

<b>Wells Fargo Bank, N.A. v Cruz</b>
2018 NY Slip Op 32148(U)
August 27, 2018
Supreme Court, Suffolk County
Docket Number: 071147/2014
Judge: Howard H. Heckman
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SUPREME COURT - STATE OF NEW YORK  
IAS PART 18 - SUFFOLK COUNTY

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

INDEX NO.: 071147/2014  
MOTION DATE: 7/31/2018  
MOTION SEQ. NO.: #004 MG  
#005 MD  
CASE DISP

-----X  
WELLS FARGO BANK, N.A.,

Plaintiff,

-against-

LEONIDES CRUZ, et al.,

Defendants.

-----X

**PLAINTIFF'S ATTORNEY:**  
GROSS POLOWY, LLC  
1775 WEHRLE DRIVE, SUITE 100  
WILLIAMSVILLE, NY 14221

**DEFENDANT'S ATTORNEY:**  
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Upon the following papers numbered 1 to 38 read on this motion \_\_\_\_\_; Notice of Motion/ Order to Show Cause and supporting papers 1-18 (#004); Notice of Cross Motion and supporting papers 19-30 (#005); Answering Affidavits and supporting papers 31-35; Replying Affidavits and supporting papers 36-38; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by plaintiff Wells Fargo Bank, N.A. seeking an order confirming the referee's report dated July 19, 2016 and granting a judgment of foreclosure and sale is granted; and it is further

**ORDERED** that the cross motion by defendants Leonides Cruz and Leonides Cruz Maldonado seeking an order pursuant to CPLR 308, 317, 3211(a)(8), 3012(d), 3408, 5015(a)(1) & RPAPL 1304: 1) denying plaintiff's motion; 2) vacating the March 11, 2016 Order (Farneti, J.) granting a default judgment; 3) dismissing plaintiff's complaint for failure to obtain personal jurisdiction over the defendants; 4) dismissing plaintiff's complaint for failure to prove service of RPAPL 1304 notices; or, in the alternative 5) vacating defendants' default and permitting defendants leave to serve a late answer; 6) directing additional CPLR 3408 court mandated settlement conferences; and 7) rejecting confirmation of the referee's report based upon the referee's failure to conduct a hearing, is denied.

Plaintiff's action seeks to foreclose a mortgage in the original sum of \$350,596.00 executed by defendants Leonides Cruz and Leonides Cruz Maldonado on August 16, 2010 in favor of U.S. Mortgage Corporation. On the same date both defendants 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 August 1, 2012. Defendants executed a subsequent loan modification agreement dated February 17, 2014 creating a single lien in the sum of \$267,292.82. Plaintiff claims that the mortgagors defaulted in making timely monthly mortgage payments beginning July 1, 2014 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 31, 2014. Defendants defaulted in serving an answer. By Order (Farneti, J.) dated March 11, 2016 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. Defendants Cruz and Maldonado submit a cross motion seeking an order denying plaintiff's motion, vacating Acting Justice Farneti's March 11, 2016 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 additional CPLR 3408 conferences.

Defendants claim that plaintiff's complaint must be dismissed based upon the plaintiff's failure to prove it has personal jurisdiction over them and plaintiff's failure to prove compliance with the requirements of RPAPL 1304. In the alternative, defendants seek an order: 1) vacating Acting Justice Farneti's March 11, 2016 Order granting a default judgment and granting leave to permit defendants to serve a late answer; 2) denying plaintiff's motion in its entirety based upon the referee's failure to conduct a hearing; 3) directing the plaintiff to offer a loan modification; and 4) remanding this action to the foreclosure settlement part for an additional CPLR 3408 court mandated conference.

