HSBC Bank USA, N.A. v Trapani
2016 NY Slip Op 31810(U)
March 22, 2016
Supreme Court, Suffolk County
Docket Number: 3706/13
Judge: Thomas F. Whelan

[* 1].

MEMO DECISION & ORDER

INDEX No. 3706/13

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 10/31/14
SUBMIT DATE: 3/8/16
Mot. Seq. # 001 - MG
Mot. Seq. # 002 - XMD
ORDER SIGNED
CDISP: NO

----------X

HSBC BANK USA, NA,

Plaintiff,

-against-

MICHAEL TRAPANI, CARMELA TRAPANI, MANUFACTURERS AND TRADERS TRUST COMPANY, MARK LEWIS TAX GRIEVANCE SERVICE, INC., FLORENCE CORPORATION, HSBC BANK NEVADA, NA, COMMISSIONER OF TAXATION AND FINANCE TAX COMPLIANCE DIVISION - SUFFOLK MIDLAND FUNDING, LLC, "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.

----------X

FEIN, SUCH & CRANE, LLP
Attys. For Plaintiff
1400 Old Country Rd. - Ste. C103
Westbury, NY 11590

ANDREW D. GREENE, PC
Atty. For Defendant Michael Trapani
3000 Marcus Ave. - Ste. 1W11
Lake Success, NY 11042

CARMELA TRAPANI
Defendant
98 Chelsea Dr. - Rt. Side Apt.
Mt. Sinai, NY 11766

Upon the following papers numbered 1 to 10 read on this motion by plaintiff for an order of reference on default; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers 5-8; Answering papers 9-10; Replying Affidavits and supporting papers ___; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by the plaintiff for an order of reference on default and the identification of the individual served as unknown defendant Jane Doe and the substitution of the name, Kelly McGiness therefor, together with the deletion of all other unknown defendants and the amendment of the caption is considered under CPLR 1024, 3215 and RPAPL Article 13 and is granted. The moving papers established the plaintiff's entitlement to this relief as they included due proof of the plaintiff's service of the summons and complaint and the defaults in answering on the part of the defendants served with process, including the defendant mortgagor, Michael Trapani, and the plaintiff's sufficient demonstration of the facts constituting the plaintiff's claim for foreclosure and sale (*see* CPLR 3215[f]; ***U.S. Bank Natl. Ass'n v Wolnerman***, 135 AD3d 850, 24 NYS3d 343 [2d Dept 2016]; ***U.S. Bank Natl. Ass'n v Alba***, 130 AD3d 715, 11 NYS2d 864 [2d Dept 2015]; ***HSBC Bank USA, N.A. v Alexander***, 124 AD3d 838, 2015 WL 361008 [2d Dept 2015]; ***Todd v Green***, 122 AD3d 831, 997 NYS2d 155 [2d Dept 2014]; ***U.S. Bank, Natl. Ass'n v Razon***, 115 AD3d 739, 981 NYS2d 571 [2d Dept 2014]; ***Triangle Prop. #2, LLC v Narang,*** 73 AD3d 1030, 903 NYS2d 424 [2d Dept 2010]); and it is further

ORDERED that the cross motion (#002) by the defendant, Michael Trapani, pursuant to CPLR 5015(a) seeking to vacate his default and permitting the filing of a late answer to the complaint is denied.

To defeat the plaintiff's facially adequate motion, it was incumbent upon defendant, Michael Trapani, who appeared in opposition to this motion, but who defaulted in answering the summons an complaint to establish that there was no default in answering due to a jurisdictional defect or otherwise, or that he possesses a reasonable excuse for the delay in answering and a potentially meritorious defense to the plaintiff's claims for foreclosure and sale (*see* ***Deutsche Bank Natl. Trust Co. v Patrick***, 93 AD3d 630, 2016 WL 7179482016 [2d Dept 2016]; ***U.S. Bank Natl. Ass'n. v Wolnerman***, 135 AD3d 850, *supra;* ***Wells Fargo Bank, N.A. v Krauss***, 128 AD3d 813, 10 NYS3d 257 [2d Dept 2015]; ***Fried v Jacob Holding, Inc.***, 110 AD3d 56, 970 NYS2d 260 [2d Dept 2013]; ***Diederich v Wetzel***, 112 AD3d 883, 979 NYS2d 605 [2d Dept 2013]; ***Swedbank AB, NY v Hale Ave. Borrower, LLC***, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]). Recent appellate case authorities have instructed that, where, as here, a claim for vacatur rests upon a jurisdictional defense, trial courts must consider the efficacy of such defense prior to determining whether discretionary grounds for a vacatur of the default exist under CPLR 5015(a)(1) or CPLR 3012(d) (*see* ***Community West Bank, N.A. v Stephen***, 127 AD3d 1008, 9 NYS3d 275 [2d Dept 2015]; ***E*Trade Bank v Vasquez***, 126 AD3d 933, 934, 7 NYS3d 285, 286 [2d Dept 2015]; ***HSBC Bank USA Natl. Ass'n v Miller***, 121 AD3d 1044, 995 NYS2d 198 [2d Dept 2014]; ***Youngstown Tube Co. v Russo***, 120 AD3d 1409, 993 NYS2d 146 [2d Dept 2014]; ***Canelas v Flores***, 112 AD3d 871, 977 NYS2d 362 [2d Dept 2013]).

The foregoing mandate is derived from long standing jurisdictional precepts which provide that the successful invocation of a jurisdictional defense is a complete defense to the complaint and where it is established, the dismissal of an action against the moving defendant is warranted without any demonstration of his or her possession of a meritorious defense or other elemental showing (*see* ***Prudence v Wright***, 94 AD3d 1073, 943 NYS2d 185 [2d Dept 2012]; *see also* ***Emigrant Mtge. Co., Inc. v Westervelt***, 105 AD3d 896, 964 NYS2d 543 [2d Dept 2013]; ***Deutsche Bank Natl. Trust Co.***

v Pestano, 71 AD3d 1074, 899 NYS2d 269 [2d Dept 2010]). Nevertheless, a defendant who successfully establishes the defense of improper service may elect to waive the jurisdictional aspect of such defense and appear in the action so as to defend against the claims interposed in an effort to succeed on the merits and avoid a second commenced action by the plaintiff (*see* ***Equicredit Corp. of Am. v Campbell***, 73 AD3d 1119, 900 NYS2d 907 [2d Dept 2010]; ***Ramirez v Romualdo***, 25 AD3d 680, 808 NYS2d 733 [2d Dept 2006]; *see also* ***ACT Prop., LLC v Garcia***, 102 AD3d 712, 957 NYS2d 884 [2d Dept 2013]; ***Dupps v Betancourt***, 99 AD3d 855, 952 NYS2d 585 [2d Dept 2012]). To do so, however, such defendant must satisfy the two prong test applicable to the discretionary vacatur permitted under CPLR 5015(a)(1) and or CPLR 3012(d), both of which require a showing of a reasonable excuse for the default such as, the improper service and the movant's possession of a meritorious defense to the action (*see* ***Eugene DiLorenzo, Inc. v A.C. Dutton Lbr. Co.***, 67 NY2d 138, 141, 501 NYS2d 8 [1986]; ***Deutsche Bank Natl. Assoc. v Kudlip***, ___ AD3d___, 2016 WL 717958 [2d Dept 2016]; ***U.S. Bank Natl. Assoc. v Sachdev***, 128 AD3d 807, 9 NYS3d 337 [2d Dept 2015]; ***ACT Prop., LLC v Garcia***, 102 AD3d 712, *supra*; ***Equicredit Corp. of America v Campbell***, 73 AD3d 1119, *supra*).

