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SHORT FORM ORDER

INDEX No. 09-37903

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 4-25-13
ADJ. DATE
Mot. Seq. # 001- MG
002- XMD

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AURORA LOAN SERVICES LLC
2617 College Park Drive
Scottsbluff, NE 69361

Plaintiff,

- against -

MICHAEL BRESCIA, CACH LLC, LVNV FUNDING LLC A/P/O CITIFINANCIAL INC., TEACHERS FEDERAL CREDIT UNION, TOWN SUPERVISOR TOWN OF BROOKHAVEN,

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.

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ROSICKI, ROSICKI & ASSOCIATES, P.C.
Attorneys for Plaintiff
26 Harvester Avenue
Batavia, New York 14020

FRED M. SCHWARTZ
Attorney for Defendant
Michael Brescia
317 Middle Country Road
Smithtown, New York 11787

Upon the following papers numbered 1 to 25 read on this motion for an order of reference ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10 ; Notice of Cross Motion and supporting papers 11 - 21 ; Answering Affidavits and supporting papers 22 - 23 ; Replying Affidavits and supporting papers 24 - 25 ; ~~Other ; (and after hearing counsel in support and opposed to the motion) it is~~

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion (001) by plaintiff Aurora Loan Services LLC (Aurora), for an order awarding plaintiff a default judgment against the non-answering, non-appearing defendants, for an order of

reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321 and, for leave to amend the caption of this action pursuant to CPLR 3025 (b), is granted; and it is further

ORDERED that the caption is hereby amended by substituting Federal National Mortgage Association in place of plaintiff Aurora, by substituting Delila DeJesus in place of defendants "John Does" and "Jane Does" and by striking therefrom the names of the remaining "John Does" and "Jane Does"; and it is further

ORDERED that Plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court; and it is further

ORDERED that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

FEDERAL NATIONAL MORTGAGE ASSOCIATION

Plaintiff,

-against-

MICHAEL BRESCIA, CACH LLC, LVNV FUNDING LLC A/P/O CITIFINANCIAL INC., TEACHERS FEDERAL CREDIT UNION, TOWN SUPERVISOR TOWN OF BROOKHAVEN, DELILA DEJESUS,

Defendants.

ORDERED that the branch of this cross motion (002) by defendant Michael Brescia (Brescia) for an order pursuant to CPLR 3215(c) dismissing the complaint on the grounds that plaintiff failed to take proceedings for the entry of a judgment within one year of defendant's default and for an order pursuant to CPLR 3211(a)(7) dismissing the complaint on the grounds that plaintiff has failed to state a cause of action, is denied; and it is further

ORDERED that the branch of the cross motion (002) seeking an order pursuant to CPLR 3012(d) compelling plaintiff to accept the late answer interposed by defendant is denied.

This is an action to foreclose a mortgage on premises known as 37 Swezey Lane, Middle Island, New York. On July 31, 2007, defendant Brescia executed an adjustable rate note in favor of Lehman Brothers Bank, FSB (Lehman) agreeing to pay $417,000.00 at the starting yearly rate of 9.225 percent. On July 31,

2007, defendant Brescia executed a mortgage in the principal sum of $417,000.00 on his home. The mortgage indicated Lehman to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Lehman as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on August 14, 2007 in the Suffolk County Clerk's Office. Thereafter, on August 20, 2009, the mortgage and note were transferred by assignment of mortgage from MERS to plaintiff Aurora and recorded on October 2, 2009 with the Suffolk County Clerk's Office. The note contains an indorsement by E. Todd Whittemore, vice president Lehman Brothers Bank, FSB transferring the note from Lehman Brothers Bank, FSB to Lehman Brothers Holding Inc. and the blank indorsement of Paul E. Sveen, authorized signatory for Lehman Brothers Holdings Inc.

Aurora Loan Services sent a notice of default dated March 16, 2009 to defendant Brescia stating that he had defaulted on his mortgage loan and that the amount past due was $29,432.79. As a result of defendants' continuing default, plaintiff commenced this foreclosure action on September 22, 2009. In its complaint, plaintiff alleges in pertinent part, that defendant breached his obligations under the terms of the note and mortgage by failing to make the monthly payments commencing with the September 1, 2008 payment. Defendant did not answer the complaint. However, he appeared through his attorney.

The Court's computerized records indicate that a foreclosure settlement conference was held on January 7, 2010 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conference is required.

Plaintiff now moves for an order awarding a default judgment against the non-answering, non-appearing defendants and an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321. Defendant Brescia, in opposition to the instant application, asserts that plaintiff's complaint should be dismissed on the basis that it failed to take proceedings for the entry of a judgment within one year of defendant's default or in the alternative, that plaintiff should be compelled to accept his late answer. Plaintiff has submitted opposition to the cross motion and defendant has submitted a reply affirmation.

