

**SABR Mtge. Loan 2008-1 RE0 Subsidiary-1 LLC
v Murillo**

2020 NY Slip Op 33924(U)

November 19, 2020

Supreme Court, Suffolk County

Docket Number: 33809-2013

Judge: Robert F. Quinlan

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SHORT FORM ORDER

INDEX No. 33809-2013

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT F. QUINLAN
Justice of the Supreme Court

Mot. Seq. #003
Date: 01-18-18
Adj.: 03-15-18
Mote. Seq. # 004
Submit Date Both: 04-12-18
Mot. Seq.: #003 - MG
Mot. Seq.: #004 - MD

-----X
SABR MORTGAGE LOAN 2008-1 RE0
SUBSIDIARY-1 LLC,

Plaintiff,

- against -

RAS BORISKIN, LLC
Attorneys for Plaintiff
900 Merchants Concourse, Suite 106
Westbury, NY 11590

DONALDO MURILLO; ADILIA MURILLO;
NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE; MIDLAND
FUNDING, LLC; PEOPLE OF THE STATE OF
NEW YORK; WORKERS COMPENSATION
BOARD OF THE STATE OF NEW YORK,
and JOHN DOE and JANE DOE #1 through #7,
the last seven (7) names being fictitious and
unknown to Plaintiff, the person or parties
intended being tenants occupants, persons or
parties, if any, having or claiming interest in or
lien upon the mortgaged premises described in
the Complaint,

CABANILLAS & ASSOCIATES, P.C.
Attorneys for Defendants Murillo
120 Bloomingdale Road, Suite 400
White Plains, NY 10605

Defendants.

-----X

Upon the following papers read upon plaintiff's motion to appoint a referee pursuant to RPAPL § 1321, and default judgment pursuant to CPLR 3215 and defendants' cross-motion to vacate their default in appearing, to file an answer and in opposition numbered 1-95; plaintiff's Notice of Motion and supporting papers: 1-40; defendants' cross-motion, opposition and supporting papers: 41-83; plaintiff's opposition, reply and supporting papers: 84-95; it is,

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ORDERED that upon its own motion, the court recalls its decision and order of April 17, 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 17, 2020 the court substitutes the following decision and order; and it is further

ORDERED that plaintiff Sabr Mortgage Loan 2008-1 REO Subsidiary-1 LLC's motion to fix and set the default of the non-appearing, non-answering defendants and for appointment of a referee pursuant to RPAPL § 1321 is granted; and it is further

ORDERED that plaintiff's proposed order, as modified by the court, is signed contemporaneously with this decision and order; and it is further

ORDERED that defendants Donaldo and Adilia Murillo's cross-motion seeking to extend their time to appear and answer the complaint pursuant to CPLR §§ 2004 and 3012 (d) is denied; and it is further

ORDERED that pursuant to the provisions of AO/115/20, AO/121/20 and AO/254/20 of the Chief Administrative Judge of the Courts, the parties are to immediately take all steps necessary to convert this action into one in conformity with the requirements for electronic filing pursuant to NYSCEF; 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 22, 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 17, 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. A virtual conference between the court and counsel for the parties was held by phone on November 17, 2020, at which time compliance with the requirements of that order were met.

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The court therefore recalls its decision and order of April 17, 2020 and in its place issues the following decision and order.

