Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

NYCTL 2012-A TRUST AND THE BANK OF NEW YORK, AS COLLATERAL AGENT AND CUSTODIAN,

Plaintiffs,

-against-

CROSS ISLAND REO, INC., PINNACLE CAPITAL HOLDINGS, LLC, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT AUTHORITY TRANSIT ADJUDICATION BUREAU, AND DAHLIA THOMPSON,

Defendants.

Index No: 21007/13

Motion Date:11/4/15

Motion Seq. No.: 4

The following papers numbered 1 to read on this motion by defendant, Pinnacle Capital Holdings, LLC, for an Order vacating the Referee's deed, Judgment of Foreclosure and Sale and Order of Reference pursuant to CPLR 5015(4) & 306-b and/or pursuant to CPLR 5015(a)(1) and/or vacating Referee's deed on the grounds that the sales price is so low as to shock the conscience; and cross-motion by defendant, Cross Island Reo, Inc., for an Order vacating the Referee's deed, Judgment of Foreclosure and Sale and Order of Reference pursuant to CPLR 5015(1) and permitting the defendant to appear and answer the complaint and/or vacating Referee's deed on the grounds that the sales price is so low as to shock the conscience.

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

Plaintiff commenced this is an action on November 14, 2013 by filing, to foreclose a tax lien upon real property located at 442 Beach 64th Street, Arverne, NY, against, inter alia, the owner, Cross Island Reo, Inc. (Cross Island), and Pinnacle Capital Holdings, LLC (Pinnacle) the holder of a mortgage encumbering the subject property. Neither Cross Island nor Pinnacle served an answer or otherwise appeared in the action. A foreclosure sale was held on March 27, 2015 and the property was sold for $155,000.00 to Gavriel Badadov who thereafter assigned his bid to Adino Shimunova. A closing was held where the referee executed and conveyed a deed to Shimanova dated June 30, 2015.

The defendants, Cross Island and Pinnacle now separately move to vacate the Order of Reference, Judgment of Foreclosure and Sale, set aside the Foreclosure Sale and the referee's deed and allow the defendants to interpose an answer pursuant to CPLR 5015(a)(1). Pinnacle also moves pursuant to CPLR 5015(a)(4) lack of personal jurisdiction on the ground that service of the summons and complaint was not made within the 120 days provided in CPLR 306-b.

Although defendants did not rely on CPLR 317, the court may consider whether application of either CPLR 5015(a)(1) or CPLR 317 would warrant the relief requested (Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co., 67 NY2d 138, 142-143 [1986]). When considering the motion based upon CPLR 317 the defendant must show, inter alia, that it "did not personally receive notice of the summons in time to defend" and demonstrate a meritorious defense (see Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co., Inc., supra at 141-142). A defendant seeking to vacate judgment entered upon its default pursuant to CPLR 5015(a)(1) must demonstrate both a reasonable excuse for the default in appearing and answering the complaint and a meritorious defense to the action (see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co., supra at 141; Gray v B.R. Trucking Co., 59 NY2d 649 [1983]). When moving pursuant to CPLR 5015(a)(4), lack of personal jurisdiction, the movant need not demonstrate a reasonable excuse for the default and a potentially meritorious defense (see Toyota Motor Credit Corp. v Lam, 93 AD3d 713, 713-714 [2012]; Deutsche Bank Natl. Trust Co. v Pestano, 71 AD3d 1074 [2010]; Harkless v Reid, 23 AD3d 622, 622-623 [2005]).

Where, as here, a defendant seeks to vacate a default judgment by raising a jurisdictional objection pursuant to CPLR 5015(a)(4), the court is required to resolve the jurisdictional

issues before determining whether to grant a discretionary vacatur under CPLR 5015(a)(1) or CPLR 317 (HSBC Bank USA, Nat. Ass'n v Miller, 121 AD3d 1044, 1045 [2014]; Canelas v Flores, 112 AD3d 871, 871 [2013]) for in the absence of personal jurisdiction over a defendant all subsequent proceedings, including a default judgment are null and void (see Emigrant Mtge. Co., Inc. v Westervelt, 105 AD3d 896, 897 [2013]; Krisilas v Mount Sinai Hosp., 63 AD3d 887, 889 [2009]).

"A process server's affidavit of service constitutes prima facie evidence of proper service" (Scarano v Scarano, 63 AD3d 716, 716 [2009]). Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit necessitating an evidentiary hearing (see Skyline Agency v Coppotelli, Inc., 117 AD2d 135, 139 [1986]), no hearing is required where the defendant fails to swear to specific facts to rebut the factual statements in the process server's affidavits (Scarano v Scarano, 63 AD3d 716, 716 [2009]; Simonds v Grobman, 277 AD2d 369, 370 [2000]).

The affidavit of service shows that Pinnacle was properly served pursuant to the Limited Liability Corporations Law(LLCL) § 303 on November 29, 2013, by delivery of two copies of the summons and complaint to the New York Secretary of State. Service is complete upon such delivery.

In support of its motion based on lack of personal jurisdiction, the defendant Pinnacle submitted the affidavit of its manager, Joseph G. Forgoine, asserting that service of process on April 28, 2014 was insufficient to confer personal jurisdiction as it was beyond the 120 days prescribed in CPLR 306-b and that Pinnacle never received the complaint although the address on file with the Secretary of State is correct.

The defendant's conclusory denial of receipt of the summons and complaint is insufficient to rebut the presumption of proper service created by the affidavit of service particularly since Forgione's did not dispute having signed the return receipt which showed that he received the mail from the Secretary of State on December 17, 2013 (see Capital Source v. AKO Med., P.C., 110 AD3d 1026 [2014]). Jurisdiction is predicated upon the service on November 29, 2013, not as defendant claims service on April 30, 2014. Plaintiff's reasons for re-serving process on April 28, 2013 does not render the prior service defective or raise any issue of fact in this regard.

Since the only excuse Pinnacle offered for its failure to appear or answer the complaint is that it was not served with

process, which the court has rejected, it has also failed to demonstrate a reasonable excuse for its default (see Community W. Bank, N.A. v Stephen, 127 AD3d 1008, 1009 [2015]; Stephan B. Gleich & Assoc. v Gritsipis, 87 AD3d 216, 221 [2011]). Since Pinnacle has not denied that Forgione signed the return receipt regarding the mailing of the summons and complaint, it has failed to demonstrate that it did not receive notice in time to defend.

Accordingly, Pinnacle's motion based on lack of personal jurisdiction pursuant to CPLR 5015(a)(4), CPLR 5015(a)(1) and CPLR 317 is denied.

With respect its cross-motion, Cross Island submitted the affidavit of its president, Carlos Gaviria asserting that he was never personally served and that he never received notice of the action until Pinnacle informed him of the referee's deed.

The affidavit of service with respect to Cross Island reflects that Cross Island was properly served pursuant to Business Corporations Law § 306. The defendant failed to demonstrate a reasonable excuse for its default since the conclusory denial of receipt is insufficient to rebut the presumption of proper service established by the affidavit of service (see Capital Source v AKO Med., P.C., supra at 1026-1027; Wassertheil v Elburg, LLC, 94 AD3d 753, 753 [2012]; Matter of Rockland Bakery, Inc. v B.M. Baking Co., Inc., 83 AD3d 1080, 1081-1082 [2011]).

Defendant also failed to establish that it did not receive notice in time to defend. The mere denial of receipt of the summons and complaint is insufficient "to establish lack of actual notice for the purpose of CPLR 317" (Capital Source v AKO Med., P.C., supra at 1026 quoting Matter of Rockland Bakery, Inc. v B.M. Baking Co., Inc., supra; see Wassertheil v Elburg, LLC, supra at 754). The plaintiff served Cross Island with additional notice pursuant to CPLR 3215(g)(4)(i) on June 9, 2014 at the address designated with the Secretary of State, and served Notice of Entry of the Order of Reference on October 24, 2014 and Notice of Entry of the Judgment of Foreclosure and Sale on February 5, 2015 to Cross Islands last known business address (see J.C. Ryan EBCO/H&G, LLC v Cyber-Struct, Inc., 134 AD3d 901, 902 [2015]) which defendant did not deny having received. However, defendant failed to move until after the co-defendant, Pinnacle moved for relief, more than seven months after the foreclosure sale was held (see JP Morgan Chase Bank, Nat. Ass'n v Russo, 121 AD3d 1048, 1049 [2014]).

Having failed to demonstrate a reasonable excuse for their

default, the court need not address whether defendants have a potentially meritorious defense (HSBC Bank USA, Nat. Ass'n v. Rotimi, 121 AD3d 855, 856 [2014]).

Notwithstanding, the defendants have also failed to demonstrate a potentially meritorious defense. The gravamen of the defendants' respective motions is the claim that the tax liens, including the one which is the subject of this action, were satisfied at the time Cross Island closed on the purchase of the property in May, 2013. In support of their claim, defendants submitted copies of the marked-up title report, closing statement and cancelled checks issued to "Citi Abstract Inc." allegedly for the payment of tax Liens. Even if the check to Citi Abstract Inc. was intended to satisfy the tax liens, the defendants have not submitted a "receipt" , cancelled check to the lienor or any other evidence that the tax liens were actually paid.

Thus Cross Island has failed to demonstrate its entitlement to relief pursuant to CPLR 5015(a)(1) or CPLR 317.

In the exercise of its equitable powers, a court may set aside a foreclosure sale where there is evidence of fraud, collusion, mistake, or misconduct. Absent such conduct, the mere inadequacy of price is an insufficient reason to set aside a sale unless the price is so inadequate as to shock the court's conscience (see Guardian Loan Co. v. Early, 47 NY2d 515, 520-521 [1979]; Provident Sav. Bank v Bordes, 244 AD2d 470, Polish National Alliance of Brooklyn, U.S.A. v White Eagle Hall Company, Inc., 98 AD2d 400, 407 [1983]).

Defendants do not allege any fraud, collusion, mistake, or misconduct in the foreclosure sale. The defendants, relying on a contract price on private sale, claim that the price at the foreclosure sale is so inadequate as to shock the conscience. It is recognized that "[p]roperty offered at a forced sale frequently produces a price 'substantially less' than market value" (Guardian Loan Co. v Early, supra at 518). In view of the total lack of any evidence of an irregularity that would have inhibited the attendance of prospective bidders, the defendants' claim based upon a contract price in proposed private sale is insufficient to establish that the price bid at the sale was so low as to shock the conscience (see Polish National Alliance of Brooklyn, U.S.A. v White Eagle Hall Company, Inc., supra at 410).

Dated: February 16, 2016
D# 53

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J.S.C.