State of N.Y. Mtge. Agency v Schaeffer
2024 NY Slip Op 34585(U)
December 26, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 607439/2024
Judge: Aletha V. Fields
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MOT SEQ 1—MD
MOT SEQ 2—MG
CAPTION CHANGE
Next appearance: Virtual conf. 1/16/25 10:30 a.m.

State Of New York – Supreme Court
Suffolk County – Part 81

STATE OF NEW YORK MORTGAGE AGENCY, Plaintiff(s), -against- MATTHEW SCHAEFFER a/k/a MATTHEW T. SCHAEFFER, et al., Defendant(s).	Index Number : 607439/2024 Hon. Aletha V. Fields, AJSC Order on Motions

DAVID A. GALLO & ASSOCIATES, LLP, Manhasset, New York, for plaintiff;

JUSTIN F. PANE, P.C., Bohemia, New York, for defendants, Matthew Schaeffer a/k/a Matthew T. Schaeffer, and Winifred Schaeffer a/k/a Winifred A. Schaeffer.

Upon efiled documents 17-39 and any efiled documents cited therein or herein, considered upon plaintiff's motion for an order "appointing a referee to compute the amount due . . . adding names of tenants residing at the mortgaged property . . . declaring that all non-appearing and non-answering defendants are in default pursuant to CPLR . . . 3215" (Notice of Motion [Dkt. 17]) and on defendant Matthew Schaeffer and Winifred Schaeffer's cross-motion for an order "pursuant to CPLR 2004, 2005, 3012 (d) and 3215 (a), denying the entirety of the plaintiff's motion and granting [the Schaeffer defendants'] cross motion to serve a late answer and compelling the plaintiff's acceptance [of it]" (Notice of Cross-Motion [Dkt. 28]), it is hereby

ORDERED that plaintiff's motion for leave to enter a default judgment be, and it hereby is, DENIED in all respects, without prejudice to plaintiff making a like motion on proper papers against any then-in-default defendants on or after January 16, 2025; and it is further

ORDERED that defendant Matthew and Winifred Schaeffer's motion for leave to file a late answer and to compel plaintiff to accept it be, and it hereby is, GRANTED to the extent that each of such defendants be, and hereby is, authorized to file in NYSCEF and thereby serve, an answer on or before January 15, 2025 and that plaintiff be, and hereby is, compelled to accept any such answer; and it is further

ORDERED that counsel for the parties be, and hereby is, directed to appear for a virtual conference to be held on January 16, 2025 at 10:30 a.m. using the standard part 81 Microsoft Teams link available in this Court's part rules with the purposes of such conference to be discussing (a) scheduling; (b) settlement; and (c) any topic any of the participating parties or this Court raises at the conference; and it is further

ORDERED that plaintiff having made a sufficient showing to justify the substitution of Sophia Schaeffer as a John Doe defendant, such substitution be, and hereby is, ordered to be made; and it is further

ORDERED that the caption of this action be, and hereby is, accordingly modified to read as:

STATE OF NEW YORK MORTGAGE AGENCY, Plaintiff, -against- MATTHEW SCHAEFFER a/k/a MATTHEW T. SCHAEFFER; WINIFRED SCHAEFFER a/k/a WINIFRED A. SCHAEFFER; CLERK OF THE SUFFOLK COUNTY TRAFFIC AND PARKING VIOLATIONS AGENCY; TOWN OF BROOKHAVEN; SOPHIA SCHAEFFER originally s/h/a John Doe # 1, Defendants.	Index Number : 607439/2024 Mortgaged Premises 210 CEDAR AVENUE PATCHOGUE, NY 11772 Dist : 0204 Section: 019.000 Block : 04.00 Lot : 018.000

And it is further

ORDERED that plaintiff be, and hereby is, directed to serve this order with CPLR 8019 (c) notice on the Suffolk County Clerk with payment of all applicable fees on or before January 15, 2025.