A "process server's affidavit of service constitutes prima facie evidence of proper service" (***Scarano v Scarano***, 63 AD3d 716, 716, 880 NYS2d 682 [2d Dept 2009]; *see* ***NYCTL 2009–A Trust v Tsafatinos***, 101 AD3d 1092, 1093, 956 NYS2d 571 [2d Dept 2012]). "Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavits" (***Countrywide Home Loans Serv., LP v Albert***, 78 AD3d at 984–985, 912 NYS2d 96 [2d Dept 2010; internal quotation marks and citation omitted]; *see* ***Mortgage Elec. Registration Sys., Inc. v Losco***, 125 AD3d 733, 2015 WL 542795 [2d Dept 2015]; ***JPMorgan Chase v Todd***, 125 AD3d 953, 2015 WL 775077 [2d Dept 2015]; ***Emigrant Mtge. Co., Inc. v Westervelt***, 105 AD3d 896, 897, 964 NYS2d 543 [2d Dept 2013]; ***Countrywide Home Loans Serv., LP v Albert***, 78 AD3d 983, 984–985, *supra*). 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* ***Beneficial Homeowner Serv. Corp. v Girault***, 60 AD3d 984, 875 NYS2d 815 [2d Dept 2009]; ***Hamlet of Olde Oyster Bay Homeowners' Assoc. v Ellner***, 57 AD3d 732, 869 NYS2d 591 [2d Dept 2008]; ***Mortgage Elec. Sys. v Shotter***, 50 AD3d 983, 857 NYS2d 592 [2d Dept 2008]; ***425 East 26th St. Owners' Corp. v Beaton***, 50 AD3d 845, 858 NYS2d 188 [2d Dept 2008]; ***Jefferson v Netusic***, 44 AD3d 621, 843 NYS2d 158 [2d Dept 2007]).

Here, the affidavit of service of the plaintiff's process server constituted prima facie evidence of proper service pursuant to CPLR 308(1) (*see* ***Onewest Bank v Johnson***, 127 AD3d 830, 4 NYS3d 889 [2d Dept 2015]; ***ACT Prop., LLC v Garcia***, 102 AD3d 712, *supra*; ***Bank of NY v Espejo***, 92 AD3d 707, 708 [2d Dept 2012]; ***U.S. Natl. Bank Assn. v Melton***, 90 AD3d 742, 743, 934 NYS2d 352 [2d Dept 2011]). It was thus incumbent upon defendant, Michael Trapani, to rebut this prima facie showing of due service by specific and substantiated allegations regarding a lack of such service (*see* ***Bank of NY v Espejo***, 92 AD3d 707, *supra*).

A review of the cross moving papers reveals that the same were insufficient to rebut the presumption of due service arising from the process server's affidavit of service upon defendant, Michael Trapani, pursuant to CPLR 308(1). Such service was effected on February 16, 2013 by personal delivery of the summons and complaint and all related documentation at the address at issue, which was the dwelling place and/or actual place of abode of defendant, Michael Trapani, as confirmed by him.

The allegations set forth in the supporting affidavit of defendant, Michael Trapani, are conclusory and unsubstantiated and thus insufficient to warrant a hearing on the issue of service (*see* ***Chichester v Alal–Amin Grocery & Halal Meat***, 100 AD3d 820, 954 NYS2d 577 [2d Dept 2012]; *cf.*, ***Dime Sav. Bank of Williamsburg v 146 Ross Realty***, 106 AD3d 863, 966 NYS2d 443 [2d Dept 2013]). The alleged minor discrepancies in the description of Michael Trapani's appearance, which the Court does not find to be inconsistent (the age and height are correctly stated) does not substantiate his claim of lack of service (*see* ***Wells Fargo Bank, N.A. v Kohn***, – AD3d – 2006 NY Slip Op 01662 [2d Dept 2016]). The defendant does not deny the description of the hair color or the weight, nor does he deny that he was at the address at which service was effected. He does not deny that this was his dwelling place and/or usual place of abode at the time of service. Defendant does not offer an explanation or proof as to his whereabouts on February 16, 2013. The Court rejects the assertion that the defendant only wears his glasses in his car as patently incredible. Defendant's counsel does not deny the claim advanced in the reply papers that he sought an extension of time to answer the complaint shortly after service of process. Here, the jurisdictional objection is without merit (*see* ***HSBC Bank USA v Dalessio***, __ AD3d –, 2016 NY Slip Op 01642 [2d Dept 2016]). Those portions of the defendant's cross motion (#002) wherein he seeks a dismissal of the plaintiff's complaint on the grounds that the court lacks jurisdiction over him due to a lack or improper service is thus denied

Nor may defendant, Michael Trapani, succeed in obtaining a direct dismissal of the plaintiff;s complaint on grounds that the plaintiff failed to comply with the pre-action, ninety day notice of default and cure required by RPAPL § 1304. Such notice has been referred to by more recent appellate case authorities as a "defense" (*see* ***Citimortgage, Inc. v Espinal***, 134 AD3d 876, 23 NYS3d 251 [2d Dept 2015], *citing* ***Pritchard v Curtis***, 101 AD3d 1502, 1504, 957 NYS2d 440 [3d Dept 2012]; ***PHH Mtge. Corp. v Celestin***, 130 AD3d 703, 11 NYS3d 871 [2d Dept 2015]; *see also* RPAPL § 1302[2]). Unlike the affirmative defense of standing, which is waived for all purposes if not asserted in an answer or pre-answer motion to dismiss, a defense premised upon a lack of compliance with the notice provisions of RPAPL § 1304 may be raised by an answering defendant even if such defense was not asserted in his or her answer (*see* ***Citimortgage, Inc. v Espinal***, 134 AD3d 876, *supra*; ***Pritchard v Curtis***, 101 AD3d 1502, *supra*; ***Citimortgage v Pembelton***, 39 Misc3d 454, 960 NYS2d 867 [Sup. Court Suffolk County 2013]).

However, non-appearing defendants who defaulted in appearing in the action by answer have been held to have waived defenses predicated upon statutory notice requirements such as those imposed by RPAPL § 1304 or § 1303, and they may not assert these defenses against a foreclosing plaintiff unless such defendants can establish discretionary grounds for a vacatur of their default (*see*

PHH Mtge. Corp. v Celestin, 130 AD3d 703, *supra*; *see also* ***Citimortgage v Baser***, ___ AD3d___, 2016 WL 802996 [2d Dept 2016]; ***HSBC Mtge. Serv. v Talip***, 111 AD3d 889, 975 NYS2d 887 [2d Dept 2013]). This result is dictated by the non-jurisdictional nature of a defense premised upon non-compliance with statutory notice requirements (*see* ***PHH Mtge. Corp. v Celestin***, 130 AD3d 703, *supra*; *also* ***Citimortgage v Baser***, ___ AD3d___, 2016 WL 802996, *supra*; ***Summitbridge Credit Inv., LLC v Wallace***, 128 AD3d 676, 9 NYS3d 320 [2d Dept 2015]; ***Pritchard v Curtis***, 101 AD3d 1502, 1504, *supra*; ***Deutsche Bank Natl. Trust Co. v Posner***, 89 AD3d 674, 933 NYS2d 52 [2d Dept 2011]; ***Citimortgage v Pembelton***, 39 Misc3d 454, *supra*).

To properly assert his RPAPL §1304 defense, defendant, Michael Trapani, must successfully establish the elements necessary to secure a discretionary vacatur of his default in timely answering the summons and complaint.

It is well established that to obtain a discretionary vacatur of an order or judgment entered upon default or to extend the time to appear by answer, the defendant must satisfy both prongs of the excusable default test which courts employ in determining applications for such relief pursuant to CPLR 5015(a)(1) and/or CPLR 3012(d). In either setting, the moving defendant must demonstrate a reasonable excuse for the default and the possession of a potentially meritorious defense, the material facts of which, must be advanced in an affidavit of the defendant or in a proposed verified answer attached to the moving papers (*see* ***Deutsche Bank Natl. Assoc. v Kudlip***, ___ AD3d___, 2016 WL 717958 [2d Dept 2016]; ***Citimortgage, Inc. v Kowalski***, 130 AD3d 558, 13 NYS3d 468 [2d Dept 2015]; ***U.S. Bank Natl. Assoc. v Sachdev***, 128 AD3d 807, *supra*; ***Emigrant Bank v O. Carl Wiseman***, 127 AD3d 1013, 6 NYS3d 670 [2d Dept 2015]; ***E*Trade Bank v Vasquez***, 126 AD3d 933, *supra*; ***Karalis v New Dimensions HR, Inc.***, 105 AD3d 707, 962 NYS2d 647 [2d Dept 2013]). This standard thus governs motions resting upon grounds of excusable default that are made both prior and subsequent to a formal fixation of a default on the part of the defendant by the court (*see* CPLR 5015[a][1]; 3012[d]; *see* ***Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.***, 67 NY2d 138, 141, *supra*; ***Juseinoski v. Board of Educ. of City of N.Y.***, 15 AD3d 353, 356, 790 NYS2d 162 [2d Dept 2005]; *see also* ***Bac Home Loans Serv., LP v Reardon***, 132 AD3d 790, 18 NYS3d 664 [2d Dept 2015; no judgment or order of reference]; ***Wells Fargo Bank v Besemer***, 131 AD3d 1047, 16 NYS3d 819 [2d Dept 2015; judgment entered]; ***Morgan Stanley Mtge. Loan Trust 2006-17XS v Waldman***, 131 AD3d 1140, 16 NYS2d 331[2d Dept 2015; order of reference issued]; ***Community Preserv. Corp. v Bridgewater Condominiums, LLC***, 89 AD3d 784, 932 NYS2d 378 [2d Dept 2011; no order of reference or judgment]).

The determination of that which constitutes a reasonable excuse lies within the discretion of the Supreme Court (*see* ***Mannino Dev., Inc. v Linares***, 117 AD3d 995, 986 NYS2d 578 [2d Dept 2014]; ***Mellon v Izmirligil***, 88 AD3d 930, 931 NYS2d 667 [2d Dept 2011]; ***Wells Fargo Bank, N.A. v Cervini***, 84 AD3d 789, *supra*; ***Maspeth Fed. Sav. & Loan Assn. v McGown***, 77 AD3d 890, *supra*; ***Star Indus. Inc. v Innovative Beverages, Inc.***, 55 AD3d 903, 904, 866 NYS2d 357 [2d Dept 2008]). Although a defect in service may, under some circumstances, constitute a reasonable excuse for a default (*see* ***Equicredit Corp. of Am. v Campbell***, 73 AD3d 119, 900 NYS2d 907 [2d Dept 2010]; ***Ramirez v Romualdo***, 25 AD3d 680, 808 NYS2d 733 [2d Dept 2006]; *see also* ***ACT Prop., LLC v***

Garcia, 102 AD3d 712, *supra*; ***Dupps v Betancourt***, 99 AD3d 855, *supra*), where a claim of defective service is not established and the defendant relies entirely upon such claim as the justification for the default, an excusable default under CPLR 5015(a)(1) or 3012(d) is not established (*see* ***U.S. Bank, Natl. Ass'n. v Smith***, 132 AD3d 848, 19 NYS3d 62 [2d Dept 2015]; ***Summitbridge Credit Investments, LLC v Wallace***, 128 AD3d 676, *supra*; ***Community W. Bank, N.A. v Stephen***, 127 AD3d 1008, 19 NYS3d 62 [2d Dept 2015]; ***U. S. Bank Natl. Assoc. v Harding***, 124 AD3d 766, 998 NYS2d 667 [2d Dept 2014]; ***HSBC Bank USA, Nat. Assoc. v Miller***, 121 AD3d 1044, 995 NYS2d 198 [2d Dept 2014]; ***Bank of New York v Samuels***, 107 Ad3d 653, 968 NYS2d 2013]; ***Deutsche Bank Natl. Trust Co. v Pietrnaico***, 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]; ***Tadco Constr. Corp. v Allstate Ins. Co.***, 73 AD3d 1022, 900 NYS2d 687 [2d Dept 2010]).

A lack of compliance with RPAPL § 1304 will also fail to qualify as a reasonable excuse for the default in answering, since the time to answer begins to run upon service of the summons rather than from the service of any of the statutory notices required by RPAPL Article 13 (*see* CPLR 320; 308).[1] However, a defendant in default may properly assert non-compliance with the notice provisions of RPAPL § 1304 and other like statutory provisions as a potentially meritorious defense to the action in support of such defendant's motion to vacate the default, whereas a waived standing defense may not be so asserted (*see* ***HSBC Bank, USA v Dammond***, 59 AD3d 679, *supra*; ***Citimortgage v Pembelton***, 39 Misc3d 454, *supra*).

Here, no reasonable excuse was advanced by defendant, Michael Trapani, in support of his application to vacate his default in answering and for leave to extend the time to answer under CPLR 3012(d). The defendant's claim of improper service of process has been found by this court to be lacking in merit and thus cannot serve as a reasonable excuse for his default in answering (*see* ***U.S. Bank, Natl. Ass'n. v Smith***, 132 AD3d 848, *supra*; ***Community W. Bank, N.A. v Stephen***, 127 AD2d 1008, *supra*; ***HSBC Bank, USA v Dammond***, 59 AD3d 679, *supra*). While the defendant's claims of non-compliance with RPAPL § 1304 may be properly advanced to satisfy the meritorious defense prong of the test used to determine his application for a discretionary vacatur of his default under CPLR 5015(a)(1) and/or CPLR 3012(d), it does not satisfy the reasonable excuse prong of such test as the moving papers failed to demonstrate that any such non-compliance caused, contributed or otherwise facilitated the defendant's default in answering following service of the summons and complaint (*see* ***PHH Mtge. Corp. v Celestin***, 130 AD3d 703, *supra*; *also see* ***Citimortgage v Baser***, ___ AD3d___, 2016 WL 802996, *supra*; ***Pritchard v Curtis***, 101 AD3d 1502, 1504, *supra*; ***Citimortgage v Pembelton***, 39 Misc3d 454, *supra*).

---

[1] Indeed, the purpose of the RPAPL § 1304 notice is to inform the borrower prior to suit of his or her contractual default and advise of the availability of pre-litigation assistance aimed at avoiding the loss of the home by way of foreclosure and sale (*see* ***Aurora Loan Servs., LLC v Weisblum***, 85 AD3d 95, 102–108, *supra*). Due to its non-jurisdictional nature, the failure to comply with the notice requirements cannot serve to extend the borrower's time to answer the complaint as such time is fixed in Article 3 of the CPLR and the Legislature chose not to amend it when it enacted the various borrower protection statutes known such as Real Property Law § 265–a [HETPA]).

The court thus finds that defendant, Michael Trapani, is not entitled to a vacatur of his default in answering nor leave to file a late answer pursuant to CPLR 5015(a)(1) and 3012(d), as no reasonable excuse for his default in answering is advanced in his cross moving papers. The absence of a reasonable excuse renders it unnecessary to determine whether the defendant demonstrated the existence of a potentially meritorious defense to the action (see ***Summitbridge Credit Inv., LLC v Wallace***, 128 AD3d 676, *supra*; *see* ***U.S. Bank N.A. v Hasan***, 126 AD3d at 684, 5 NYS3d 460 [2d Dept 2015]).

In view of the foregoing, the cross motion (#002) by defendant Michael Trapani for vacatur of his default in answering and leave to serve a late answer is denied and the plaintiff's motion (#001) for an order of reference is granted and the proposed Order appointing a referee to compute, as modified by the court, has been marked signed.

DATED: 3/22/16

THOMAS F. WHELAN, J.S.C.