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SHORT FORM ORDER

INDEX No. 15831/09

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 2/13/14
ADJ. DATES 2/14/14
Mot. Seq. # 004 - MD
CDISP: YES

AMTRUST-NP SFR, Venture LLC, Plaintiff, -against- KAREN EMMEL, J.P. MORGAN CHASE BANK Defendants.	McCABE, WESIBERG, P.C. Attys. for Plaintiff 145 Hugenot St. Suite 499 New Rochelle, NY 10801 FRED M. SCHWARTZ Atty. for Defendant Emmel 317 Middle Country Rd. Smithtown, NY 11787

Upon the following papers numbered 1 to 8 read on this motion by defendant Emmel to vacate sale, deed and judgment and dismissing the complaint or granting leave to file late answer; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers ____; Answering papers 5-6; Replying Affidavits and supporting papers 7-8; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant, Karen Emmel, for an order vacating the judgment of foreclosure and sale entered upon the default in answering of the moving defendant and a vacatur of the public sale and any deed issued by the referee of sale and a vacatur together with dismissal of the complaint or the granting of leave to appear herein to serve and file a late answer is considered under CPLR 5015 and 317 and is denied.

This mortgage foreclosure action was commenced on April 28, 2009 by a predecessor-in-interest of the above named plaintiff. None of the named defendants appeared by answer in response to the plaintiff's service of the summons and complaint.

Two days after the plaintiff's service of process was complete on July 6, 2010, the plaintiff moved for a default judgment and an order appointing a referee. The plaintiff's noticed motion for the fixation of the defaults of the defendants served with process was granted by order dated June 29,

2010. Therein, the unknown defendants listed in the caption were deleted as parties as none were served with process. Service of such order with notice of its entry in the office of the Clerk on July 7, 2010 was effected upon defendant Emmel and the second named defendant on July 19, 2010, a copy of which was filed with the Clerk on July 29, 2010. On September 13, 2013, the plaintiff was granted a judgment of foreclosure and sale. Therein, the current plaintiff was substituted in the place and stead of the original plaintiff pursuant to CPLR 1018. Service of the judgment of foreclosure and sale, together with notice of its entry was effected on the defendants on November 25, 2013 and filed with the Clerk on December 12, 2013. The property was sold at a public auction held in accordance with the judgment on November 21, 2013.

Prior to the issuance of the June 29, 2010, defendant Emmel did appear at the settlement conference of the type contemplated by CPLR 3408. The initial conference was scheduled by court personnel assigned to the specialized mortgage foreclosure for July of 2009 and was thereafter adjourned several times until November 17, 2009 when the action was released therefrom and assigned to an IAS part (27) other than this one. After several status conferences were scheduled in IAS Part 27 during a six month period beginning in December 1, 2009, the assigned Justice recused himself from presiding over the case in an order dated June 18, 2010. The action was then assigned to the undersigned with the plaintiff's pending motion for order of reference which was renumbered as motion sequence 002. The motion was first calendared before this court on June 25, 2010, marked submitted on that date and was granted on June 29, 2010 in the order of reference issued by this court as described above.

By the instant motion (#004), defendant Emmel seeks to vacate the judgment and order of reference and also seeks dismissal of the complaint on claims resting upon a purported absence of jurisdiction over her person due to improper service of the complaint. The moving defendant's challenge to the propriety of service is predicated upon claims that the process server failed to engage in the due diligence required by CPLR 308(4) before effecting service of the summons and complaint by affixation to the door of the defendant's dwelling place and usual place of abode and the mailing thereof thereto. Although defendant Emmel admits to finding the the summons, complaint and other papers served by the plaintiff's process server "on the ground near my home", she claims that the four attempts to serve her pursuant to CPLR 308(1) or 308 (2) were insufficient to satisfy the due diligence requirement.

Service pursuant to CPLR 308(4) may be used only where personal service under CPLR 308(1) and (2) cannot be made with due diligence (*see* ***Deutsche Bank Natl. Trust Co. v White***, 110 AD3d 759, 972 NYS2d 664 [2d Dept 2013]; ***Lemberger v Khan***, 18 AD3d 447, 794 NYS2d 416 [2d Dept 2005]). Although the statute does not define "due diligence," it has been interpreted and applied on a case-by-case basis with the focus being not on the quantity of the attempts at personal delivery, but on their quality" (***Serraro v Staropoli***, 94 AD3d 1083, 943 NYS2d 201 [2d Dept 2012] *quoting* ***McSorley v Spear***, 50 AD3d at 653, 854 NYS2d 759 [2d Dept 2008]). The "due diligence" requirement may be met with "a few visits on different occasions and at different times to the defendant's residence or place of business when the defendant could reasonably be expected to be found at such location at those times" (***Deutsche Bank Natl. Trust Co. v White***, 110 AD3d 759, 760

supra, *quoting* ***Estate of Waterman v Jones***, 46 AD3d 63, 66, 843 NYS2d 462 [2d Dept 2007]; *see* ***State v Mappa***, 78 AD3d 926, 911 NYS2d 426 [2d Dept 2010]; ***JPMorgan Chase Bank, N.A. v Szajna***, 72 AD3d 902, 898 NYS2d 524 [2d Dept 2010]).

