failure to obtain personal jurisdiction over him must be denied (*HSBC Bank USA v. Desrouilleres*, 128 AD3d 1013, 11 NYS3d 93 (2nd Dept., 2015); *JPMorgan Chase Bank, N.A. v. Baldi*, 128 AD3d 777, 10 NYS3d 126 (2nd Dept., 2016)); *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 defendant's claim that the complaint must be dismissed for failure to prosecute, a court's power to dismiss a complaint sua sponte is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal (*see Chase Home Finance, LLC v. Kornitzer*, 139 AD3d 784, 31 NYS3d 559 (2nd Dept., 2016); *Wachovia Bank, N.A. v. Akojenu*, 138 AD3d 1112, 30 NYS3d 659 (2nd Dept., 2016)). While defendant's argument recites CPLR 3404 as legal grounds for "dismissal of abandoned cases", that statute pertains only to actions where a note of issue has been filed and the action has been "stricken" from the court calendar by the court based upon inactivity. In this case no note of issue has ever been filed and defendant's reference to the action as having been "purged" was merely a clerical error since the clerk's office retains no authority to legally purge or to dismiss an action. The legal grounds for dismissing a pre-note of issue action is dictated by the requirements of CPLR 3216 which statute does not permit dismissal "unless a written

demand is served upon the party against whom such relief is sought requiring the plaintiff to serve an affidavit of due diligence within ninety (90) days of receipt of the demand (CPLR 3216(b); *see BankUnited v. Kheyfets*, 150 AD3d 948, 57 NYS3d 159 (2nd Dept., 2017)). In this case no written demand has been served upon the plaintiff and no extraordinary circumstances exist which could possibly warrant dismissal of plaintiff's complaint (*see Deutsche Bank National Trust Co. v. Cotton*, 147 AD3d 1020, 46 NYS3d 913 (2nd Dept., 2017); *Deutsche Bank National Trust Co. v. Rauf*, 139 AD3d 789, 29 NYS3d 811 (2nd Dept., 2016)).

With respect to the defendant's application seeking an order vacating Acting Justice Farneti's August 3, 2010 Order and granting defendant leave to serve a late answer, the law requires proof to establish a reasonable excuse for the defendant's failure to timely serve an answer and a showing of an arguably meritorious defense (*see Deutsche Bank National Trust Co. v. Gutierrez*, 102 AD3d 825, 958 NYS2d 478 (2nd Dept., 2013); *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 his default in timely answering the plaintiff's complaint. Absent any credible explanation for his continuing default, the defendant's application must be denied regardless of whether he has demonstrated the existence of a potentially meritorious defense to plaintiff's action (*U.S. Bank, N.A. v. Cherubin, supra.*; *Aurora Loan Services, LLC v. Lucero*, 131 AD3d 496, 14 NYS3d 707 (2nd Dept., 2015)). The absence of a reasonable excuse renders it unnecessary to determine whether the defendant demonstrated the existence of a potentially meritorious defense to the action (*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., 2012)). And such waiver applies to all the defenses the defaulting defendant seeks to raise in his opposition including lack of standing (*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., 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); *Flagstar Bank, FSB v. Jambelli*, 140 AD3d 829, 32 NYS3d 625 (2nd Dept., 2016); *Wassertheil v. Elburg, LLC*, 94 AD3d 753, 941 NYS2d 679 (2nd Dept., 2012); *Hosten v. Oladapo*, 44 AD3d 1006, 844 NYS2d 417 (2nd Dept., 2007)).

With respect to defendant's claim that plaintiff failed to correct alleged deficiencies recited in Acting Justice Farneti's February 20, 2009 Order which denied plaintiff's motion seeking an order granting a default judgment without prejudice, the doctrine of res judicata prevents a party from litigating a claim which was previously litigated or which ought to have been litigated (*see Siegel, "New York Practice"*, Sections 4442-4443, page 585). The related "law of the case" doctrine is a rule of practice which provides that once an issue is judicially determined either directly or by implication, it is not to be reconsidered by judges or courts of coordinate jurisdiction in the course of the same litigation (*see Martin v. City of Cohoes*, 37 NY2d 162, 371 NYS2d 687 (1975); *J-Mar Service Center, Inc. v. Mahoney, Connor & Hussey*, 45 AD3d 809, 847 NYS2d 130 (2nd Dept., 2007); *Vanguard Tours, Inc. v. Town of Yorktown*, 102 AD2d 868, 477 NYS2d 40 (2nd Dept., 1984); *Holloway v. Cha Laundry, Inc.*, 97 AD2d 385, 467 NYS2d 834 (1st Dept., 1983)).

In this case plaintiff submitted a second motion seeking a default judgment which was

granted by Order (Farneti, J.) dated August 3, 2010. The effect of the second order granting plaintiff's application was to render moot any prior claimed deficiencies in plaintiff's initial application since the legal effect of the default judgment order was to grant all of the relief requested by the plaintiff including deeming all defendants in default and granting judgment in favor of the plaintiff.