This is a residential mortgage foreclosure action in which plaintiff alleges that defendants Matthew Schaeffer and Winifred Schaeffer (together, borrowers, and individually M. Schaeffer or W. Schaeffer, respectively) on or about October 19, 2007 executed and delivered to CitiMortgage, Inc. (lender) a promissory note in the initial principal amount of two hundred fifty-five thousand dollars ($255,000.00) and to secure borrowers' obligations under the note contemporaneously executed and delivered to lender a mortgage encumbering certain realty in Suffolk County. Plaintiff alleges that through a recorded assignment of mortgage, lender assigned the mortgage to plaintiff and that more than a decade after the assignment, plaintiff and borrowers modified the loan to a new principal balance of four hundred ninety-nine thousand seven hundred thirty-six dollars and eight cents ($499,736.08). Plaintiff alleges that it paid the mortgage recording tax when it recorded the modification in the Suffolk County Clerk's office.

On July 9, 2024, defendant M. Schaeffer appeared in this action (Notice of Appearance [Dkt. 16]). Plaintiff's notice of motion seeks relief declaring that all "non-appearing and non-answering defendants are in default" (Notice of Motion [Dkt. 17]). The terminology can be confusing (***21st Mtge. Corp. v Raghu***, 197 AD3d 1212 [2d Dept 2021]). Plaintiff's proposed form

of order includes M. Schaeffer as a defendant whom plaintiff seeks this Court to determine to be in default. M. Schaeffer is not both non-appearing and non-answering, so plaintiff's motion, to the extent that it seeks leave to enter default judgment against M. Schaeffer is denied because such relief is not requested in the notice of motion. M. Schaeffer appeared but did not answer (***Raghu***, 197 AD3d at 1216 ["The consequences of a total failure to appear in an action are more significant than the consequences that stem from other species of default"]). In the alternative, as set forth below, such relief against M. Schaeffer is denied as academic.

CPLR 3215 does not contemplate that default judgments are to be rubber-stamped once jurisdiction and a failure to appear [or plead] have been shown" (***Joosten v Gale***, 129 AD2d 531 535 [1st Dept 1987]). Defaulters like borrowers "are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (***Woodson v Mendon Leasing Corp.***, 100 NY2d 62, 71 [2003]). Nevertheless, CPLR 3215 (f) requires an affidavit of facts setting forth "proof of facts constituting the claim, the default and the amount due" (CPLR 3215 [f]). Thus, the affidavit must establish three things: (A) the claim, (B) the default in appearing, answering, or appearing for trial, and (C) the amount due. "Where a verified complaint has been served, it may be used as the affidavit of facts constituting the claim and the amount due; in such case, an affidavit as to the default shall be made by the party or the party's attorney" (CPLR 3215 [f]).

However, a complaint verified by an attorney, although permissible under CPLR 3020 (d) (3) . . . is insufficient for purposes of CPLR 3215 (e)[1] when the attorney lacks personal knowledge of the facts constituting the claim" (***Joosten***, 129 AD2d at 534 [footnote added to explain why ***Joosten*** refers to subdivision e instead of subdivision f). The Second Department has an identical rule (***DLJ Mtge. Capital, Inc. v United Gen. Title Ins. Co.***, 128 AD3d 760 [2d Dept 2015]). The key in both ***Joosten*** and ***DLJ*** is that the affiant verifying the complaint have personal knowledge of the facts (*see*, ***Triangle Properties #2, LLC v Narang***, 73 AD3d 1030 [2d Dept 2010] [a corporate plaintiff's vice-president's verification was sufficient]).

Here, three fundamental flaws preclude consideration of the verified complaint as the affidavit of facts constituting the claim and the amount due.

First, the person who verified the complaint did so three days before plaintiff's counsel signed the complaint, so this Court has no way to know whether the complaint was changed in the three days between the verification being signed and the final complaint being signed. A witness cannot swear to the truth of a draft. The potential cure would require plaintiff's counsel to be a witness, thereby implicating the witness-advocate rule. This Court declines to jeopardize the attorney-client relationship like this on these facts where the cure would not permit this Court to reach the merits.