The court rejects defendant's assertion that the plaintiff abandoned its claims under CPLR 3215(c). CPLR 3215(c) provides claimants with an exception to the otherwise mandatory nature of that provision, namely, that any failure to move within one year of the default may be excused if sufficient cause is shown why the complaint should not be dismissed (*see* CPLR 3215[c]; ***Giglio v NTIMP, Inc.***, 86 AD3d 301, 926 NYS2d 546 [2d Dept 2011]). Here, the subject property is a residential and improved with a one-to-four family, owner-occupied dwelling. As such, plaintiff filed and served a request for judicial intervention seeking a residential foreclosure conference pursuant to CPLR 3408. On January 7, 2010, a foreclosure settlement conference was scheduled however, defendant failed to appear and as a result of his non-appearance, this matter was referred to this IAS part. By order dated March 31, 2013 (Pitts, J.), this court directed that plaintiff file with the court any intended motion for an order of reference within ninety days of the date of the decision or face a potential dismissal of the action. Plaintiff timely complied with this court's directive by filing the instant motion. Accordingly, plaintiff's forbearance during the period awaiting the holding of the settlement conference and thereafter, through at least the court's order dated March 31,

2013, is a "sufficient cause" for its failure to have sought entry of a default judgment against defendant Brescia within one year after his default (*see* CPLR 3215[c]; *see also* ***Ingenito v Grumman Corp.***, 192 AD2d 509, 596 NYS2d 83 [2d Dept 1993]).

In addition, the plaintiff has offered proof that it was the holder of the note at the time of the action's commencement (*see* ***Bank of New York v Silverberg***, 86 AD3d 274, 926 NYS2d 532 [2d Dept 2011]) and proof of defendant's default in payment under the terms of the mortgage and note. Therefore, plaintiff has sufficiently demonstrated that it has a meritorious claim (*see* ***Ryant v Bullock***, 77 AD3d 811, 908 NYS2d 884 [2d Dept 2010]).

Defendant Brescia also moves for an order permitting him to interpose an answer with affirmative defenses pursuant to CPLR 3012(d) in excess of three years six months after the commencement of this action. Defendant proffers as his reasonable excuse for the default in this action that the summons and complaint were not given to him by Delila DeJesus, an alleged co-occupant of the subject premises and, that it was not until after the time to respond that he became aware that the instant proceeding was commenced.

It is well settled that "a defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action when ... moving to extend the time to answer or to compel the acceptance of an untimely answer" (*see* ***Maspeth Fed. Sav. & Loan Assn. v McGown***, 77 AD3d 890, 891, 909 NYS2d 642 [2d Dept 2010], *quoting* ***Lipp v Port Auth. of N.Y. & NJ***, 34 AD3d 649, 649, 824 NYS2d 671 [2d Dept 2006]; ***Karalis v New Dimensions HR, Inc.***, 105 AD3d 707, 962 NYS2d 647 [2d Dept 2013]; ***Swedbank, AB v Hale Ave. Borrower, LLC***, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]; ***Community Preservation Corp. v Bridgewater Condominiums, LLC***, 89 AD3d 784, 932 NYS2d 378 [2d Dept 2011]; ***Midfirst Bank v Al-Rahman***, 81 AD3d 797, 917 NYS2d 871 [2d Dept 2011]; ***Deutsche Bank Natl. Trust Co. v Rudman***, 80 AD3d 651, 914 NYS2d 672 [2d Dept 2010]). The determination as to what constitutes a reasonable excuse lies within the sound discretion of the trial court (*see* ***Segovia v Delcon Constr. Corp.***, 43 AD3d 1143, 842 NYS2d 536 [2d Dept 2007]; ***Matter of Gambardella v Ortov Light., Inc.***, 278 AD2d 494, 717 NYS2d 923 [2d Dept 2000]). Here, the process server's affidavit of service constituted prima facie evidence of proper service upon defendant Brescia pursuant to CPLR 308 (2) and defendant's conclusory, undetailed and unsubstantiated denial of receipt of the summons and complaint is insufficient to rebut the presumption of proper service created by said affidavits (*see*, ***Beneficial Homeowner Service Corp. v Girault***, 60 AD3d 984, 875 NYS2d 815 [2d Dept 2009]). No satisfactory excuse has been offered for the extreme delay in serving and filing an answer in this matter.

As the Court concludes that the defendant does not have a reasonable excuse for defaulting in the action, it is unnecessary to address whether he has meritorious defenses (*see* ***Midfirst Bank v Al-Rahman***, 81 AD3d 797, 917 NYS2d 871 [2d Dept 2011]; ***Deutsche Bank Natl. Trust Co. v Rudman***, 80 AD3d 651, 914 NYS2d 672 [2d Dept 2010]).

Based upon the foregoing, plaintiff's request for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted. Defendant's cross motion is denied in its entirety.

The proposed order appointing a referee to compute pursuant to RPAPL §1321 is signed as modified by the court.

To the extent that either plaintiff or defendant have requested other forms of relief but have not supported such noticed forms of relief with any allegations of law or fact, the court denies such applications.

Dated: October 15, 2013

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION