

<b>JPMorgan Chase Bank, N.A. v Keating</b>
2017 NY Slip Op 31196(U)
May 16, 2017
Supreme Court, Suffolk County
Docket Number: 579-2013
Judge: C. Randall Hinrichs
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**SUPREME COURT OF THE STATE OF NEW YORK**  
**I.A.S. PART 49 - SUFFOLK COUNTY**

**PRESENT: HON. C. RANDALL HINRICHS**

Supreme Court Justice

Motion Date: 002: 5-7-2015; 003: 6-4-2015

Motion Sequence: 002: MotD; 003: MD

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 JPMorgan Chase Bank, National Association,

Plaintiff,

-against-

Robert Stephen Keating a/k/a Robert Keating;  
 Karin T. Pataki a/k/a Karin Pataki a/k/a Karin  
 Soper; Leanna Pataki and "John Doe" said name  
 being fictitious, it being the intention of Plaintiff  
 to designate any and all occupants of premises  
 being foreclosed herein, and any parties,  
 corporations or entities, if any, having or claiming  
 an interest or lien upon the mortgaged premises,

Defendants.  
 -----x

SHAPIRO, DICARO & BARAK, LLC  
 Attorneys for Plaintiff  
 175 Mile Crossing Boulevard  
 Rochester, NY 14624

LAW OFFICE OF CHRISTOPHER THOMPSON  
 Attorney for Defendants, Karin T. Pataki a/k/a  
 Karin Pataki a/k/a Karin Soper, Leanna Pataki and  
 Michael Pataki, set forth as "John Doe"  
 33 Davison Lane East  
 West Islip, NY 11795

ROBERT STEPHEN KEATING  
 a/k/a ROBERT KEATING, Defendant Pro Se  
 6 Jefferson Boulevard  
 Port Jefferson Station, NY 11776

Upon reading the following named papers on this motion: Notice of Motion for Summary Judgment and Order of Reference and supporting papers; Notice of Cross-Motion to Dismiss and supporting papers; Affirmation in Opposition and Reply Affirmation; and Affirmation in Opposition and in Support of Cross Motion, it is

**ORDERED** that so much of the plaintiff's motion seeking an Order pursuant to CPLR § 3212 awarding summary judgment in its favor against defendants Michael Pataki, and Karin T. Pataki a/k/a Karin Pataki a/k/a Karin Soper is granted, and as to defendant Leanna Pataki the motion is denied, without prejudice to renewal within 120 days of the date herein, not to be extended without leave of Court; and it is further

**ORDERED** that the Answer insofar as interposed on behalf of defendants Michael Pataki and Karin Pataki is stricken and shall be treated as a general notice of appearance requiring notice of all further proceedings; and it is further

**ORDERED** that plaintiff's motion to amend the caption is granted; and it is further

**ORDERED** that plaintiff's motion for a default judgment against defendant Susan Pataki is granted; and it is further

**ORDERED** that plaintiff's motion for a default judgment against defendant Robert Stephen Keating a/k/a Robert Keating is denied without prejudice to renewal within 120 days of the date herein, not to be extended without leave of Court; and it is further

**ORDERED** that plaintiff's motion for an Order appointing a referee to compute and reforming the mortgage description is denied, without prejudice to renewal within 120 days of the date herein, not to be extended without leave of Court, upon plaintiff's future renewal of the application for summary judgment against defendant Leanna Pataki and a default judgment against defendant Robert Stephen Keating a/k/a Robert Keating; and it is further

**ORDERED** that the cross motion of the answering defendants, Karin T. Pataki a/k/a Karin Pataki a/k/a Karin Soper, Leanna Pataki and Michael Pataki, for an Order dismissing the complaint is denied; and it is further

**ORDERED** that plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared herein and not waived further notice pursuant to CPLR § 2103(b)(1), (2) or (3) within thirty (30) days of the date herein, and to promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage on real property located at 1 Emily Court, Greenlawn, New York 11740 in Suffolk County ["the subject premises"]. On July 29, 2004, defendants Robert Stephen Keating ["Robert"] and Karin Pataki ["Karin"], executed a note in favor of plaintiff's predecessor, RBMG, Inc., in the principal sum of \$250,000.00. To secure the note, on the same date, Robert and Karin and defendant Leanna Pataki ["Leanna"] gave the lender a mortgage encumbering the subject premises. At all relevant times, Karin is Leanna's mother and Robert's mother-in-law. Robert, Karin, and Leanna defaulted on the note and mortgage by failing to make a monthly payment of principal and interest which had come due on December 1, 2011, and the payments due thereafter. After the mortgagors failed to cure the default in payment, the plaintiff commenced the instant action on January 4, 2013. The note, indorsed in blank, was attached to the complaint when the action was commenced.

Robert defaulted in the action. Issue was joined by Karin, Leanna, and Michael Pataki ["Michael"] by the interposition of an Answer dated February 3, 2013. By their Answer, Karin, Leanna and Michael generally deny the material allegations set forth in the Complaint, and assert thirteen affirmative defenses and two counterclaims. By so-ordered stipulation dated August 12, 2014, the answering defendants withdrew the two counterclaims. The remaining defendants have neither appeared nor answered herein.

The Court notes that plaintiff's application for summary judgment mistakenly moves against Robert as an answering defendant. The underlying papers and the so-ordered stipulation dated August 12, 2014, clearly demonstrate that Michael is the answering defendant, incorrectly referred to as Robert Stephen Keating in plaintiff's summary judgment motion. Since this motion for summary judgment has been pending since June of 2015 through no fault of the parties, the Court will exercise its discretion and correct the error in the papers (*see*, CPLR § 2001).

Here, the plaintiff established, *prima facie*, that it had standing to commence the action by demonstrating that it had physical possession of the note prior to the commencement of the action, as evidenced by its attachment of the indorsed note to the summons and complaint at the time the action was commenced (*Deutsche Bank Nat. Trust Co. v. Logan*, 146 A.D.3d 861, 862, 45 N.Y.S.3d 189, 191 [2d Dept 2017]). The affidavit of the plaintiff's vice president, Ray Thacker, established the plaintiff's *prima facie* entitlement to judgment as a matter of law by producing copies of the mortgage, the unpaid note, and evidence of the default by mortgagors Robert, Karin, and Leanna in making the monthly mortgage payments

(see *JPMorgan Chase Bank, N.A. v. Weinberger*, 142 A.D.3d 643, 645, 37 N.Y.S.3d 286 [2d Dept 2016]; *Cent. Mortg. Co. v. Davis*, — A.D.3d \_\_\_, 2017 WL 1394282, at \*2 [2d Dept 2017]).

In addition to the standing defense, the opposition and cross motion on behalf of Karin, Leanna, and Michael asserts that the plaintiff failed to provide proper statutory and contractual notices of the default and that Karin was not properly served with the summons, complaint, and RPAPL §1303 notice. Notably, the plaintiff's complaint does not allege that it complied with any notice of default requirements in the mortgage. With respect to RPAPL §1304, the complaint alleges only that if the subject note and mortgage fall within the prescribed definition of a sub-prime home loan or high cost home loan as defined by certain provisions of the New York State Banking Law, then the plaintiff has complied with, inter alia, section thirteen hundred four of the RPAPL.

Although the affidavit of Ray Thacker purports to establish that the plaintiff strictly complied with RPAPL § 1304, defendant Karin Pataki readily admits in her affidavit in support of her cross motion (at ¶ 4), that she does not reside at the subject premises and has resided at a different address in Port Jefferson Station, New York, since at least 2004. (See, Karin Pataki's affidavit, ¶ 5). Defendant Karin Pataki has never occupied the property as her principal residence. Rather, Karin attests that she never occupied the subject premises but that it was occupied by her daughter and her husband and Karin's son and his wife.

In light of the admissions in Karin's affidavit, the plaintiff was not required to serve a 90-Day notice on Karin (see, RPAPL § 1304[5](a)[iii]). Further, as to Karin, any contention regarding the plaintiff's failure to strictly comply with RPAPL § 1303 is similarly without merit since the property subject to foreclosure was never owner-occupied by Karin (see, RPAPL § 1303[1][a]).

Leanna, who executed the mortgage along with Robert and Karin, is a "borrower" entitled to a 90-day pre-foreclosure notice pursuant to RPAPL 1304 (*Aurora Loan Servs., LLC v. Weisblum*, 85 A.D.3d 95, 105, 923 N.Y.S.2d 609, 616 [2d Dept 2011]). As to Leanna, the Thacker affidavit failed to establish, prima facie, that the plaintiff strictly complied with the 90-day notice requirement of RPAPL 1304 or that the plaintiff was not required to do so (*CitiMortgage, Inc. v. Pappas*, 147 A.D.3d 900, 47 N.Y.S.3d 415, 416 [2d Dept 2017]; *Deutsche Bank Nat. Trust Co. v. Spanos*, 102 A.D.3d 909, 910, 961 N.Y.S.2d 200, 202 [2d Dept 2013]). Thus, so much of the plaintiff's motion that seeks an order granting summary judgment and related relief against Leanna is denied.

As to so much of the cross motion seeking summary judgment based upon the plaintiff's failure to provide Leanna with the requisite notice pursuant to RPAPL §1303, the cross motion is denied. No affidavit by Leanna accompanied the cross moving papers. The process server's affidavit of service constituted prima facie evidence of proper service of the summons and complaint pursuant to CPLR 308(2) and of proper service of the notice required by Real Property Actions and Proceedings Law § 1303 (*US Bank Nat. Ass'n v. Tate*, 102 A.D.3d 859, 859, 958 N.Y.S.2d 722, 723 [2d Dept 2013]). Leanna failed to raise an issue of fact.

As for RPAPL 1304 and Leanna's cross motion for summary judgment dismissing the complaint, the cross motion is silent as to whether Leanna was served with a 90-day notice. As the moving party, Leanna needed to affirmatively demonstrate that as to her, the pre-condition was not satisfied and must affirmatively demonstrate the merit of her claim or defense (*Deutsche Bank Nat. Trust Co. v. Spanos*, 102 A.D.3d 909, 911, 961 N.Y.S.2d 200, 202 [2d Dept 2013]). Thus, Leanna has failed to establish her entitlement to judgment as a matter of law regardless of the sufficiency of the opposing papers (see

*Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985]). So much of the cross motion that seeks summary judgment dismissing the complaint against Leanna based upon the plaintiff's failure to provide Leanna with the requisite notice pursuant to RPAPL §1304 is denied.

The Answer of Karin, Leanna, and Michael asserts as the Eighth Affirmative Defense that “[p]laintiff has failed to meet numerous conditions precedent to the filing of this action.” CPLR § 3015(a) entitled “Conditions Precedent” requires that the “denial of performance or occurrence shall be made specifically and with particularity. In the case of such denial, the party relying upon the performance or occurrence shall be required to prove on the trial such performance or occurrence as shall have been so specified.” The requirement of specificity only applies to condition precedents contained within a contract, not statutory condition precedents. Defendants’ Answer contains no specificity with respect to the contractual condition precedent contained in the mortgage. Accordingly, this contractual condition precedent affirmative defense was waived (*First N. Mortgage Corp. v. Yatrakis*, 154 A.D.2d 433, 546 N.Y.S.2d 9 [2d Dept 1989]).

Defendant Karin Pataki asserts that she was not served with a Summons and Complaint in this action and that the process server did not ask her whether she was active in the military service. Karin’s objection to personal jurisdiction was waived by failing to move for dismissal within sixty (60) days of serving her answer containing the affirmative defense (*see*, CPLR § 3211[a][8]). In any event, the process server’s affidavit states that she served Karin Pataki personally at 6 Jefferson Boulevard, Port Jefferson Station, NY 11776, the same address where Karin attests she resides. The process server included a description of the home located at that address and a physical description of the defendant. A process server’s sworn affidavit of service constitutes prima facie evidence of proper service (*see ACT Prop., LLC v Ana Garcia*, 102 A.D.3d 712, 957 N.Y.S.2d 884 [2d Dept 2013]; *Deutsche Bank Natl. Trust Co. v Pietranico*, 102 A.D.3d 724, 957 N.Y.S.2d 868 [2d Dept 2013]; *Bank of N.Y. v Espejo*, 92 A.D.3d 707, 939 N.Y.S.2d 105 [2d Dept 2012]). Karin’s bare and conclusory denial of receipt of the pleadings, in conjunction with a denial that the process server asked whether she was in the active military service, is insufficient to rebut the presumption of proper personal service created by the affidavit of the plaintiff’s process server (*see U.S. Bank Natl. Assn. v Tate*, 102 A.D.3d 859, 958 N.Y.S.2d 722 [2d Dept 2013]). So much of the cross motion that seeks dismissal of the complaint against Karin based on lack of personal jurisdiction is denied.

The answering defendants make no further arguments in support of their remaining affirmative defenses. Plaintiff submitted sufficient proof to establish, prima facie, that the remaining affirmative defenses set forth in the defendants’ Answer are subject to dismissal due to their unmeritorious nature (*see, Becher v Feller*, 64 A.D.3d 672, 884 N.Y.S.2d 83 [2d Dept 2009]).

Plaintiff’s motion for a default judgment is granted against defendant Susan Pataki. Paragraph 57 of plaintiff’s counsel’s affirmation asserts that CPLR § 3215(g)(3) is not applicable since the answering defendants are the only parties on the note. However, the mistake within plaintiff’s papers whereby Michael Pataki is mistakenly identified as Robert Stephen Keating has made plaintiff’s papers deficient with respect to the application for a default judgment against Robert. Robert is on the note and is in default in this action. Plaintiff must provide Robert with additional notice pursuant to CPLR § 3215(g)(3) before a default judgment can be entered against him. Plaintiff’s motion for a default judgment against Robert is denied without prejudice to renewal within 120 days of the date herein, not to be extended without leave of Court.

The branch of the instant motion wherein the plaintiff seeks an order pursuant to CPLR § 1024 amending the caption by substituting Michael Pataki and Susan Pataki for the fictitious defendants, "John Doe," is granted (*see, PHH Mtge. Corp. v Davis*, 111 A.D.3d 1110, 975 N.Y.S.2d 480 [3d Dept 2013]; *Flagstar Bank v Bellafiore*, 94 A.D.3d 1044, 943 N.Y.S.2d 551 [2d Dept 2012]; *Neighborhood Hous. Servs. of N.Y. City, Inc. v Meltzer*, 67 A.D.3d 872, 889 N.Y.S.2d 627 [2d Dept 2009]). By its submissions, the plaintiff established the basis for the above-noted relief. All future proceedings shall be captioned accordingly.

Accordingly, the proposed order submitted by the plaintiff has been marked "not signed."

Dated: May 16, 2017



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C. RANDALL HINRICHS, J.S.C.

\_\_\_\_\_ FINAL DISPOSITION      X      NON-FINAL DISPOSITION