With respect to defendant's claim that plaintiff has failed to negotiate in good faith to offer the mortgagor a loan modification, there is no evidence submitted to support defendant's assertion. The legal requirements set forth pursuant to CPLR 3408 for mandatory court settlement conferences were not in effect when this action was commenced in 2007. However, it is undisputed that the defendant was in fact afforded the opportunity for such a conference yet failed to appear for one. The opportunity for such a conference was specifically referenced in the handwritten additions to Acting Justice Farneti's August 3, 2010 Order and was confirmed by the Court's initials in the margin of the Order. The Ordered paragraph states that defendant Werner "failed to avail himself of a settlement conference despite being notified by the court". Such evidence contradicts defense counsel's claim that Werner was not afforded a court settlement conference and no legal or equitable basis exists to further delay prosecution of this action given the fact that the mortgagor has not made a mortgage payment in nearly eleven (11) years.

With respect to defendant's contentions seeking dismissal based upon expiration of the statute of limitations and expiration of the lis pendens, neither argument is sustainable. CPLR 3211(e) provides that a statute of limitations defense is waived unless it is raised in a pre-answer motion to dismiss or asserted in defendant's answer since it is not a jurisdictional defense. Defendant Werner having defaulted in serving an answer for a period of more than ten years has waived any right to assert a statute of limitations defense. Nor is the fact that the original lis pendens expired during the course of prosecution of this action a legal impediment to maintain this action since CPLR 6516 grants the mortgagee authority to file a successive notice of pendency.

With respect to defendant's claim concerning the lack of admissible proof offered by the plaintiff in support of its application to confirm the referee's report and computations, no legal basis exists to deny confirmation of the referee's report. Plaintiff's submissions establish its entitlement to a judgment of foreclosure and sale based upon the referee's report and findings (*see U.S. Bank, N.A. v. Saraceno*, 147 AD3d 1005, 48 NYS3d 163 (2nd Dept., 2017); *HSBC Bank USA, N.A. v. Simmons*, 125 AD3d 930, 5 NYS3d 175 (2nd Dept., 2015); *CitiMortgage, Inc. v. Kidd*, 148 AD3d 767, 49 NYS3d 482 (2nd Dept., 2017); *Matter of Cincotta*, 139 AD3d 1058, 32 NYS3d 610 (2nd Dept., 2016)). In this case the plaintiff submitted sufficient evidence in the form of an affidavit from a document control officer employed by the loan servicer together with sufficient documentary evidence to establish the accuracy of the referee's computations and to confirm the finding that the mortgaged premises should be sold in one parcel (*CitiMortgage, Inc. v. Kidd, supra.*; *Hudson v. Smith*, 127 AD3d 816, 4 NYS3d 894 (2nd Dept., 2015)). As recited hereinabove, the admissibility of such testimony from an employee of the mortgage servicer and agent of the mortgage lender, was considered in plaintiff's motion seeking a default judgment and was determined to be admissible by Acting Justice Farneti prior to rendering his award of judgment in favor of the plaintiff. The admissibility of such testimony having been previously determined by the motion court, the "law of the case" establishes the admissibility of such testimony in support of the referee's findings and this court hereby adopts and confirms the referee's computations and report (CPLR 4311; RPAPL 1321; *Deutsche Bank National Trust Co. v. Williams*, 134 AD3d 981, 20 NYS3d 907 (2nd Dept., 2015);

Deutsche Bank National Trust Co. v. Zlotoff, et al., 77 AD3d 702, 908 NYS2d 612 (2nd Dept., 2010); *Shultis v. Woodstock Land Development Associates*, 195 AD2d 677, 599 NYS2d 340 (3rd Dept., 1993); *Woodridge Hotel LLC v. Hotel Lake House, Inc.* 281 AD2d 778, 711 NYS2d 275 (3rd Dept., 2005); *FDIC v. 65 Lenox Road Owners Corp.*, 270 AD3d 303, 704 NYS2d 613 (2nd Dept., 2000); *Adelman v. Freund*, 234 AD2d 488, 651 NYS2d 604 (2nd Dept., 1996); *Stein v. American Mortgage Banking, Ltd.*, 216 AD2d 458, 628 NYS2d 162 (2nd Dept., 1995)).

Defense counsel's final argument seeks what can only be characterized as *extra extraordinary* relief in the form of requesting that this court sua sponte "quiet title" to the mortgaged premises. This request would necessarily require that the court install, on defendant's behalf, a counterclaim (or complaint) seeking relief in the form of an action pursuant to RPAPL Article 15 and to sua sponte grant judgment with respect to that counterclaim (or complaint) and expunge the mortgage as it presently exists encumbering the premises. Perhaps more simply put, the request is to award an immediate free house to a mortgagor who hasn't made a mortgage payment in ten (10) years and eleven (11) months, and has apparently been the recipient of an arguably distorted form of social welfare throughout this period and until today. As this court sits as a court of equity, such an argument is disingenuous at best and absurd at worst.

Accordingly defendant's motions are denied in their entirety, and plaintiff's motion seeking an order confirming the referee's report and for a judgment of foreclosure and sale is granted. The proposed judgment of foreclosure and sale has been signed simultaneously with the execution of this order.

Dated: May 8, 2018

HON. HOWARD H. HECKMAN, JR.

J.S.C.