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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
I.A.S PART 9 SUFFOLK COUNTY

INDEX NO.: 13463-10

PRESENT:
HON. DANIEL MARTIN

MOTION DATE: 10-25-11
10-26-11
ADJ. DATE: 11-23-11
MOT. SEQ. #: 002-MG
003-XMD

---x

ONEWEST BANK FSB

Plaintiff,

-against-

NESTOR PEREZ; ROSA C. GOMEZ, A/K/A ROSA C. PEREZ; BERKOSKI ENTERPRISES INC.; CASTLE AUTO PARTS, LLC; DAIMLER CHRYSLER FINANCIAL SERVICES AMERICAS, LLC SUCCESSOR BY MERGER TO DAIMLER CHRYSLER SERVICES NORTH AMERICA, LLC; CLERK OF THE SUFFOLK COUNTY DISTRICT COURT; "JOHN DOE #1-5" AND "JANE DOE #1-5" said names being fictitious, it being the intention of Plaintiff to designate any and all occupants, tenants, persons or corporations, if any, having or claiming an interest in or lien upon the premises being foreclosed herein;

Defendants.

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PLAINTIFF'S ATTY:

FEIN, SUCH & CRANE, LLP
747 CHESTNUT RIDGE RD. STE. 200
CHESTNUT RIDGE, NY 10977-6216

DEFENDANT'S ATTY:

KENNETH S. PELSINGER, PC.
3601 HEMPSTEAD TPKE, STE 305
LEVITTOWN, NY 11756

DEFENDANTS:

NESTOR PEREZ
1004 EVERGREEN AVE. BSMT.
BRONX, N.Y. 10472

ROSA C. GOMEZ A/K/A
ROSA C. PEREZ
6 MYRTLE AVENUE
BRENTWOOD, N.Y. 11717

BERKOSKI ENTERPRISES, INC.
1 MARINER DRIVE
SOUTHAMPTON, N.Y. 1968

CASTLE AUTO PARTS, LLC
2061 JERICHO TURNPIKE
COMMACK, N. Y. 11725

DAIMLER CHRYSLER
FINANCIAL SERVICES
AMERICAS, LLC SUCCESSOR
BY MERGER TO DAIMLER
CHRYSLER SERVICES
NORTH AMERICA, LLC
111 EIGHT AVENUE
NEW YORK, N. Y. 10011

CLERK OF THE SUFFOLK COUNTY DISTRICT COURT
400 CARLETON AVENUE
CENTRAL ISLIP, N. Y. 11762

CLAUDIO POLO
6 MYRTLE AVENUE
BRENTWOOD, N. Y. 11717

CHRISTIAN GOMEZ
6 MYRTLE AVENUE
BRENTWOOD, N. Y. 11717

JULIO POLO
6 MYRTLE AVENUE
BRENTWOOD, N.Y. 11717

The following named papers have been read on this motion:	
Order to Show Cause/Notice of Motion	X
Cross-Motion	X
Answering Affidavits	X
Replying Affidavits	

ORDERED that this motion (002) by the plaintiff for an order pursuant to Real Property Actions and Proceedings Law § 1321 for leave to enter a default judgment as against the defendants and an order of reference appointing a referee to compute; and pursuant to CPLR 3025 (b) for leave to amend the caption of the summons and complaint is granted; and it is further

ORDERED that this cross motion (003) by the defendant Nestor Perez for an order pursuant to CPLR 3012 (d) extending his time to appear and answer and compelling the plaintiff to accept his proposed answer is considered and is denied; and it is further

ORDERED that David T. Reilly with an office at 170 Old Country Road, Ste 308 Mineola, N.Y. 11501 is appointed Referee to ascertain and compute the amount due upon the note and mortgage documents which this action was brought to foreclose, and to examine and report whether the mortgaged property can be sold in parcels; and it is further

ORDERED that the Referee be paid the sum of $250.00 for the computation of the amount due the plaintiff, within 30 days hereof.

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

ORDERED that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF SUFFOLK

ONEWEST BANK FSB, Plaintiff, -against- NESTOR PEREZ; ROSA C. GOMEZ, a/ka ROSA C. PEREZ; BERKOWSKI ENTERPRISES, INC.; CASTLE AUTO PARTS, LLC; DAIMLER CHRYSLER FINANCIAL SERVICES AMERICAS, LLC SUCCESSOR BY MERGER TO DAIMLER CHRYSLER SERVICES NORTH AMERICA, LLC; CLERK OF THE SUFFOLK COUNTY DISTRICT COURT; CLAUDIO POLO; CHRISTIAN GOMEZ; JULIO POLO; Defendants.

