SHORT FORM ORDER

INDEX NO. 07197-2008

SUPREME COURT - STATE OF NEW YORK
PART 27 SUFFOLK COUNTY

PRESENT: HON. ROBERT F. QUINLAN
Justice of the Supreme Court

Motion Date (#006): 01-18-19
Adj Date: 01-24-19; 03-07-19
Motion Date (#007): 03-07-19
Adj Date (#006 & #007): 04-11-19
Fully Submitted: 09-19-19
Motion Seq.: #006-MG
#007-MotD

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WELLS FARGO BANK N.A. ON BEHALF OF MORGAN STANLEY ABC CAPITAL I INC. TRUST 2005-WMC6 MORTGAGE PASS THROUGH CERTIFICATES SERIES 2005-WMC6

Plaintiff,

-against-

ERIC GOLDEN, HUNTINGTON HOSPITAL ASSOCIATION, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. AS NOMINEE FOR WMC MORTGAGE CORP., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, PEOPLE OF THE STATE OF NEW YORK, TOWN OF BABYLON SUPERVISOR,

Defendants.

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Upon the following papers, which for the purpose of this decision are addressed together, read on plaintiff's application for an order resettling the order dated April 17, 2018 and entered May 3, 2018: Notice of Motion and supporting papers 1-7; and defendant Golden's Order To Show Cause seeking to vacate all prior orders, vacating the appointment of the Guardian Ad Litem and discharging him, dismissal of the action pursuant to CPLR § 3215 (c) and/or dismissing the action for failure to comply with CPLR § 306-b: Order To Show Cause, affirmation of counsel, affidavit of defendant and supporting papers 1-35; Affirmation in Opposition to Order To Show Cause and supporting papers 36-78; it is

ORDERED that upon its own motion, the court recalls its decision and order of April 22, 2020 so that a conference could be held pursuant to the requirements of AO/157/20 of the Chief Administrative Judge of the Courts, dated July 23, 2020; and

UPON the court having held a phone conference on this action on November 17, 2020 in compliance with the requirements of AO/157/20 of the Chief Administrative Judge of the Courts, dated July 23, 2020, and counsel for both parties having appeared; it is

ORDERED that in place of the order and decision of April 22, 2020 the court substitutes the following decision and order; and it is further

ORDERED that plaintiff's motion to resettle the order of April 17, 2018 and entered with the Suffolk County Clerk on May 3, 2018, restoring the case to the active calendar and for an order of reference is granted, and plaintiff's proposed order submitted with its motion, as modified by the court, is signed contemporaneously herewith; and it is further

ORDERED that the portion of defendant Eric Golden's order to show cause seeking to discharge the Guardian Ad Litem appointed by the order of January 11, 2010 (Mackenzie, J), Vincent J. Messina. Esq., is granted, and Vincent J. Messina. Esq is discharged and relieved of any and all further duties and responsibilities pursuant to such order; and it is further

ORDERED that in conjunction with plaintiff's proposed order signed contemporaneously herewith, Vincent J. Messina, Esq., is to submit an affirmation, setting forth his services performed pursuant to the order of January 11, 2010 and his reasonable charges therefore pursuant to the authorization of his fee of $600.00 set by that order, to plaintiff's counsel within thirty (30) days of the date of filing of this decision and order with the Suffolk County Clerk, so that it may be considered along with plaintiff's application for a judgment of foreclosure and sale to be submitted pursuant to the order upon resettlement granted above; and it is further

ORDERED that in all other regards, the remaining applications contained in defendant Eric Golden's Order To Show Cause are denied; and it is further

ORDERED that as the court is being involuntarily retired as of December 31, 2020, the action is set for a conference before a justice to be assigned on February 16, 2021 at 9:30 AM, to monitor the progress of this action, at which counsel for the parties are to appear.

AO/157/20 COMPLIANCE

Through an inadvertent misinterpretation of the Administrative Orders of the Chief Judge issued shortly after the inception of the Covid-19 Crisis, as well as the Executive Orders of the Governor, by the then District Administrative Judge, Suffolk County, 10th Judicial District and other justices of the court, including this court, it was deemed permissible to issue decisions and orders in foreclosure actions that did not lead directly to a judgment of foreclosure and sale being issued. As that was the result in this

court's decision of April 22, 2020, the court issued that decision and order. The court no longer is of that opinion, and accordingly set this action for a conference pursuant to the requirements of AO/157/20 of the Chief Administrative Judge of the Courts, dated July 23, 2020. The court scheduled a virtual phone conference in compliance with that order for November 17, 2020 at 11:45 AM.

A stipulation and consent to E-filing dated June 30, 2020, was filed with the Suffolk County Clerk on July 6, 2020 by then counsel for plaintiff, co-counsel for plaintiff and defendant's counsel (NYSCEF Doc. #2). On July 16, 2020 Parker Ibrahim & Berg, LLP withdrew as co-counsel for plaintiff (NYSCEF Doc. #5) and on November 2, 2020 Eckert Seamans Chedrin & Mellot, LLC filed a notice of appearance substituting as counsel for plaintiff in place of Shapiro Dicaro & Barak, LLC (NYSCEF Doc. #8), as counsel for defendant and counsel from both Shapiro Dicaro & Barak, LLC and Parker Ibrahim & Berg, LLP appeared on the phone conference , since both of plaintiff's counsel had apeared on the motions before the court, the court found that the failure of an attorney from Eckert Seamans Chedrin & Mellot, LLC to appear was not a reason to adjourn the conference, as plaintiff's interests were represented.

The court therefore recalls its decision and order of April 22, 2020 and in its place issues the following decision and order.

This is an action to foreclose a mortgage on real property located at 46 Bernstein Blvd., Center Moriches, Suffolk County, New York ("the property") given by defendant Eric Golden ("defendant") on April 11, 2006 to a predecessor in interest to plaintiff Wells Fargo Bank, N.A. on behalf of Morgan Stanley ABC Capital I Inc. Trust 2005-WMC6 Mortgage Pass Through Certificates Series 2005-WMC6 ("plaintiff") to secure a note of the same date. According to the allegations defendant failed to make the payment due under the terms of the note and mortgage commencing June 1, 2006 and following. Plaintiff's former counsel, Steven J. Baum, P.C., commenced this action by filing a summons and complaint with the Suffolk County Clerk ("Clerk") on February 19, 2008. As plaintiff had difficulty in locating defendant at the property, as well as at least two other addresses within Suffolk County which were identified by searches as other residences for him, plaintiff made an application for service by publication (CPLR § 308 [5], CPLR 316) on April 22, 2008, but withdrew the motion, resubmitting it on October 10, 2009 (Mot. Seq. #002), asking at the same time for the appointment of a guardian ad litem for defendant and an extension of the time to serve the summons and complaint by 120 days. By order dated January 11, 2010, the court (Mackenzie, J.) granted plaintiff's applications, publication was made pursuant to the terms of the order and the appointed guardian ad litem filed an appearance on behalf of defendant dated May 13, 2010. On July 6, 2010 plaintiff filed a motion seeking an order of reference, but withdrew it on October 19, 2010.

Shapiro Dicaro & Barak, LLC substituted for plaintiff's prior counsel on January 4, 2012. On November 5, 2014, defendant filed a Chapter 7 bankruptcy application under case# 8-14-74972 in the U.S. Bankruptcy Court, Eastern District of New York, which resulted in an automatic stay of this foreclosure action (11 U.S.C. § 362 [a]) . The bankruptcy proceeding was closed without discharge by an order of that court dated March 13, 2017. As this court's records showed no activity on the file, and there had been no communication to the court concerning the bankruptcy proceedings, the action had been "purged" from the court's active inventory by the Supreme Court Clerk's Office. Such an action

was neither a dismissal pursuant to CPLR 3216, 3404 nor 22 NYCRR § 202.27, therefore plaintiff could move to restore the case to the calendar (*see OneWest Bank, FSB v Kaur*, 172 AD3d 1392 [2d Dept 2019]), which plaintiff did by a motion dated November 30, 2017, including therein a request for an order of reference (Mot. Seq. #004). Justice Mackenzie's inventory of foreclosure actions had been transferred by administrative order to this part, as she no longer was available to handle foreclosure actions, and this court granted plaintiff's applications by order dated April 17, 2018, including setting the default of the non-appearing, non-answering defendants, appointing a referee to compute pursuant to RPAPL § 1321 and amending the caption. The order was entered with the Clerk on May 3, 2018. On August 8, 2018 plaintiff then filed a motion, returnable September 20, 2018, seeking a judgment of foreclosure and sale (Mot. Seq. #005), but upon learning that defendant had filed a Chapter 13 application in the U.S. Bankruptcy Court, Eastern District of New York on April 4, 2018, plaintiff's counsel notified the court of that fact asking that the motion be withdrawn. Although the bankruptcy petition was dismissed on June 7, 2018, the automatic stay of 11 U.S.C. § 362 (a) precluded this court from issuing the order of April 17, 2018 (*see U.S. Bank, N.A. v Joseph*, 159 AD3d 968 [2d Dept 2018]). Therefore, the court issued an order upon the withdrawal of Mot. Seq. #005 on October 30, 2018, directing plaintiff to resettle the order and setting the action for a conference on January 23, 2019.

Plaintiff's counsel filed the present motion (Mot. Seq. #006) to resettle the order of April 17, 2018 on December 21, 2018, returnable January 18, 2019. On January 8, 2019 defendant's counsel filed a notice of appearance with the court and at that time failed to raise any of the issues now raised in defendant's order to show cause filed a month later. Over two weeks after filing his notice of appearance, defendant's counsel entered into a stipulation with plaintiff's counsel on January 23, 2019 which provided for the adjournment of the submission of Mot. Seq. #006 to March 7, 2019, for defendant to respond to plaintiff's motion, or cross-move, by March 1, 2019, and plaintiff to reply, including any response to a cross-motion, by March 5, 2019. Defendant's counsel faxed a copy of the stipulation to chambers on January 23, 2019.

Defendant never responded to plaintiff's motion, nor cross-moved, instead filing the order to show cause (Mot. Seq. #007) referred to above, signed by the court on February 8, 2019, and made returnable March 7, 2019. This application sought to vacate all prior orders, vacate the appointment of the guardian ad litem and discharge him, dismiss the action pursuant to CPLR § 3215 (c) or dismiss the action for failure to comply with CPLR § 306-b. Both motions were adjourned to April 11, 2019. By order dated May 17, 2019, the court set both motions for conference on July 8, 2019, as by letter dated May 14, 2019, and faxed to chambers that same day, plaintiff's counsel notified the court and defendant's counsel that a Chapter 11 Bankruptcy petition had been filed in the U.S. District Court, District of Delaware on April 23, 2019, by defendant WMC Mortgage, LLC, sued herein as Mortgage Electronic Registration Systems, Inc. as nominee for WMC Mortgage Corp. ("WMC"), and the mandatory bankruptcy stay of 11 U.S.C. § 362 (a) precluded any action in the case. The conference was adjourned to September 16, 2019 and the motions to September 19, 2019. At the conference of September 16, 2019, plaintiff's counsel advised the court that WMC claimed no stake in the property, so the bankruptcy stay was inapplicable to this action, and both motions were marked fully submitted on September 19, 2019.

The court first addresses defendant's motion brought by order to show cause.

VACATUR DENIED

Although brought by an order to show, defendant's motion was still required to comply with the requirement of CPLR 2214 (a) that it specify the grounds for the relief requested. It does not, merely asking for "the following relief: i) Vacating all orders in this action;" failing to specify the basis for such vacatur. Where a motion fails to comply with the requirements for a notice of motion set forth in CPLR 2214 (a) by failing to set forth the grounds therefore, a court is within its discretion to deny the motion. Even though supporting papers supply the missing information, a court is not required to comb through a litigant's papers to find information that is required to be set forth in the notice of motion (*see Abizadeh v Abizadeh* 159 AD3d 856 [2d Dept 2018]). Here, nowhere in defendant's counsel's affirmation, defendant's affidavit or any supporting papers does defendant set forth the statutory basis for his application to vacate all prior orders in this action. The court recognizes that the basic form for a notice of motion set forth in 22 NYCRR 202.7 fails to clearly list this requirement, and that failure to cite statute or case law for grounds in a notice of motion does not warrant denial if the other papers submitted adequately set forth the grounds in support for the motion, (*see Blauman-Spindler v Blauman*, 68 AD3d 1105 [2d Dept 2009]; *Bank of America, N.A. v Diaz*, 160 AD3d 457 [1st Dept 2018]). Upon reading defendant's submissions, and comparing it with the provisions of CPLR 5015 (a), it does not appear from the history provided by defendant in his affidavit and his counsel in his affirmation, that the motion to vacate the order is in any way based upon CPLR 5015 (a) (1) as an excusable default, since defendant offers no reasonable excuse for his default and provides no claim of any meritorious defense, nor does he deny that he was in default in payment within two months of obtaining the loan. Further, although defendant appears to be aware of the action from his multiple bankruptcy filings, he makes no arguments pursuant to CPLR § 317.

Based upon defendant's arguments, he appears to be relying upon CPLR 5015 (a) (4), that the court lacks jurisdiction over him as he claims that the order of Justice Mackenzie, dated January 11, 2010, authorizing service by publication pursuant to CPLR 316, as authorized by CPLR § 308 (5), was not sufficient to meet the requirements of due process. Such an argument is without merit, and is based upon what may be called a disingenuous presentation by defendant.

Defendant argues that "due diligence" is the standard that must be applied before service by publication is authorized. The Second Department has determined that the standard of proof of "impracticability" required to be met before service by publication can be authorized is less than the more stringent standard of proof of "due diligence" required before service under CPLR 308 (4) (*see Kelly v Lewis*, 220 AD2d 485 [2d Dept 1995]; *Bayview Loan Servicing, Inc. v Cave*, 172 AD3d 985 [2d Dept 2019]; *Wells Fargo Bank, N.A. v Patel*, 175 AD3d 1350 [2d Dept 2019]). Here, Justice Mackenzie, based upon the facts presented to her, exercised her discretion to authorize service by publication based upon the "impracticability" of other methods of service. Even though this case was transferred to this part, and Justice Mackenzie had retired by the time both Mot. Seqs. #006 and #007 were filed, it is not for this court to act as an appellate court and determine that she abused her discretion.

The court recognizes that in *Bayview Loan Servicing, Inc. v Cave*, the Second Department reversed the decision of the trial court, directing that a hearing be held to determine whether service upon

the defendant-mortgagor at the mortgaged property was "impracticable," but the facts before the court there were different than those now before this court. There, plaintiff's process server claimed that the mortgaged property was vacant, while defendant-mortgagor averred that she had lived at the mortgaged property since 1993, and that at the time that service was attempted she lived there with her daughter. Here plaintiff's position is dissimilar.

The court notes that in his affidavit plaintiff never states that he lived at the property, stating that prior to 2007 he had lived at 72 South Country Road, East Patchogue, Suffolk County ("East Patchogue") and just before the action was filed he moved, as a result of a divorce, to what he states is his present address, 157 Carll's Path, Deer Park, Suffolk County ("Deer Park"), a property that he admits owning since 1990. Once plaintiff's process server determined from defendant's tenant that defendant did not reside at the property and that his mailing address was unknown as he personally collected the rent, the two addresses defendant refers to in his affidavit were determined by plaintiff's process server's diligent efforts to be two possible addresses for defendant. Plaintiff's process server learned from defendant's tenant at the East Patchogue property that defendant did not live there, and, again, that the tenant had no address for defendant as he personally collected the rent. Because a neighbor at the Deer Park property told plaintiff's process server that defendant did not reside there, even though the process server had received a USPS notification that the Deer Park property was "good as addressed," defendant argues that plaintiff should have done more to try to serve him at the Deer Park property where he states he resided. Defendant's argument continues that as no further effort was made to serve him at the Deer Park property, the service by publication was unauthorized, and that despite plaintiff's compliance with the terms of Justice Mackenzie's order of publication, the court has no jurisdiction over him.

In making this argument, defendant fails to address his responsibilities under the mortgage (Defendant's Exhibit "C") he signed before a notary, less than two months before he stopped making payments. Although the "1-4 Family Rider" attached to the mortgage dispensed with the residency requirements of paragraph 6 and the standard provisions of paragraph 19 of the mortgage, it did not relieve him from the provisions of paragraph 15. That paragraph states that any notice is to be given by first class mail, or delivery, to him at the property, that he is to have only one notice address at a time, and that he was to notify the lender of any change of his notice address. Missing from defendant's affidavit is a statement that he ever notified the lender, or its successor in interest, of any notice address other than the property. The failure to provide such notice, as to either of his residences, can be construed as an attempt to evade process, especially when considering the promptness that he went into default on this rental property, making the facts surrounding service here significantly different than those in *Bayview Loan Servicing, Inc. v Cave*.

Additionally, by filing a notice of appearance and not raising at the same time a claim of lack of service or lack of jurisdiction, and then waiting a month to file his order to show cause, defendant waived the issue of jurisdiction (*see Middle Island Mortgage Corp. v Johnson*, 175 AD3d 490 [2d Dept 2019]). He should have followed the procedures outlined in *HSBC Bank USA, N. A. v Grella*, 145 AD3d 669 (2d Dept 2016), and either filed his motion to vacate pursuant to CPLR 5015 (a) (4) and to dismiss pursuant to CPLR §§ 306-b and § 3215 (c) or filed a notice of appearance at the same time of filing those motions. Of course he could also have moved simultaneously pursuant to CPLR § 317, but apparently chose not to do so because of the requirement to show that he did not personally receive

notice of the summons in time to defend and that he had a meritorious defense *(see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr., Co.*, 67 NY2d 138 [1986]; *ACT Prop., LLC v Ana Garcia*, 102 AD3d 712 [2d Dept 2013]; *Deutsche Bank Natl. Trust Co. v Gutierrez*, 102 AD3d 825 [2d Dept 2013]).

Defendants general claim for vacatur is denied.

DISMISSAL PURSUANT TO CPLR § 3215 (c) DENIED

As with defendant's motion to vacate made after his counsel filed a notice of appearance, the filing of a notice of appearance without simultaneously moving for dismissal of the action pursuant to CPLR § 3215 (c) waives such a claim (*see Countrywide Home Loans Servicing, LP v. Albert*, 78 AD3d 983 [2d Dept 2010]; *HSBC Bank, USA v. Lugo*, 127 AD3d 502 [1st Dept 2015]; *US Bank National Assoc. v Pepe*, 161 AD3d 811 [2d Dept 2018]; *Wilmington Sav. Fund Socty, FSB v Chisthy*, 179 AD3d 1147 [2d Dept 2020]).

Additionally, defendant seems to misapprehend the law surrounding the application of CPLR § 3215 (c), as it only applies after service is made (*see BAC Home Loan Servicing, LP v Rogener*, 171 AD3d 996 [2d Dept 2019]), so anytime between the filing of the complaint and completion of service on the 28th day after the first publication (CPLR 316 [c]) is excluded from computation. The guardian ad litem filed an appearance on behalf of defendant dated May 13, 2010, and on July 6, 2010 plaintiff filed a motion seeking an order of reference, but withdrew it on October 19, 2010 (Mot. Seq. # 003). The guardian's filing of a notice of appearance on behalf of defendant also precludes the application of § 3215 (c) in this action. Although defendant makes little argument concerning this basis for dismissal, even assuming *arguendo* that his theory is that the appointment of the guardian was somehow a nullity was correct, the filing of a motion for an order of reference within one (1) year of service, although withdrawn, has been held to be enough to comply with the provisions of CPLR § 3215(c) and dismissal is not warranted (*see GMAC Mtg LLC v Todaro*, 129 AD3d 666 [2d Dept 2015]; *Banc of America Mtg Capital Corp v Hasan*, 138 AD3d 903 [2d Dept 2016]; *US Bank, NA v Konstantinovic*, 147 AD3d 1002 [2d Dept 2017];*US Bank N.A. v Piccone*, 170 AD3d 1070 [2d Dept 2019]; *Natl. City Mtge Co. v Sclavos*, 172 AD3d 884 [2d Dept 2019];*Aurora Loan Services v Bandhu*, 175 AD3d 1470 [2d Dept 2019]). Accordingly that portion of defendant's motion is denied.

CLAIM FOR DISMISSAL PURSUANT TO CPLR 306-b DENIED

At the same time as plaintiff moved before Justice Mackenzie for an order of publication and the appointment of a guardian ad litem, it move to extend the time to serve the summons and complaint pursuant to CPLR 306-b. After reviewing plaintiff's submissions, Justice Mackenzie exercised her discretion and granted the request for extension; implicit in that finding was a determination that either good cause or the interests of justice warranted the extension based upon plaintiff's submissions. Defendant moves to dismiss claiming that plaintiff made its application to extend after the 120 days for service of the summons and complaint had expired, therefore the action should be dismissed, providing no case law to support his argument.

CPLR 306-b provides that if service upon a defendant is not made within 120 days of filing, upon

motion, the court shall dismiss the action without prejudice or upon good cause shown or in the interest of justice, may extend time for service. It does not, as defendant seems to posit, require the court to dismiss the action without a motion, if service is not made within 120 days. As long as no judgment has been entered dismissing the action, a plaintiff may move to extend the time to serve, if it convinces the court that there is good cause or the interest of justice militates towards it (*see Cooke-Garrett v Hoque*, 109 AD3d 457 [2d Dept 2013]; *U.S. Bank Natl. Assn. v Saintus*, 153 AD3d 1380 [2d Dept 2017]; *McDaniels v Suffolk County Dept. Of Social Services*, 180 AD3d 916 [2d Dept 2020]; *State of New York Mortgage Agency v Braun*, 182 AD3d 63 [2d Dept 2020]). Plaintiff's motion to extend time for service was permissible, appropriately considered by Justice MacKenzie, and granted by her order of January 11, 2010. Again, it is not for this court to determine if a retired justice had abused her discretion in making such a determination, although the court notes that faced with the same circumstances, it would have acted similarly to Justice MacKenzie.

GUARDIAN AD LITEM DISCHARGED

As defendant has now appeared by counsel, there is no further need for the guardian ad litem appointed by the order of January 11, 2010, nor a need to vacate the order appointing him. Accordingly, he is discharged and relieved of any further duties in this matter. His affidavit establishing the services performed pursuant to his order of appointment is to be submitted to plaintiff's counsel within thirty (30) days of the date of the filing of this decision and order with the Suffolk County Clerk so that it may be considered along with plaintiff's application for a judgment of foreclosure and sale to be submitted pursuant to the order upon resettlement as indicated below.

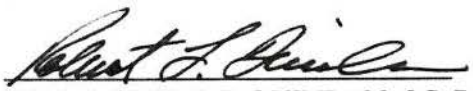
PLAINTIFF'S MOTION TO RESETTLE THE ORDER OF APRIL 17, 2018 IS GRANTED

As defendant has failed to provide any opposition to plaintiff's motion to resettle the order of April 17, 2018, to restore the case to the court's active calendar and grant an order of reference, and as the basis for that motion having been previously established to the court's satisfaction upon the submission of plaintiff's prior motion (Mot. Seq. #004), that motion is granted. As stated above, the need to resettle that order was brought about by the filing of another bankruptcy proceeding by defendant just prior to the court's decision, and as proof that the bankruptcy has been dismissed has been provided upon this motion, that infirmity no longer exists. The court signs contemporaneously with this decision and order, plaintiff's proposed order, as modified by the court.

The action is set for a conference before a justice to be assigned on February 16, 2021 at 9:30 AM to monitor the progress of this action.

This constitutes the decision and order of the Court.

DATED: November 19, 2020



HON. ROBERT F. QUINLAN, J.S.C.

| | FINAL DISPOSITION |X| NON-FINAL DISPOSITION