

<b>OneWest Bank, FSB v Byam</b>
2013 NY Slip Op 32605(U)
October 21, 2013
Supreme Court, Queens County
Docket Number: 2986/2013
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
**Justice**

- - - - - x

OneWest Bank, FSB,

Index No.: 2986/2013

Plaintiff,

Motion Date: 09/19/13

- against -

Motion No.: 107

Dale Byam as Legatee and Devisee of  
the Estate of Leo Benjamin Byam a/k/a  
Leo B. Byam-deceased, Gerard Byam as  
Legatee and Devisee of the Estate of  
Leo Benjamin Byam a/k/a Leo B. Byam-  
deceased; Secretary of Housing and  
Urban development, City of New York  
Department of Transportation, Parking  
Violations Bureau, New York State  
Department of Taxation and Finance-Tax  
Compliance Division-C.O.-ATC, Internal  
Revenue Service United States of  
America, Claire Mullinenu,

Motion Seq.: 2

Defendants.

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The following papers numbered 1 to 9 were read on this motion by  
the defendant, GERARD BYAM, for an order pursuant to CPLR 5015(a)  
vacating the Order of Reference dated June 25, 2013 and  
compelling the plaintiff to accept a late answer with affirmative  
defenses in the form submitted with the motion:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 5  
Affirmation in Opposition-Affidavits-Exhibits.....6 - 9

In this action to foreclosure a reverse mortgage, covering  
premises located at 137-07 Francis Lewis Boulevard, Laurelton,  
N.Y. 11413, defendant, Gerard Byam, moves for an order vacating  
an order of reference granted on default and for leave to serve a

late verified answer with affirmative defenses on the ground of excusable default or for an order dismissing the complaint for failure to join a necessary party.

The summons and verified complaint was filed on February 14, 2013 and served on the defendant on March 26, 2013. According to the complaint, on October 18, 2004, Leo B. Byam took out a reverse mortgage with Financial Freedom Senior Funding Corporation. The reverse mortgage was thereafter assigned to the plaintiff, OneWest Bank. Pursuant to the terms of the mortgage the bank advanced sums to Leo Byam at certain intervals. Mr. Byam died on November 22, 2011. The loan became due upon the borrower's death. As of January 14, 2013, the principal sum of \$71,684.89 was due on the mortgage.

According to the terms of Leo Byam's Will, title to the real property was bequeathed to his son Gerard Byam and his daughter Dale Byam. The decedent's heirs have been provided with notice of the balance on the mortgage and for two years have not elected to make payments on the balance due. Therefore, the bank seeks to foreclose on the property in order to recover the sums advanced to the decedent plus any interest and other costs.

As an answer was not forthcoming within 20 days, the plaintiff submitted an ex parte application for an order of reference which was signed by this Court on June 25, 2013 appointing William Mackay, Jr., as Referee to compute the amounts due and owing to the plaintiff.

On June 26, 2013, three months after service of the summons and complaint, the defendant, through his attorneys Fanning and Hughes, served an answer containing twelve affirmative defenses. However, by certified mail dated July 1, 2013, the plaintiff through its counsel Gerald Roth, Esq. rejected the answer as untimely. Plaintiff stated that the summons and complaint were served on March 26, 2013 and the answer was due 20 days thereafter. As the answer was not served until June 26, 2013, plaintiff rejected same as untimely.

Defendant Gerard Byam now moves for an order pursuant to CPLR 5015(a) and CPLR 3012(d) for an order vacating the Order of reference and compelling the plaintiff to accept a late answer. In support of the motion, defendant submits an affirmation from counsel Christopher Fanning, Esq. stating that the summons and complaint was in fact served on the defendant on March 26, 2013. However, counsel states that as a result of a clerical mixup the pleadings were misplaced and therefore they were unaware of their existence until after defendant's time to answer had expired.

Counsel states that although the answer was due on April 15, 2013, they served an answer on June 26, 2013, eight weeks after the time to serve an answer had expired. Counsel claims that the defendant has meritorious defenses including the fact that a personal representative has not yet been appointed for the estate and the action was commenced prior to the appointment of a personal representative (citing Jordan v. City of New York, 23 AD3d 436 [2d Dept. 2005][a party may not commence a legal action or proceeding against a dead person, but must instead name the personal representative of the decedent's estate. Nor can a party enter a personal judgment against a decedent]). In addition, counsel alleges that all of the distributees have not been served with notice of the action.

In opposition to the motion, plaintiff asserts that the answer was served two months late and defendant has failed to provide a reasonable excuse for the late service of the answer or a meritorious defense as required by CPLR 3012(d) (citing Maspeth Fed. Sav. & Loan Assn. v McGown, 77 AD3d 890 [2d Dept. 2010]). Plaintiff contends that the action was commenced against Dale and Gerard Byam the two parties to whom the property was devised by the will of the decedent. Counsel claims that although there may be other distributees of the estate the only two parties who have an interest in the mortgaged property are the two parties who have been named as defendants in this action. As the will of the borrower specifically devises title to the mortgaged premises to Dale and Gerard Byam and as a deficiency judgment is not sought herein, counsel argues that it is not necessary for a personal representative of the estate or any other distributees to be named as defendants herein.

Upon review of the defendant's motion and the plaintiff's opposition thereto, this court finds that the defendant's motion for an order vacating the order of reference dated June 25, 2013 and for leave to file a late answer is granted.

The Courts have held that as a general rule, a defendant seeking to vacate a default judgment entered upon his or her failure to answer or appear, must demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the action (see CPLR 5015[a][1]; 3012 [d]; U.S. Bank Nat. Assn. v Slavinski, 78 AD3d 1167 [2d Dept. 2010]; Maspeth Federal Savings and Loan Association v McGown, 77 AD3d 890 [2d Dept. 2010]; Ryan v Breezy Point Coop., Inc., 76 AD3d 523[2d Dept. 2010]; Taddeo-Amendola v 970 Assets, LLC, 72 AD3d 677 [2d Dept. 2010]; Perfect Care, Inc. v Ultracare Supplies, Inc., 71 AD3d 752 [2d Dept. 2010]; Zarzuela v Castanos, 71 AD3d 880 [2d Dept. 2010]; Bank of N.Y. v Segui, 42 AD3d 555 [2d Dept. 2007]).

Here, this court finds that the defendant has offered a reasonable excuse for serving the answer two months days late based upon law office failure and the defendant has alleged a valid affirmative defense. Although the plaintiff made service upon the only two distributees who have an interest in the property under the terms of the decedent's will, the property of a testator or testatrix passes under the terms of the will, which is effective only upon its probate and the appointment of a personal representative of the estate (see Deutsche Bank Nat'l Trust Co. v Torres, 24 Misc. 3d 1216(A) [Sup. Ct. Suffolk Co, 2009]. "Authority over the decedent's ownership interest in the mortgaged premises through the exercise of his right of redemption or otherwise presumptively falls within the province of the personal representative of his testate estate rather than his statutory distributees" (Everhome Mtge. Co. v Sirignano, 40 Misc. 3d 1223(A) [Sup. Ct. Suffolk Co., 2013). The plaintiff is thus precluded from prosecuting its claims for foreclosure and sale against his devisees and, instead, must proceed against the duly appointed personal representative of his estate (see EPTL 1-2.13; 11-3.1; Everhome Mtge. Co. v Sirignano, supra).

Had the decedent died without a will a personal representative would not have to be served as real property owned by an intestate decedent devolves directly to his or her statutory distributees without the necessity of any act by an administrator of his or her estate (see Deutsche Bank Nat'l Trust Co. v. Torres, supra).

Further, there is a strong public policy favoring the resolution of cases on the merits. The defendant acted diligently and never intended to willfully abandon its defense. In addition, the plaintiff will not be prejudiced as a result of the defendant's short delay in serving an answer (see Vellucci v Home Depot U.S.A., Inc., 102 AD3d 767 [2d Dept. 2013]; Arias v First Presbyt. Church in Jamaica, 97 AD3d 712 [2d Dept. 2013]; Zeccola & Selinger, LLC v Horowitz, 88 AD3d 992 [2d Dept. 2011]; Covaci v Whitestone Constr. Corp., 78 AD3d 1108 [2d Dept. 2010]; Chakmakian v Maroney, 78 AD3d 1103 [2d Dept. 2010]; Performance Constr. Corp. v Huntington Bldg., LLC, 68 AD3d 737 [2d Dept. 2009]).

Accordingly, the defendant's motion for an order pursuant to CPLR 5015(a) and 3012(d) to vacate the order of reference and to compel the acceptance of a late answer is granted and the proposed answer annexed to the motion papers shall be deemed served upon service of a copy of this order bearing the date stamp of the County Clerk, with notice of entry.

In addition, the action shall be stayed pending the appointment of a personal representative for the decedent at which time the parties may stipulate or the plaintiff may move to vacate the stay and for leave to amend the summons and complaint to add the personal representative as a necessary party-defendant (see CPLR 1003; MLG Capital Assets, LLC v Eidelkind Trust, 283 AD2d 619 [2d Dept. 2001]).

Dated: October 21, 2013  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**