U.S. Bank N.A. v Bastidas
2015 NY Slip Op 32521(U)
December 16, 2015
Supreme Court, Queens County
Docket Number: 173/10
Judge: Darrell L. Gavrin
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MEMORANDUM

SUPREME COURT: QUEENS COUNTY
IA PART 27

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF BANC OF AMERICA FUNDING CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-8,

Plaintiffs,

- against -

CARMEN BASTIDAS, MIGUEL E. CABRERA, ALLSTATE INSURANCE COMPANY a/s/o DENNIS FITZGERALD, CRIMINAL COURT OF THE CITY OF NEW YORK, MIDLAND FUNDING NCC-2 CORP., NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, UNITED STATES OF AMERICA ACTING THROUGH THE IRS,

Defendants.

INDEX NO. 173/10

MOTION DATE Sept. 4, 2015

MOTION CAL. NO. 72

MOTION SEQUENCE NO. 3

Plaintiff commenced this action on January 5, 2010, to foreclose a mortgage given by defendants, Carmen Bastidas and Miguel Cabrera s/h/a Miguel E. Cabrera, on the real property known as 5512 96th Street, Corona, New York (the subject property). Defendants defaulted in answering the complaint. A series of residential foreclosure settlement conferences were held pursuant to CPLR 3408, and then, pursuant to a stipulation dated March 19, 2012, the next scheduled conference was adjourned to May 9, 2012. By order dated May 9, 2012, the Court Attorney Referee released the case from the Residential Foreclosure Part, noting that defendants (the borrowers) had failed to appear on that date's scheduled conference.

Plaintiff moved on September 9, 2013, for an order of reference based upon defendants' failure to appear or answer the complaint. The motion was denied without prejudice, on the ground plaintiff had "failed to provide or demonstrate a reasonable excuse for the delay in seeking a default judgment more than three years after defendants' default" (*see* order dated October 16, 2013). Plaintiff thereafter moved on January 13, 2014, for an order of reference, and in support of the motion, provided a detailed explanation for its delay in seeking the default judgment. As a consequence, the motion was granted by order dated January 20, 2015, and entered on January 28, 2015, and Zenith T. Taylor, Esq. was appointed as the referee to compute the amount due plaintiff on the note and mortgage. Zenith T. Taylor, Esq., however,

has declined the appointment (*see* Exhibit annexed to the affirmation dated June 10, 2015, of Kathryn Assini, Esq. [letter dated April 15, 2015]), and plaintiff moves for leave to appoint a substitute referee.

Defendants, Bastidas and Cabrera, oppose the motion, and cross-move pursuant to CPLR 2221, 5015 and 317 to vacate the order of reference and prior orders, and to dismiss the complaint insofar as asserted against them pursuant to CPLR 3215© for failure to take proceedings for entry of a default judgment within one year of their default, or, in the alternative, for leave to serve a late answer as proposed pursuant to CPLR 3012(d).

To the extent defendants, Bastidas and Cabrera, make reference to CPLR 2221 in their notice of cross motion, along with CPLR 5015 and CPLR 317, their cross motion is deemed to be one to vacate their default in answering (*see Matter of Gavrin*, 294 AD2d 185 [1st Dept 2002]).

Defendants, Bastidas and Cabrera, contend defendant, Bastidas, was not properly served with process. Defendants, Bastidas and Cabrera, however, do not explicitly cross-move pursuant to CPLR 5015(a)(4) or assert that the court lacks personal jurisdiction over them. Nor do they cross-move to dismiss the complaint, insofar as asserted against them, on the ground of lack of personal jurisdiction due to improper service of process (*see* CPLR 3211[a][8]). Furthermore, to the extent defendant, Cabrera, asserts the service of process upon defendant, Bastidas, was improper, he lacks standing to challenge the validity of such service inasmuch as that claim is a personal one which may be raised only by defendant, Bastidas (*see Wells Fargo Bank, N.A. v Bowie*, 89 AD3d 931 [2d Dept 2011]; *Home Sav. of Am. v Gkanios*, 233 AD2d 422, 423 [2d Dept 1996]).

Plaintiff offers an affidavit of service dated January 20, 2010, of a licensed process server, indicating service of process upon defendant, Bastidas, by service of a copy of the summons and complaint upon "MIGUEL E. CABRERA (HUSBAND)" on January 13, 2010, at 2:00 P.M. at 5512 96th Street, 1st Floor, Corona, New York, as the dwelling place of defendant, Bastidas, and a subsequent mailing of a copy of the summons and complaint to defendant, Bastidas, on January 20, 2014. This affidavit of service constitutes prima facie proof of proper service of process upon defendant, Bastidas, pursuant to CPLR 308(2) (*see Bank of New York v Samuels*, 107 AD3d 653 [2d Dept 2013]; *Skyline Agency, Inc. v Ambrose Coppotelli, Inc.*, 117 AD2d 135, 139 [2d Dept 1986]).

In rebuttal, defendant, Bastidas, asserts that defendant, Cabrera, "lived" in Miami, Florida at the time of the alleged service. CPLR 308(2), however, does not require the person to whom the process is delivered be a person who resides at the same address as the defendant. Rather, CPLR 308(2) requires that delivery be made to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served, and mailing the summons to the defendant's last known residence or his or her actual place of business.

Defendant, Bastidas, makes no claim defendant, Cabrera, was not present at the

96th Street premises on January 13, 2010 at 2:00 P.M., or that he does not physically resemble the person described in the affidavit of service. Defendant, Cabrera, notably has not supplied an affidavit in support of the cross motion (*see Roberts v Anka*, 45 AD3d 752, 754 [2d Dept 2007]; *Foster v Jordan*, 269 AD2d 152 [1st Dept 2000]; *cf. Lattingtown Harbor Prop. Owners Assn., Inc. v Agostino*, 34 AD3d 536, 538 [2d Dept 2006]).

Furthermore, although defendant, Bastidas, states that defendant, Cabrera, divorced her daughter Elizabeth in the beginning of 2010, Bastidas makes no claim that at the time of the alleged service of process, Cabrera was not a person of suitable age and discretion. Nor does defendant, Bastidas, swear to specific facts to rebut the statements in the process server's affidavit relative to the subsequent mailing of the copy of the summons and complaint (*see Engel v Lichterman*, 62 NY2d 943 [1984], *affg* 95 AD2d 536 [2d Dept 1983]). Thus, defendant Bastidas's unsubstantiated denial of service of the summons and complaint is an insufficient basis to warrant a hearing on the issue of the propriety of the service (*see JPMorgan Chase Bank, Nat. Assn. v Todd*, 125 AD3d 933 [2d Dept 2015]; *Remington Investments, Inc. v Seiden*, 240 AD2d 647 [2d Dept 1997]; *Sando Realty Corp. v Aris*, 209 AD2d 682 [2d Dept 1994]). Defendant, Bastidas, therefore is not entitled to relief pursuant to CPLR 5015(a)(4) or to dismiss the complaint insofar as asserted against her pursuant to CPLR 3211(a)(8).

That branch of the cross motion by defendants, Bastidas and Cabrera, pursuant to CPLR 5015(a)(4) to vacate their default in answering and to dismiss the complaint insofar as asserted against them pursuant to CPLR 3211(a)(8) based upon improper service of process upon defendant, Bastidas, is denied.

To the extent defendants, Bastidas and Cabrera, cross-move pursuant to CPLR 2221, they seek, in effect, to vacate their default in answering the complaint and to compel the plaintiff to accept their late answer pursuant to CPLR 3012(d). A defendant seeking to vacate a default in answering a complaint and to compel the plaintiff to accept an untimely answer as timely must show both a reasonable excuse for the default and the existence of a potentially meritorious defense (*see* CPLR 3012[d]; 5015[a][1]; *U.S. Bank N.A. v Sachdev*, 128 AD3d 807, 807 [2d Dept 2011]; *Chase Home Fin., LLC v Minott*, 115 AD3d 634, 634 [2d Dept 2014]; *Karalis v New Dimensions HR, Inc.*, 105 AD3d 707, 708 [2d Dept 2013]; *Community Preserv. Corp. v Bridgewater Condominiums, LLC*, 89 AD3d 784, 785 [2d Dept 2011]; *Wells Fargo Bank, N.A. v Cervini*, 84 AD3d 789, 789 [2d Dept 2011]). The determination of what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court (*see U.S. Bank Nat. Assn. v Sachdev*, 128 AD3d 807 [2d Dept 2015]; *Maspeth Fed. Sav. & Loan Assn. v McGown*, 77 AD3d 889, 890 [2d Dept 2010]).

Defendant, Bastidas, asserts that she defaulted in serving an answer because she relied upon an attorney, who had agreed to represent her in the action, to serve an answer or a notice of appearance on her behalf, but who did not do so. She, however, has failed to demonstrate she retained him prior to the expiration of the statutory time period in which to answer (*see People's United Bank v Latini Tuxedo Mgt., LLC*, 95 AD3d 1285, 1286 [2d Dept 2012] [internal quotation marks omitted] [where a party asserts law office failure, it must provide "a detailed and credible explanation of the default"]; *(Kohn v Kohn*, 86 AD3d 630, 630 [2d Dept 2011]).

She merely states that she contacted an attorney because she was unable to pay her mortgage on or about the beginning of 2010. And, to the extent she claims she was unable to "supervise" the attorney because her attention was focused on her daughter Elizabeth, who had sustained injuries in a car accident in March 2010, and was hospitalized for several months, including weeks with a coma, defendant, Bastidas, attended six conferences without counsel from December 2010 through January 2012, prior to the attorney's execution of the March 19, 2012 stipulation for an adjournment. Consequently, defendant, Bastidas, has failed to show her default in answering was the result of "law office failure." Defendant, Bastidas, has failed to show she had a reasonable excuse for defaulting in answering, and it is not necessary to consider whether she has demonstrated a potentially meritorious defense, including lack of standing (*see BAC Home Loans Servicing, LP v Reardon*, 132 AD3d 790 [2d Dept 2015]).

Defendant, Cabrera, has failed to offer any excuse for his failure to answer the complaint (CPLR 5015[a][1]). (He makes no claim that the attorney retained by defendant, Bastidas, agreed to represent him as well.) Under such circumstances, it is not necessary to consider whether he has demonstrated a potentially meritorious defense, including lack of standing (*see BAC Home Loans Servicing, LP v Reardon*, 132 AD3d 790).

To the extent defendant, Bastidas, moves to vacate her default in answering and the order of reference pursuant to CPLR 317, she has failed to demonstrate that she did not personally receive notice of the summons in time to defend, as required to obtain relief pursuant to CPLR 317 (*see Taieb v Hilton Hotels Corp.*, 60 NY2d 725 [1983]; *393 Lefferts Partners, LLC v. New York Ave. at Lefferts, LLC*, 68 AD3d 976 [2d Dept 2009]). To the extent defendant, Cabrera, moves to vacate his default in answering and the order of reference pursuant to CPLR 317, he was served with process pursuant to CPLR 308(1), and therefore CPLR 317 is inapplicable.

Those branches of the cross motion by defendants, Bastidas and Cabrera, which are, in effect to vacate their default in answering pursuant to CPLR 5015(a)(1) and CPLR 317 and to compel plaintiff to accept their late answer pursuant to CPLR 3012(d) are denied.

With respect to that branch of the cross motion by defendants, Bastidas and Cabrera, to vacate the order of reference and to dismiss the complaint insofar as asserted against them pursuant to CPLR 3215©, defendants, Bastidas and Cabrera, assert the court erred in denying the original motion by plaintiff for a default judgment "without prejudice." According to defendants, Bastidas and Cabrera, the court should have dismissed the complaint insofar as asserted against them as abandoned, based upon its finding that plaintiff failed to demonstrate a reasonable excuse for its delay in seeking the judgment (*see* order dated October 16, 2013). Defendants, Bastidas and Cabrera, also assert that even assuming the court properly denied the original motion by plaintiff for an order of reference without prejudice to renewal, plaintiff, in its subsequent motion for leave to enter a default judgment against them, failed to establish "sufficient cause" pursuant to CPLR 3215© to avoid dismissal of the complaint insofar as asserted against them as abandoned.

Defendants, Bastidas and Cabrera, have failed to cite to any statutory or case law

authority which prohibits the court from denying a motion by a plaintiff for leave to enter a default judgment without prejudice to renewal. In addition, plaintiff, when renewing its motion, pointed to its participation in the conferences, and indicated that it forbore from prosecuting the action from December 5, 2012 through February 1, 2013, as a result of Hurricane Sandy and in consideration of the hold placed on the case by FEMA. Plaintiff also indicated that it changed counsel as of January 2012, received necessary communications regarding proper documentation on August 19, 2013, and then promptly moved for leave to enter a default judgment. Under such circumstances, plaintiff did not abandon the action by failing to initiate proceedings for the entry of a default judgment against defendants, Bastidas and Cabrera, within one year of their default and established sufficient cause as to why the complaint should not be dismissed (*see* CPLR 3215[c]; *US Bank Nat. Assn. v Dorestant*, 131 AD3d 467 [2d Dept 2015]; *Ingenito v Grumman Corp.*, 192 AD2d 509 [2d Dept 1993]).

Defendants, Bastidas and Cabrera, assert the order of reference should be vacated and the complaint dismissed insofar as asserted against them on the ground defendant, Bastidas, did not receive a 90-day notice pursuant to RPAPL 1304. The version of RPAPL 1304 in effect on the commencement date (*see* former L 2008, c 472, § 2, eff Sept. 1, 2008) provided for the sending of a 90-day notice prior to institution of a foreclosure action with regard to a "high-cost home loan," as such term is defined in Banking Law § 6-l, a "subprime home loan" or a "non-traditional home loan." A "home loan" was defined at that time as a loan "including an open-end credit plan, other than a reverse mortgage transaction," in which, among other things, "[t]he principal amount of the loan at origination did not exceed the conforming loan size that was in existence at the time of origination for a comparable dwelling as established by the federal national mortgage association" (*see* former RPAPL 1304, L 2008, c 472, § 2). Plaintiff contends the subject mortgage loan exceeded the "conforming loan size" that was in existence in June 2007 when the loan was originated, for a comparable two-family dwelling as established by the Federal National Mortgage Association (FANNIE MAE). The conventional loan limit of $533,850.00 constituted the conforming loan size for the maximum loan amount, for a two-family dwelling, which could be purchased by FANNIE MAE (*see* 12 USC § 1717). The subject mortgage loan was in the principal amount of $637, 225.00. The notice requirements of RPAPL 1304 thus are inapplicable to this action, since the subject loan did not satisfy the statutory definition of a "home loan," as that term was defined when this action was commenced (*see* L 2008, ch 472, § 2; *Fairmont Capital, LLC v Laniado*, 116 AD3d 998 [2d Dept 2014]).

The branch of the cross motion by defendants, Bastidas and Cabrera, to vacate the order of reference and to dismiss the complaint insofar as asserted against them pursuant to CPLR 3215© and for noncompliance with RPAPL 1304 is denied.

The motion by plaintiff for leave to appoint a substitute referee is granted.

Settle order.

DATED: December 16, 2015

DARRELL L. GAVRIN, J.S.C.