

Pennymac Corp. v Reilly
2019 NY Slip Op 32822(U)
September 20, 2019
Supreme Court, Suffolk County
Docket Number: 29541/2013
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.: 29541/2013
MOTION DATE: 8/20/2019
MOTION SEQ. NO.: #003 MD

-----X
PENNYMAC CORP.,

Plaintiffs,

-against-

JOANN REILLY, et al.,

Defendants.
-----X

PLAINTIFF'S ATTORNEY:
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DEFENDANT'S ATTORNEY:
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Upon the following papers numbered 1 to 47 read on this motion; Notice of Motion/ Order to Show Cause and supporting papers 1-15 (#003); Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 16-44; Replying Affidavits and supporting papers 45-47; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendant JoAnn Reilly brought on by Order to Show Cause (Hudson, J.) dated December 18, 2017 seeking an order pursuant to CPLR 2004, 3012(d), 3211(a)(8)), 3215(c), 3408, 5015 & 6301 & RPAPL 1303 & 1304: 1) staying a foreclosure sale and enjoining prosecution of this action; 2) vacating the Order (Mayer, J.) dated February 24, 2016 granting a default judgment; 3) dismissing plaintiff's complaint or, in the alternative; 4) vacating the defendant's default in appearing in this action; 5) granting defendant leave to serve a late answer and; 6) restoring this action to the foreclosure settlement conference is denied; and it is further

ORDERED that plaintiff is directed to serve a motion seeking a judgment of foreclosure and sale within sixty days of this order.

Plaintiff's action seeks to foreclose a mortgage in the original sum of \$415,150.00 executed by defendant JoAnn Reilly on January 11, 2008 in favor of American Mortgage Network, Inc. On the same date mortgagor Reilly executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. Defendant made a total of nine (9) payments and thereafter defaulted in making timely payments due under the terms of the mortgage beginning December 1, 2008 and continuing to date. Plaintiff commenced a prior foreclosure action seeking to foreclose the mortgage loan on May 18, 2009. That action was voluntarily discontinued as of May 3, 2013. Plaintiff commenced this second action by filing a summons, complaint and notice of pendency in the Suffolk County Clerk's Office on November 6, 2013. Defendant/mortgagor Reilly defaulted in serving a timely answer. By Order (Mayer, J.) dated February 24, 2016 plaintiff's unopposed 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 was granted.

Plaintiff's unopposed motion for an order confirming the referee's report and for a Judgment of Foreclosure and Sale was served on July 27, 2016 and made originally returnable on August 25, 2016 assigned to IAS Part 17. The unopposed motion remained sub judice until the Court (Mayer,

J.) signed the judgment of foreclosure and sale on September 11, 2017. However, court records indicate that three days later, on September 14, 2017, Justice Mayer signed a short form Order denying plaintiff's motion. Although the parties have submitted copies of the signed September 11, 2017 Judgment of Foreclosure and Sale, the county clerk file does not have any record of that judgment and it appears that the only official record of entry is the September 14, 2017 short form Order (Mayer, J.) dated September 14, 2017 denying plaintiff's motion on the basis of a FEMA hold.

It appears neither party was aware of Justice Mayer's September 14, 2017 short form Order denying plaintiff's motion. As a result, on December 18, 2017 the defaulting defendant brought this Order to Show Cause seeking to stay the sale of the premises and to vacate the prior Judgment of Foreclosure and Sale and the Order granting a default judgment. This motion was made originally returnable in IAS Part 17 on January 16, 2018 and remained without decision assigned to IAS Part 17. Court records indicate that plaintiff's counsel was substituted on August 2, 2018. During the latter part of 2018 Supreme Court Justice Mayer retired. The pending motion and underlying action were reassigned to this IAS Part 18 by administrative order. As a result of the reassignment and the confusion surrounding whether there was an enforceable Judgment of Foreclosure and Sale granted by Justice Mayer on September 11, 2017 (which was not entered in the county clerk file) together with plaintiff's incoming attorney's unfamiliarity with the case history, this action was scheduled for a number of conferences in IAS Part 18. Based upon discussions had during those conferences and the underlying record, the court has determined that there exists no enforceable judgment of foreclosure and sale, and to the extent that defendant's motion seeks to vacate that judgment that application is denied as moot. The balance of the motion was submitted on the IAS Part 18 motion calendar on August 20, 2019.

Defendant claims that the February 24, 2016 Order granting the default judgment must be vacated and the complaint dismissed since the court lacks personal jurisdiction over Reilly. Defendant argues that the complaint must also be dismissed as abandoned pursuant to CPLR 3215(c). In the alternative, defendant claims that she should be granted permission to serve a late answer and that the action should be remanded to the foreclosure settlement part.

With respect to defendant/mortgagor's claim that the court lacks personal jurisdiction over her, the law provides that absent proper service of the summons and complaint a default judgment is a nullity since a court lacks in personam jurisdiction over the defendants (CPLR 5015(a)(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, the affidavit of a process server constitutes a prima facie showing of proper service (*FV-1, 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)). A defendant may rebut the process server's affidavit by submitting an affidavit containing specific and detailed contradictions of the allegations in the process server's affidavit, but bare, conclusory and unsubstantiated denials are insufficient to rebut the presumption of 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 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)). Defendant's sworn affidavit denying service, together with claims of significant discrepancies between the defendant's appearance and the description of the person served by the

process server will necessitate a hearing (*see Machovec v. Svoboda*, 120 AD3d 772, 992 NYS2d 279 (2nd Dept., 2014); *Emigrant Mortgage Company v. Westervelt*, *supra.*; *Wells Fargo Bank, N.A. v. Final Touch Interiors, LLC*, 112 AD3d 813, 977 NYS2d 351 (2nd Dept., 2013)). However, claimed discrepancies which are unsubstantiated and of a minor, slight or inconsequential nature, are insufficient to warrant a hearing on the issue of service (*IndyMac Federal Bank, FSB v. Hyman*, 74 Ad3d 751, 901 NYS2d 545 (2nd Dept., 2010); *Beneficial Homeowner Service Corp. v. Girault*, 60 AD3d 984, 875 NYS2d 815 (2nd Dept., 2009)).

The process server's affidavit states that service was made upon defendant Reilly by personal delivery of the summons, complaint and RPAPL 1303 notice pursuant to CPLR 308(2) on November 22, 2013 at 12:20 p.m. at residential premises located at 3117 Grand Boulevard, Baldwin, New York 11510 by "delivering thereat a true copy of each to KEVIN DOE (LAST NAME REFUSED), CO-TENANT, a person of suitable age and discretion." The person who was served responded affirmatively to the process server's question concerning whether Reilly resided in the Baldwin premises.. The description of the person served was a white male wearing an "unknown" cap who was approximately 58 years old , 5 foot 4 inches tall, and who weighed approximately 160 pounds. The process server completed service by a follow-up first class mailing of the summons, complaint, and RPAPL 1303 notice on November 29, 2013 addressed to the Baldwin premises.

In her affidavit submitted in support of her motion, defendant Reilly concedes that the Baldwin premises are her "primary residence" which is a "one family house" and states that she was working at 12:20 p.m. when service took place. The defaulting mortgagor denies having a co-tenant and states that she has "no idea who this person ("Kevin Doe") is but he is not my cotenant". Defendant denies ever having received the summons and complaint and states that she only learned of the foreclosure after receiving "a notice that there was a sale scheduled for my property !".

The process server's affidavit constitutes prima facie evidence of proper service pursuant to CPLR 308(2) upon defendant Reilly. It was thus incumbent upon the defendant to rebut this prima facie showing by submission of specific and substantiated allegations regarding the lack of service. Defendant's affidavit fail to rebut the presumption of due service upon her. Defendant's denial provides no specific factual details which would contradict the process server's affidavit sufficient to raise the existence of a genuine factual issue concerning service of process. Absent are any details concerning where the mortgagor was working at the time of service, who she may or may not have resided with in the Baldwin premises on November 22, 2013, who might have been present in the Baldwin premises to answer the door on November 22, 2013, and how this individual described by the process server came to be present in the house that day. A fair reading of the defendant's affidavit reveals it is nothing more than a generalized, conclusory denial which does not provide any credible detailed proof sufficient to contradict the prima showing by the plaintiff. Absent too are any affidavits for neighbors, co-workers, friends, disinterested witnesses, or even relatives who could corroborate defendant's denial that any one fitting the description of the individual who was served on November 22, 2013 did not have access to the Baldwin premises or who could describe the living situation at the Baldwin premises at the time of service. Absent any credible, specific and detailed evidence to contradict the process server's affidavit, no legal grounds exist to find that personal jurisdiction was not acquired over this defendant and, based upon this record, the plaintiff has established that personal jurisdiction was in fact acquired over defendant Reilly.

