HSBC Bank USA, N.A. v Holder

2023 NY Slip Op 32112(U)

June 16, 2023

Supreme Court, New York County

Docket Number: Index No. 850127/2022

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** **32**

Justice

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HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE FOR FREMONT HOME LOAN TRUST 2006-C, MORTGAGE-BACKED CERTIFICATES, SERIES 2006-C,

Plaintiff,

- v -

MAXCINE HOLDER, BOARD OF MANAGERS OF MAGNOLIA MANSION CONDOMINIUM, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,AS MORTGAGEE, AS NOMINEE FOR FREMONT INVESTMENT & LOAN, ITS SUCCESSORS AND ASSIGNS, ROBERT G. LUCAS AND JOSEPH H. PACIFICO, JR., AS AGENT FOR LUCAS INVESTORS GROUP, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, CITY OF NEW YORK PARKING VIOLATIONS BUREAU, CITY OF NEW YORK TRANSIT ADJUDICATION BUREAU, JOHN DOE #1 THROUGH JOHN DOE #12, THE LAST TWELVE NAMES BEING FICTITIOUS AND UNKNOWN TO PLAINTIFF, THE PERSONS OR PARTIES INTENDED BEING THE TENANTS,

Defendant.

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INDEX NO. 850127/2022

MOTION DATE ______________

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163

were read on this motion to/for DISMISS.

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

This is an action to foreclose on a mortgage encumbering a parcel of residential real property located at 309 East 108th Street, Unit 1F, New York, New York. The mortgage secures a loan with an original principal amount of $656,000.00 memorialized by an adjustable-rate note. The note and mortgage, both dated June 9, 2006, were given by Defendant Maxcine Holder ("Holder").

Plaintiff commenced this action and pled that Holder defaulted in repayment of the indebtedness on or about October 1, 2016. Defendant Board of Managers of Magnolia Mansion Condominium ("Magnolia") answered and by order dated April 13, 2023, was granted leave to amend its answer. In that pleading, Magnolia asserts one affirmative defense and one counterclaim, both seeking to toll accrual of interest. Defendant Holder has not answered.

Now, Defendants Holder moves for ten forms of relief including consolidation, dismissal pursuant to RPAPL §§1301[3] and 1304, for lack of personal jurisdiction and for defrauding the Court, vacating her "arguable default", for leave to file a late answer and dismissing the action sought to be consolidated. Plaintiff opposes the motion.

The viability of the branches of Holder's motion seeking non-jurisdictional relief is wholly dependent on whether Holder defaulted in appearing and, if so, whether that default should be vacated (*see generally Deutsche Bank Natl. Trust Co. v Hall*, 185 AD3d 1006, 1011 [2d Dept 2020]). As such, the Court will preliminarily address the branches of the motion related to vacatur and leave to file a late answer (*see* CPLR §§3012[d] and 5015[a]).

Generally, to vacate a default in opposing a motion, a party is required to demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the motion (*see* CPLR §5015[a][1]; *Bear Stern-Asset-Backed Sec. I Trust 2006 v Ceesay*, 180 AD3d 504 [1st Dept 2020]). However, a defendant is not required to meet these requisites if there is a lack of jurisdiction (*see* CPLR §5015[a][4]; *Avis Rent A Car Sys., LLC v Scaramellino,* 161 AD3d 572 [1st Dept 2018]). Thus, a court is required to resolve the jurisdictional issue before considering whether to grant a discretionary vacatur of the default (*see eg Caba v Rai*, 63 AD3d 578, 581, n.1 [1st Dept 2009]; *Kondaur Capital Corp. v McAuliffe*, 156 AD3d 778, 779 [2d Dept 2017]).

Ordinarily, "[a] process server's affidavit of service constitutes prima facie evidence of proper service and, therefore, gives rise to a presumption of proper service" (*Bethpage Fed. Credit Union v Grant*, 178 AD3d 997, 997 [2d Dept 2019]). "In order to warrant a hearing to determine the validity of service of process, the denial of service must be substantiated by specific, detailed facts that contradict the affidavit of service" (*Deutsche Bank Natl. Trust Co. v Kenol*, 205 AD3d 1004 [2d Dept 2022]; *see also Bank of Am., N.A. v Diaz,* 160 AD3d 457, 458 [1st Dept 2018]; *NYCTL 1998-1 Trust & Bank of N.Y. v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004]).

Here, Plaintiff filed two affidavits of service attesting to service of the summons and complaint on Holder. In the first affidavit of service, dated August 8, 2022, a process server, David Campbell, attested that July 27, 2022 [Wed.], at 8:29pm, he served Holder at her "dwelling place/usual place of abode" by affixing, *inter alia*, a copy of the summons and verified complaint to the door of the mortgaged premises. The process server also claims that two attempts to serve Holder were made prior to the affixing which occurred on July 12, 2022, at 1:30pm [Tue.], July 21, 2022, at 11:37am [Thu.]. On its face, the affidavit of service fails to demonstrate that diligent attempts to serve Holder under CPLR §308[1] and [2] were made prior to resorting to affix and mail service under CPLR §308[4] (*see eg O'Connell v Post,* 27 AD3d 630 [2d Dept 2006]). Two of the attempts were made on weekdays at a time when Holder could reasonably be expected to be at work or commuting to or therefrom (*see Coley v Gonzalez*, 170 AD3d 1107 [2d Dept 2019]). Further, the process server does not indicate he reached the unit door during the July 12 attempt. Also absent is any indication if efforts were made to locate Holder's place of employment (*see McSorley v Spear,* 50 AD3d 652 [2d Dept 2008]).

