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SHORT FORM ORDER

INDEX No. 10-19686

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 10-24-13
ADJ. DATE
Mot. Seq. # 001 - MG
002 - XMD

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WELLS FARGO BANK, N.A., ALSO KNOWN AS WACHOVIA MORTGAGE A DIVISION OF WELLS FARGO BANK, N.A., FORMERLY KNOWN AS WACHOVIA MORTGAGE, FSB., FORMERLY KNOWN AS WORLD SAVINGS BANK, FSB.,

Plaintiff,

- against -

ANNMARIE PETTINATO, "JOHN DOE 1 to JOHN DOE 25", said names being fictitious, the persons or parties intended being the persons, parties, corporations or entities, if any, having or claiming an interest in or lien upon the mortgaged premises described in the complaint,

Defendants.

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Upon the following papers numbered 1 to 20 read on this motion for an order of reference and cross motion to vacate default ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; Notice of Cross Motion and supporting papers 13 -20 ; ~~Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers ____; 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 by plaintiff Wells Fargo Bank, N.A., also known as Wachovia Mortgage a division of Wells Fargo Bank, N.A., formerly known as Wachovia Mortgage, FSB, formerly known as World Savings Bank, FSB (Wells Fargo) for an order fixing the defaults of the non-answering, non-

appearing defendants, for *nunc pro tunc* relief and, for an order of reference appointing a referee to compute pursuant to Real Property Actions and Proceedings Law § 1321, is granted; and it is further

ORDERED that plaintiff's application 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 the names of Sandra Wills and Gary Wills in place of "John Doe#1" and "John Doe #2" and by striking therefrom the caption the names of "John Doe #3" through "John Doe #25"; and it is further

ORDERED that the defendant captioned as "Annmarie Pettinato" is hereby amended to read as "Annemarie Pettinato"; 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

_____x

WELLS FARGO BANK, N.A., ALSO KNOWN AS WACHOVIA MORTGAGE A DIVISION OF WELLS FARGO BANK, N.A., FORMERLY KNOWN AS WACHOVIA MORTGAGE, FSB., FORMERLY KNOWN AS WORLD SAVINGS BANK, FSB.,

Plaintiff,

- against -

ANNEMARIE PETTINATO, SANDRA WILLS, GARY WILLS,

Defendants.

_____x

ORDERED that the cross motion by defendant Pettinato for an order vacating her default, allowing late service of an answer and placing the action back on the foreclosure conference calendar or, in the alternative, dismissing the action is denied.

The plaintiff commenced this an action to foreclose a mortgage on May 28, 2010 in connection with the premises known as 22 Pearl Street, Patchogue, New York. On December 4, 2007, defendant Annemarie Pettinato (Pettinato) executed an adjustable rate note in favor of World Savings Bank, FSB (World Savings), agreeing to pay the sum of $273,000.00 at the starting rate of 8.280 percent. On December 4, 2007, defendant Pettinato executed a first mortgage in the principal sum of $273,000.00 on the subject property.

The mortgage was recorded on January 22, 2008 in the Suffolk County Clerk's Office. Plaintiff became the holder of the note and mortgage by virtue of a series of bank mergers with World Savings having merged with and into Wachovia Mortgage, FSB and Wachovia Mortgage, FSB having merged with and into plaintiff, Wells Fargo.

A notice of default dated July 21, 2009 was sent to defendant Pettinato stating that she had defaulted on her mortgage loan and that the amount past due was $4,248.25. As a result of defendant's continuing default, plaintiff commenced this foreclosure action. In its complaint, plaintiff alleges in pertinent part that defendant breached her obligations under the terms and conditions of the note and mortgage by failing to make the monthly payments commencing with the June 15, 2009 payment and subsequent payments thereafter.

The Court's computerized records indicate that a foreclosure settlement conference was held on September 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 of reference contending that none of the defendants have appeared or answered; that the time provided by law in which the defendants were required to answer and/or appear has expired; that defendants' time to answer has not been extended by Court Order or stipulation; and, that all defendants are in default. Defendant Pettinato has submitted a cross motion contending in pertinent part that plaintiff failed to properly serve her and that she has not had an opportunity to conduct discovery.

That branch of defendant Pettinato's cross motion seeking a dismissal of the complaint on the basis that plaintiff failed to obtain personal jurisdiction over the defendant is denied. When a defendant seeking to vacate a default raises a jurisdictional objection pursuant to CPLR 5015 (a) (4), the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5015 (a) (1) (*see* ***Roberts v Anka***, 45 AD3d 752, 846 NYS2d 280 [2d Dept 2007]; ***Marable v Williams***, 278 AD2d 459, 718 NYS2d 400 [2d Dept 2000]; ***Taylor v Jones***, 172 AD2d 745, 569 NYS2d 131 [2d Dept 1991]).

