

U.S. Bank v Abu

2019 NY Slip Op 34159(U)

April 12, 2019

Supreme Court, Bronx County

Docket Number: 32349/2017E

Judge: Doris M. Gonzalez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

U.S. Bank, etc.,

Plaintiff,

-against-

DECISION AND ORDER

Present: Hon. Doris M. Gonzalez

Index No. 32349/2017E

Mark Abu, et. al.,

Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of motion(s) and/or cross-motion(s), as indicated below:

Papers	Numbered
Order to Shio Cause and Affidavits Annexed	1
Opposition	2
Reply	3

Plaintiff moves for judgment. Defendant Mark Abu (hereinafter, "defendant") opposes the motion, and cross-moves to vacate this Court's prior Orders, and to dismiss the complaint, based on, inter alia, lack of personal jurisdiction.

Purported service was made on the defendant at 140 Carver Loop, Apt. 3G, on August 9, 2017, by substituted service on a person of suitable age and discretion identified as "John Doe (NAME REFUSED) SON." The defendant contends that he resides at 1020 Ogden Avenue. In support of this contention, he provides a Con Ed "Turn-Off" notice dated March 23, 2018, addressed to him at "1020 Ogden Avenue Apartment 3," and his driver's license setting for an address, for the period July 24, 2009, expiring July 29, 2017, bearing an address at "1820 Ogden Avenue 2." In addition, he annexes the affidavit of service in a prior foreclosure action in which defendant Ude was served at 1229 Manor Avenue Apartment 1 on October 22, 2009.¹

"Under CPLR 5015(a), a court is empowered to vacate a default judgment for several reasons, including excusable neglect; newly-discovered evidence; fraud, misrepresentation or

¹ It appears that defendant annexed this affidavit of service in error, and that defendant intended to attach an affidavit of service on defendant in 2009 showing service at the subject mortgage premises.

other misconduct by an adverse party; lack of jurisdiction; or upon the reversal, modification or vacatur of a prior order" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68, 790 N.E.2d 1156, 760 N.Y.S.2d 727). When a defendant seeks to vacate a default judgment raises both a jurisdictional objection pursuant to CPLR 5015(a)(4) and seeks a discretionary vacatur pursuant to CPLR 5015(a)(1), "the 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)." (*Canelas v Flores*, 112 AD3d 871, 977 N.Y.S.2d 362 [2d Dept. 2013]).

A party who moves to vacate a judgment entered on default on the ground of lack of personal jurisdiction is not required to demonstrate a reasonable excuse for the default or a potentially meritorious defense. (*Dime Sav. Bank of Williamsburg v. 146 Ross Realty, LLC*, 106 A.D.3d 863, 966 N.Y.S.2d 443 [2d Dept. 2013].) The process server's affidavits of service constitutes prima facie evidence that the defendant was validly served. (*US Consults v APG, Inc.*, 82 A.D.3d 753, 753, 917 NYS2d 911 [2d Dept. 2011]; *Bank of N.Y. v Segui*, 68 A.D.3d 908, 909, 890 N.Y.S.2d 830 [2d Dept. 2009]). "Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to 'specific facts to rebut the statements in the process server's affidavits' " (*Scarano v Scarano*, 63 A.D.3d 716, 716, 880 N.Y.S.2d 682 [2d Dept. 2009] [citation omitted], quoting *Simonds v Grobman*, 277 A.D.2d 369, 370, 716 N.Y.S.2d 692 [2d Dept. 2000]; *Indymac Fed. Bank FSB v Quattrochi*, 99 A.D.3d 763, 952 N.Y.S.2d 239 [2d Dept. 2012]). A defendant's denial of service, standing alone, without any factual elaboration, is insufficient to warrant granting a traverse hearing. (*Deutsche Bank Natl. Trust Co. v. Dixon*, 93 A.D.3d 630, 939 N.Y.S.2d 705 [2d Dept. 2012] [in mortgage foreclosure action, defendant's conclusory denial of receipt of a copy of the

summons and complaint was insufficient to rebut the presumption of proper service established by the affidavit of the plaintiff's process server].)

Here, the defendant denies residing at 140 Carver Loop, Apt. 3G, and denies that he has a son matching the description who resided there at the time of service. However, defendant's averments are conclusory and inconsistent. The Con Ed notice lists defendant at "1020 Ogden Avenue Apartment 3," and his driver's license indicates that he resides at Apt. "2." Moreover, the Con Ed notice for Apartment 3 states that the billing address is in the name of "Highland Realty Corp." at a post office box in the Bronx. The place of service in 2009 is not relevant under the circumstances herein. Further, the plaintiff has shown that at least 10 tenants were residing at the premises, providing further evidence that the defendant was not a resident, but was using the premises as an investment property.

It is well established that relief pursuant to CPLR 5015(a)(1) (vacating a default) and/or CPLR 3012(d) (leave to serve a late answer) is available only upon a showing of a reasonable excuse for the default in answering, and a meritorious defense to the plaintiff's claims. (*See Eugene DiLorenzo, Inc. v AC Dutton Lbr. Co.*, 67 N.Y.2d 138, 492 N.E.2d 116, 501 N.Y.S.2d 8 [1986]; *Deutsche Bank Natl. Trust Co. v Gutierrez*, 102 A.D.3d 825, 958 N.Y.S.2d 472 [2d Dept. 2013]; *HSBC Bank USA, N.A. v Lafazan*, 115 A.D.3d 647, 983 N.Y.S.2d 32 [2d Dept. 2014] [defendants' participation in foreclosure part settlement conferences, purported reliance on settlement discussions, and their contention that the plaintiff's counsel should have advised them that they were in default, did not constitute a reasonable excuse]). Defendant has not established a reasonable excuse for vacating her default in answering the complaint, as "the only excuse [she] proffered was that [she] was not served with process." (*Bedessee Imports, Inc. v Najjar*, 2019 N.Y. App. Div. LEXIS 1549, *4, 2019 NY Slip Op 01552, 1 [2d Dept. 2019].)

Nor has defendant shown an entitlement to relief under CPLR 317. CPLR 317 permits a defendant who has been "served with a summons other than by personal delivery" to defend the action upon a finding by the court that the defendant "did not personally receive notice of the summons in time to defend and has a meritorious defense." (CPLR 317; *Taieb v Hilton Hotels Corp.*, 60 NY2d 725, 728, 456 N.E.2d 1197, 469 N.Y.S.2d 74; *Fleisher v Kaba*, 78 A.D.3d 1118, 1119, 912 N.Y.S.2d 604; *Reyes v DCH Mgt., Inc.*, 56 A.D.3d 644, 867 N.Y.S.2d 340). "The mere denial of receipt of the summons and complaint is . . . insufficient 'to establish lack of actual notice for the purpose of CPLR 317'" (*Wassertheil v. Elburg, LLC*, 94 A.D.3d 753, 754, 941 N.Y.S.2d 679, 680-81 [2d Dept. 2012] quoting *Matter of Rockland Bakery, Inc. v B.M. Baking Co., Inc.*, 83 A.D.3d 1080, 1081-1082, 923 N.Y.S.2d 572).


The Court has considered the remaining arguments and finds them to be without merit.

The motion is denied.

This constitutes the Decision and Order of the Court.

All stays are vacated.

4/12/19
DATE


Hon. Doris M. Gonzalez, J.S.C.

RECEIVED NYSCEF: 04/16/2019
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*copy to
att'y*

AT an IAS Part ²⁴ of the Supreme Court of the state of New York, held in and for the County of Bronx, at the Court House located at 851 Grand Concourse, Bronx, New York on the ^{15th} day of ^{April}, 2019

PRESENT: HON. DORIS GONZALEZ

J.S.C.

Index No. 32349/2017E

-----X
U.S BANK NATIONAL ASSOCIATION, AS TRUSTEE
TO STRUCTURED ASSET INVESTMENT LOAN TRUST,
MORTGAGE PASS THROUGH CERTIFICATE

Plaintiff **ORDER TO SHOW CAUSE**

-against-

MARK ABU, ET. AL.,

Defendant(s)

-----X
Upon the annexed affirmation of Uche Emelumadu, Esq, counsel to Defendant Mark Abu, dated March 28, 2019, 2019, the affidavit of Mark Abu, dated March 20, 2019, the summons and verified complaint herein, and upon all the pleadings and proceedings heretofore had herein,

LET the plaintiff and their attorneys show cause before this Court at an IAS Part ²⁴ Room ⁶⁰⁷ of the courthouse, located at 851 Grand Concourse, Bronx, New York, on the ^{8th} day of April 2019, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made and issued herein, pursuant to CPLR 5015(a)(1), CPLR 5015(a)(4), CPLR 1001, CPLR 1003, CPLR 317, CPLR 3211(a)(8), CPLR 2103(b), CPLR 2004, RPAPL 1302,1303,1304, 1305,1306 and 1320:

1. Vacating the Default Judgment of Foreclosure herein;
2. Dismissing the Complaint for failure to prove service of RPAPL 1303 as well as proof of service of RPAPL 1304 notices;
3. Dismissing the complaint herein for failure to obtain personal jurisdiction over the defendant Mark Abu (Defendant); or, in the alternative, vacating the said defendant's default, and permitting the said Defendant to appear and serve an answer;
4. Dismissing the Complaint for failure to add an indispensable party; and
5. Such other and further relief as this Court deems just proper;

SUFFICIENT CAUSE appearing for the reliefs requested herein, therefore, pending the hearing ~~and determination~~ of the within motion, it is hereby

ORDERED, that the Plaintiff, the Referee David Lesch, Esq, and their heirs, successors, officers, representatives, attorneys, agents, and assigns, be and hereby are, stayed and enjoined from selling, Transferring, hypothecating, pledging, assigning, encumbering or otherwise disposing of, or making any attempt to sell the property located at 1020 Ogden Street, Bronx, New York, on April 15, 2019, and the foreclosure sale by auction of the premises 1020 Ogden Avenue, Bronx, New York, is hereby stayed pending the hearing ~~and determination~~ of this motion;

DM
JIC

SUFFICIENT REASON appearing therefrom, let service of a copy of this Order, together with the papers upon which it is granted upon plaintiff's attorneys, Gross Polowy, LLC, 1775 Wehrle Drive, Suite 100, Williamsville, New York 14221, and upon Referee David Lesch, Esq., 860 Grand Concourse, Suite 2M, Bronx, New York 10451, by ~~Overnight~~ *Pernight Delivery* ~~Mail Delivery~~ *at Mail*, no later than the *2nd* day of *April*, be deemed good and sufficient service.

ENTER,

DM

HON. DORIS GONZALEZ J.S.C.