

<b>JPMorgan Chase Bank NA v Mendoza</b>
2015 NY Slip Op 31802(U)
September 15, 2015
Supreme Court, Queens County
Docket Number: 12885/2008
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

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JPMORGAN CHASE BANK NA
10790 Rancho Berriardo Road
San Diego, CA 92127

Index No.: 12885/2008

Motion Date: 8/25/15

Plaintiff,

Motion No.: 84

- against -

Motion Seq.: 3

RICARDO D. MENDOZA, INSTATE
INVESTMENTS INC. ASSIGNEE, MADISON
RESOURCES LTD., NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK
CITY TRANSIT ADJUDICATION BUREAU,
ALICIA COOPER,

Defendants.

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The following papers numbered 1 to 14 read on this motion by
plaintiff for an order granting default judgment against
defendant; vacating the Order of Reference dated September 2,
2008 and the Judgment of Foreclosure & Sale dated December 10,
2008; granting a new Order of Reference; and amending the
caption; and on this cross motion by defendant Ricardo D. Mendoza
for leave to file an answer, nunc pro tunc; and dismissing the
complaint for lack of standing pursuant to CPLR 5015(a).

Table with 2 columns: Document Name and Papers Numbered. Includes entries for Notice of Motion-Affidavits-Exhibits (1-8), Notice of Cross Motion-Affirmation-Exhibits (9-12), and Reply Affirmation-Exhibits (13-14).

Upon the foregoing papers it is ordered that this motion and
this cross motion are determined as follows:

This is an action to foreclose a mortgage encumbering property known as 142-51 122<sup>nd</sup> Avenue, Jamaica, NY 11436. Based upon the record before this Court, defendant Ricardo D. Mendoza (defendant) executed a note and mortgage in the principal amount of \$315,000.00 in favor of plaintiff on November 16, 2007. The mortgage was subsequently assigned to Pennymac Corp. after commencement of this action on January 9, 2014. Defendant defaulted on the note and mortgage on February 1, 2008 when he failed to make the monthly mortgage payments as well as the subsequent payments.

Plaintiff accelerated defendant's mortgage and brought an action to foreclose its mortgage by filing a notice of pendency, summons and complaint on May 22, 2008. Pursuant to the affidavit of service, defendant was served with a copy of the summons and complaint pursuant to CPLR 308(2) on May 27, 2008 by service upon a person of suitable age and discretion at defendant's dwelling.

Defendant failed to answer the summons and complaint or otherwise appear in the foreclosure action. On September 2, 2008, plaintiff's application for an order of reference was granted by this Court. After the referee issued a report of amount due, plaintiff moved this Court for a Judgment of Foreclosure and Sale which was granted on November 26, 2008. Before plaintiff could conduct a foreclosure sale, defendant filed a Chapter 13 Bankruptcy Petition on February 26, 2009. This petition was dismissed on May 26, 2009. Defendant filed five additional bankruptcy petitions. Each petition was ultimately dismissed. The last petition was dismissed on May 20, 2014.

Counsel for plaintiff states that plaintiff could not confirm or deny that the affidavit submitted with plaintiff's prior application for an Order of Reference was executed with all required formalities. Therefore, plaintiff now requests that the Order of Reference granted by this Court on September 2, 2008 be vacated. Plaintiff has now confirmed to counsel that the affidavit of merit is factually accurate and requests that a new Order of Reference be granted in favor of the plaintiff. Plaintiff also request that the caption be amended to substitute Pennymac Corp. as plaintiff in place and stead of JPMorgan Chase Bank, NA and to substitute Alicia Cooper in place of "John Doe #1" and strike the remaining "John Doe" defendants. In response, defendant filed a cross motion which seeks leave to interpose a late answer.

In support of its motion, plaintiff submits an affirmation from counsel; an affidavit of merit from Jervon Randall, Default Specialist III of Pennymac Loan Services, LLC the servicer for Pennymac Corp., the assignee of plaintiff; a copy of the note, mortgage and assignment of mortgage; a copy of the 30 day demand letter and notice of default; a copy of the Office of Court Administration Affirmation and Attorney Affirmation pursuant to CPLR 2106; a copy of the notice of pendency, summons and complaint; copies of affidavits of service; copies of the orders dismissing the bankruptcy petitions; a copy of the Judgment of Foreclosure & Sale; and a copy of the Order of Reference.

The affidavit of Mr. Randall dated October 20, 2014 states that defendant failed to cure his default, and there is due and owing an unpaid balance of \$314,902.06.

Plaintiff contends, based upon the evidence submitted, that plaintiff has made a prima facie showing that it is entitled to a default judgment and an Order of Reference. Further, counsel asserts that defendant was lawfully served with a summons and complaint and that the court therefore has personal jurisdiction. In addition, plaintiff asserts that it had standing to bring the action as the originator of the loan.

It is well settled that a plaintiff in a mortgage foreclosure action establishes a prima facie case of entitlement to judgment through submission of proof of the existence of the underlying note, mortgage and default in payment after due demand (see Midfirst Bank v Agho, 121 AD3d 343 [2d Dept. 2014]); Marculescu v Ouanez, 27 AD3d 701 [2d Dept. 2006]; U.S. Bank Trust National Assoc. v Butti, 16 AD3d 408 [2d Dept. 2005]). Upon such a showing, the burden shifts to the defendant to produce evidence in admissible form sufficient to raise a material issue of fact requiring a trial (see Grogg Assocs. v South Rd. Assocs., 74 AD3d 1021 [2d Dept. 2010]; Woods v Zik Realty Corp., 172 AD2d 606 [2d Dept. 1991]).

Defendant opposes this motion seeking to serve a late answer. Pursuant to CPLR 3012(d), "a court may extend the time to appear . . . upon such terms as may be just and upon a showing of reasonable excuse for delay or default." A defendant must provide a reasonable excuse for the default and establish a potentially meritorious defense (Grinage v City of New York, 45 AD3d 729 [2d Dept. 2007]; Giovanelli v Riversa, 23 AD3d 616 [2d Dept. 2005]; Ennis v Lema, 305 AD3d 663 [2d Dept. 2003]).

Here, defendant failed to offer any evidence whatsoever regarding a meritorious defense to the underlying foreclosure action or a reasonable excuse for failing to answer the summons and complaint. The affidavit of service submitted by plaintiff constitutes prima facie evidence of proper service pursuant to CPLR 308[2] (see Emigrant Mtge. Co., Inc. v Westervelt, 105 AD3d 896 [2d Dept. [2d Dept. 2013]; Matter of Nieto, 70 AD3d 831 [2d Dept. 2010]; Argent Mtge. Co., LLC v Vlahos, 66 AD3d 721 [2d Dept. 2009]). Defendant solely submits an affirmation from counsel including a bare and unsubstantiated denial of receipt, which is insufficient to dispute the veracity and content of the affidavit, and therefore, does not rebut the presumption of proper service created by the affidavit of service (see Deutsche Bank Natl. Trust Co. v Quinones, 114 AD3d 719 [2d Dept. 2014]; Irwin Mtge. Corp. v Devis, 72 AD3d 743 [2d Dept. 2010]; Mortgage Elec. Registration Sys., Inc. v Schotter, 50 AD3d 983 [2d Dept. 2008]). "A court need not conduct a hearing to determine the validity of the service of process where the defendant fails to raise an issue of fact regarding service" (Hamlet on Olde Oyster Bay Homeowners Assn., Inc. v Ellner, 57 AD3d 732 [2d Dept. 2008]); see Simmons First Natl. Bank v Mandracchia, 248 AD2d 375 [2d Dept. 1998]).

Here, counsel's affidavit, which contains only a conclusory denial of receipt of the summons and complaint, is insufficient to rebut the presumption of proper service as defendant never denied the specific facts contained in the process server's affidavit (see Deutsche Bank Natl. Trust Co. v Dixon, 93 AD3d 630 [2d Dept. 2012]; U.S. Natl. Bank Assn. v Melton, 90 AD3d 742, [2d Dept. 2011]; City of New York v Miller, 72 AD3d 726 [2d Dept. 2010]). Moreover, defendant himself fails to submit an affidavit, and an attorney's affirmation is insufficient to raise a claim of improper service (see Wells Fargo Bank, N.A. v Bowie, 89 AD3d 931 [2d Dept. 2011]; NYCTL 1996-1 Trust v King, 13 AD3d 429 [2d Dept. 2004]; Home Savings of America, F.A. v Gkanios, 233 AD2d 422 [2d Dept. 1996]).

This Court finds that plaintiff's submissions are sufficient to establish its entitlement to a default judgment. The complaint herein sufficiently sets forth a valid cause of action for foreclosure. Plaintiff has submitted a copy of the mortgage and note and an affidavit from Mr. Randall establishing defendant's default in payment. Plaintiff demonstrated proper service of the summons and complaint and showed by admissible evidence that it had been the holder of the note and mortgage as of the date of

the commencement of the action. In addition, plaintiff has submitted sufficient proof to demonstrate that defendant was served with notice pursuant to RPAPL 1303, and that defendant was not entitled to notice under RPAPL 1304 as defendant does not reside at the subject property.

Accordingly, for all of the above stated reasons, it is hereby,

ORDERED, that plaintiff's motion to vacate the prior Order of Reference and Judgment of Foreclosure and Sale and for a new Order of Reference is granted; and it is further

ORDERED, that defendant's cross motion to serve a late answer and dismiss the complaint is denied.

Order of Reference signed contemporaneously herewith.

Dated: September 15, 2015  
Long Island City, N.Y.

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