

HSBC Bank US, N.A. v Cesario
2018 NY Slip Op 30862(U)
May 10, 2018
Supreme Court, Suffolk County
Docket Number: 00825/2014
Judge: Linda Kevins
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SHORT FORM ORDER

INDEX NO. 00825/2014

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

PRESENT:

Hon. LINDA KEVINS
Justice of the Supreme Court

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HSBC BANK US, NATIONAL ASSOCIATION AS
TRUSTEE FOR ACE SECURITIES CORP. HOME
EQUITY LOAN TRUST, SERIES 2006-HE1, ASSET
BACKED PASS-THROUGH CERTIFICATES,

Motion Date: 2/13/2018
Sequence No. 003
CASE DISP.

Plaintiff,
- against -

**DECISION AND
ORDER**

MICHAEL P. CESARIO, NEW YORK STATE
DEPARTMENT OF LABOR, NEW YORK STATE
DEPARTMENT OF TAXATION & FINANCE, NEW
YORK STATE DEPARTMENT OF LABOR –
UNEMPLOYMENT INSURANCE DIVISION, NEW YORK
STATE DEPARTMENT OF TAXATION & FINANCE TAX
COMPLIANCE DIVISION – CO – ATC, NEW YORK STATE
DEPARTMENT OF TAXATION & FINANCE TAX
COMPLIANCE DIVISION – DO - HIGH VALUE,
WORKERS' COMPENSATION BOARD OF THE STATE
OF NEW YORK, NEW YORK STATE DEPARTMENT OF
TAXATION & FINANCE CIVIL ENFORCEMENT –
SUFFOLK – DO, NEW YORK STATE DEPARTMENT OF
TAXATION & FINANCE CIVIL ENFORCEMENT – REGION
5D, LOWELL ELECTRICAL CONTRACTING INC.,
CHRISTOPHER DEVEAU,

Defendant(s).
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This case has been recently reassigned to Part 29 of this Court. This case had been assigned to Hon. W. Gerard Asher until his retirement. Section (a) of CPLR §2221 states, in pertinent part, that a motion for leave to vacate or modify an Order shall be made, on notice, to the judge who signed the Order, unless he or she is for any reason unable to hear it. Therefore, the matter is properly before this Court.

The following papers have been read:

Defendant Michael P. Cesrario's Order to Show Cause seeking an Order Vacating both the April 11, 2017 Judgment of Foreclosure and Sale and the January 4, 2017 Referee's Report	1
Plaintiff's Affirmation in Opposition to Defendant's Order to Show Cause,	2

The motion is decided as follows:

Facts and Allegations

Plaintiff's action seeks to foreclose a mortgage in the original sum of \$470,000.00 executed by Defendant Michael P. Cesario (hereinafter Defendant), on September 26, 2005, in favor of Plaintiff's predecessor in interest, Fremont Investment & Loan, for property located at 56 Shinnecock Hills Rod, Southampton, New York 11698 (subject property). On the same date, Defendant executed a promissory note promising to repay the entire amount of the indebtedness to the mortgage lender. Defendant alleges, and Plaintiff does not dispute, that a prior foreclosure action had been started against Defendant in this court under Index Number 42245/2009, which was voluntarily discontinued following a Loan Modification Agreement that was entered into on or about December 1, 2009, by Defendant for a principal sum of \$535,644.00, at the reduced interest rate of 7.1%.

Defendant defaulted on his mortgage payments starting on June 1, 2010, and continuing to date. The loan was assigned to Plaintiff on or about September 27, 2013.

This action was started with the service of a Summons and Complaint, pursuant to CPLR §308(2), on January 15, 2014. An Affidavit of Service by Victoria Vinceslio states that at 11:28 AM she delivered the Summons and Complaint, Certificate of Merit, and RPAPL §1303 Notice to Christopher Deveau, "Co-Tenant," and followed up the service by First Class Mail to Defendant addressed to the subject premises; Defendant resides at the subject property.

Defendant acknowledges that he has not served an Answer and his time to do so expired on February 14, 2014. Defendant baldly asserts that he was not served with the Summons and Complaint but does not address any of the particulars set forth in Ms. Vincello's Affidavit of Service.

Foreclosure settlement conferences pursuant to CPLR §3408 were scheduled for July 17, 2014, and October 20, 2014, and the matter was discharged thereafter from the Foreclosure Settlement Conference Part as "not settled."

On December 19, 2014, Plaintiff moved *ex parte* for an Order of Reference, which was granted by Order dated April 30, 2015 (Asher, J.). Thereafter, Plaintiff moved by Notice of Motion on February 9, 2017, for a Judgment of Foreclosure and Sale (JFS), which was granted by Order dated April 11, 2017. The JFS noted that Defendant was in default. A sale of the subject property was set for October 19, 2017, but was stayed when the instant Order to Show Cause was signed on October 17, 2017 (Asher, J.). The Stay has remained in place.

Defendant argues that the JFS must be vacated under CPLR §5015(a)(1) and (4). He claims he was not served with the Summons and Complaint in the present action, and he thought there was no pending action because the first action was discontinued. He claims he can make payments if the loan were modified and that suffices as a meritorious defense. He also asserts that he was not served with the motion that resulted in the granting of the JFS. Finally, Defendant argues that the Referee made two material mistakes that require his report be rejected: 1) he allegedly miscalculated the interest rate by calculating 9.1% instead of 7.1%; and 2) he failed to give Defendant notice of a Referee's Hearing before issuing his report.

In opposition, Plaintiff argues: 1) the Summons and Complaint was properly served; 2) Defendant has not set forth a reasonable excuse or meritorious defense for having defaulted; 3) because Defendant has defaulted, he is not entitled to notice of a Referee's hearing; and 4) even if Defendant was entitled to notice that the Referee was calculating costs, there is no need for a hearing because the Referee made the appropriate calculations.

Analysis

Defendant cites to CPLR §5015(a)(1) and (4) as the basis to vacate the JFS. That statute states:

(a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:

1. excusable default, if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry upon the moving party, or, if the moving party has entered the judgment or order, within one year after such entry; or
4. lack of jurisdiction to render the judgment or order

When a defendant seeks to vacate a default judgment by raising a jurisdictional objection under CPLR §5015(a)(4), and seeks a discretionary vacatur under CPLR §5015 (a) (1), "a court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5015 (a) (1)" (see *Kondaur Capital Corp. v. McAuliffe*, 156 AD3d 778, 67 NYS3d 653 [2d Dept 2017], quoting *Wells Fargo Bank, NA v Besemer*, 131 AD3d 1047, 1047, 16 NYS3d 819, 821 [2d Dept 2015]).

A. Jurisdiction Under CPLR §5015(a)(4) and Service of Process

A defendant seeking to vacate a default for having failed to appear and answer a complaint must show both a reasonable excuse for the default and the existence of a potentially meritorious defense (see, *Wells Fargo Bank, N.A., v. Singh*, 153 Ade 893, 57 NYS3d 903 [2d Dept 2017]; *US Bank, N.A. v. Samuel*, 138 AD3d 1105, 30 NYS3 305 [2d Dept 2016]). Nevertheless, 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 assess whether defendant has a meritorious defense (*Prudence v. Wright*, 94 AD3d 1073, 943 NYS2d 185 [2d

Dept 2012]); *Deutsche Bank National Trust Co. v. Pestano*, 71 AD3d 1074, 899 NYS2d 269 [2d Dept 2010]).

According to CPLR §308(2), in relevant part, personal service upon a natural person may be made "by delivering the summons within the state to a person of suitable age and discretion at the...usual place of abode of the person to be served and by...mailing the summons to the person to be served at his or her last known residence..."

A process server's affidavit constitutes prima facie evidence of proper service (*see U.S. Bank, N.A. v Tauber*, 140 AD3d 1154; 36 NYS3d 144 [2d Dept 2016]; *FV-I, Inc. v Reid*, 138 AD3d 922, 31 NYS3d 119 [2d Dept 2016]; *Machovec v Svoboda*, 120 AD3d 772, 992 NYS2d 279 [2d Dept 2014]). In order to vacate a default judgment under CPLR 5015(a)(4), a defendant must overcome the presumption raised by the process server's affidavit of service (*see Deutsche Bank Natl. Trust Co. v O'King*, 148 AD3d 776, 51 NYS3d 523 [2d Dept 2017]; *Machovec v Svoboda*, 120 AD3d 772). A defendant may defeat the presumption of proper service if he or she provides detailed and specific sworn evidence denying the process server's allegations (*see Machovec v Svoboda, id.*; *Deutsche Bank Natl. Trust Co. v O'King*, 148 AD3d 776; *Deutsche Bank Natl. Trust Co. v DaCosta*, 97 AD3d 630, 631; 949 NYS2d 393 [2d Dept 2012]).

Here, Plaintiff's process server, Victoria Vinceslio, stated in her Affidavit of Service that she delivered the Summons and Complaint to Christopher Deveau at the subject premises and recited a detailed physical description of Mr. Deveau, establishing that he is a person of suitable age and discretion. Likewise, Ms. Vinceslio mailed the Summons and Complaint with attached documents in accordance with CPLR §308(2). The Court therefore finds this Affidavit constitutes prima facie evidence of proper service upon Defendant. The Court also finds that Defendant, on the other hand, fails to adequately rebut the presumption of Service of Process. Defendant provides only a simple denial that he was served with the Complaint and does not challenge any of the allegations made in Ms. Vinceslio's Affidavit. Moreover, Defendant readily admits that he resides at the subject property and does not deny that he knows Christopher Deveau. Service of Process was therefore proper (*see e.g., HSBC Bank USA v. Whitter*, – AD3d –, 2018 NY Slip Op 02146 [2d Dept 2018]).

Based upon the evidence, Defendant's request to vacate under CPLR §5015(a)(4) is denied.

B. Reasonable Excuse and Meritorious Defense Under CPLR §5015(a)(1)

To warrant relief under CPLR §5015(a)(1), Defendant must demonstrate "excusable default" grounds that require a showing of a reasonable excuse for the default and a demonstration of a potentially meritorious defense (*see Bank of N.Y. Mellon v. Genova*, – AD3d –, 2018 NY Slip Op 02179 [2d Dept 2018]; *Deutsche Bank Natl. Trust Co. v Gutierrez*, 102 AD3d 825, 958 N.Y.S.2d 472 [2d Dept 2013]; *see also Wells Fargo Bank, N.A. v Russell*, 101 AD3d 860, 955 N.Y.S.2d 654 [2d Dept 2012]). The facts supporting the asserted meritorious defense must be presented in an affidavit by Defendant or in a proposed verified answer attached to the moving papers (*see Gershman v Ahmad*, 131 AD3d 1104, 16 NYS3d 836 [2d Dept 2015]; *Karalis v New Dimensions HR, Inc.*, 105 AD3d 707, 962 NYS2d 647 [2d Dept 2013]).

The determination of what constitutes a reasonable excuse lies within the discretion of the this Court (see *Mellon v Izmirligil*, 88 AD3d 930, 44 NYS3d 44 [2d Dept 2016]; *Star Indus. Inc. v Innovative Beverages, Inc.*, 55 AD3d 903, 866 NYS2d 357 [2d Dept 2008]). Although a defect in service may, under some circumstances, constitute a reasonable excuse for a default (see *Equicredit Corp. of Am. v Campbell*, 73 AD3d 119, 900 NYS2d 907 [2d Dept 2010]; *Ramirez v Romualdo*, 25 AD3d 680, 808 NYS2d 733 [2d Dept 2006]; see also *ACT Prop., LLC v Garcia*, 102 AD3d 712, 957 NYS2d 884 [2d Dept 2013]; *Dupps v Betancourt*, 99 AD3d 855, 952 NYS2d 585 [2d Dept 2012]), where a claim of defective service is not established and the defendant relies entirely upon such claim as the justification for the default, an excusable default under CPLR 5015(a)(1) is not established (see *U.S. Bank, Natl. Ass'n. v Smith*, 132 AD3d 848, 19 NYS3d 62 [2d Dept 2015]; *Summitbridge Credit Inv., LLC v Wallace*, 128 AD3d 676, 9 NYS3d 320 [2d Dept 2015]; *Community W. Bank, N.A. v Stephen*, 127 AD3d 1008, 9 NYS3d 275 [2d Dept 2015]; *U.S. Bank Natl. Assoc. v Harding*, 124 AD3d 766, 998 NYS2d 667 [2d Dept 2015]; *HSBC Bank USA, Nat. Assoc. v Miller*, 121 AD3d 1044, 995 NYS2d 198 [2d Dept 20014]; *Bank of New York v Samuels*, 107 AD3d 653, 968 NYS2d 93 [2d Dept 2013]; *Deutsche Bank Natl. Trust Co. v Pietranico*, 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]; *Tadco Constr. Corp. v Allstate Ins. Co.*, 73 AD3d 1022, 900 NYS2d 687 [2d Dept 2010]).