This is an action to foreclose a mortgage on residential property located at 204 Crooked Hill Road, Brentwood, Suffolk County, New York ("the property") given on December 21, 2007 by defendants Donaldo Murillo and Adilia Murillo ("defendants") to EquiFirst Corporation ("EquiFirst"), a predecessor in interest to plaintiff Sabr Mortgage Loan 2008-1 REO Subsidiary-1 LLC ("plaintiff"), to secure a note given the same day to EquiFirst by defendant Donaldo Murillo. Defendants allegedly defaulted in their payment obligations and plaintiff brought the instant action by filing a summon, complaint and notice of pendency with the Suffolk County Clerk ("Clerk") on December 24, 2013. Although plaintiff has presented affidavits of service upon defendants filed with the Clerk, showing that defendant Adilia Murillo had been served personally at the property on January 13, 2014, and defendant Donaldo Murillo had been served at the property on the same day by substituted service upon defendant Adilia Murillo pursuant to CPLR 308 (2) and filed with the Clerk on January 29, 2014, defendants did not file an answer, although they retained counsel who appeared on their behalf at various conferences before the court, and who communicated to the court in writing his status as their counsel, at least by a letter dated January 17, 2018 and faxed to chambers the same day, which is part of the court's file. Plaintiff moved to amend their complaint (Mot. Seq. #002), which was granted by order of this court dated October 13, 2015 (MacKenzie, J.). Subsequently, in 2016, by order of the District Administrative Judge the action was transferred to this part, and plaintiff moved for an order of reference (Mot. Seq. #002) which was denied by order of the court dated November 6, 2017 for plaintiff's failure to comply with the provisions of CPLR 2013 and §3215 (g), with leave to renew upon proper papers. Plaintiff thereafter filed their present motion (Mot. Seq. #003), and defendants' present counsel substituted in place of defendants former counsel, and notified the court by letter dated and faxed on March 14, that on March 13, 2018 that their office had entered into a stipulation with plaintiff's counsel to adjourn plaintiff's motion to April 12, 2018 so that defendants' new counsel could oppose that motion and cross-move. Defendants subsequently filed their cross-motion and opposition (Mot. Seq. #004), plaintiff responded and the motions were marked submitted.

MOTION TO DISMISS PURSUANT TO CPLR 3211 (a) (8) DENIED

Defendants move to dismiss the action pursuant to CPLR § 3211 (a) (8) claiming that the court lacks jurisdiction over them. In doing so, defendants present counsel appears to ignore the clear statement by defendants' in their affidavits that although Ms. Murillo claims not to have been served personally, or served on behalf of Mr. Murillo, they acknowledge receiving a copy of the summons and complaint by mail in their affidavits and, in the exact same language in paragraph "8" of each of their affidavits state:

Upon receiving this notice, we immediately sought assistance from Jeffrey Eisenberg, Esq. to help us with the defense of the foreclosure and for loan modification. It was our reasonable belief that Mr. Eisenberg would do what was necessary to defend the foreclosure action in a timely manner, including filing any necessary pleadings to protect our defense and interests.

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No answer was ever filed on behalf of defendants, nor does it appear that there is a record that Mr. Eisenberg ever filed a formal notice of appearance on their behalf before he filed a letter with the court dated, and faxed, January 17, 2018, which is part of the court's record, stating that: "I am attorney of record for Donaldo Murillo in the above entitled action." In addition, and confirmed by defendants acknowledgment that Mr. Eisenberg was retained "immediately," court records show that he appeared at conferences before this part on a number of occasions, including February 1, 2017 where he advised the court he was filing a loan modification on behalf of defendants, and August 9, 2017 where he asked for an adjournment to oppose Mot. Seq. # 002, advising the court that defendants had missed the first payment required in the loan modification. Further, the court's records indicate that on April 23, 2018 defendants' present counsel submitted a consent to change attorneys form substituting for "Jeffrey S. Eisenberg."

Filing of a notice of appearance in an action by party's counsel serves as a waiver of objection to personal jurisdiction in the absence of either service of an answer which raises the jurisdictional claim, or a motion to dismiss pursuant to CPLR 3211 (a) (8) (*see Countrywide Home Loans Servicing, LP v Albert*, 78 AD3d 983 [2d Dept 2010]; *American Home Mtge. Servicing Inc. v Arklis*, 150 AD3d 1180 [2d Dept 2017]; *JPMorgan Chase Bank v Jacobowitz*, 176 AD3d 1191 [2d Dept 2019]). Whether a formal notice of appearance was filed before January 17, 2018 and somehow not recorded, or misplaced, by the Supreme Court Clerk's office, or not filed at all, it is clear that Mr. Eisenberg was appearing before the court on behalf of defendants, and as such that course of conduct without asserting a defense of lack of jurisdiction, constituted a waiver of the defense of lack of jurisdiction (*see Aurora Loan Servs., LLC v Coleluori*, 170 AD3d 1097 [2d Dept 2019]). Even if prior counsel had not provided written proof of his appearance, such conduct is similar to where defendants have taken actions which amount to an informal appearance, thereby waiving the ability to move pursuant to CPLR § 3215 (c) (*see Myers v Slutsky*, 139 AD2d 709 [2d Dept 1988]; *Bank of America, NA v Rice*, 155 AD3d 593 [2d Dept 2017]; *US Bank Natl. Assoc. v Gustavia Home, LCC*, 156 AD3d 843 [2d Dept 2017]; *Household Finance Realty Corp. of N.Y. v Adeosun-Agyebusi*, 156 AD3d 870 [2d Dept 2017]). Even if the court had determined that Mr. Eisenberg's appearance was first officially made by the letter of January 17, 2018, by not accompanying that filing with a motion to dismiss under CPLR 3211 (a) (8) or in some other way raising the objection to personal service, his appearance waived jurisdiction on behalf of defendants and it could not be revived by present counsel's motion submitted almost three months later (*see Countrywide Home Loans Servicing, LP v Albert*, 78 AD3d 983 [2d Dept 2010]; *US Bank NA v Pepe*, 161 AD3d 811 [2d Dept, 2018]; *Deutsche Bank Natl. Trust Co. v Vu*, 167 AD3d 844 [2d Dept 2018]; *Mid-Island Mtge. Corp. v Johnson*, 175 AD3d 490 [2d Dept 2019]; *JPMorgan Chase Bank v Jacobowitz*, 176 AD3d 1191 [2d Dept 2019]).

The court notes that defendants' present counsel did not move for dismissal pursuant to CPLR § 3215 (c), apparently realizing that although plaintiff did not move on defendants' default in answering within one year, the conduct of prior counsel would have precluded its application, as indicated above.

Accordingly, as defendants have waived all claims that the court lacks jurisdiction over them, their motion to dismiss pursuant to CPLR 3211 (a) (8) is denied.

MOTION TO “EXTEND TIME TO FILE ANSWER” DENIED

Whether to extend time to answer a complaint and compel acceptance of a late answer pursuant to CPLR § 3012 (d) or to vacate a default for not filing an answer under CPLR 5015 (a) (1), defendant must provide a reasonable excuse and proof of a meritorious defense (*see Maspeth Fed. Sav. & Loan Assn. v McGown*, 77 AD3d 890 [2d Dept 2010]; *TCIF REO GCM, LLC v Walker*, 139 AD3d 7945 [2d Dept 2016]; *U.S. Bank, N.A. v Grubb*, 162 AD3d 823 [2d Dept 2018]). Considering the particular facts of this case the court will treat defendants’ motion as one both under CPLR § 3012 (d) and CPLR 5015 (a) (1), and in light of the court’s decision above it will not consider an application pursuant to CPLR 5015 (a) (4).

Where there is failure to provide a reasonable excuse, the court need not consider claims of meritorious defenses (*see HSBC Bank USA v Miller*, 121 AD3d 1044 [2d Dept 2014]; *Bank of NY v Krausz*, 144 AD3d 718 [2d Dept 2016]; *Wells Fargo Bank v Pelosi*; 159 AD3d 852 [2d Dept 2018]).

The determination as to what constitutes a reasonable excuse lies within the sound discretion of the trial court (*see Matter of Gambardella v Ortov Light.*, 278 AD2d 494 [2d Dept 2000]; *Segovia v Delcon Constr. Corp.*, 43 AD3d 1143 [2d Dept 2007]). There are claims of excuse which have been found by appellate courts not to be reasonable. A claim of lack of jurisdiction or inadequate service, is not a basis for a reasonable excuse (see *US Bank, N.A. v Dedomenico*, 162 AD3d 962 [2d Dept 2018]; *West Coast Servicing, Inc. v Yusupova*, 172 AD3d 789 [2d Dept 2019]; *Bank of New York Mellon v Tedesco*, 174 AD3d 490 [2d Dept 2019]); nor is reliance on poor advice or strategy (*see Chase Home Finance, LLC v Minott* 115 AD3d 634 [2d Dept 2014]; *Bank of NY Mellon v Colucci*, 138 AD3d 1047 [2d Dept 2016]); or “law office failure.”

Law office failure should not be excused and accepted as a reasonable excuse for delay where there has been a long period of unexplained inaction, failed strategy, or no detailed or credible explanation (*see Wells Fargo Bank, N.A. v Cervini*, 84 AD3d 789 [2d Dept 2011]; *US Bank Natl Assn v Barr*, 139 AD3d 937 [2d Dept 2016]; *LaSalle Bank, NA v LoRusso*, 155 AD3d 706 [2d Dept 2017]; *Deutsche Bank Natl. Trust v Saketos*, 158 AD3d 610 [2d Dept 2018]; *Bank of New York Mellon v Rucci*, 168 AD3d 799 [2d Dept 2019]; *HSBC Bank USA, N.A. v Coronel*, 174 AD3d 689 [2d Dept 2019]; *Nationstar Mtge, LLC v Sobel*, 179 AD3d 710 [2d Dept 2020]). Where claim of “law office failure” consisted of incorrect or incomplete advice of prior counsel, it is a misguided strategy, not law office failure, and is insufficient to provide the reasonable excuse necessary (*see Bank of N. Y. Mellon, Trust Co. N.A. v Talukder*, 176 AD3d 772 [2d Dept 2019]).

Under the circumstances presented here where defendants acknowledge the engagement of prior counsel who, for whatever reason, decided not to file an answer on their behalf, but instead appeared before the court representing defendants, engaged in loan modifications on their behalf and acknowledged his representation in at least two writings filed with the court, defendants reliance upon his actions as a reasonable excuse is misplaced and fails to provide a reasonable excuse for their default in answering.

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Having failed to provide a reasonable excuse, the court need not consider claims of meritorious defense made by defendants, and any claim by defendants that they may raise plaintiff's alleged failure to comply with the conditions of RPAPL § 1304 without first vacating their default in answering is without merit (*see PHH Mtge. Corp. v Celestin*, 130 AD3d 703 [2d Dept 2015]; *Flagstar Bank, FSB v Jambelli*, 140 AD3d 829 [2d Dept 2016]; *HSBC Bank USA v. Hasis*, 154 AD3d 832 [2d Dept 2017]; *Wilmington Sav. Fund Socty, FSB v Chisthy*, 179 AD3d 1147 [2d Dept 2020]).

Accordingly defendants' motion is denied.

PLAINTIFF GRANTED DEFAULT JUDGMENT

On a motion for leave to enter a default judgment, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's failure to answer or appear (CPLR 3215[f]; RPAPL § 1321; *see US Bank, N.A. v Singer*, 145 AD3d 1057 [2d Dept 2016]; *Bank of Am., NA v Agarwal*, 150 AD3d 651 [2d Dept 2017]; *352 Legion Funding Assoc. v 348 Riverdale, LLC*, 164 AD3d 551 [2d Dept 2018]). Proof required on default under CPLR 3215 (f) is merely proof of facts constituting the claim, and movant must only submit sufficient proof to enable the court to determine if the claim is viable since defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them (*see Woodson v. Mendon Leasing Corp.*, 100 NY2d 62 [2003]; *HSBC Bank USA, N.A. v Simms*, 163 AD3d 930 [2d Dept 2018]; *Vanderbilt Mtge & Fin., Inc. v Ammon*, 179 AD3d 1138 [2d Dept 2020]; *Wilmington Sav. Fund Socty, FSB v Chisthy*). Plaintiff has met its proof of a prima facie case through the production of the original mortgage, the unpaid note, and evidence of defendants default and is entitled to have its motion granted (*see Deutsche Bank Natl. Trust Co. v Abdan*, 131AD3d 1001 [2d Dept 2015]; *U. S. Bank N. A. v Akande*, 136 AD3d 887 [2d Dept 2016]).

Although under certain circumstances, CPLR § 3215(c) requires a court to dismiss an action, even *sua sponte*, where plaintiff has taken no action on the default within one year of defendants' failure to answer, such a requirement is inapplicable where a defendant has filed a formal appearance (*see Countrywide Home Loans Servicing, LP v. Albert*, 78 AD3d 983 [2d Dept 2010]; *US Bank National Assoc. v Pepe*; *Wilmington Sav. Fund Socty, FSB v Chisthy*) or taken actions which amount to an informal appearance, as referred to above (*see Myers v Slutsky*; *Bank of America, NA v Rice*; *US Bank Natl. Assoc. v Gustavia Home, LCC*; *Household Finance Realty Corp. of N.Y. v Adeosun-Agyebusi*); as such actions waive the opportunity for dismissal.

The default of the non-appearing defendants are fixed and set, plaintiff's application for the appointment of a referee to compute pursuant to RPAPL § 1321 is granted, and plaintiff's proposed order, as modified by the court is signed contemporaneously with this decision.

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 22, 2021 at 9:30 AM, to monitor the progress of this action, at which counsel for the parties are to appear.

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This constitutes the decision and order of the court.

Dated: November 19, 2020



Hon. Robert F. Quinlan, J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION