

**Wells Fargo Bank, N.A. v Alvarado**

2017 NY Slip Op 31030(U)

April 18, 2017

Supreme Court, Suffolk County

Docket Number: 10494/2009

Judge: Howard H. Heckman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
IAS PART 18 - SUFFOLK COUNTY

**PRESENT:**  
**HON. HOWARD H. HECKMAN JR., J.S.C.**

INDEX NO.: 10494/2009  
MOTION DATE: 06/09/2016  
MOTION SEQ. NO.: 005 MD

-----X  
WELLS FARGO BANK, N.A.,

Plaintiffs,

-against-

HENRY ALVARADO,

Defendants.  
-----X

**PLAINTIFFS' ATTORNEY:**  
LEOPOLD & ASSOCIATES, PLLC  
80 BUSINESS PARK DR., STE. 110  
ARMONK, NY 10504

**DEFENDANTS' ATTORNEYS:**  
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Upon the following papers numbered 1 to 26 read on this motion; Notice of Motion/ Order to Show Cause and supporting papers 1- 14; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers 15-20; Replying Affidavits and supporting papers 21-26; Other     ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by defendant Henry Alvarado brought on by Order to Show Cause (Ford, J.) dated May 23, 2016 seeking an order pursuant to 3012, 3211(a)(8), 3408, 5015 & 5240 & RPAPL 1304: 1) staying the foreclosure sale scheduled for May 24, 2016; 2) vacating the Order (Gazzillo, J.) dated February 2, 2010 granting a default judgment and appointing a referee to compute the sums due and owing to the plaintiff; 3) vacating the Judgment of Foreclosure and Sale (Gazzillo, J.) dated February 7, 2014; and 4) dismissing plaintiff's complaint; or, in the alternative 5) granting defendant leave to serve a late answer; and 6) remanding this action to the foreclosure settlement part for the purpose of conducting a settlement conference is denied; and it is further

**ORDERED** that the referee is directed to reschedule the foreclosure sale forthwith and to notify all appropriate parties.

Plaintiff's action seeks to foreclose a mortgage in the original sum of \$385,000.00 executed by the defendant Henry Alvarado on January 29, 2007 . On that same date defendant Henry Alvarado executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. Plaintiff claims that the defendant has defaulted in making timely monthly mortgage payments since December 1, 2008. By Order (Gazzillo, J.) dated February 2, 2010 plaintiff's unopposed default judgment motion was granted and a referee was appointed to compute the sums due and owing to the mortgage lender. A Judgment of Foreclosure and Sale (Gazzillo, J.) was granted on February 7, 2014. The property was scheduled to be sold at auction on May 24, 2016. The sale was stayed as a result of this application.

Defendant's motion seeks and order permanently staying the sale of the premises, vacating the judgment of foreclosure and sale and order granting a default judgment, and dismissing the complaint or, in the alternative, granting Alvarado leave to serve a late answer and remanding this action for a court settlement conference. Defendant claims that he holds a "lucrative job" and has been "saving money diligently to put towards saving this property" and requests that he be given an opportunity for a loan modification. Defendant also claims that the interests of justice would best be served by vacating the judgment of foreclosure and sale. In his affidavit the defendant denies having ever been served with a summons and complaint and denies ever receiving a 30-day pre-foreclosure notice, a 90-day pre-foreclosure notice and any information concerning a foreclosure settlement conference. Defendant contends that plaintiff failed to serve notices required under the terms of the mortgage (30-day notice) and pursuant to RPAPL 1304 (90-day notice) and therefore the complaint must be dismissed since each of the notices are conditions precedent to commencing this action.

In opposition, plaintiff submits an attorney's affirmation and argues that the relevant, admissible evidence submitted in the form of the process server's affidavit of service establishes prima facie evidence that the defendant was properly served with process and the court therefore has personal jurisdiction over the defendant. Plaintiff contends that no basis exists to vacate the defendant's default absent proof of a reasonable excuse for his default in appearing and a demonstration of an arguably meritorious defense. Plaintiff argues that the defendant has failed to submit any reasonable explanation for his default in appearing since service of the summons and complaint on March 28, 2009 and therefore defendant's motion must be denied in its entirety. Plaintiff claims that the defendant has waived his right to contest the issues of service of statutory and mortgage pre-foreclosure notices and that even were those issues to be litigated sufficient evidence is submitted to show that all required notices were served upon the defendant. Plaintiff also claims that the mortgage lender has no objection to reviewing defendant's loan modification request but that the lender has no obligation to enter into a loan modification agreement.

A defendant seeking to vacate a default in appearing and answering a complaint must show both a reasonable excuse for the default and the existence of a potentially meritorious defense (*Eugene DiLorenzo, Inc. V. A.C. Dutton Lbr., Co.*, 67 NY2d 138, 501 NYS2d 8 (1986); *Deutsche Bank National Trust Co. v. Gutierrez*, 102 AD3d 825, 958 NYS2d 472 (2<sup>nd</sup> Dept., 2013); *U.S. Bank, N.A. v. Samuel*, 138 AD3d 1105, 30 NYS3d 305 (2<sup>nd</sup> Dept., 2016); *TCIF REO GCM, LLC v. Walker*, 139 AD3d 704, 32 NYS3d 223 (2<sup>nd</sup> Dept., 2016); CPLR 317 & 3012(d)). Absent proper service of the summons and complaint a default judgment is a nullity since a court lacks in personem jurisdiction over the defendant (CPLR 5015(a)(4); *Prudence v. Wright*, 94 AD3d 1073, 943 NYS2d 185 (2<sup>nd</sup> Dept., 2012); *Emigrant Mortgage Co., Inc. v. Westervelt*, 105 AD3d 896, 964 NYKS2d 543 (2<sup>nd</sup> Dept., 2013); *Deutsche Bank National Trust Co. v. Pestano*, 71 AD3d 1074, 899 NYS2d 269 (2<sup>nd</sup> Dept., 2010)).

Ordinarily a process server's affidavit of service constitutes prima facie evidence of proper service (*U.S. Bank, N.A. v. Tauber*, 140 AD3d 1154, 36 NYS3d 144 (2<sup>nd</sup> Dept., 2016); *FV-I, Inc. v. Reid*, 138 AD3d 922, 31 NYS3d 119 (2<sup>nd</sup> Dept., 2016); *Wachovia Bank, N.A. v. Greenberg*, 138 AD3d 984, 31 NYS3d 110 (2<sup>nd</sup> Dept., 2016); *MERS v. Losco*, 125 AD3d 733, 5 NYS3d 112 (2<sup>nd</sup> Dept., 2015); *NYCTL v. Tsafatinos*, 101 AD3d 1092, 956 NYS2d 571 (2<sup>nd</sup> Dept., 2012)). A defendant may rebut the process server's affidavit by submitting an affidavit containing specific and detailed contradictions of the claims in the process server's affidavit, but bare, conclusory and unsubstantiated denials of service are insufficient to rebut the presumption of proper service (*U.S.*

*Bank, N.A. v. Peralta*, 142 AD3d 988, 37 NYS3d 308 (2<sup>nd</sup> Dept., 2016); *Washington Mutual Bank v. Huggins*, 140 AD3d 858, 35 NYS3d 127 (2<sup>nd</sup> Dept., 2016); *Wells Fargo Bank v. Christie*, 83 AD3d 824, 921 NYS2d 127 (2<sup>nd</sup> Dept., 2011); *U.S. Bank, N.A. v. Tate*, 102 AD3d 859, 958 NYS2d 722 (2<sup>nd</sup> Dept., 2013); *Beneficial Homeowner Serv. Corp. v. Girault*, 60 AD3d 984, 875 NYS2d 815 (2<sup>nd</sup> Dept., 2009)). Defendant's sworn affidavit denying service, together with claims of significant discrepancies between the appearance and the description of the person served by the process server will necessitate a hearing (*see Machovec v. Svoboda*, 120 AD3d 772, 992 NYS2d 279 (2<sup>nd</sup> Dept., 2013); *Emigrant Mortgage Services v. Westervelt*, *supra.*; *Wells Fargo Bank, N.A. v. Final Touch Interiors, LLC*, 112 AD3d 813, 977 NYS2d 351 (2<sup>nd</sup> Dept., 2013)). However, claimed discrepancies which are unsubstantiated and of a minor, slight or inconsequential nature are insufficient to warrant a hearing on the issue of service (*IndyMac Federal Bank, FSB v. Hyman*, 74 AD3d 751, 901 NYS2d 545 (2<sup>nd</sup> Dept., 2010); *Beneficial Homeowner Service Corp. v. Girault*, 60 AD3d 984, 875 NYS2d 815 (2<sup>nd</sup> Dept., 2009)).

The record shows that the process server served defendant Alvarado by substituted service by delivery of the summons and complaint on Alvarado's wife, a person of suitable age and discretion at defendant's usual place of abode on March 28, 2009 at approximately 7:00 p.m. The description of the person served was a black haired, brown skin female who was approximately 40 to 49 years of age, 5 foot 4 inches - 5 foot 7 inches tall and weight between 150 to 174 pounds. Defendant Alvarado submits an affidavit claiming: 1) that he was never served with the summons and complaint; and 2) that the description of his wife was inaccurate based upon estimations of her age (33 years), her height (5 foot tall) and her weight (180 pounds).

Based upon this record, the affidavit of the process server constituted prima facie evidence of proper service pursuant to CPLR 308(2) upon the defendant Henry Alvarado. It was thus incumbent upon the defendant to rebut this prima facie showing by submission of specific and substantiated allegations regarding the lack of service. Defendant's affidavit wholly fails to rebut the presumption of due service upon him. Defendant's claimed discrepancies between Guadalupe Alvarado's physical height and weight contained in the process server's affidavit were minor and are not substantiated by any relevant, admissible proof other than his self-serving estimates of his wife's physical dimensions at the time process was served. In this respect, there is no objective evidence submitted in the form of documentary evidence (i.e. driver's license, photographs, independent neutral observer affidavits, etc.) to support defendant's claims detailing his wife's appearance. Having submitted unsubstantiated and conclusory denials of service and receipt of papers, the defendant's application to dismiss plaintiff's complaint for failure to obtain personal jurisdiction over him is denied (*Wells Fargo Bank, N.A. v. Tricarico*, 139 AD3d 722, 32 NYS3d 213 (2<sup>nd</sup> Dept., 2016); *IndyMac Bank v. Hyman*, 74 AD3d 751, 901 NYS2d 545 (2<sup>nd</sup> Dept., 2010)).

With respect to the defendant's application seeking leave to serve a late answer, the law requires proof to establish a reasonable excuse for the defendant's failure to timely serve an answer and a showing of an arguably meritorious defense (*see Deutsche Bank National Trust Co. v. Gutierrez*, 102 AD3d 825, 958 NYS2d 478 (2<sup>nd</sup> Dept., 2013); *Deutsche Bank National Trust Co. v. Karlis*, 138 AD3d 915, 30 NYS3d 228 (2<sup>nd</sup> Dept., 2016); *U.S. Bank, N.A. v. Cherubin*, 141 AD3d 514, 36 NYS3d 154 (2<sup>nd</sup> Dept., 2016)). Defendant has wholly failed to provide any reasonable explanation for his more than eight year default in timely answering the plaintiff's complaint. Absent such explanation the defendant's application must be denied regardless of whether the

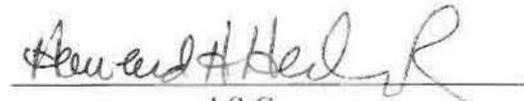
defendant has demonstrated the existence of a potentially meritorious defense to plaintiff's action (*U.S. Bank, N.A. v. Cherubin, supra.*; *Aurora Loan Services, LLC v. Lucero*, 131 AD3d 496, 14 NYS3d 707 (2<sup>nd</sup> Dept., 2015)) and it is unnecessary for the court to consider that aspect of the defendant's claims (*Deutsche Bank National Trust Co. v. Rudman*, 80 AD3d 651, 914 NYS2d 672 (2<sup>nd</sup> Dept., 2011); *Deutsche Bank National Trust Co. v. Gutierrez, supra.*; *Deutsche Bank National Trust Co. v. Pietranico*, 102 AD3d 724, 957 NYS2d 868 (2<sup>nd</sup> Dept., 2013); *Wells Fargo Bank, N.A. v. Russell*, 101 AD3d 860, 955 NYS2d 654 (2<sup>nd</sup> Dept., 2012)).

With respect to defendant's claims concerning plaintiff's alleged failure to serve mortgage and statutory pre-foreclosure notices, while service of such notices are considered conditions precedent to a mortgage foreclosure action (*Aurora Loan Services, LLC v. Weisblum*, 85 AD3d 95, 923 NYS2d 609 (2<sup>nd</sup> Dept., 2011); *First National Bank of Chicago v. Silver*, 73 AD3d 162, 899 NYS2d 256 (2<sup>nd</sup> Dept., 2010)), a failure to comply with such provisions is not a jurisdictional defect sufficient to provide independent grounds for vacating a default by a party who has otherwise defaulted in appearing in an action (*U.S. Bank, N.A. v. Carey*, 137 AD3d 894, 28 NYS2d 68 (2<sup>nd</sup> Dept., 2016); *PHH Mortgage Corp. v. Celestin*, 130 AD3d 703, 11 NYS3d 871 (2<sup>nd</sup> Dept., 2015); *Pritchard v. Curtis*, 101 AD3d 1502, 957 NYS2d 440 (3<sup>rd</sup> Dept., 2012); *Deutsche Bank National Trust Co. v. Posner*, 89 AD3d 674, 933 NYS2d 52 (2<sup>nd</sup> Dept., 2011)). In this case, the defendant has failed to provide any reasonable excuse for his failure to timely serve an answer and the mere showing of an arguably meritorious defense (i.e. plaintiff's alleged failure to serve pre-foreclosure notices) is legally insufficient to provide grounds to set aside his continuing default in appearing in this action (*Flagstar Bank v. Jambelli*, 140 AD3d 829, 32 NYS3d 625 (2<sup>nd</sup> Dept., 2016); *Pritchard v. Curtis, supra.*; *Wassertheil v. Elburg*, 94 AD3d 753, 941 NYS2d 679 (2<sup>nd</sup> Dept., 2012)). Moreover, even were this court to consider the merits of the defaulting defendant's arguments, the plaintiff has submitted sufficient evidence to establish that the required mortgage and RPAPL 1304 default notices were timely served by the mortgage servicer in compliance with mortgage and statutory requirements.

Finally, with respect to the defendant's claims seeking equitable considerations and an additional settlement conference, while the court retains inherent equitable power to ensure that foreclosure is not made an "instrument of injustice" (*see Alkafi v. Celestial Church of Christ Calvary Parish*, 24 AD3d 476, 477, 808 NYS2d 230 (2<sup>nd</sup> Dept., 2005) quoting *Guardian Loan Co. v. Early*, 47 NY2d 515, 520, 419 NYS2d 56 (1992)), the record in this action does not justify any further delay in the prosecution of this action. Defendant entered into a contract on January 29, 2007 promising to re-pay the sum of money borrowed to the lender by making timely monthly payments for thirty years. The record is clear that defendant breached his agreement more than eight years ago when he defaulted in making payments on December 1, 2008. Clearly the balancing of equitable considerations weigh in favor of the party which did not breach the agreement. Moreover, while the defendant contends that he should be entitled to additional settlement conferences and a loan modification, court records show that he was already afforded six court settlement conferences beginning July 16, 2009 until he failed to appear for a settlement conference on February 10, 2011, and that he has been afforded nearly an additional year to remain in the premises without any payments made, as a result of this application and the delay occasioned by current court procedures.

Based upon these circumstances no reason exists to further delay scheduling the sale of the mortgaged premises and the referee is directed to forthwith schedule the sale upon appropriate notice to all parties.

Dated: April 18, 2017

  
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J.S.C.