

HSBC Bank USA, N.A. v Del Vento
2021 NY Slip Op 31492(U)
April 22, 2021
Supreme Court, New York County
Docket Number: 850055/2019
Judge: Francis A. Kahn III
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANCIS A. KAHN, III PART **IAS MOTION 32**

Acting Justice

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INDEX NO. 850055/2019

HSBC BANK USA, NATIONAL ASSOCIATION, AS
TRUSTEE FOR DEUTSCHE ALT-A SECURITIES INC.
MORTGAGE LOAN TRUST, MORTGAGE PASS-
THROUGH CERTIFICATES SERIES 2005-3,

MOTION DATE _____

MOTION SEQ. NO. 001

Plaintiff,

- v -

**DECISION + ORDER ON
MOTION**

ROBERT DEL VENTO, THE BOARD OF MANAGERS OF
THE SENATE EAST CONDOMINIUM, JOHN DOE

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87

**ORDER OF REFERENCE/REFERENCE TO
COMPUTE**

were read on this motion to/for

Upon the foregoing documents, the motion is determined as follows:

In this action to foreclose on residential real property located at 335 East 51st Street, Apt. 9D New York, NY, Plaintiff moves for default judgment against all defendants and for an order of reference. Defendant Robert Del Vento (“Del Vento”) cross-moves to vacate his default, to compel Plaintiff to accept Del Vento’s answer or, in the alternative, to dismiss the action for improper service and referring this matter for a foreclosure settlement conference pursuant to CPLR §3408.

Plaintiff has established *prima facie* its entitlement to a default judgment against Defendants by submitting proof of the mortgage, the unpaid note, the loan modification agreement, notice of default, and proof of service on each defendants as well as proof of their failure to appear or answer (*see* CPLR §3215[f]; *SRMOF II 2012-I Trust v Tella*, 139 AD3d 599, 600 [1st Dept 2016]).

“To defeat a facially adequate CPLR 3215 motion, a defendant must show either that there was no default, or that it has a reasonable excuse for its delay and a potentially meritorious defense” (*US Bank N.A. v Dorestant*, 131 AD3d 467 [2nd Dept 2015]). Where a defendant seeking “to vacate a default raises a jurisdictional objection pursuant to CPLR 5015(a)(4), the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default” (*see Nationstar Mtge., LLC v Esdelle*, ___AD3d ___, 2020 NY Slip Op 4956 [2nd Dept 2020]).

Here, the affidavit of service of the process server filed by the Plaintiff demonstrated that on March 21, 2019, Del Vento was served by personal delivery (*see* CPLR §308[1]) at “782 Northfield

Ave, Side 2L West Orange, New Jersey 07052". The affidavit also contained an alleged physical description of Del Vento.

In his affidavit in opposition and support of the cross-motion, Del Vento's naked denial of service is insufficient as it is entirely conclusory (*see US Bank N.A. v Ramos*, 153 AD3d 882 [2nd Dept 2017]). Although Del Vento "set forth that he did not receive the pleadings, [he] did not deny the specific facts contained in the process server's affidavit" (*BAC Home Loans Servicing, LP v Carrasco*, 160 AD3d 688 [2nd Dept 2018]; *cf. Bank, N.A. v Tauber*, 140 AD3d 1154, 1155 [2nd Dept 2016])["the sworn denial, combined with documentary and other evidence supporting such claim, is sufficient to rebut the plaintiff's prima facie showing of proper service and to necessitate an evidentiary hearing"].

Movant's argument that the failure to conduct a settlement conference pursuant to CPLR §3408 requires denial of Plaintiff's motion is also unavailing. "CPLR§ 3408 only mandates a settlement conference in a residential foreclosure action involving a 'home loan' as defined by RPAPL §1304, and when the 'defendant is a resident of the property subject to foreclosure'" (*Richlew Real Estate Venture v Grant* 131 AD3d 1223 [2d Dept 2015]; *see also* CPLR §3408; *JP Morgan Chase Bank, N.A. v Venture*, 148 AD3d 1269 [3d Dept 2017]). "When CPLR §3408 and RPAPL §1304[6] are read together, it appears that a settlement conference is mandated where two 'residency' requirements are met, one considered as of the time of the subject mortgage is given, and one considered as of the time of the foreclosure action is commenced," (*see HSBC Bank United States v. McKenna*, 37 Misc 3d 885 [Sup. Ct. Kings County, 2012]).

While Del Vento's affidavit may have established that the subject loan was a "home loan" because he avers that it was his "intention to use this property for my own personal and household use", nothing in the affidavit demonstrates that Defendant was "a resident of the subject property" when the action was commenced (*see Wells Fargo Bank v Ostiguy*, 119 AD3d 1266 [3rd Dept 2014]; *Brandywine Pavers, LLC v Bombard*, 108 AD3d 1209 [4th Dept 2013]). Indeed, movant's counsel acknowledges in his affirmation that Del Vento "wasn't occupying the premise at the inception of this action". Del Vento's assertion that he was not occupying the premises because of ongoing construction was ineffective as it was only contained only in his attorney's affirmation and not in Del Vento's affidavit.

Accordingly, it is

ORDERED that the motion for a default judgment against Defendants is granted; and it is

ORDERED that **Mark McKew, Esq.**, 1725 York Ave, Ste 29A, New York, New York, 212-876-6783 is hereby appointed Referee in accordance with RPAPL § 1321 to examine whether the tax parcel can be sold in parcels; and it is further

ORDERED that the Referee shall hold no hearing and take no testimony or evidence other than by written submission; the Court is the ultimate arbiter and the Referee's report is merely an advisory finding; and it is further

ORDERED that by accepting this appointment the Referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon

compensation”), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of \$350 shall be paid to the Referee for the computation of the amount due and upon the filing of his report and the Referee shall not request or accept additional compensation for the computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further;

ORDERED that the Referee is prohibited from accepting or retaining any funds for himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that plaintiff shall forward all necessary documents to the Referee and to defendants who have appeared in this case within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that if defendant(s) have objections, they must submit them to the referee within 14 days of the mailing of plaintiff’s submissions; and include these objections to the Court if opposing the motion for a judgment of foreclosure and sale; and it is further

ORDERED the failure by defendants to submit objections to the referee shall be deemed a waiver of objections before the Court on an application for a judgment of foreclosure and sale; and it is further

ORDERED that plaintiff must bring a motion for a judgment of foreclosure and sale within 30 days of receipt of the referee’s report; and it is further

ORDERED that if plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to plaintiff’s failure to move this litigation forward; and it further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the parties being removed pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address (www.nycourts.gov/suptctmanh)); and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

All parties are to appear for a virtual conference via Microsoft Teams on **July 8, 2021 at 12:20 p.m.** If a motion for judgment of foreclosure and sale has been filed Plaintiff may contact the Part Clerk Tamika Wright (tswright@nycourt.gov) in writing to request that the conference be cancelled. If a motion has not been made, then a conference is required to explore the reasons for the delay.

4/22/2021

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

FRANCIS A. KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III
J.S.C.

v