

Aurora Loan Servs. LLC v Adler

2015 NY Slip Op 31112(U)

June 26, 2015

Supreme Court, New York County

Docket Number: 115937/09

Judge: Joan A. Madden

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

MA
7/1/15
E

PRESENT: HON. JOAN A. MADDEN
J.S.C. Justice

PART 11

Index Number : 115937/2009
AURORA LOAN SERVICES LLC
VS.
ADLER, MEYER
SEQUENCE NUMBER : 002
JUDGMENT OF FORECLOSURE & SALE

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is *determined in accordance with the annexed memorandum decision. Settle order and judgment of foreclosure and sale on notice.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

RECEIVED
JUL 1 2015
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Dated: June 26, 2015

[Signature], J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
 - 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

810

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
AURORA LOAN SERVICES LLC,

Plaintiff,

INDEX NO. 115937/09

-against-

MEYER ADLER, 59 WEST 128 HOLDING, LLC,
HYPOTHECATORS MORTGAGE COMPANY,
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, NEW YORK CITY PARKING VIOLATIONS
BUREAU, NEW YORK CITY TRANSIT ADJUDICATION
BUREAU, PEOPLE OF THE STATE OF NEW YORK,

Defendants.

-----X
JOAN A. MADDEN, J.:

In this mortgage foreclosure action, plaintiff moves for an order confirming the Referee's Report of Amount Due and for a judgment of foreclosure and sale. Defendant mortgagor, Meyer Adler, opposes the motion and cross-moves for an order pursuant to CPLR 5015(a)(1) and (4), CPLR 3012(d) and CPLR 2004 vacating his default and extending his time to answer, and an order pursuant to CPLR 3211(a)(1), (2), and (8) dismissing the complaint for lack of stranding, lack of personal jurisdiction and lack of subject matter jurisdiction.

On November 12, 2009, plaintiff commenced this action to foreclose on a mortgage in the amount of \$502,000 on the property located at 59 West 128th Street in New York City. Even though defendant Adler failed to serve and file an answer, mortgage foreclosure settlement conferences were scheduled from January 2010 to October 2011. By order dated October 27, 2011, the mortgage foreclosure part remanded the action to Trial Support after Adler failed to appear for two conference despite written notice. Plaintiff subsequently moved for a default

judgment against Adler and the appointment of a referee to compute, and the motion was granted in December 2012. In or about January 2014, plaintiff made the instant motion to confirm the referee's report and for a judgment of foreclosure and sale. In April 2014, Adler, appearing by counsel, opposed plaintiff's motion and cross-moved to vacate his default, serve a late answer, and dismiss the complaint on various grounds.

At the outset, the court will consider Adler's cross-motion. Adler first seeks to vacate his default in failing to answer on jurisdictional grounds under CPLR 5015(a)(4). Adler asserts the court lacks personal jurisdiction over him based on improper service. It is well settled that a properly executed affidavit of service raises a presumption of proper service, and a mere conclusory denial of receipt is not enough to rebut that presumption. See ATM One, LLC v. Landaverde, 2 NY3d 472 (2004); Kihl v. Pfeffer, 94 NY2d 118 (1999); Slimani v. Citibank, NA, 47 AD3d 489 (1st Dept 2008); Northern v. Hernandez, 17 AD3d 285 (1st Dept 2005); Ames Capital Corp v. Ford, 294 AD2d 134 (1st Dept 2002); Fairmont Funding Ltd v. Stefansky, 235 AD2d 213 (1st Dept 1997).

Here, the affidavit of service states that on November 17, 2009, Adler was served by delivering the summons and complaint to "Etha Doe (Housekeeper)," a person of suitable age and discretion at Adler's dwelling place within the State of New York, 36 Olympia Lane, Monsey, NY 10952. A separate affidavit of service states that copies of the papers were mailed to Adler at the same address on November 18, 2009.

In support of this cross-motion, Adler submits a carefully drafted affidavit that his housekeeper does not qualify as a person of suitable age and discretion since she is a "Hungarian immigrant who was not fluent in English." Adler states, "I did not believe that I had been served

with process because 'Etha Doe' never conveyed the summons and complaint to me," and "failed to appreciate the importance, meaning and significance of the legal papers delivered to her due to her lack of fluency in English, and thus neglected to either hand me the summons or advise me of its delivery to my residence." Adler states that his housekeeper "could not be trusted to comprehend and appreciate the importance of the legal documents which plaintiff's process server allegedly handed to her," which is "confirmed by her failure to convey the summons to me or to otherwise inform me of its delivery to my home." He further states that "I would have promptly appeared in this matter had I known that plaintiff's complaint had been delivered to my house," and "I only failed to appear because I believed that plaintiff had never attempted to personally serve me with its summons and complaint."

Adler's affidavit is insufficient to rebut the presumption of proper service. See ATM One, LLC v. Landaverde, supra; Kihl v. Pfeffer, supra; Ames Capital Corp v. Ford, supra; Fairmont Funding Ltd v. Stefansky, supra. Contrary to Adler's admittedly mistaken belief about personal service, plaintiff was not required to make any attempt to deliver the papers to him personally, as delivery to a person of suitable age and discretion at Adler's actual place of residence properly effectuated service in accordance with CPLR 308(2). In the absence of an affidavit from his housekeeper, Adler fails to raise an issue of fact as to whether she qualified as a person of suitable age and discretion authorized to accept service under CPLR 308(2). Significantly, Adler does not specifically state that he never received the summons and complaint, does not deny receiving the mailed copies of the papers, and does not state that he was unaware of this action until he received the instant motion papers. Thus, since Adler fails to rebut the presumption that service was properly effectuated as set forth in the affidavit of service,

he has not raised an issue of fact for a traverse hearing, and is not entitled to relief pursuant to CPLR 5015(a)(4). 530,531 (1st Dept 2009). Defendant Adler fails to satisfy his burden, as he 2009); Time Warner City Cable v. Tri State Auto, Inc., 5 AD3d 153 (1st Dept), lv app disp 3 NY3d 656 (2004). Thus, Adler is not entitled to relief under CPLR 5015(a)(1).

Adler also seeks to vacate his default based on excusable default pursuant to CPLR 5015(a)(1), which requires him to establish both a reasonable excuse for his default in appearing and answering, and a potentially meritorious defense to the action. See Eugene DiLorenzo, Inc v. A.C. Dutton Lumber Co, Inc., 67 Ny2d 138 (1986); M.R. v. 2526 Valentine LLC, 58 AD3d 530, 531 (1st Dept 2009). Adler fails to satisfy his burden, as he has not established a reasonable excuse for his default. The only excuse he proffers is his objection to service of process, which the court has already rejected. Absent a reasonable excuse, the court need not reach the issue of whether he has a potentially meritorious defense. See Tribeca Technology solutions, Inc v. Goldberg, 100 AD3d 536 (1st Dept 2013); Bendeck v. Zablah, '05 AD3d 457 (1st Dept 2013); Admiral Insurance Co v. Marriott Int'l, Inc. 79 AD3d 572 (1st Dept 2010), lv app den 17 NY3d 708 (2011); Caba v. Rai, 63 AD3d 578, 582 (1st Dept 2009); Time Warner City Cable v. Tri State Auto, Inc., 5 AD3d 153 (1st Dept), lv app disp 3 NY3d 656 (2004). Thus, Adler is not entitled to relief under CPLR 5015(a)(1).

Adler further seeks relief pursuant to CPLR 3012(d) and CPLR 2004 granting leave to serve a late answer. In determining a motion for leave to serve a late answer pursuant to CPLR 3012(d), the court considers a number of factors including the length of defendant's delay, the excuse offered for the delay, the absence or presence of willfulness, the possibility of prejudice to plaintiff, the potential merits of the defenses, and the public policy favoring the resolution of

disputes on the merits. See Cirillo v. Macy's, Inc., 61 AD3d 538 (1st Dept 2009); Jones v. 414 Equities LC, 57 AD3d 65, 81 (1st Dept 2008).

Considering the relevant factors, the court concludes that Adler is not entitled to serve a late answer, as he fails to provide an adequate excuse for his inordinate delay in answering. See Whittemore v. Yeo, 99 AD3d 496 (1st Dept 2012). More than four years elapsed between the time Adler was served in November 2009 and when he made the instant cross-motion to vacate his default and serve a late answer in April 2014. The record shows that Adler does not reside in the mortgaged premises, and therefore was not entitled to a mandatory settlement conference. Nevertheless, the court held eleven mortgage foreclosure settlement conference from January 2010 to October 2011. Adler does not deny plaintiff's assertion that he participated in several of those conferences. After Adler failed to appear for two settlement conferences, the action was remanded to this court, and plaintiff moved for a default judgment and the appointment of a referee to compute; that motion was granted in November 2012. In January 2014, plaintiff made the instant motion for a judgment of foreclosure and sale. Only then, in response to plaintiff's motion, did Adler for the first time in April 2014 seek to vacate his default and serve a late answer.

As his explanation for not answering, Adler again relies on his mistaken belief that he was never served and his objection that his "non-English speaking housekeeper from Hungary" was not a person of suitable age and discretion. Adler, however, does not explain why he waited until April 2014 to seek relief and answer, as clearly he was aware of the action and participated in at least some of the settlement conferences as early as 2010 or 2011. Even after the matter was remanded to this Court in October 2011, Adler took no action for another 2½ years. Adler's

“failure to do nothing during this period evinces willfulness.” Wittemore v. Yeo, supra. Thus, under the circumstances presented, Adler’s proffered explanation is insufficient to excuse the lengthy and inordinate delay.

Adler likewise fails to establish that he has a potentially meritorious defense. While he asserts the court lacks subject matter jurisdiction on the ground that plaintiff lacks standing, binding appellate authority clearly holds that a party’s lack of standing does not constitute a jurisdictional defect. See Tribeca Lending Corp v. Bartlett, 121 AD3d 613 (1st Dept 2014); Lance Int’l v. First National City Bank, 86 AD3d 479 (1st Dept 2011), lv app disp 19 NY 3d 898 (2012); Wells Fargo Minnesota, N.A. v. Mastropaolo, 42 AD3d 239 (2nd Dept 2007). The case Adler cites, Stark v. Goldberg, 297 AD2d 203 (1st Dept 2002), has been overruled. Moreover, by defaulting and failing to timely appear or answer, Adler “waived any argument that plaintiff lacked standing to commence the action.” U.S. Bank, N.A. v. Bernabel, 125 AD3d 541 (1st Dept 2015); accord Wells Fargo Bank, NA v. Edwards, 95 AD3d 692 (1st Dept 2012).

In view of the foregoing, Adler has failed to establish a factual or legal basis for vacating his default or granting leave to serve a late answer, and as such, his cross-motion is denied in its entirety. Plaintiff’s motion is therefore granted and plaintiff is entitled to an order confirming the referee’s report and a judgment of foreclosure and sale.

Settle order and judgment of foreclosure and sale on notice.

DATED: June 26, 2015
~~June 26, 2015~~

ENTER:


J.S.C.