Second, "[a] verification is a statement under oath that the pleading is true to the knowledge of the deponent, except as to matters alleged on information and belief" (CPLR 3020 [a]). Because plaintiff, in the complaint, "complains and alleges, upon information and belief, as follows"

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[1] When the First Department decided ***Joosten***, the provisions now found at CPLR 3215 (f) were found at CPLR 3215 (e) (*see*, L 1992 ch 255 [relettering subdivisions d through h as e through i and adding a new subdivision d]).

(Complaint [Dkt. 1] at introductory unnumbered paragraph) the entire complaint is only on information and belief. Therefore, the verification makes nothing in the complaint true. Because the entire complaint is based on information and belief, the sources of which are not included with the complaint in admissible form, the verification affiant stands no different from most attorneys—someone without personal knowledge of the alleged facts. CPLR 3215 (f) requires some degree of personal knowledge, and "a review of records maintained in the normal course of business does not vest an affiant with personal knowledge" (***U.S. Bank, N.A. v Ramanababu***, 203 AD3d 1139, 1142 [2d Dept 2022]).

Third, when the affiant is not an employee of the plaintiff, the affiant must prove that such affiant is acting on plaintiff's behalf because CPLR 3215 (f) requires that the affidavit be made by the party (*cf.* (***HSBC Bank (USA), Inc. v Betts***, 67 AD3d 735 [2d Dept 2009]). Plaintiff has not demonstrated the authority of the verification affiant to act on plaintiff's behalf.

Borrowers are correct that the problems with the verification precludes consideration of the verified complaint as the affidavit of facts constituting the claim and amount due. Therefore, plaintiff's application for leave to enter a default judgment is denied. However, as to those defendants who have not answered or appeared, plaintiff may make a later application as set forth in the decretal portion of this order.

"A defendant who has failed to timely answer a complaint and who seeks leave to serve a late answer must provide a reasonable excuse for the delay and demonstrate a potentially meritorious defense. A defendant opposing a facially adequate motion for leave to enter a default judgment must make a similar showing" (***Wang v IV-CVCF NEB REO, LLC***, 227 AD3d 937, 940 [2d Dept 2024]). Another formulation of the rule is, "the Supreme Court may compel a plaintiff to accept an untimely answer where the record demonstrates that there was only a short delay in appearing or answering the complaint, that there was no willfulness on the part of the defendant, that there would be no prejudice to plaintiff, and that a potentially meritorious defense exists" (***Xu v JJW Enters., Inc.***, 149 AD3d 1146, 1147 [2d Dept 2017] quoted by ***Baldwin Rte. 6, LLC v Bernad Creations, Ltd.***, 158 AD3d 659 [2d Dept 2018]).

Defendants' claim of reasonable excuse is law office failure and that only 31 days after M. Schaeffer defaulted in answering, defense counsel, representing now both borrowers instead of just M. Schaeffer, notified plaintiff's counsel of the law office failure, requested an extension of time to answer, and offered to withdraw or waive jurisdictional defenses and all counterclaims. Defendants' claim a meritorious defense to the motion for leave to enter a default judgment, and by extension a potentially meritorious defense to the action.

In opposition, plaintiff argues that borrowers cannot succeed because the affirmation regarding law office failure came from the lawyer in charge of the office whose failure is at issue instead of from borrowers themselves and because borrowers "disingenuous allegations set forth in their attorney's affirmation and or (sic) purported Memo of Law are belied by the overwhelming evidence against them" (Affirmation in Further Support [Dkt. 36] at ¶ 28).

"A conclusory, undetailed, and uncorroborated claim of law office failure does not amount to a reasonable excuse" (***Bank of N.Y. Mellon Tr. Co., N.A. v Talukder***, 176 AD3d 772, 774 [2d

Dept 2019]) because the Legislature did not intend CPLR 2005 "to routinely excuse such defaults, and mere neglect will not be accepted as a reasonable excuse" (***Maruf v E.B. Mgt. Props., LLC***, 181 AD3d 670, 671-672 [2d Dept 2020]). Contrary to plaintiff's contention that the attorney affirmant who submitted proof of the law office failure lacks personal knowledge of the fact (Affirmation in Further Support [Dkt. 36] ¶ 16), the affirmation that borrowers' counsel submitted is detailed and corroborated. Counsel set forth the entire client relationship history, including that counsel, in conjunction with a predecessor firm, represented borrowers in a 2016 mortgage foreclosure action that ended when the loan was modified. In addition, counsel credibly set forth that borrowers re-engaged counsel's firm for this action shortly after plaintiff caused borrowers to be served with process. Counsel corroborates that allegation of fact with a copy of the engagement agreement dated April 4, 2024 (Business Records [Dkt. 30] 006-010), a credit card authorization (id. [Dkt. 30] 011), and calendar entries (id. [Dkt. 30] 001). Counsel corroborates the allegation that counsel wanted to have borrowers represented at the CPLR 3408 conference with the calendar entries (id.). Borrower's counsel sets forth that the firm has a computerized engagement management system with the ability to assign specific tasks to members of the firm's team, and that in this circumstance, the individual who assigned the task of timely answering the complaint after the foreclosure settlement conference (CPLR 3408 [m]) erred by self-assigning the task of handling the answer and by marking that task complete. As a result of these two errors, borrowers defaulted in answering, described in ***Raghu***, *supra*, as a failure to plead or answer.

Shortly after borrowers' counsel discovered the error and uncovered how it occurred, borrowers' counsel contacted plaintiff's counsel to arrange for a stipulation that would extend the time to answer. Borrower's counsel offered to waive any jurisdictional defenses and all counterclaims. Plaintiff's counsel, learning of this offer not even 45 days after the expiration of at least one borrower's time to answer, did not extend this simple, routine courtesy. Instead, plaintiff's counsel checked with its client on September 9 or 10, 2024 (Exhibit 2 [Dkt. 31] 006) and did not substantively respond to borrowers' counsel's request until September 23, 2024 (id. [Dkt. 31] 002). "For routine matters such as scheduling decisions not materially affecting the interests of the client, the lawyer need not consult in advance, but should keep the client reasonably informed thereafter" (Rules of Professional Conduct [22 NYCRR § 1200.0] rule 1.4 comment 3). Nevertheless, it appears that plaintiff, a public benefit corporation, rejected a slightly late to answer homeowner's effort to avoid foreclosure and to protect the homeowner's rights (*see generally*, ***Bank of Am. v Kessler***, 39 NY3d 317 [2023] [RPAPL § 1304 is designed to avoid foreclosure]; Foreclosure Abuse Prevention Act L 2022 ch 821 [statute designed to shift power away from lenders who engage in abusive manipulation of the statute of limitations]; ***Aurora Loan Servs. LLC v Weisblum***, 85 AD3d 95 [2d Dept 2011] [strict, not substantial or reasonable, compliance with RPAPL § 1304 is required]; ***First Nat. Bank of Chicago v Silver***, 73 AD3d 162 [2d Dept 2010] [strict, not substantial or reasonable compliance with RPAPL § 1303 is required]; CPLR 3408).

Far from being a collection of conclusory allegations of law office failure, as plaintiff argues, borrowers set forth a reasonable excuse, through their attorney who has personal knowledge and knowledge from business records that borrowers' counsel disclosed in this motion practice; those business records corroborate borrowers' counsel's explanation of the law office failure that, significantly, was non-malicious human error within the context of an established law office system. Plaintiff does not suggest that it sustains prejudice from borrowers' law office

failure. Therefore, borrowers have satisfied all but the potentially meritorious defense prong of both the ***Wang*** and ***Xu*** formulation of the rule about defeating a motion for leave to enter a default judgment and for leave to file a late answer.

As for a meritorious defense, borrowers have asserted one against the default judgment motion which requires that such motion be denied. In addition, the absence of business records and proof of authority are potentially meritorious defenses. Therefore, borrowers have satisfied their burden under both ***Wang*** and ***Xu*** to cause denial of the motion for leave to enter a default judgment and to be granted leave to file a late answer.

Therefore, each defendant is granted leave to file a late answer on or before January 15, 2025. A conference is set for January 16, 2025.

Dated : December 26, 2024
Riverhead, New York

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Hon. Aletha V. Fields, AJSC