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 (2<sup>nd</sup> Dept., 2013); *U.S. Bank, N.A. v. Samuel*, 138 AD3d 1105, 30 NYS3d 305 (2<sup>nd</sup> Dept., 2016); *TCIF REO GCM, LLC v. Walker*, 139 AD3d 704, 32 NYS3d 223 (2<sup>nd</sup> 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 (2<sup>nd</sup> Dept., 2012); *Emigrant Mortgage Co., Inc. v. Westervelt*, 105 AD3d 896, 964 NYS2d 543 (2<sup>nd</sup> Dept., 2013); *Deutsche Bank National Trust Co. v. Pestano*, 71 AD3d 1074, 899 NYS2d 269 (2<sup>nd</sup> 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 (2<sup>nd</sup> Dept., 2016); *FV-1, Inc. v. Reid*, 138 AD3d 922, 31 NYS3d 119 (2<sup>nd</sup> Dept., 2016); *Wachovia Bank, N.A. v. Greenberg*, 138 AD3d 984, 31 NYS3d 110 (2<sup>nd</sup> Dept., 2016); *MERS v. Losco*, 125 AD3d 733, 5 NYS3d 112 (2<sup>nd</sup> Dept., 2015); *NYCTL v. Tsafatinos*, 101 AD3d 1092, 956 NYS2d 571 (2<sup>nd</sup> 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 (2<sup>nd</sup> Dept., 2016); *Washington Mutual Bank v. Huggins*, 140 AD3d 858, 35 NYS3d 127 (2<sup>nd</sup> Dept., 2016); *Wells Fargo Bank, N.A. v. Christie*, 83 AD3d 824, 921 NYS2d 127 (2<sup>nd</sup> Dept., 2011); *U.S. Bank, N.A. v. Tate*, 102 AD3d 859, 958 NYS2d 722 (2<sup>nd</sup> Dept., 2013); *Beneficial Homeowner Serv. Corp. v. Girault*, 60 AD3d 984, 875 NYS2d 815 (2<sup>nd</sup> Dept., 2009)).

The process server's affidavit states that the summons, complaint and RPAPL 1303 notice were served upon defendants Leonides Cruz and Leonides Cruz Maldonado pursuant to CPLR 308(2) by delivering a true copy of the documents on January 9, 2015 at 12:05 p.m. "to Santa Jiminez, co-occupant ("girlfriend"- as to defendant Maldonado), a person of suitable age and

discretion.... (at) defendant's place of residence..." The process server thereafter mailed a copies of the same papers marked "personal and confidential" to each defendant by regular first-class mail to the residence on January 14, 2015. Defendant Cruz's affidavit in opposition states that he does not know an individual by the name of "Santa Jiminez"; that he was never served nor did he ever receive by mail a copy of the summons and complaint; and that he was residing at the premises and received all mail delivered to the mortgaged premises during this time period. Defendant Maldonado does not submit any admissible proof in opposition to the process server's affidavit.

Based upon this record the affidavit of the process server constitutes prima facie evidence of proper service pursuant to CPLR 308(2) upon both defendants. Having established a prima facie showing of jurisdiction over the defendants, it is incumbent upon each defendant to rebut this prima facie showing by submission of specific and substantive evidence regarding lack of service. The affidavit submitted by defendant Cruz wholly fails to rebut the presumption of due service upon him or upon defendant Maldonado. 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 states a blanket denial of service and receipt of the summons and complaint, yet fails to provide any particular details concerning precisely who was residing in the premises in January, 2015, where defendant Cruz was at the moment in time when the process server claims he served those papers; who could have been present in the premises to receive service of the summons and complaint; and why an individual fitting the description of the person served would have been present in the mortgaged premises on January 14, 2015.. Defendant's affidavit states merely that he lived in the premises, collected mail, and knows nothing else about the action and fails to provide any statements from disinterested witnesses or documentation concerning his whereabouts when process was served.

Equally important for purposes of service upon co-defendant Maldonado, a review of the mortgage and note signed by the defendants clearly show that all notices were required to be delivered to the mortgaged premises, and that it was each defendant's duty to notify the mortgagee of a change of address to deliver notices to the mortgagor (see paragraph 13 of the original mortgage dated August 16, 2010 & paragraph 8 of the original promissory note dated August 16, 2010). While defendant Cruz claims that defendant Maldonado resided in the Dominican Republic when service was made, there is no evidence submitted to prove that Maldonado notified the mortgage lender of his change of address (if in fact he no longer resided in the premises) and therefore plaintiff had every right to rely upon the terms of the parties agreements when serving defendant with a copy of the summons and complaint. Nor has either defendant submitted an affidavit from a co-worker, employer, friend, acquaintance or any documentary evidence which would provide contradictory proof to plaintiff's claims or support defendants' claims. Absent such evidentiary proof corroborating defendant's unsubstantiated and conclusory denial of service and receipt of papers, the defendants' application to dismiss plaintiff's complaint for failure to obtain personal jurisdiction over them must be denied (*HSBC Bank USA v. Desrouilleres*, 128 AD3d 1013, 11 NYS3d 93 (2<sup>nd</sup> Dept., 2015); *JPMorgan Chase Bank, N.A. v. Baldi*, 128 AD3d 777, 10 NYS3d 126 (2<sup>nd</sup> Dept., 2016)); *Wells Fargo Bank, N.A. v. Tricarico*, 139 AD3d 722, 32 NYS3d 213 (2<sup>nd</sup> Dept., 2016); *IndyMac Bank v. Hyman*, 74 AD3d 751, 901 NYS2d 545 (2<sup>nd</sup> Dept., 2010)).

With respect to the defendant's application seeking an order vacating Acting Justice

Farneti's March 11, 2016 Order and granting defendants leave to serve a late answer, the law requires proof to establish a reasonable excuse for the defendants' 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 (2<sup>nd</sup> Dept., 2013); *Deutsche Bank National Trust Co. v. Karlis*, 138 AD3d 915, 30 NYS3d 228 (2<sup>nd</sup> Dept., 2016); *U.S. Bank, N.A. v. Cherubin*, 141 AD3d 514, 36 NYS3d 154 (2<sup>nd</sup> Dept., 2016)). Defendants have wholly failed to provide any reasonable excuse for their default in timely answering the plaintiff's complaint. Absent any credible explanation for their continuing default, the defendants' application must be denied regardless of whether they have 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 (2<sup>nd</sup> Dept., 2015)). The absence of a reasonable excuse renders it unnecessary to determine whether the defendants demonstrated the existence of a potentially meritorious defense to the action (*see Summitbridge Credit Investments, LLC v. Wallace*, 128 AD3d 676, 9 NYS3d 320 (2<sup>nd</sup> Dept., 2015); *Deutsche Bank National Trust Co. v. Rudman*, 80 AD3d 651, 914 NYS2d 672 (2<sup>nd</sup> Dept., 2011); *Deutsche Bank National Trust Co., v. Gutierrez, supra.*; *Deutsche Bank National Trust Co. v. Pietranico*, 102 AD3d 724, 957 NYS2d 868 (2<sup>nd</sup> Dept., 2013); *Wells Fargo Bank, N.A. v. Russell*, 101 AD3d 860, 955 NYS2d 654 (2<sup>nd</sup> Dept., 2012)). And such waiver applies to all the defenses the defaulting defendants seek to raise in their opposition including failure to serve pre-foreclosure 90-day default notices since any alleged failure to comply with RPAPL 1304 is not a jurisdictional defect which could provide grounds for a defaulting defendant to vacate an order granting a default judgment absent a reasonable excuse for failing to submit a timely answer (*see PHH Mortgage Corp. v. Celestin*, 130 AD3d 703, 11 NYS3d 871 (2<sup>nd</sup> Dept. 2015); *Pritchard v. Curtis*, 101 AD3d 1502, 957 NYS2d 440 (3<sup>rd</sup> Dept., 2012); *Deutsche Bank National Trust Co. v. Posner*, 89 AD3d 674, 933 NYS2d 52 (2<sup>nd</sup> Dept., 2011)).