Here, the process server's affidavit of service constituted prima facie evidence of proper service upon defendant Pettinato pursuant to CPLR 308 (2) and defendant's conclusory and unsubstantiated denial of receipt of the summons and complaint is insufficient to rebut the presumption of proper service created by said affidavit (*see* ***Beneficial Homeowner Service Corp. v Girault***, 60 AD3d 984, 875 NYS2d 815 [2d Dept 2009]). Under these circumstances, the court finds that the service effected was compliant with the dictates of CPLR 308 (2) and sufficient to provide the court with personal jurisdiction over defendant Pettinato.

Under CPLR 317, a defendant is not required to offer a reasonable excuse to vacate his or her default (*see* ***Eugene Di Lorenzo, Inc. v A C. Dutton Lbr. Co.***, 67 NY2d 138, 141, 501 NYS2d 8 [1986]), but must demonstrate that he or she did not personally receive notice of the summons in time to defend the action (*id.* at 143, 501 NYS2d 8; *see* ***Fleisher v Kaba***, 78 AD3d 1118, 1119, 912 NYS2d 604 [2d Dept 2010]; *see also*

Clover M. Barrett, P.C. v Gordon, 90 AD3d 973, 936 NYS2d 217 [2d Dept 2011]). As indicated above, defendant's unsubstantiated denials are insufficient to rebut the prima facie showing of proper service created by the process server's affidavit. Where the only excuse offered is the defendant's unsuccessful claim that she was not served with process or was not served in time to defend, a reasonable excuse is not established (*see* ***ACT Prop., LLC v Ana Garcia***, 102 AD3d 712, 957 NYS2d 884; ***Deutsche Bank Natl. Trust Co. v Pietranico***, 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]; ***Indymac Fed. Bank FSB v Quattrochi***, 99 AD3d 763, 952 NYS2d 239 [2d Dept 2012]; ***Reich v Redley***, 96 AD3d 1038, 947 NYS2d 564 [2d Dept 2012]). Under these circumstances, the court need not address whether the moving defendant has a meritorious defense (*see* ***Deutsche Bank Natl. Trust Co. v Gutierrez***, 102 AD3d 825, 958 NYS2d 472; ***Deutsche Bank Natl. Trust Co. v Pietranico***, 102 AD3d 724, 957 NYS2d 868; ***Wells Fargo Bank, N.A. v Russell***, 101 AD3d 860, 955 NYS2d 654). Accordingly, that branch of defendant's cross motion seeking to vacate her default due to lack of personal jurisdiction, dismissal of the complaint or a traverse hearing on the issue of service of process is denied.

The moving defendant's remaining claim that the plaintiff's motion is essentially premature since there has been no discovery, is rejected. CPLR 3212(f) provides that "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just." Appellate case authorities have long instructed that to avail oneself of the safe harbor this rule affords, the claimant must "offer an evidentiary basis to show that discovery may lead to relevant evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff" (***Martinez v Kreychmar***, 84 AD3d 1037, 923 NYS2d 648 [2d Dept 2011]; *see* ***Seaway Capital Corp. v 500 Sterling Realty Corp.***, 94 AD3d 856, 941 NYS2d 871 [2d Dept 2012]). In addition, the party asserting the rule must demonstrate that he or she made reasonable attempts to discover facts which would give rise to a genuine triable issue of fact on matters material to those at issue (*see* ***Swedbank, AB v Hale Ave. Borrower, LLC***, 89 AD3d 922, 932 NYS2d 540 [2d Dept 2011]). Here, the opposing papers submitted by defendant Pettinato were insufficient to satisfy this statutory burden. The defendant failed to demonstrate that she made reasonable attempts to discover the facts which would give rise to a triable issue of fact or that further discovery might lead to relevant evidence (*see* CPLR 3212 [f]; ***Cortes v Whelan***, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]; ***Sasson v Setina Mfg. Co., Inc.***, 26 AD3d 487, 810 NYS2d 500 [2d Dept 2006]). Accordingly, defendant's claim of prematurity is thus rejected as unmeritorious.

Plaintiff moves to fix the defaults of the non-answering, non-appearing defendants. " 'On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing' " (***Dupps v Betancourt***, 99 AD3d 855, 952 NYS2d 585 [2d Dept 2012], *quoting* ***Atlantic Cas. Ins. Co. v RJNJ Servs., Inc.***, 89 AD3d 649, 932 NYS2d 109 [2d Dept 2011]; *see* CPLR 3215[f]; ***Green Tree Serv., LLC v Cary***, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]). Here, plaintiff has met all of the requirements with respect to the non-appearing, non-answering defendants (*see id.*).

Accordingly, plaintiff's application for an order fixing the defaults of the non-answering, non-appearing defendants and for an order of reference appointing a referee to compute the amount due plaintiff under the note and mortgage is granted (*see* ***Green Tree Serv., v Cary***, 106 AD3d 691, 965 NYS2d 511; ***Vermont Fed. Bank v Chase***, 226 AD2d 1034, 641 NYS2d 440 [3d Dept 1996]; ***Bank of East Asia, Ltd. v Smith***, 201 AD2d 522, 607 NYS2d 431 [2d Dept 1994]).

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

Dated: June 5, 2014

J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**