

US Bank N.A. v Russo
2018 NY Slip Op 32147(U)
August 29, 2018
Supreme Court, Suffolk County
Docket Number: 48387/2009
Judge: C. Randall Hinrichs
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 49 SUFFOLK COUNTY

PRESENT: HON. C. RANDALL HINRICHS
Justice of the Supreme Court

Motion Date: 004: 6-14-2017; 005: 7-27-2017
Adjourned Date: 8-1-2018
Motion Sequence: 004: MotD; 005: MotD

US BANK NATIONAL ASSOCIATION, AS TRUSTEE,
SUCCESSOR IN INTEREST TO WACHOVIA BANK,
NATIONAL ASSOCIATION, AS TRUSTEE FOR WELLS
FARGO ASSET SECURITIES CORPORATION,
MORTGAGE PASS-THROUGH CERTIFICATES,
SERIES 2004-CC,

GROSS, POLOWY LLC
By Kimberly L. Cioffi, Esq.
Attorneys for Plaintiff
900 Merchants Concourse
Suite 412
Westbury, NY 11590

Plaintiff,

-against-

CHRISTOPHER THOMPSON, ESQ.
Attorney for Defendant
VINCENT RUSSO
33 Davison Lane East
West Islip, NY 11705

VINCENT RUSSO, MARY RUSSO, AMERICAN
EXPRESS CO TRAVEL RELATED SERVICES, INC.,
CAPITAL ONE BANK, CENTURION CAPITAL
CORPORATION ASSIGNEE OF CHASE MANHATTAN
BANK USA NA, COUNTY OF SUFFOLK, GOOD
SAMARITAN HOSPITAL MEDICAL CENTER, HANN
FINANCIAL SERVICE CORPORATION JAWAM, INC.
D/B/A EMPIRE BAIL BONDS, NATIONAL CITY
BANK, NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE,

MARY RUSSO, Defendant Pro Se
43 Westfield Drive
Centerport, NY 11721

Defendant.

Upon the reading and filing of the following papers in this matter: (1) Order to Show Cause by the defendants, dated May 24, 2017, and supporting papers; (2) Affirmation in Opposition by the plaintiff, dated June 12, 2017, and supporting papers; (3) Order to Show Cause by the defendants, dated July 11, 2017, and supporting papers; (4) Affirmation in Opposition by the plaintiff, dated July 24, 2017, and supporting papers, it is

ORDERED that the Orders to Show Cause brought by the defendants, Sequence Numbers 004 and 005, are hereby consolidated for the purposes of this determination; and it is further

ORDERED that the motions by the defendants seeking, *inter alia*, to vacate the Order of Reference and Judgment of Foreclosure and Sale and to vacate their default, are denied, except to the extent that the stay of the foreclosure sale is hereby extended until September 12, 2018, on which date the stay will automatically be lifted.

The plaintiff commenced the instant foreclosure action on December 9, 2009. On February 26, 2010, the defendants Vincent Russo and Mary Russo (“defendants”), through their attorneys Lieto & Greenberg, LLP, served an answer which was returned and rejected by the plaintiff as untimely. The Court’s records reflect that this matter was conferenced numerous times, both in the foreclosure settlement part and in this court’s part, Part 49. Conferences were held on March 3, 2011 (with no appearance by the defendant), March 27, 2013, August 28, 2013 and finally on September 18, 2013. On March 4, 2010, Francis Lieto, Esq. of Lieto & Greenberg, LLP filed a Notice of Appearance for the defendants. On November 16, 2012, a date on which this matter was scheduled for a status conference, Jeannie V. Daal, Esq. of Jeannie V. Daal, P.C. filed a Notice of Appearance for the defendants. Following this matter’s release from the settlement part on September 18, 2013, the plaintiff filed a motion for an order of reference on or about November 12, 2013. The order of reference was unopposed and granted by the Court on April 29, 2014. The referee issued his report on July 21, 2014. On February 9, 2015, the plaintiff filed a motion for a judgment of foreclosure and sale, which was unopposed and granted by the Court on March 17, 2015. A sale was scheduled for April 11, 2016. The defendants then brought an Order to Show Cause representing that they wished to reinstate the loan and were able to meet the reinstatement sum if the Court were to toll a period of interest and late fees, due to unreasonable delays in the case. The Order to Show Cause was signed by Hon. Ralph T. Gazzillo on April 7, 2016, without the provision for a stay of the sale pending a hearing of the motion. The defendant then filed for Chapter 13 Bankruptcy on April 8, 2016 and the sale was cancelled. Upon being advised that the defendant’s bankruptcy case was dismissed on November 15, 2016, this Court considered and denied the defendants’ motion by Order dated February 21, 2017, finding that the defendant failed to provide an excuse for failing to timely answer the complaint, and that any delays in the matter were the result of active settlement negotiations between the parties. The Court further found that the defendants’ mere desire to reinstate the loan or obtain a loan modification did not constitute a reasonable excuse or a meritorious defense (*see Deutsche Bank Natl. Trust Co. v Gutierrez*, 102 AD3d 825 [2d Dept 2013]), nor did it warrant a tolling of interest for a period of time during which loss mitigation efforts were being pursued by the parties.