Here, Defendant does not articulate any reasonable excuse. Defendant's claim of improper Service of Process has been found by this Court to be lacking in merit and thus cannot serve as a reasonable excuse for failing to answer (see *U.S. Bank, Natl. Ass'n. v Smith*, 132 AD3d 848, 19 NYS2d 62 [2d Dept 2015]; *Community W. Bank, N.A. v Stephen*, 127 AD2d 1008, 9 NYS3d 275 [2d Dept 2015]; *U.S. Bank Nat. Ass'n v Harding*, 124 Ad3d 766, 998 NYS2d 667 [2d Dept 2015]). Defendant's assertion that he was confused by the discontinuance of the earlier foreclosure action is likewise without merit. The Court takes judicial notice that the parties are advised of a Foreclosure Settlement Conference by court personnel. This Notice was sent more than four years after the prior case was discontinued, so any claim of confusion is disingenuous.

Therefore, Defendant's request to vacate under CPLR §5015(a)(1) is denied.

C. Notice of the Judgment of Foreclosure and Sale and Referee's Report

A defendant who has defaulted by having failed to answer in a foreclosure action has waived his or her right to notice of any application for Judgment (see e.g., *Bartlett v Lundin*, 182 AD 117, 169 NYS 391 [3d Dept 1918]) and has waived his or her right to discovery and notice of a Referee's hearing (see e.g., *Indus PVR LLC v. MAA-Sharda, Inc.* 140 AD3d 1666, 34 NYS3d 816 [4d Dept 2016]). Nevertheless, the Court notes that in this case the Affidavit of Service for the Motion for Judgment of Foreclosure and Sale shows that a copy was served upon Defendant (see Exhibit F of Plaintiff's Affirmation in Opposition). The Affidavit of Service carries a presumption of proper service. (See CPLR §§2214 and 2103).

While a referee in a foreclosure action is generally required to hold a hearing on notice to those who have appeared in the action, and to take certain proofs (see CPLR 4313; RPAPL § 1321), no hearing is required where a defendant waives his or her right to notice of the hearing by admitting the default and the amount due in his or her answer or otherwise (see e.g.,

Blueberry Inv. Co. v Ilana Realty, 184 AD2d 906, 585 NYS2d 564 [2d Dept 1992]). Moreover, even in the absence of a waiver, the failure to conduct a hearing on due notice to appearing parties does not necessarily warrant remitting the matter back to the referee to hold a hearing. Unlike references to hear and determine, references to hear and report under RPAPL §1321 are advisory only, leaving the court as the ultimate arbiter of the issues referred (see CPLR 4311; *Shultis v Woodstock Land Dev. Assoc.*, 195 AD2d 677, 599 NYS2d 340 [3d Dept 1993]).

Defendant's claim that the Referee applied the incorrect interest rate when making his calculations is, on its face, not true. A simple reading of the Report and the calculations made shows that the Referee used the rate of 7.1%. This is the amount Defendant claims should have been applied and is, in fact, the rate reflected in the Loan Modification Agreement.

Therefore, upon the foregoing papers, it is hereby

ORDERED, that Defendant's Motion (003) is **DENIED**; and it is further

ORDERED, that the stay imposed by the October 17, 2017 Order (Asher, J.) is hereby vacated; and it is further


ORDERED, that Plaintiff is directed to serve a copy of this Order with Notice of Entry within 20 days of the date of this Order upon all parties who have not waived further notice, as well as upon the Referee, and to promptly file the Affidavit of Service with the Clerk of the Court; and it is further

ORDERED, that upon service of this Order by Plaintiff, the Referee is directed to forthwith reschedule the Foreclosure Sale on notice to all appropriate parties.

Any relief requested and not specifically granted herein is denied.

This constitutes the Order of the Court.

Dated: May 10, 2018


Linda Kevins