Here, the process server's affidavit constituted prima facie evidence of service pursuant to CPLR 308(4) as it recites four attempts to serve defendant Emmet at various times on two weekdays and May 9, 2009, a Saturday at 10:15 a.m. and at 5:20 p.m when service was then effected pursuant to CPLR 308(4). Under the circumstances of this case, the court finds that such service comports with the due diligence requirements of CPLR 308(4) and was sufficient to confer in personam jurisdiction over defendant Emmel. Her claims for a vacatur of the judgment, the sale, and any deed issued by the referee and for dismissal of the complaint pursuant to CPLR 5015(4) are thus denied.

Also unavailing are the plaintiff's claims for relief pursuant to CPLR 317. A defendant moving under CPLR 317 must establish that he or she did not personally receive notice of the summons in time to defend and that he or she possesses a meritorious defense to the claim of the plaintiff. No demonstration of a reasonable excuse is necessary under CPLR 317, since the statute itself provides for same, namely, non-receipt of personal notice of the summons in time to defend (*id.*). However, an affidavit of merit by the moving defendant or a proposed answer, verified by such defendant containing the assertion of facts which potentially constitute at least one bona fide defense must be attached to the motion papers, in which, relief under any of these statutes is demanded (*see* ***New York Hosp. Med. Ctr. of Queens v Insurance Co. of the State of Pennsylvania***, 16 AD3d 391, 791 NYS2d 145 [2d Dept 2005]; ***Hilldun Corp. v Scarboro Textiles, Inc.***, 73 AD2d 535, 422 NYS2d 417 [1st Dept 1979]).

Here, there has been no showing that defendant Emmel failed to receive notice of the action in time to defend. Indeed, the record is replete with evidence otherwise. In any event, the absence of any denial of receipt of the mailings of the summons and complaint attested to in the affidavit of the process server are fatal to the moving defendant's claim for relief under CPLR 317 (*see* ***Burekhovitch v Tatarchuk***, 99 AD3d 653, 952 NYS2d 812 [2d Dept 2012]; ***Cavalry Portfolio Serv., LLC v Reisman***, 55 AD3d 524, 865 NYS2d 286 [2d Dept 2008]). In addition, the moving defendant's unestablished claim of a lack of due service of the summons and complaint are equally insufficient to establish a lack of personal notice of the action in time to defend (*see* ***Bank of New York v Samuels***, 107 AD3d 653, 968 NYS2d 93 [2d Dept 2013]; ***Stevens v Charles***, 102 AD3d 763, 958 NYS2d 722 [2d Dept 2013]).

The remaining claims of defendant Emmel in support of her motion rest upon a purported excusable default in answering the complaint and are governed by CPLR 5015(a)(1) and/or CPLR 3012(d). To establish an entitlement to relief pursuant to CPLR 5015(a)(1) and/or CPLR 3012(d), a moving defendant must establish both a reasonable excuse for the default and the existence of a potentially meritorious defense (*see* ***Wells Fargo Bank v Malave,*** 107 AD3d 880, 968 NYS2d 127 [2d Dept 2013]; ***Midfirst Bank v Al-Rahman***, 81 AD3d 797, 917 NYS2d 871 [2d Dept 2011]; ***Karalis v New Dimensions HR, Inc,*** 105 AD3d 707, 962 NYS2d 647 [2d Dept 2013]; ***Bank of New York v Espejo***, 92 AD3d 707, *supra*; ***Integon Natl. Ins. Co. v Norterile,*** 88 AD3d 654, 930 NYS2d 260 [2d Dept 2011]).

Here, defendant Emmel's claims as to an excusable default are premised upon a lack of knowledge of judicial processes and her participation in various conferences and proceedings conducted by the IAS Justice previously assigned to this action. However, recent appellate case authorities have instructed that confusion or ignorance of the law, legal processes and/or court procedures or difficulty in obtaining counsel do not constitute reasonable excuses for the failure to answer or otherwise appear (*see* ***Chase Home Finance, LLC v Minott***, ___ AD3d___, 2014 WL 840295 [2d Dep 2014]; ***Garal Wholesalers, Ltd. v Raven Brands, Inc.***, 82 AD3d 1041, 919 NYS2d 358 [2d Dept 2011]; ***US Bank Natl. Assoc. v Slavinski***, 78 AD3d 1167, 912 NYS2d 285 [2d Dept 2010]; ***Yao Ping Tang v Grand Estate, LLC***, 77 AD3d 822, 910 NYS2d 104 [2d Dept 2010]; ***Dorrer v Berry***, 37 AD3d 519, 830 NYS2d 277 [2d Dept 2007]; ***Awad v Severino***, 122 AD2d 242, 505 NYS2d 437 [2d Dept.1986]).

Defendant Emmel's reliance upon and her participation in the several of numerous conferences held herein without serving an answer are also unavailing, since participation in statutorily mandated settlement conferences, which are scheduled by court personnel after the time in which an answer is due, may not serve as a de facto extension of the time to answer and/or a reasonable excuse for a default (*see* ***Chase Home Finance, LLC v Minott***, ___ AD3d___, 2014 WL 840295, *supra*; ***HSBC Bank USA, Natl. Ass'n v Lafazan***, ___ AD3d___, 2014 WL 840547 [2d Dept 2014]; ***Community Preserv. Corp. v Bridgewater Condominiums, LLC***, 89 AD3d 784, 785, 932 NYS2d 378 [2d Dept 2011]; ***Bank of New York Mellon v Izmirligil***, 88 AD3d 930, 931 NYS2d 667 [2d Dept 2011]; ***Onewest Bank, FSB v Navarro***, 2013 WL 6500194, *3+, 41 Misc3d 1238[A]; ***Onewest Bank FSB v Berry***, 25 Misc3d 1218[A], 901 NYS2d 908 [Sup Ct. Suffolk County 2009]). To hold otherwise would effect an unfounded judicial transformation of the limited scope and objectives of the simple settlement conference procedures legislatively imposed by CPLR 3408 into a revocation of longstanding rules and laws governing defaults which the legislature chose not to alter (*see e.g.*, CPLR 320; *cf.*, L.2008, c. 472, § 3, eff. Aug. 5, 2008; Amended L.2009, c. 507, § 9, eff. Feb. 13, 2010; L.2013, c. 306, § 2, eff. Aug. 30, 2013).

In addition, the court finds that the mere fact that parties to a foreclosure action engage in pre-action and/or post-action loan modification discussions is alone insufficient to constitute a reasonable excuse for a default in answering, especially where the default in answering remains unchallenged by the party in default for a lengthy period of time (*see* ***Deutsche Bank Natl. Trust Co. v Gutierrez***, 102 AD3d 825, 958 NYS2d 472 [2d Dept 2013]). Such is the case here as the defendant was or should have been well aware of her status as a defendant in default long before the interposition of this motion, which was effected subsequent to the public sale of the premises. Such a long delay warrants a denial of relief to the moving defendant under CPLR 50515(a)(1) and or 3012(d), (*see* ***TD Bank, N.A. v Spector***, 114 AD3d 933, 980 NYS2d 836 [2d Dept 2014]). Since the moving defendant failed to advance a reasonable excuse for default, it is unnecessary to consider the moving defendant's claims to a meritorious defense (*see* ***Citimortgage, Inc. v Bustamante***, 107 AD3d 752, 968 NYS2d 513 [2d Dept 2013]).

The court has considered the remaining contentions of the moving defendant and her counsel in which they claim "that this proceeding is wrought with procedural flaws that warrant the vacatur

of the Order of Reference and Judgment of Foreclosure", none of which are jurisdictional in nature, including any and all failures to comply with the statutorily mandated notices of default and finds them all to be without merit (*see* ***Pritchard v Curtis***, 101 AD3d 1502, 957 NYS2d 440 [3d Dept 2012]; ***Deutsche Bank Natl. Trust Co. v Posner***, 89 AD3d 674, 933 NYS2d 52 [2d Dept 2011]; ***Citimortgage, Inc. v Pembelton***, 39 Misc3d 454, 960 NYS2d 867 [Sup Ct. Suffolk County 2013]; ***JP Morgan Chase Bank v Benitez***, 2013 WL 4038140, *3+, 2013 [Sup. Ct Suffolk County 2013]).

In view of the foregoing, the instant motion (#004) by defendant Emmel is denied.

DATED: 3/18/14

THOMAS F. WHELAN, J.S.C.