Having determined the jurisdictional issue, the defendant seeks, in the alternative, permission

to vacate her default and leave to serve a late answer. A defendant seeking to vacate her default in appearing in an action and seeking leave to serve a late answer pursuant to CPLR 5015(a)(1) and CPLR 3012(d) 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)). Among the relevant factors to be considered are the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, the public policy in favor of resolving cases on the merits and whether the untimely answer sets forth an arguably meritorious defense to the plaintiff's complaint (*see Dinstber v. Allstate Insurance Company*, 75 AD3d 957, 906 NYS2d 636 (3rd Dept., 2010); *Montgomery v. Cranes, Inc.*, 50 AD3d 81, 855 NYS2d 681 (2nd Dept., 2008)).

The record reveals that this defendant was served with the summons, complaint, and RPAPL 1303 notice on November 22, 2013 and defaulted in serving an answer. Upon defendant's failure to timely serve an answer, the plaintiff's unopposed motion for a default judgment and for the appointment of a referee which was originally submitted in December, 2014, was granted by Order (Mayer, J.) dated February 24, 2016. Plaintiff's subsequent motion for an order confirming the referee's report and for a judgment of foreclosure and sale was submitted without opposition on August 4, 2016. Defendant did not appear in this action until she submitted this Order to Show Cause on December 18, 2017. In her affidavit she claims to have had no notice of this action until she inexplicably received a notice about the scheduled sale of the mortgaged premises and she thereafter retained counsel and submitted this application.

Based upon these undisputed facts, the defendant has failed to provide any reasonable excuse or rational explanation for her failure to timely serve an answer to the plaintiff's complaint. The record clearly shows that defendant was served with the pleadings in November, 2013 and did nothing for the ensuing four (4) years until, on the eve of a scheduled foreclosure sale in December, 2017, she submitted this motion. Having failed to provide any reasonable excuse for her prolonged delay in seeking to vacate her default, it is unnecessary to consider whether the defendant has demonstrated the existence of an arguably meritorious defense (*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, even were the Court to consider the proposed defenses sought to be asserted, none of the affirmative defenses is meritorious since the defendants clearly waived their lack of standing defense by defaulting in serving an answer (*see 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)) and with respect to defendant's claims concerning the mortgage lender's alleged failure to serve statutory pre-foreclosure notices, while service of such notices are considered conditions precedent to a mortgage foreclosure action (*see 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)), a 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 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 Company v. Posner*, 89 AD3d 674, 933

NYS2d 52 (2nd Dept., 2011)). In this case the defendant has failed to provide any reasonable excuse for her 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 her continuing default in appearing in this action (*see Kondaur Capital Corp. v. McAulliffe*, 156 AD3d 778, 67 NYS3d 653 (2nd Dept., 2017); *HSBC Bank USA, N.A. v. Hasis*, 154 AD3d 832, 62 NYS3d 467 (2nd Dept., 2017); *Bank of America, N.A. v. Agarwal*, 150 AD3d 651, 57 NYS3d 153 (2nd Dept., 2017); *Deutsche Bank National Trust Co. v. Lopez*, 148 AD3d 475, 49 NYS3d 123 (2nd Dept., 2017); *HSBC Bank USA, N.A. v. Clayton*, 146 AD3d 942, 45 NYS3d 543 (2nd Dept., 2017); *Flagstar Bank, FSB v. Jambelli*, 140 AD3d 829, 45 NYS3d 543 (2nd Dept., 2016); *PHH Mortgage Corp. v. Celestin, supra.*). And even if the court addressed the merits of these defenses, plaintiff has submitted sufficient, admissible evidence to prove compliance with the requirements of standing, RPAPL 1303 & 1304 and therefore no grounds exist to vacate defendant's default.

With respect to defendant's application seeking dismissal based upon abandonment pursuant to CPLR 3215(c), the record shows that plaintiff's service of its motion seeking a default judgment on December 26, 2014 was well within the one year period for seeking entry of a default judgment in view of the undisputed fact that the CPLR 3408 foreclosure conference in this action was held on April 28, 2014— which is the starting date from which the one year period commences. Accordingly no legal grounds exist to vacate Justice Mayer's February 24, 2016 Order (which was sub judice for a period of nearly fourteen (14) months) granting a default judgment in favor of plaintiff since service of plaintiff's motion was timely. Defendant's attempt to claim that a prior 2009 action was evidence of abandonment is irrelevant and even if considered on the merits is not meritorious, since plaintiff timely moved in that action to seek a default and thereafter voluntarily discontinued the action.

Finally, defendant is not entitled to have this action remanded to the foreclosure settlement part for additional conferences as the mortgagor concedes that she does not reside in the premises and therefore the mortgage does not qualify as a home loan pursuant to RPAPL 1304 & CPLR 3408.

Accordingly, the defendant's motion is denied in its entirety.

Dated: September 20, 2019

HON. HOWARD H. HECKMAN, JR.

J.S.C.