On May 24, 2017, the defendants brought an Order to Show Cause (Sequence No. 004) seeking an order: (1) granting the defendants’ motion to renew; (2) vacating the default judgment pursuant to CPLR 5015(a)(1); (3) vacating the Order of Reference and Judgment of Foreclosure and Sale; (4) dismissing Plaintiff’s Complaint; and (4) for such other and further relief as is just and proper. The Order to Show Cause was signed by this Court on May 24, 2017. In their motion, the defendants argue that they did not receive notice of the plaintiff’s motions for an Order of Reference and Judgment of Foreclosure because they were served on defendants’ prior counsel, Francis Leito, Esq., and not on the defendants themselves or on their new counsel, Jeannie Daal, Esq.. The defendants seek to vacate their default in opposing the plaintiff’s motions on this ground. They assert that because they were not properly noticed, they were unaware of the motions and thus failed to respond. The defendants stated that upon learning of a scheduled sale, they contacted Jeannie Daal, Esq., who advised them to move to reinstate their loan. By way of their instant motion, defendants also seek to vacate their underlying default in answering on the ground of law office failure. The defendants raise numerous defenses, including CPLR 3215(c), insufficient proof of default, the plaintiff’s failure to comply with the notice requirements of RPAPL 1304 and the contractual notice of default, and the plaintiff’s lack of standing.

On July 11, 2017, the defendants brought another motion by Order to Show Cause (Sequence No. 005) seeking to cancel the sale scheduled for July 14, 2017 pending the determination of the previous Order to Show Cause (Sequence No. 004). That application was signed by Hon. Paul J. Baisley, Jr., with a provision staying the sale pending the hearing and determination of both motions.

Preliminarily, the Court notes that while this is the defendants' second motion to vacate, the first having been denied by prior order of this Court, there is no bar to the bringing of successive motions to vacate upon CPLR 5015 grounds, as long as the same grounds are not relitigated (*see, Glendora v Mastrorilli*, 14 Misc.3d 87, 831 NYS2d 645 [Sup Ct., Appellate Term 2006]). Here, as this second motion was brought on different grounds, it is not barred.

The Court next turns to the defendants' allegations that they did not receive proper notice of the plaintiff's motions for an Order of Reference and a Judgment of Foreclosure and Sale. CPLR 3215(g) provides that a defendant who has not appeared is entitled to notice of an application for a default judgment if more than one year has elapsed since the default. Here, where the defendants defaulted in 2010 and the plaintiff moved for a default judgment in 2013, this provision is applicable and the defendants were entitled to notice of the plaintiff's application. As the defendants indicate, the plaintiff served its Notices of Motion for an Order of Reference and for a Judgment of Foreclosure on Francis Leito, Esq. of Lieto & Greenberg, LLP, the attorney who interposed the untimely answer on behalf of the defendants. The defendants attach, and the County Clerk's file contains, a Notice of Appearance form by Jeannie V. Daal, P.C. on behalf of the defendants dated November 16, 2012. Neither the defendants' motion nor the Court's records, however, reflect that a formal consent to change attorney to reflect Jeannie Daal, Esq. as defendants' counsel was ever executed and filed and that notice of any such change of attorney was provided to the plaintiff's attorney, as required by CPLR 321(b). The only consent to change attorney form for the defendants contained in the County Clerk's file is one substituting Christopher Thompson, Esq. as counsel for the defendant Vincent Russo dated May 23, 2017. Accordingly, the defendants have failed to demonstrate that they formally changed counsel prior to May 23, 2017 and that plaintiff was on notice of any such change. An adverse party is entitled to treat the other side's attorney of record as an authorized agent until the formalities of CPLR 321(b) have been satisfied (*see, Siegel v Obes*, 112 AD2d 930, 492 NYS2d 447 [2d Dept 1985]; *Hendry v Hilton*, 283 AD 168, 127 NYS2d 454 [2d Dept 1953]). In the absence of the filing of a consent to change attorney stipulation or an order of the court, "service of papers upon the attorney [of record] is service upon the party and, as to adverse parties, the authority of the attorney continues unabated" (*Hess v Tyszko*, 46 AD2d 980, 362 NYS2d 387 [3d Dept 1974]). Here, where Francis Leito, Esq. interposed a tardy answer on the defendants' behalf, the plaintiffs properly served all further papers on him, as the service of an answer qualifies as an "appearance" under CPLR 320(a), whether timely or not (*see, Siegel, N.Y. Prac.* 203 "Service on All Parties" [6th ed.]). Accordingly, the defendants' application to vacate the Order of Reference and Judgment of Foreclosure on the grounds that they did not receive proper notice of the plaintiff's motions, is denied.

That branch of the defendants' motion seeking leave to renew is denied as procedurally improper (*see Maddux v Schur*, 53 AD3d 738, 861 NYS2d 814 [3d Dept 2008] [A motion to renew pursuant to CPLR 2221 is not the proper procedural vehicle to address a final judgment]; *Hudson City Sav. Bank*

v Bomba, 149 AD3d 704, 51 NYS3d 570 [2d Dept 2017] [upholding the denial of that branch of defendants' motion seeking leave to renew since there was no opposition to the plaintiff's motion for summary judgment that could have been renewed]; *see also, Dobbyn-Blackmore v City of New York*, 123 AD3d 1083, 1 NYS3d 193 [2d Dept 2014]; *Eagle Ins. Co. v Persaud*, 1 AD3d 356, 766 NYS2d 571 [Mem] [2d Dept 2003]; *Dinallo v DAL Elec.*, 60 AD3d 620, 874 NYS2d 246 [2d Dept 2009]).

With respect to the defendants' argument that this action should be dismissed pursuant to CPLR 3215(c), which requires a plaintiff to move for a default judgment within one year following a defendant's default, the Court notes that in granting the plaintiff's application for an order of default pursuant to RPAPL 1321 on April 29, 2014, it necessarily determined that the plaintiff had show the "sufficient cause...why the complaint should not be dismissed," required by CPLR 3215(c) to avoid dismissal (*see Giglio v NTIMP, Inc.*, 86 AD3d 301, 307-8, 926 NYS2d 546 [2d Dept 2011]; *Myers v Slutsky*, 139 AD2d 709, 710, 527 NYS2d 464 [2d Dept 1988]).

