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| U.S. Bank N.A. v Joseph |
| 2020 NY Slip Op 32463(U) |
| March 5, 2020 |
| Supreme Court, Kings County |
| Docket Number: 504762/16 |
| Judge: Ingrid Joseph |
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At Part FRP3 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of March, 2020.

PRESENT: Hon. Ingrid Joseph
HON. INGRID JOSEPH, Supreme Court Justice
Justice.

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U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE
FOR CREDIT SUISSE FIRST BOSTON MORTGAGE
SECURITIES CORP., CSMC MORTGAGE-BACKED
PASS-THROUGH CERTIFICATES, SERIES 2006-5,

Plaintiff,

- against -

Index No. 504762/16

ERNST JOSEPH a/k/a ERNET JOSEPH, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC. AS
NOMINEE FOR WALL STREET MORTGAGE BANKERS,
LTD., CITIBANK, N.A., CITY OF NEW YORK
ENVIRONMENTAL CONTROL BOARD, CRIMINAL
COURT OF THE CITY OF NEW YORK, NEW YORK
STATE DEPARTMENT OF TAXATION AND FINANCE,
INTERNAL REVENUE SERVICE - UNITED STATES OF
AMERICA, CITY OF NEW YORK DEPARTMENT OF
TRANSPORTATION PARKING VIOLATIONS BUREAU,
CITY OF NEW YORK TRANSIT ADJUDICATION
BUREAU, NADINE BIGAUD, GERALDINE DELCE,

Defendants.

2020 JUL 23 PM 2:40
KINGS COUNTY CLERK
FILED

Recitation, as required by CPLR §2219(a), of the papers considered in the review of Plaintiff's and Defendant's Motion:

| <u>Papers</u> | <u>Numbered</u> |
|---------------------------------------|-----------------|
| Notice of Motion and | |
| Affidavits/Affirmations Annexed..... | 1-3 4-7 |
| Affirmation in Opposition Papers..... | 5-6 8 |
| Reply to Opposition Papers..... | 8 9 |

Plaintiff U.S. Bank National Association, as Trustee for Credit Suisse First Boston Mortgage Securities Corp., CSMC Mortgage-Backed Pass-Through Certificates, Series 2006-5 ("Plaintiff") moves (MS 2) for an order confirming the referee's report and granting a

judgment of foreclosure and sale.

Defendant Ernst Joseph a/k/a Ernet Joseph ("Defendant") cross-moves (MS 3) for an order permitting him to interpose a late answer, and dismissing the instant action, or alternatively setting the instant matter down for a traverse hearing, and vacating the order of reference.

On March 30, 2016, Plaintiff commenced this foreclosure action by filing a summons and a complaint. Defendant previously executed a \$304,000.00 note secured by a mortgage on his property located at 141 East 87th Street in Brooklyn on February 28, 2006 in favor of Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for the original lender, Wall Street Mortgage Bankers, Ltd. The mortgage was subsequently assigned to Plaintiff.

According to Plaintiffs's affidavit of service in the record, on April 5, 2016 at 12:41 p.m., Plaintiff served Defendant with the summons, complaint and foreclosure notices by delivering them to "NADINE BIGAUD, NIECE" at the Property and subsequently mailing them to Defendant at the Property on April 14, 2016. The affidavit of service describes Nadine Bigaud as a female, black woman with black hair, as age 32, with a height of 5' - 5'3" and a weight of 150-174 pounds.

Defendant failed to answer or otherwise appear in the action. On December 7, 2016, Plaintiff moved for an order of reference on default. Plaintiff's motion for an order of reference was granted by a March 13, 2019 order in which Robert Charles Rosenberg, Esq. was appointed referee to compute the amount due to Plaintiff. Referee Rosenberg subsequently issued an April 22, 2019 Oath and Report of Amount Due.

Plaintiff now moves for an order confirming Referee Rosenberg's Report, granting it a judgment of foreclosure and sale. Defendant opposes Plaintiff's motion and cross-moves for an order vacating the order of reference, allowing him to interpose a late answer to the complaint, dismissing the complaint, or, alternatively, setting the matter down for a traverse hearing. Defendant resubmits an affidavit that he previously attempted to file in opposition to Plaintiff's motion for an order of reference, which was, apparently, "rejected by the efileing system." In that

affidavit, Defendant attested that he did not receive a copy of the summons and complaint, that he does not know a “Nadine Bigaud” and that “[t]here is no one in my household that even remotely fits this description” in Plaintiff’s affidavit of service. Defendant attests that he lives at the mortgaged premises with Jeanne Amazon, his 93-year-old mother, and Magli Septimus, his 53-year-old sister who is “over 300 lbs” and does not match the description of the person at the mortgaged premises who was purportedly served with process.

Plaintiff, in opposition to the cross motion, explains that Defendant’s prior cross motion filed in response to Plaintiff’s motion for an order of reference was denied by the court (Knipel, J.) when Defendant failed to appear for a November 14, 2018 conference. Plaintiff argues that Defendant is not entitled to a “second bite at the same apple,” and asserts that Defendant’s cross motion “should not even be considered by the Court.” Additionally, Plaintiff contends that Defendant’s conclusory allegations that he was not properly served are meritless because the affidavit of service constitutes prima facie evidence of proper service. Plaintiff also contends that Defendant failed to provide a reasonable excuse for his default and a meritorious defense to the foreclosure action.

“Under CPLR 5015 (a) (4), a default must be vacated once a movant demonstrates lack of personal jurisdiction . . . A party who moves to vacate a judgment entered on default is relieved of any obligation to demonstrate a reasonable excuse for the default and a potentially meritorious defense when lack of personal jurisdiction is asserted as the ground for vacatur” (*Toyota Motor Credit Corp. v Lam*, 93 AD3d 713, 713-714 [2012] [internal citations omitted]). “Although bare and unsubstantiated denials are insufficient to rebut the presumption of service, a sworn denial of service containing a detailed and specific contradiction of the allegations in the process server’s affidavit generally rebuts the presumption of proper service and necessitates a hearing to determine the propriety of service of process” (*HMC Assets, LLC v Dhanani*, 173 AD3d 700, 701 [2019]).

Here, Defendant has provided a sworn denial of service contradicting the process server’s allegations that the summons and complaint were delivered to Nadine Bigaud at the mortgaged

premises. Defendant explains that he lives at the mortgaged premises with his elderly mother and his sister, that he does not know an individual named "Nadine Bigaud" and "[t]here is no one in my household that even remotely fits [the process server's] description." Based on Defendant's affidavit testimony challenging the process server's allegations, the court finds that there is a sufficient dispute as to whether service of process was properly effectuated upon Defendant at the mortgaged premises to warrant a hearing. Thus, a traverse hearing is necessary to determine whether Defendant was properly served. Accordingly, it is hereby

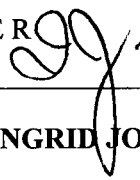
ORDERED that Plaintiff's motion (MS #2) shall be held in abeyance pending a traverse hearing scheduled on the 15th day of June, 2020 located at the Supreme Court 360 Adams St in room 482 at 9:45 am; and it is further

ORDERED that following the determination of the traverse hearing the parties will return to part FRP3 in courtroom 363 located at 360 Adams Street Brooklyn, New York on the 24th day of June 2020 at 9:40 am and it is further

ORDERED that Defendant's cross motion (MS #3) is only granted to the extent that this matter will be set down for a traverse hearing, and Defendant's cross motion is otherwise held in abeyance pending the outcome of the traverse hearing.

This constitutes the decision and order of the Court.

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KINGS COUNTY CLERK
FILED

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HON. INGRID JOSEPH, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice