

U.S. Bank Trust v Wine
2020 NY Slip Op 30484(U)
February 13, 2020
Supreme Court, Suffolk County
Docket Number: 2106/2010
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.: 2106/2010
MOTION DATE: 2-4-20
MOTION SEQ. NO.: #004 MG
#005 MD
CASE DISP

-----X
U.S. BANK TRUST,

Plaintiff,

-against-

BERNARD WINE, et al.,

Defendants.
-----X

PLAINTIFF'S ATTORNEY:
KNUCKLES KOMOSINSKI & MANFRO
565 TAXTER ROAD, SUITE 590
ELMSFORD, NY 10523

DEFENDANTS' ATTORNEY:
CHRISTOPHER THOMPSON, ESQ.
33 DAVISON LANE EAST
WEST ISLIP, NY 11795

Upon the following papers numbered 1 to 47 read on this motion _____; Notice of Motion/ Order to Show Cause and supporting papers 1-16 (#004); Notice of Cross Motion and supporting papers 17-34 (#005); Answering Affidavits and supporting papers 35-47; Replying Affidavits and supporting papers _____; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Beneficial Homeowner Service Corporation seeking an order: 1) vacating the Judgment of Foreclosure and Sale (Gazzillo, J.) dated March 25, 2016; 2) substituting U.S. Bank Trust, N.A. as Trustee for LSF8 Master Participation Trust as the named party plaintiff in place and stead of Beneficial Homeowner Service Corporation; 3) confirming the referee's report dated July 16, 2014; and 4) granting a substitute judgment of foreclosure and sale is granted; and it is further

ORDERED that the cross motion by defendants Bernard Wine and Kathleen Wine seeking an order pursuant to CPLR 317, 3012(d), 3215(c) & 5015(a)(4) & RPAPL1304 : 1) denying plaintiff's motion; 2) vacating the July 18, 2013 Order (Gazzillo, J.) granting a default judgment; 3) dismissing plaintiff's complaint against both defendants for failure to obtain personal jurisdiction; 4) dismissing plaintiff's complaint for failure to prove service of RPAPL 1304 notices; or, in the alternative: 5) vacating defendants' default; and 6) granting defendants' leave to serve a late answer, is denied.

Plaintiff's action seeks to foreclose a mortgage in the original sum of \$29,389.86 executed by defendants Bernard Wine and Kathleen Wine on January 23, 2010 in favor of Beneficial Homeowner Service Corporation. On the same date both mortgagors executed a promissory note promising to repay the entire amount of the indebtedness to the mortgage lender. Both defendants subsequently executed two Consolidated, Extension, and Modification Agreements dated October 21, 2004 and December 8, 2006. The second consolidated mortgage created a single lien in the sum of \$357,997.67. This mortgage and note were assigned to U.S. Bank Trust, N.A. by assignment dated April 1, 2014. Plaintiff claims that the mortgagors defaulted in making timely monthly mortgage payments beginning April 13, 2009 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 January 13, 2010. Plaintiff's affidavit of service states that defendant Bernard Wine was personally served with

the summons, complaint and RPAPL 1303 notice pursuant to CPLR 308(1) on January 19, 2010 at the mortgaged premises, and that defendant Kathleen Wine was personally served with the summons, complaint and RPAPL 1303 notice pursuant to CPLR 308(2) by substituted service upon a person of suitable age and discretion, "Bernard Wine, Co-Resident" on January 19, 2010 at the mortgaged premises with a follow-up first class mailing (addressed separately to both defendants) on January 26, 2010. Both defendant/mortgagors defaulted in serving an answer.

By Order (Gazzillo, J.) dated March 4, 2011 plaintiff's unopposed motion for an order granting a default judgment and for the appointment of a referee was granted. Thereafter plaintiff determined that the attorney affirmation of merit submitted in support of the original motion seeking a default judgment was incorrectly notarized. Plaintiff submitted a second motion (which was unopposed) seeking an order vacating the March 4, 2011 Order and granting a second order of reference. Plaintiff's unopposed motion was granted by Order (Gazzillo, J.) dated July 18, 2013.

Court records indicate that plaintiff served a motion seeking an order confirming the referee's report of sale and for a judgment of foreclosure and sale on August 5, 2014 assigned to IAS Part 6 (Acting Justice Gazzillo). The motion was unopposed and remained sub judice for nearly 19 months until the motion was granted by Judgment of Foreclosure and Sale (Gazzillo, J.) dated March 25, 2016. Plaintiff claims that it was never provided with a copy of that Judgment. Court records would have indicated that the foreclosure action was "disposed" and therefore there was no re-assignment of this action based upon Acting Justice Gazzillo's subsequent retirement. Plaintiff's counsel made letter requests to the Special Term Clerk seeking a copy of the Judgment. As a result of a December, 2018 letter request, this action was restored as an active foreclosure action and assigned to this IAS Part 18 in January, 2019. Upon requisitioning the County Clerk file in January, 2019 it was discovered that the Judgment of Foreclosure and Sale signed by Acting Justice Gazzillo dated March 25, 2016 was not in the file and plaintiff's counsel was instructed that a motion was required to vacate the missing prior Judgment.

Court records indicate that plaintiff served its current motion seeking to vacate the March 25, 2016 Judgment and for a substitute Judgment and Order on July 12, 2019 with an original return date of August 13, 2019. Defendants served their cross motion on September 4, 2019 with an original return date of September 17, 2019. Both motions were subsequently adjourned on consent and were marked submitted on the IAS Part 18 motion calendar on February 4, 2020.

With respect to defendants' cross motion, 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 (2nd Dept., 2013); *U.S. Bank, N.A. v. Samuel*, 138 AD3d 1105, 30 NYS3d 305 (2nd Dept., 2016); *TCIF REO GCM, LLC v. Walker*, 139 AD3d 704, 32 NYS3d 223 (2nd 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 (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 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 (2nd Dept., 2016); *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); *NYCTL v. Tsafatinos*, 101 AD3d 1092, 956 NYS2d 571 (2nd 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 (2nd Dept., 2016); *Washington Mutual Bank v. Huggins*, 140 AD3d 858, 35 NYS3d 127 (2nd Dept., 2016); *Wells Fargo Bank, N.A. 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); *Beneficial Homeowner Serv. Corp. v. Girault*, 60 AD3d 984, 875 NYS2d 815 (2nd Dept., 2009)).

The process server's affidavit states that the summons, complaint and RPAPL 1303 notice were personally served upon defendant Bernard Wine by personal in-hand delivery to Wine pursuant to CPLR 308(1) on January 19, 2010 at 9:05 p.m. at 1060 Reilly Street, Bay Shore, New York (the mortgaged premises). The affidavit of service upon defendant Kathleen Wine states similarly that she was served by service upon Bernard Wine on the same date, time and place with the required follow-up first class mailing seven days later. The description of the person served (as to both defendants) states that Bernard Wine was a white male with grey hair, approximately 50 years of age, approximately 5 '10" tall, weighing approximately 195 pounds.

In opposition, both defendants submit near identical affidavits claiming that the process server's affidavit is completely untrue with Bernard Wine now claiming, nearly ten years later (affidavit dated September 3, 2019), that "I have never been served with a summons and complaint" and that "no such person fitting that description lived at my address (the mortgaged premises) on or about January 19, 2010". Defendant's wife, defendant Kathleen Wine's affidavit mimics her husband's affidavit claiming that he would have been at work during the time the process server claims to have served him. Both defendants state that there were discrepancies in the description of Wine's appearance in the process server's affidavit which included the following:

1. His age— claiming that Wine "would have just turned 50 years of age";
2. His height— claiming that Wine was 5' 9" and not 5' 10";
3. His weight— claiming that he weighed "well over 220 pounds";
4. His appearance since he would have been wearing glasses and was "noticeably bald".

Based upon this record the affidavit of the process server constitutes prima facie evidence of proper service pursuant to CPLR 308 (1) . Having established a prima facie showing of jurisdiction, it is incumbent upon the defendants to rebut this prima facie showing by submission of specific and substantive evidence regarding lack of service. The affidavits submitted by both defendants wholly fail to rebut the presumption of due service upon Wine since the claimed discrepancies described in both affidavits are insufficient to raise the quantum of evidence required to raise a genuine issue of fact concerning service of process. Those claimed discrepancies dispute the defendant's age (which was entirely accurate at 50 years), defendant's height (5' 9" as opposed to an estimated 5' 10"— a one inch discrepancy), defendant's weight (approximately 195 - versus 220 pounds). Given the

circumstances of a one-time, short-time, nighttime meeting between the two men each of these claimed discrepancies are of a minor and inconsequential nature and fail to raise a significant issue concerning the accuracy and credibility of the process servers's affidavit (*JPMorgan Chase Bank, N.A. v. Daar*, 161 AD3d 835, 76 NYS3d 603 (2nd Dept., 2018)). The remaining claims amount to nothing more than generalizations concerning what defendant Wine may have been wearing at 9:05 p.m. (eyeglasses) while answering the front door and the fact that he was balding— which is not addressed in the process server's affidavit, and non-specific self-serving statements about Wine's usual business regimen without any distinct, particular recollection (nearly ten years later) of whether Wine was home earlier than normal on January 19, 2010. Nor have these defendants submitted any corroborative sworn testimony in the form of affidavits from co-employees, witnesses or family members and/or documentary proof which would support their claims concerning the details of Wine's appearance at the time service took place and/or contradicting the process server's claims.(somewhat ironically the copy of the driver's license submitted by Wine confirms the process server's description of his "grey hair"). At best these defendants offer nothing more than unsubstantiated, self-serving, and conclusory denials of service many, many years after service was completed. Moreover, in view of the minor discrepancies complained of and the more than seven years having passed since the Wines filed for bankruptcy (listing this foreclosure action in the petition) and defendants having attended mediation conferences in 2014 & 2015, the defaulting mortgagors' claims are not credible and their application to dismiss plaintiff's complaint for failure to obtain personal jurisdiction must therefore be denied (*JPMorgan Chase Bank, N.A. v. Daar, supra.*; *HSBC Bank USA v. Desrouilleres*, 128 AD3d 1013, 11 NYS3d 93 (2nd Dept., 2015); *JPMorgan Chase Bank, N.A. v. Baldi*, 128 AD3d 777, 10 NYS3d 126 (2nd Dept., 2016)); *Wells Fargo Bank, N.A. v. Tricarico*, 139 AD3d 722, 32 NYS3d 213 (2nd Dept., 2016); *IndyMac Bank v. Hyman*, 74 AD3d 751, 901 NYS2d 545 (2nd Dept., 2010)).

With respect to the defendants' application seeking an order vacating Acting Justice Gazzillo's July 18, 2013 Order and granting them leave to serve a late answer, the law requires proof to establish a reasonable excuse for the defendant's 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 (2nd Dept., 2013); *Deutsche Bank National Trust Co. v. Karlis*, 138 AD3d 915, 30 NYS3d 228 (2nd Dept., 2016); *U.S. Bank, N.A. v. Cherubin*, 141 AD3d 514, 36 NYS3d 154 (2nd 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 (2nd 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 (2nd Dept., 2015); *Deutsche Bank National Trust Co. v. Rudman*, 80 AD3d 651, 914 NYS2d 672 (2nd Dept., 2011); *Deutsche Bank National Trust Co., v. Gutierrez, supra.*; *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)). And such waiver applies to all the defenses the defaulting defendants seek to raise in their cross motion including standing since that defense was waived as a result of the defendants' default in serving an answer (*see Wells Fargo Bank, N.A. v. Emma*, 161 AD3d 1131, 78 NYS3d 425 (2nd Dept., 2018); *Bank of New York Mellon v. Izmirlgil*, 144 AD3d 1067, 44 NYS3d 44 (2nd Dept., 2016)) and failure to serve pre-foreclosure notices since any alleged failure to comply

with RPAPL 1304 default notices are not jurisdictional defects which could provide independent grounds for defaulting defendants to vacate an order granting a default judgment absent a reasonable excuse for failing to submit a timely answer (*see as to RPAPL 1304 notice: Kondaur Capital Corp. v. McAuliffe*, 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); *HSBC Bank USA, 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); *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 Co. v. Posner*, 89 AD3d 674, 933 NYS2d 52 (2nd Dept., 2011)); *see as to mortgage default notice: CPLR 3018; Emigrant Bank v. Marando*, 143 AD3d 856, 39 NYS3d 83 (2nd Dept., 2016); *Signature Bank v. Epstein*, 95 AD3d 1199, 945 NYS2d 347 (2nd Dept., 2012); *First North Mortgage Corp., v. Yatrakis*, 154 AD2d 433, 546 NYS2d 9 (2nd Dept., 1989); *see also Wilmington Trust v. Sukhu*, 155 AD3d 591, 63 NYS3d 853 (1st Dept., 2017); *Karel v. Clark*, 129 AD2d 773, 514 NYS2d 773 (2nd Dept., 1987)). Defendants remaining myriad of claims concerning alleging violations of CPLR 1018 & 3215(c) and General Obligations Law 5-703 are, based upon the undisputed record, wholly without merit and need not be further addressed.

With respect to plaintiff's motion for an order re-confirming the referee's report and for a substitute judgment of foreclosure and sale, 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 (2nd Dept., 2017); *HSBC Bank USA, N.A. v. Simmons*, 125 AD3d 930, 5 NYS3d 175 (2nd Dept., 2015); *CitiMortgage, Inc. v. Kidd*, 148 AD3d 767, 49 NYS3d 482 (2nd Dept., 2017); *Matter of Cincotta*, 139 AD3d 1058, 32 NYS3d 610 (2nd Dept., 2016)). In this case the plaintiff submitted sufficient evidence in the form of an affidavit from the mortgage servicer/attorney-in-fact's default service officer 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 (2nd Dept., 2015)). Accordingly there is no legal basis to deny re-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 (2nd Dept., 2000); *Adelman v. Fremd*, 234 AD2d 488, 651 NYS2d 604 (2nd Dept., 1996); *Stein v. American Mortgage Banking, Ltd.*, 216 AD2d 458, 628 NKYS2d 162 (2nd Dept., 1995)).

Finally with respect to the interest to be awarded to the plaintiff, the issue of interest to be awarded in an equity action is within the court's discretion and the exercise of such discretion is governed by the particular facts of the case including "wrongful conduct" on the part of a party (*see BAC Home Loans Servicing, LP v. Jackson*, 159 AD3d 861, 74 NYS3d 59 (2nd Dept., 2018); *CitiCorp Trust Bank v. Vidaurre*, 155 AD3d 934, 65 NYS3d 237 (2nd Dept., 2017)). The record in this case shows no evidence of wrongful conduct on the part of the mortgage lender---- indeed the long delays which occurred were primarily the result of the court system's multiple delays in rendering judgment with respect to outstanding motion applications and thereafter the misplacement of the prior judgment, neither of which events can be attributed to the "wrongful conduct" of the plaintiff. The reality of what has occurred is that the mortgage lender has had to continue to make payments on behalf of these defaulting borrowers for the past ten plus (10+) years for real property taxes and hazard insurance so as not to lose title to the mortgaged premises, and the defaulting

borrowers have been able to remain in title and possession of the premises without making any payments in return for having received more than \$350,000.00 from the bank. As defense counsel so presciently states at paragraph 70 of his affirmation: "a cardinal principle of equity jurisprudence (*is*) that he who seeks equity must do equity"— Given the undisputed facts in this record of a breach of a promise of repayment having gone on for nearly eleven years, equity clearly requires that the mortgage lender be granted a substitute judgment of foreclosure and sale and that these premises be sold without further delay.

Accordingly defendants' cross motion is denied in its entirety and plaintiff's motion seeking an order re-confirming the referee's report and for a replacement 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: February 13, 2020

HON. HOWARD H. HECKMAN, JR.

J.S.C.