With respect to defendant's request to "equitably" restore this action to the foreclosure settlement conference part, court records indicate that a CPLR 3408 mandatory court settlement conference was scheduled and held on July 7, 2015. At the conclusion of the scheduled conference the court attorney/referee responsible for conducting the conference marked the action "not settled" and the action was remanded for assignment to an IAS part. Defendants have offered no explanation why another court conference would be "equitably" required. There is no proof in this record that plaintiff has failed to deal with the defendants in a fair way, particularly in view of the fact that the mortgage lender previously modified the parties mortgage agreement and defendants made only three (3) payments under the terms of their modified agreement before defaulting in making any further payments required under the terms of the modification agreement. The law is clear that a foreclosing party has no obligation to modify the terms of its loan freely entered into by the borrowers and a failure to modify the loan obligation for a third time does not provide a defense to this mortgage foreclosure action (*see Citibank, N.A. v. Van Brunt Properties, LLC*, 95 AD3d 1158, 945 NYS2d 330 (2<sup>nd</sup> Dept., 2010)). Based upon this record neither the law nor equity demands that this court require that plaintiff further delay its right to foreclose by remanding this action for additional conferences. Defendants remain free to negotiate with the lender in whatever manner they deem appropriate but it is not for this court to further delay prosecution of this action.

Finally, with respect to defendants' claim that, as defaulting defendants, they have an absolute and unqualified right to a hearing before the referee and therefore the referee's report should be rejected, no legal basis exists to deny confirmation of the referee's report. The law is clear that unlike references to hear and determine, references to hear and report are advisory only which leaves

the court as the ultimate arbiter of the issues referred (CPLR 4311; RPAPL 1321; *Deutsche Bank National Trust Co. v. Williams*, 134 AD3d 981, 20 NYS3d 907 (2<sup>nd</sup> Dept., 2015); *Deutsche Bank National Trust Co. v. Zlotoff et al.*, 77 AD3d 702, 908 NYS2d 612 (2<sup>nd</sup> Dept., 2010); *Shultis v. Woodstock Land Development Associates*, 195 AD2d 677, 599 NYS2d 340 (3<sup>rd</sup> Dept., 1993); *Woodridge Hotel LLC v. Hotel Lake House, Inc.*, 281 AD2d 778, 711 NYS2d 275 (3<sup>rd</sup> Dept., 2001)). 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 (2<sup>nd</sup> Dept., 2017); *HSBC Bank USA, N.A. v. Simmons*, 125 AD3d 930, 5 NYS3d 175 (2<sup>nd</sup> Dept., 2015); *CitiMortgage, Inc. v. Kidd*, 148 AD3d 767, 49 NYS3d 482 (2<sup>nd</sup> Dept., 2017); *Matter of Cincotta*, 139 AD3d 1058, 32 NYS3d 610 (2<sup>nd</sup> Dept., 2016)). In this case the plaintiff submitted sufficient evidence in the form of an "affidavit of merit and amounts due and owing" from a Wells Fargo vice president of loan documentation dated September 14, 2015, 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 (2<sup>nd</sup> Dept., 2015)). In opposition to the report's findings and the evidence submitted by the plaintiff, defendants have every right and opportunity to submit testimonial and documentary evidence to contradict the referee's report. Such proofs could provide legal grounds to determine disputed factual issues and/or to require a hearing. Defendants have wholly failed to submit any contradictory proof which would raise such issues. Absent the submission of any admissible evidence to contradict the referee's findings, the only relevant, admissible proof before this court has been submitted by the plaintiff, and therefore there is no requirement to either compel the referee to conduct a hearing, or to deny confirmation of the referee's report since the court is the ultimate arbiter of the amount of damages due the plaintiff (*Deutsche Bank National Trust Co. v. Zlotoff, supra.*; *FDIC v. 65 Lenox Road Owners Corp.*, 270 AD2d 303, 704 NYS2d 613 (2<sup>nd</sup> Dept., 2000); *Adelman v. Fremd*, 234 AD2d 488, 651 NYS2d 604 (2<sup>nd</sup> Dept., 1996); *Stein v. American Mortgage Banking, Ltd.*, 216 AD2d 458, 628 NKYS2d 162 (2<sup>nd</sup> Dept., 1995)).

Accordingly defendants' cross motion is denied in its 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: August 27, 2018

HON. HOWARD H. HECKMAN, JR.

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J.S.C.