Plaintiff filed a second affidavit of service, dated August 18, 2022, wherein the process server, Magdy Ahmed, averred that on August 13, 2022, he served a summons and verified complaint, a RPAPL §1303 notice and other documents, ostensibly pursuant to CPLR §308[2], by delivery to "David Holder, Brother", a person of suitable age and discretion at the mortgaged premises. The process server further averred that the person served affirmed that Holder resided at the premises. By separate

affidavit, dated August 19, 2022, another process server avered that an additional copy of, *inter alia*, the summons and complaint was sent to Holder by first class mail in an envelope marked personal and confidential. These affidavits are facially sufficient to establish a presumption of proper service under CPLR §308[2] (*see eg Rivera v Corrections Officer L. Banks*, 135 AD3d 621 [1st Dept 2016]; *Hulse v Wirth*, 175 AD3d 1276, 1277 [2d Dept 2019]). As such, despite the first failed attempt, Plaintiff proffered *prima facie* proof of personal jurisdiction of Holder (*see generally Arce v Sybron Corp.*, 82 AD2d 308, 312 [2d Dept 1981]["For the purpose of ascertaining whether plaintiffs acquired jurisdiction of the person of the defendant it was only important to know that at least one of those services was good"]).

In opposition, although Holder attested to deficiencies in the due diligence exercised by the first process server, her affidavit is silent as to the second service. She does not deny receipt of the summons and complaint served on her brother or receipt of the latter mailing. No affidavit from David Holder repudiating the process server's affidavit was provided. Therefore, Holder's affidavit is entirely insufficient to defeat the process server's affidavit (*see Bethpage Fed. Credit Union v Grant*, 178 AD3d 997, 997 [2d Dept 2019]; *see also Wells Fargo Bank, NA v Spaulding*, 177 AD3d 817, 819 [2d Dept 2019]; *NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459 [1st Dept 2004]).

As to discretionary vacatur under CPLR §5015[a][1], "[w]hether there is a reasonable excuse for a default is a discretionary, sui generis determination to be made by the court based on all relevant factors, including the extent of the delay, whether there has been prejudice to the opposing party, whether there has been willfulness, and the strong public policy in favor of resolving cases on the merits" (*Harcztark v Drive Variety, Inc.*, 21 AD3d 876, 876-877 [2nd Dept 2005]; *see also Glauber v Ekstein*, 133 AD3d 713, 713 [2d Dept 2015]). To demonstrate a meritorious defense, the movant must tender "an affidavit from an individual with knowledge of the facts" (*Peacock v Kalikow*, 239 AD2d 188, 190 [1st Dept 1997]). The affidavit must make satisfactory factual allegations; it must do more than merely make "conclusory allegations or vague assertions" (*see Gorman v English*, 137 AD3d 556 [1st Dept 2015] [internal citations omitted]).

Holder's claim of confusion based upon the existence of a prior action is insufficient (*see LaSalle Bank N.A. v Calle*, 153 AD3d 801 [2d Dept 2017]; *Lane v Smith*, 84 AD3d 746 [2d Dept 2011]). Her argument that she lacked "real notice" of the proceeding is not credible and her affidavit demonstrates, at most mere neglect which is not a reasonable excuse (*OneWest Bank, FSB v Singer*, 153 AD3d 714 [2d Dept 2017]). Absent a reasonable excuse, the Court need not determine whether Holder has presented a meritorious defense to the action (*see Pina v Jobar U.S.A. LLC*, 104 AD3d 544, 545 [1st Dept 2013]). For the same reasons, the branch of the motion to compel Plaintiff to accept a late answer from Defendants pursuant to CPLR §3012[d] fails (*see Bank of N.Y. Mellon v Tedesco,* 174 AD3d 490, 491 [2d Dept 2019]["To extend the time to answer the complaint and to compel the plaintiff to accept an untimely answer as timely, a defendant must provide a reasonable excuse for the delay and demonstrate a potentially meritorious defense to the action"]).

Nevertheless, all the above may ultimately be meaningless as no residential foreclosure settlement conference has been conducted. If applicable, CPLR §3408[m] provides that, "[a] defendant who appears at the settlement conference but who failed to file a timely answer . . . shall be presumed to have a reasonable excuse for the default and shall be permitted to serve and file an answer, without any substantive defenses deemed to have been waived within thirty days of initial appearance at the settlement conference. The default shall be deemed vacated upon service and filing of an answer."

Accordingly, it is

ORDERED that the branch of Defendant's motion to vacate her default are denied, but this matter is referred to the Residential Mortgage Foreclosure Settlement Part for a conference pursuant to CPLR §3408, and it is

ORDERED that the remaining branches of the motion are denied without prejudice to a new motion after the completion of the conference.

6/16/2023
DATE

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

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION		
		GRANTED		DENIED	X	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE