

Wilmington Trust Natl. Assn. v Moran

2018 NY Slip Op 33235(U)

December 4, 2018

Supreme Court, Queens County

Docket Number: 709618/2017

Judge: Ernest F. Hart

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This opinion is uncorrected and not selected for official publication.

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART6

HONORABLE ERNEST F. HART

WILMINGTON TRUST NATIONAL ASSOCIATION,
not in its Individual Capacity but
Solely as Successor Trustee to Citibank,
N.A. as Trustee to Lehman XS Trust
Mortgage Pass-Through Certificates,
Series 2007-11,

X
INDEX NO.: 709618/2017

MOTION SEQ. NO. 1

Motion Date:
November 29, 2018

Plaintiff(s),

DATED:
December 4, 2018

- against -

Jhovanny Moran a/k/a Jhovanny Morau,
Mortgage Electronic Registration Systems,
Inc., as nominee for First Magnus
Financial Corporation, Board of Directors
of 161st Street Homeowners Association,
Inc. aka 161 Street Homeowners
Association, Inc., Midland Funding, LLC
doing business in NY as Midland Funding
of Delaware, LLC New York City Environmental
Control Board, New York City Parking
Violations Bureau, New York City Transit
Adjudication Bureau, Et al.,

Defendants.

X

This is an action to foreclose a mortgage against real property known as 131-12 161st Street, Jamaica, New York, given by Jhovanny Moran, as record owner, to secure a note evidencing a loan in the amount of \$436,000. The plaintiff alleges that it is the holder of the mortgage and underlying obligation and that a default occurred under the terms of the note and mortgage by failure to make the monthly installment payment due on August 1, 2011 and as a consequence, the plaintiff elected to accelerate the entire mortgage debt.

The plaintiff has now moved for a default judgment, to amend the caption and for a judgment of foreclosure and sale. The defendant has cross moved to dismiss the complaint or in the alternative for leave to submit a late answer.

Plaintiff has made a prima facie showing of entitlement to judgment as a matter of law by submission of the mortgage, the note and proof of default. (See *GRP Loan, LLC v Taylor*, 95 AD3d 1172 [2d Dept 2012]; *Capstone Business Credit, LLC v Imperia Family Realty, LLC*, 70 AD3d 882 [2d Dept 2010]; *EMC Mtge. Corp. v Riverdale Assoc.*, 291 AD2d 370 [2d Dept 2002].) In opposition the defendant failed to raise any issue warranting denial of the motion. The Court, however, will not award a Judgment of Foreclosure and Sale at this juncture, but instead orders the appointment of a Referee to compute the amount owed to plaintiff. Pursuant to RPAPL 1321 if a defendant fails to answer within the time allowed a court "shall ascertain and determine the amount due, or direct a referee to compute the amount due to plaintiff..." Here the court, directs the appointment of a referee to compute the amount owed to plaintiff.

The defendant's cross motion to dismiss or in the alternative to vacate her default or file a late answer is denied. To vacate a default, the defendant need not demonstrate a meritorious defense when the motion is based upon lack of personal jurisdiction (CPLR 5015(a)(4); see *Harkless v Reid*, 23 AD3d 622 [2d Dept 2005]). The

defense of lack of personal jurisdiction is without merit. Insofar as defendant Jhovanny Moran claims the court lacks personal jurisdiction over him due to improper service, plaintiff offers an affidavit of service dated July 24, 2017. This affidavit reflects that the defendant Jhovanny Moran was served pursuant to CPLR 308(2) on July 20, 2017, by delivery to Roseanna Moran, a person of suitable age and discretion, at the defendant's dwelling house, and subsequent mailing of the summons and complaint to the same address on July 21, 2017. This affidavit of service was filed with the Court on July 25, 2017. This affidavit constitutes prima facie proof of proper service upon the defendant Nelson Ramos pursuant to CPLR 308(2) (see *Chichester v Alal-Amin Grocery & Halal Meat*, 100 AD3d 820 [2d Dept 2012]; *US Natl. Bank Assn. v Melton*, 90 AD3d 742 [2d Dept 2011]). Although the defendant asserts that he had no knowledge of the commencement of the foreclosure action, he has offered nothing to rebut or dispute the veracity or contents of the affidavit of service (see *Manhattan Sav. Bank v Kohen*, 231 AD2d 499, 500 [2d Dept 1996]). The defendant's bare and unsubstantiated denial of receipt does not rebut the presumption of proper service created by the affidavit of service (see *Beneficial Homeowner Service Corp. v Girault*, 60 AD3d 984 [2d Dept 2009]; *Simmons First Natl. Bank v Mandracchia*, 248 AD2d 375 [2d Dept 1998]; *Remington Investments, Inc. v Seiden*, 240 AD2d 647 [2d Dept 1997]). The court does not need to "conduct a hearing to determine

the validity of the service of process where the defendant fails to raise an issue of fact regarding service" (*Hamlet on Olde Oyster Bay Homeowners Assn., Inc. v Ellner*, 57 AD3d 732, 733 [2d Dept 2008]); see *Simmons First Natl. Bank*, 248 AD2d at 376; *Sando Realty Corp. v Aris*, 209 AD2d 682 [2d Dept 1994]). In his affidavit the defendant Moran admits that Roseanna Moran is wife, but that she does not speak English and did not understand or comprehend the importance of the documents she was served with. The defendant Jhovanny Moran, however, did not provide an affidavit from her Roseanna Moran. The defendant Moran does not deny that the address listed in the affidavit of service was his residence at the time of service. Therefore, the defendant Moran failed to raise any triable issue as to the service of the complaint.

A defendant moving to vacate a default judgment under CPLR 5015(a)(1) or who moves to file a late answer must establish a reasonable excuse for the default and a potentially meritorious defense (see *Wells Fargo, N.A. v Cervini*, 84 AD3d 789 [2d Dept 2011]; *Midfirst Bank v Al-Rahman*, 81 AD3d 797 [2d Dept 2011]; *Peck v Dybo Realty Corp.*, 77 AD3d 640 [2d Dept 2010]; *Alberton Devs., Inc. v All Trade Enters., Inc.*, 74 AD3d 1000 [2d Dept 2010]; *NYCTL-1997-1 Trust v Vila*, 19 AD3d 382 [2d Dept 2005]). The determination of what constitutes a reasonable excuse is left to the sound discretion of the court (see *Abrams v City of New York*, 13 AD3d 566 [2d Dept 2004]; *Scarlett v McCarthy*, 2 AD3d 623 [2d

Dept 2003]; *Westchester Med. Ctr. v Clarendon Ins. Co.*, 304 AD2d 753 [2d Dept 2003]). To the extent defendant Jhovanny Moran argues that he has a reasonable excuse for the default on the ground he did not receive timely notice of the action, such excuse must be rejected since he has offered nothing to rebut the contents of the affidavit of service of process (see *Reich v Redley*, 96 AD3d 1038 [2d Dept 2012]; *Pezolano v Incorporated City of Glen Cove*, 71 AD3d 970 [2d Dept 2010]; *Puco v DeFeo*, 296 AD2d 571 [2d Dept 2002]; *NYCTL 1997-1 Trust v Nillas*, 288 AD2d 279 [2d Dept 2001]).

In light of the fact that the defendant did not demonstrate a reasonable excuse for his default, it is not necessary to consider whether she proffered a potentially meritorious defense (*Deutsche Bank Natl. Trust Co. v Conway*, 99 AD3d 755 [2d Dept 2012]; *U.S. Bank N.A. v Stewart*, 97 AD3d 740 [2d Dept 2012]).

Accordingly, the branches of the plaintiff's motion to amend the caption and for a default judgment is granted, the branch of the motion for a judgment of foreclosure and sale is denied at this juncture and a referee to compute shall be named in the order to be entered hereon. The cross motion is denied.

Settle Order.

_____/s/_____
J.S.C.