This is an action to foreclose a mortgage on residential real property known as 6 Mrytle Avenue, Brentwood, New York (the subject property). The defendant Nestor Perez (the defendant mortgagor) allegedly executed an interest only fixed rate promissory note dated January 22, 2008 in favor of IndyMac Bank, F.S.B. (the lender) agreeing to pay the principal sum of $403,142 at the rate of 6.625% beginning on March 1, 2008 through to March 1, 2018, the due date. The note also provides that all amounts owed, if any, shall be paid on February 1, 2038, the maturity date. To secure said note, the defendant mortgagor and the defendant Rosa C. Gomez also known as Rosa C. Perez (Rosa Gomez) executed a mortgage of the same date on the subject property. The note bears an undated endorsement by the lender in blank and without recourse. The mortgage indicates that Mortgage Electronic Registration Systems, Inc. (MERS) was acting solely as a nominee for the lender and its successors and assigns and that for the purposes of recording the mortgage MERS was the mortgagee of record. By assignment dated March 31, 2010, MERS as nominee for the lender allegedly transferred the mortgage and "all rights accrued under said [m]ortgage and all indebtedness secured thereby" to OneWest Bank FSB (the plaintiff).

The defendant mortgagor allegedly defaulted on his monthly payment of interest on July 1, 2009 and each month thereafter. The plaintiff allegedly sent the defendant mortgagor a notice of default dated August 15, 2009 as well as a 90-day notice dated November 2, 2009 pursuant to RPAPL § 1304. The plaintiff also allegedly sent Rosa Gomez a notice of default dated February 17, 2010. The defendant mortgagor and Rosa Gomez allegedly failed to cure their default.

The plaintiff commenced the instant action by the filing of a summons and complaint on April 8, 2010. None of the defendants have filed an answer. According to the records maintained by the Court's computerized database, a pre-screening settlement conference was held in the Specialized Mortgage Foreclosure Conference Part on July 23, 2010. The Court's records also reflect that notice of the conference was sent to the defendant mortgagor at his residence, 104 Evergreen Avenue, Bronx, New York (the Bronx residence), and Rosa Gomez at the subject property. On that date, this case was marked to indicate that there was no appearance or participation from the defendant mortgagor or Rosa Gomez. As a result, this case was referred to IAS Part 9. Accordingly, there has been compliance with CPLR 3408 and no further settlement conference is required. Thereafter, the plaintiff moved for, inter alia, an order appointing a referee to compute and an amendment of the caption. On or about November 8, 2010, the plaintiff's application for an order of reference was marked "not-signed - withdrawn" which effected a disposition of the motion without judicial input.

The plaintiff now moves by notice of motion for, inter alia, an order appointing a referee to compute and an amendment of the caption. In support of the motion, the plaintiff submits, among other things, the summons and complaint, affidavits of service, the note and mortgage, the assignment, and an affidavit of merit. In one affidavit of service, the plaintiff's process server alleges, among other things, that a copy of the summons and verified complaint with notice of pendency in compliance with RPAPL §§ 1302 and 1320 was delivered to Clare Maza, a co-resident at the defendant mortgagor's dwelling/the Bronx residence, on April 14, 2010, and another copy was mailed to the defendant mortgagor on April 15, 2010. The proffered affidavit of service upon the defendant mortgagor is stamped filed on April 15, 2010 by the Suffolk County Clerk's Office. In another affidavit of service pursuant to CPLR 3215 (g)(3), additional notice was allegedly sent to the defendant mortgagor at the Bronx residence by ordinary mail on April 15, 2010. Accompanying that affidavit is a copy of a certificate of mailing by the U.S. Postal Service of mailing upon the defendant mortgagor at the Bronx residence on April 15, 2010.

The defendant mortgagor now cross moves for an order pursuant to CPLR 3012 (d) extending his time to appear and answer and compelling the plaintiff to accept his proposed answer. The submissions in support of the cross motion include an affidavit from the defendant mortgagor and a proposed verified answer and counterclaim. In his affidavit, the defendant mortgagor alleges that he was never served with the summons and complaint and that he did not receive a copy by mail. He also alleges that never received the Court's notice of the foreclosure settlement conference. The defendant mortgagor further alleges that "as soon as [he] learned of the within foreclosure action" he retained an attorney to draft the proposed answer. As to the merits of his application, the defendant mortgagor claims that the plaintiff does not have standing on the grounds that the assignment of the note and mortgage was defective. In the proposed answer, the defendant mortgagor alleges, among other things, lack of personal jurisdiction and a lack of standing.

In opposition to the cross-motion, the plaintiff contends that the defendant mortgagor has neither a reasonable excuse for his default in answering nor a valid defense to this foreclosure action rendering the submission of an answer meaningless. The plaintiff also contends that since the defendant mortgagor's answering time expired on May 25, 2010, an order compelling acceptance of an answer at this time would be highly prejudicial to it. The plaintiff adds that the defendant does not deny knowing Clare Maza, but only claims that he did not receive the summons and complaint.

A plaintiff in a mortgage foreclosure action establishes a prima facie case, as a matter of law, by submission of the mortgage, the mortgage note, bond or obligation, and evidence of default (*see*, ***Valley Nat'l Bank v Deutsche***, 88 AD3d 691, 930 NYS2d 477 [2d Dept 2011]; ***Wells Fargo Bank v Karla***, 71 AD3d 1006, 896 NYS2d 681 [2d Dept 2010]; ***Washington Mut. Bank FA v O'Connor***, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]). The burden then shifts to the defendant to demonstrate "the existence of a triable issue of fact as to a bona fide defense to the action, such as waiver, estoppel, bad faith, fraud, or oppressive or unconscionable conduct on the part of the plaintiff" (***Capstone Bus. Credit, LLC v Imperia Family Realty, LLC***, 70 AD3d 882, 883, 895 NYS2d 199 [2d Dept 2010]). In the instant case, the plaintiff produced the executed note and mortgage, evidence of nonpayment, and the notice of default. The plaintiff also submitted, inter alia, an affidavit from an officer of the plaintiff whereby its is alleged that the plaintiff is still the holder of the note and mortgage, as well the assignment which predates the commencement of this action (*see*, ***U.S. Bank, N.A. v Collymore***, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]). As the

plaintiff demonstrated its entitlement to judgment as a matter of law, the burden of proof shifted to the defendant mortgagor (*see*, ***HSBC Bank USA v Merrill***, 37 AD3d 899, 830 NYS2d 598 [3d Dept 2007]). Accordingly, it was incumbent upon the defendant mortgagor to produce evidentiary proof in admissible form sufficient to demonstrate the existence of a triable issue of fact as to a bona fide defense to the action (*see*, ***Argent Mtge. Co., LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]; ***Aames Funding Corp. v Houston***, 44 AD3d 692, 843 NYS2d 660 [2d Dept 2007]).

Turning to the issues raised by the cross motion, it is well settled that a "defendant who seeks to successfully oppose a motion for leave to enter a default judgment based on the failure to timely serve an answer and seeks leave to extend the time to appear or to compel acceptance of an untimely answer must provide a reasonable excuse for the default and for the delay and show a potentially meritorious defense" (***Deutsche Bank Nat'l. Trust Co. v Rudman***, 80 AD3d 651, 652 [2d Dept 2011]; *see also*, ***May v Hartsdale Manor Owners Corp.***, 73 AD3d 713 [2d Dept 2010]; ***Sbarra v Sievernich***, 2011 NY Slip Op 32064U [Sup Ct, Suffolk County, July 13, 2011, Cohalan, J.]). The determination of what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court (*see*, ***Maspeth Federal Sav. & Loan Assn. v Smith***, 84 AD3d 746 [2d Dept 2010]; ***Star Indus. Inc. v Innovative Beverages, Inc.***, 55 AD3d 903 [2d Dept 2008]). Vague, nonspecific and uncorroborated factual assertions, upon which a claim of a reasonable excuse for a default are predicated, are generally insufficient to satisfy the reasonable excuse requirements (*see*, ***Wells Fargo Bank v Linzenberg***, 50 AD3d 674 [2d Dept 2008]; ***Canty v Gregory***, 37 AD3d 508 [2d Dept 2007]).

CPLR 308 (2), inter alia, authorizes service by delivery of the summons within the State to a person of suitable age and discretion at the defendant's dwelling place, and mailing the summons to the defendant's last known residence. "The plaintiff bears the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process" (***Bankers Trust Co. of Cal. v Tsoukas***, 303 AD2d 343, 343, 756 NYS2d 92 [2d Dept 2003]; *see*, ***Wern v D'Alessandro***, 219 AD2d 646, 647, 631 NYS2d 425 [2d Dept 1995]). An affidavit of service by the plaintiff's process server which specifies the papers served, the person who was served, and the date, time, address and sets forth facts showing that service was made by an authorized person, and in an authorized manner, constitutes prima facie evidence of proper service (***Maldonado v County of Suffolk***, 229 AD2d 376, 644 NYS2d 572 [2d Dept 1996]). A sworn denial of service by the defendant will rebut the presumption of proper service only where it refutes factual allegations in the process server's affidavit or presents a question of fact rather than baldly denying receipt of process (***Silverman v Deutsche***, 283 AD2d 478, 724 NYS2d 647 [2d Dept 2001]; ***European Am. Bank v Abramoff***, 201 AD2d 611, 608 NYS2d 233 [2d Dept 1994]). Bare conclusory and unsubstantiated denials of receipt of process are thus insufficient to rebut the presumption of proper service created by the affidavit of the plaintiff's process server and to require a traverse hearing (*see*, ***Irwin Mtge. Corp. v Devis***, 72 AD3d 743, 898 NYS2d 854 [2d Dept 2010]; ***Beneficial Homeowner Serv. Corp. v Girault***, 60 AD3d 984, 875 NYS2d 815 [2d Dept 2009]).

By its submissions, the plaintiff established, prima facie, that the defendant was properly served pursuant to CPLR 308 (2) (*see*, ***Matter of Goldberger v Gansburg***, 85 AD3d 914, 926 NYS2d 116 [2d Dept 2011]; ***Roberts v Anka***, 45 AD3d 752, 846 NYS2d 280 [2d Dept 2007]). The affidavits submitted by the plaintiff show that the defendant mortgagor was properly served pursuant to CPLR 308 (2). The plaintiff has also demonstrated that the affidavit of service upon the defendant mortgagor by substitute

service was timely filed with the Suffolk County Clerk's Office. Under the circumstances presented here, the defendant mortgagor's papers are insufficient to rebut the process server's affidavit of service of the summons and complaint pursuant to CPLR 308 (2) (*see*, ***Beneficial Homeowner Serv. Corp. v Girault***, 60 AD3d 984, *supra;* ***Hamlet of Olde Oyster Bay Homeowners' Assoc. Ellner***, 57 AD3d 732, 869 NYS2d 591 [2d Dept 2008]). The bald, conclusory, and unsubstantiated denial of service set forth in the defendant mortgagor's supporting affidavit failed to rebut the presumption of service that arose from the affidavit of the plaintiff's process server. In his affidavit, the defendant mortgagor, has not claimed that the Bronx residence was not his dwelling at the time of service, nor has he denied that he even knows his co-resident Clare Maza. Moreover, the defendant mortgagor failed to submit any affidavit by Clare Maza denying receipt of the summons and complaint (*see*, ***Roberts v Anka***, 45 AD3d 752, *supra; cf.*, ***Foster v Jordan***, 269 AD2d 152, 703 NYS2d 23 [1st Dept 2000]). The defendant mortgagor's denial of service is conclusory insofar as it does not refute the contents of the process server's affidavit, nor does it raise a question of fact as to whether service was properly effectuated. All that is offered is a denial of service (*see*, ***Tikvah Enterprises, LLC v Neuman***, 80 AD3d 748, 915 NYS2d 508 [2d Dept 2011]; *cf.*, ***U.S. Bank, Nat'l Assn. v Arias***, 85 AD3d 1014, 927 NYS2d 362 [2d Dept 2011]). Accordingly, the defendant mortgagor's claim that this Court lacks personal jurisdiction over him due to improper service of process must fail. Accordingly, no hearing is required.

The defendant mortgagor has failed to demonstrate a reasonable excuse for his lengthy default other than improper service which has been found unmeritorious (*see*, ***Deutsche Bank Nat'l Trust Co. v Rudman***, 80 AD3d 651, 914 NYS2d 672 [2d Dept 2011]; ***The Bank of New York v Bestbuysigital, Inc.***, 2010 NY Misc LEXIS 2360, 2010 NY Slip Op 31418U [Sup Ct, Nassau County, June 2, 2010, Palmeri, J.]; ***Long Is. Minimally Invasive Surgery, P.C. v Lester***, 12 Misc3d 1183A, 824 NYS2d 763 [App Term, 1st Dept, July 13, 2006, Phelan, J.]). Even if the branch of the defendant mortgagor's cross motion which seeks, in effect, to vacate his default were to be treated as one made pursuant to CPLR 317 (*see*, ***Eugene DiLorenzo, Inc. v A. C. Dutton Lbr. Co.***, 67 NY2d 138, 501 NYS2d 8 [1986]), the defendant mortgagor failed to demonstrate that he did not receive notice of the summons and complaint in time to defend the action (see, ***C & H Import & Export v MNA Global, Inc.***, 79 AD3d 784, 912 NYS2d 428 [2d Dept 2010]). The plaintiff's evidence that a copy of the summons and complaint was mailed to the defendant mortgagor's correct residence address created a presumption of proper mailing and of receipt (*see*, ***Engel v Lichterman***, 62 NY2d 943, 479 NYS2d 188 [1984]; ***Calvary Portfolio Servs., LLC v Reisman***, 55 AD3d 524, 865 NYS2d 286 [2d Dept 2008]). His denial of receipt, without more, does not rebut the presumption of proper mailing (*see*, ***Calvary Portfolio Servs., LLC v Reisman***, 55 AD3d 524, *supra*). Additionally, while the defendant mortgagor proffers that he retained an attorney to draft the proposed answer after he learned of this action, he has not set forth any specific allegations as to how or when he first became aware of this litigation (*see*, ***Silverman v Deutsche***, 283 AD2d 478, *supra*; *see also*, ***Bank of NY v Jayaswal***, 33 Misc3d 1214A, 2011 NY Misc. LEXIS 4998 [Sup Ct, Suffolk County, Oct. 17, 2011, Whelan, J.]; ***Green Point Sav. Bank v Clark***, 253 AD2d 514, 676 NYS2d 874 [2d Dept 1998]). In light of the defendant mortgagor's 17-month delay in moving for the relief herein, his conclusory, vague allegations in this regard are simply incredible as a matter of law.

Since the defendant mortgagor failed to proffer a reasonable excuse for his failure to timely answer the complaint pursuant to CPLR 3012 (d), it is unnecessary to consider whether he demonstrated the existence of a potentially meritorious defense (*see*, ***Deutsche Bank Nat'l Trust Co. v Rudman***, 80 AD3d

651, *supra*; ***HSBC Bank USA, N.A. v Roldan***, 80 AD3d 566, 914 NYS2d 647 [2d Dept 2011]). In any event, the defendant mortgagor failed to demonstrate that any of the defenses raised in his proposed answer are potentially meritorious (*see*, ***Levy v Prime East 15th, LLC***, 89 AD3d 1066, 933 NYS2d 587 [2d Dept 2011]; ***Valley Nat'l Bank v Deutsche***, 88 AD3d 691, *supra*; ***Deutsche Bank Nat'l Trust Co. v Pietranico***, 33 Misc3d 528, 928 NYS2d 818 [Sup Ct, Suffolk County, July 27, 2011], Whelan, J.]; ***10 Connor Lane v C. Connor Lane Assoc., LLC***, 2011 NY Slip Op 31439U [Sup Ct, Suffolk County, May 10, 2011, Martin, J.]).

Based upon the foregoing, the motion for leave to enter a default judgment against all the defendants, none of which has answered, and for an order of reference is granted (*see*, RPAPL § 1321; ***HSBC Bank USA, N.A. v Roldan***, 80 AD3d 566, *supra*). The cross motion by the defendant mortgagor for an order extending his time to appear and answer and compelling the plaintiff to accept his answer is denied (*see*, *id.*).

The branch of the instant motion wherein the plaintiff seeks an order substituting Claudio Polo in place for John Doe # 1, Christian Gomez for John Doe # 2, and Julio Polo for John Doe # 3, and amending the caption by excising the fictitious named defendants, John Doe # 4 through John Doe # 5 and Jane Doe # 1 through Jane Doe # 5, is granted pursuant to CPLR 1024. By its submissions, the plaintiff established the basis for this relief (*see*, ***Neighborhood Hous. Servs. N.Y. City, Inc. v Meltzer***, 67 AD3d 872, 889 NYS2d 627 [2d Dept 2009]). All future proceedings shall be captioned as indicated above.

Accordingly, the motion is granted and the cross motion is denied. The proposed order appointing a referee to compute, as modified by the Court, has been signed simultaneously herewith.

Dated: MAY 4, 2012
Riverhead, NY

HON. DANIEL MARTIN, A.J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**