A party may not move for affirmative relief of a non-jurisdictional nature, such as dismissal of a complaint, without first moving to vacate his/her default (*see HSBC Mtge. Corp. v Morocho*, 106 AD3d 875 [2d Dept 2013]; *U.S. Bank Natl. Assn. v Gonzalez*, 99 AD3d 694 [2d Dept 2012]; *Deutsche Bank Trust Co., Am. v Stathaklis*, 90 AD3d 694 [2d Dept 2011]; *Holubar v. Holubar*, 89 AD3d 802 [2d Dept 2011]). Thus, the Court next turns to the defendants' application to vacate their underlying default in timely answering the complaint. In seeking to vacate a default, a party must establish both a reasonable excuse for its delay in answering and potentially meritorious defense (CPLR 5015[a][1]; *Wells Fargo Bank v Malave*, 107 AD3d 880 [2d Dept 2013]). Here, the Court finds that the defendants have failed to establish a basis to be relieved from their underlying default in failing to timely answer. The only excuse proffered by the defendants is law office failure. The defendants claim that they promptly hired an attorney after learning of the action and that they were unaware that their answer was rejected. Although the court has discretion to accept law office failure as a reasonable excuse (*see CPLR 2005*), a claim of law office failure must be supported by a "detailed and credible explanation of the default" (*People's United Bank v Latini Tuxedo Management, LLC*, 95 AD3d 1285, 944 NYS2d 909[Mem] [2d Dept 2012]). Under the circumstances present here, the defendants' conclusory, undetailed and uncorroborated claim of law office failure does not amount to a reasonable excuse (*see Piton v Cribb*, 38 AD3d 741, 832 NYS2d 274 [2d Dept 2007]; *HSBC Bank USA, Nat. Ass'n v Wider*, 101 AD3d 683, 955 NYS2d 202 [2d Dept 2012]; *Wells Fargo Bank, N.A. v Cervini*, 84 AD3d 789, 921 NYS2d 643 [2d Dept 2011]; *Lugauer v Forest City Ratner Co.*, 44 AD3d 829, 843 NYS2d 456 [2d Dept 2007]). The bare assertion by the defendants' new counsel that law office failure on the part of the defendants' prior counsel resulted in the late service of their answer is entirely conclusory and uncorroborated (*see generally, Galaxy General Contracting Corp. v 2201 7th Ave. Realty LLC*, 95 AD3d 789, 945 NYS2d 298 [1st Dept 2012], *cf.*, *Goldstein v Meadows Redevelopment Co Owners Corp. I.*, 46 AD3d 509, 846 NYS2d 384 [2d Dept 2007]).

The absence of a reasonable excuse renders it unnecessary to determine . . . the existence of a potentially meritorious defense to the action (*New Century Mortgage Corp. v Adeyan-Ju*, 139 AD3d 683, 684, 32 NYS3d 193 [2d Dept 2016] *internal citations and quotations omitted*). Since the defendants failed to offer a reasonable excuse, the Court need not consider whether they offered a potentially

meritorious defense, including the plaintiff's alleged failure to comply with RPAPL 1304 (*see, Kondaur Capital Corp. v McAuliffe*, 156 AD3d 778, 67 NYS3d 653 [2d Dept 2017]; *Bank of Am., N.A. v Agarwal*, 150 AD3d 651, 57 NYS3d 153 [2d Dept 2017]). Additionally, since the defendants defaulted in answering the complaint and failed to demonstrate grounds for vacating their default, they are precluded from asserting the plaintiff's lack of standing as a defense (*Bank of N.Y. Mellon v Izmirligil*, 144 AD3d 1067, 44 NYS3d 44 [2d Dept 2016]; *see also, Wells Fargo Bank, N.A. v Combs*, 128 AD3d 812, 10 NYS3d 121 [2d Dept 2015] ["The Combs defendants waived their argument that the plaintiff lacked standing to commence the foreclosure action because they never appeared or answered."]). Nor have the defendants otherwise demonstrated that the invocation of a court's inherent power to vacate a judgment in the interest of substantial justice is warranted in this case (*see U.S. Bank Nat. Ass'n v Slavinski*, 78 AD3d 1167 [2d Dept 2010]; *Woodson v Mendon Leasing Corp.*, 100 NY2d 62 [2d Dept 2010]).

The Court finds that the defendant's remaining contentions are without merit or need not be addressed in light of its determination.

Accordingly, the defendants' motions are denied. In light of the extensive negotiations that the parties have engaged in, however, and to allow them an opportunity to continue to negotiate, the Court hereby extends the stay of the foreclosure sale until September 26, 2018, on which date the stay will be automatically lifted. The matter remains on the Court's Conference Calendar for September 26, 2018.

DATED: August 29, 2018


 C. RANDALL HINRICHS
 J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION