

**JPMorgan Chase Bank N.A. v Jacob**

2016 NY Slip Op 32095(U)

September 6, 2016

Supreme Court, Queens County

Docket Number: 20755/2013

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. ROBERT J. McDONALD  
Justice

IAS PART 34

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JPMORGAN CHASE BANK NATIONAL ASSOCIATION, Index No.: 20755/2013

Plaintiff, Motion Date: 8/16/16

- against - Motion Cal. No.: 71

JONATHAN JACOB; NEW YORK CITY PARKING Motion Seq. No.: 4

VIOLATIONS BUREAU; NEW YORK CITY TRANSIT  
ADJUDICATION BUREAU; T.D. BANK, N.A.;  
UNITED STATES OF AMERICA-INTERNAL REVENUE  
SERVICE; A.P.R.A. FUEL OIL BUYERS GROUP,  
INC.; NEW YORK CITY DEPARTMENT OF FINANCE;  
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD;  
"JOHN DOES" and "JANE DOES", said names  
being fictitious, parties intended being  
possible tenants or occupants of premises,  
and corporations, other entities or  
persons who claim, or may claim, a lien  
against the premises,

Defendants.

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The following papers numbered 1 to 10 read on this motion by  
plaintiff to appoint a Referee to compute the total sums due and  
owing to plaintiff, to amend the caption, to award plaintiff  
default judgment against all defendants, and for reformation of  
the mortgage:

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Affidavit in Opposition-Exhibits.....	5 - 7
Reply Affirmation-Exhibits.....	8 - 10

This foreclosure action pertains to the property located at  
65-48 174<sup>TH</sup> Street, Fresh Meadows, New York.

Based upon the record before this Court, defendant Jonathan  
Jacobs executed and delivered to Washington Mutual Bank a Home  
Equity Line of Credit Agreement in which he agreed to pay the sum  
of \$500,000. As collateral security for the debt, Mr. Jacobs

executed and delivered a Home Equity Line Mortgage dated June 21, 2007 to Washington Mutual Bank. The mortgage was subsequently assigned to plaintiff. Plaintiff asserts that Mr. Jacobs defaulted on his mortgage when he failed to make his monthly payments beginning on June 26, 2009.

Plaintiff subsequently accelerated the mortgage and commenced an action to foreclose the mortgage by filing a lis pendens and summons and complaint on November 12, 2013. Mr. Jacobs was served with a copy of the summons and complaint on November 16, 2013 at his residence pursuant to CPLR 308(2) by serving a person of suitable age and discretion. Mr. Jacobs failed to serve an answer to the complaint or otherwise appear in the action and is now in default. All other defendants, including occupants Ari Jacobs and Anna Jacobs, were duly served and are also in default.

Plaintiff filed a Request for Judicial Intervention on December 3, 2013. A Residential Foreclosure Conference was scheduled for January 31, 2014. On that date, plaintiff appeared at the conference, but Mr. Jacobs failed to appear. Plaintiff was directed to file an application seeking an Order of Reference by the next conference date, July 10, 2014.

In February 2014, Mr. Jacobs moved for an order dismissing the complaint. By Order dated March 6, 2014, this Court denied the motion on the ground that Mr. Jacobs failed to provide a legal or factual basis to vacate his default or to dismiss the complaint.

Mr. Jacobs then moved for an order restoring this matter to the Residential Foreclosure Settlement Part, stating that he was not notified of the date of the prior conference of January 31, 2014. By Order dated July 17, 2014, this Court granted Mr. Jacobs' motion to the extent that the parties were directed to appear for a settlement conference in the Residential Foreclosure Conference Part. Conferences were held from October 7, 2014 through February 19, 2015, at which time plaintiff was permitted to proceed with this action.

Mr. Jacobs then moved for an order granting him leave to file a late answer and dismissing the action. Mr. Jacobs' motion was denied by this Court's Order dated March 3, 2016 on the ground that he waived any objection to personal jurisdiction by failing to assert such in his prior motions or at the settlement conferences.

Plaintiff now moves for an Order of Reference.

In support of the motion, plaintiff submits an affirmation from counsel, Shaun C. Morrison, Esq.; a copy of the Residential Foreclosure Conference Order; an affidavit of merit and amount due; copies of the 90-day notice and notice of default; copies of the affidavits of service for all defendants; a copy of the pleadings with copies of the Home Equity Line of Credit Agreement, Credit Line Mortgage, assignment, and Loan Modification Agreement for the Home Equity Line of Credit; and a copy of the certificate of merit.

Zachary T. Killian, Vice President of plaintiff, submits an affidavit of merit and amount due affirming that based upon a personal review of plaintiff's business records, plaintiff is in possession of the original Note, and a true and correct copy of the Note was attached to the Complaint. He affirms that Mr. Jacobs failed to make the payment that was due for June 26, 2009 and all subsequent payments. He also affirms that a notice of default and 90-day pre-foreclosure notice were sent to Mr. Jacobs.

In an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through production of the mortgage, the note, and evidence of default (see Emigrant Mtge. Co., Inc. v Beckerman, 105 AD3d 895 [2d Dept. 2013]; Solomon v Burden, 104 AD3d 839 [2d Dept. 2013]; Baron Assoc., LLC v Garcia Group Enters., Inc., 96 AD3d 793 [2d Dept. 2012]).

Plaintiff has made a prima facie showing that it is entitled to judgment based upon its submission of the process server's affidavits of service, note, mortgage, assignment, and affidavit of Mr. Killian evidencing Mr. Jacobs' failure to make the contractually required loan payments.

In opposition, Mr. Jacobs, who is still in default, submits an affidavit contending that plaintiff failed to negotiate in good faith during the settlement conferences in violation of CPLR 3408(f), that he is a victim of "sewer service", and that plaintiff failed to comply with RPAPL 1304.

It is well settled that a party in default may not seek affirmative relief absent the vacatur of default unless the application is premised upon jurisdictional grounds (U.S. Bank N.A. v Gonzalez, 99 AD3d 694 [2d Dept 2012]; Deutsche Bank Trust Co., Ams. v Stathakis, 90 AD3d 983 [2d Dept 2011]; Holubar v Holubar, 89 AD3d 802 [2d Dept 2011]; McGee v Dunn, 75 AD3d 624 [2d Dept 2010]). Thus, Mr. Jacobs must first vacate his default before he may be awarded any affirmative relief, including leave

to submit a late answer and to restore this matter back to the Settlement Conference Part. This Court also notes that Mr. Jacobs' opposition is improper as he seeks affirmative relief, but fails to cross-move for such.

As a reasonable excuse, it appears that Mr. Jacobs asserts that he was not served with process. By Order dated March 3, 2016, this Court previously found that Mr. Jacobs waived any objection to personal jurisdiction, and in any event, failed to rebut the process server's affidavit of service. Thus, as it was already determined that Mr. Jacobs waived any objection to personal jurisdiction, Mr. Jacobs has failed to offer an excuse for his default. Since Mr. Jacobs failed to offer a reasonable excuse for his default, this Court need not address whether he demonstrated a meritorious defense (see Tribeca Lending Corp. v Correa, 92 AD3d 770 [2d Dept. 2012]; Maida v Lessing's Rest. Servs., Inc., 80 AD3d 732 [2d Dept. 2011]; American Shoring, Inc. v D.C.A. Constr. Ltd., 15 AD3d 431 [2d Dept. 2005]). Thus, any request for affirmative relief is denied.

In any event, Mr. Jacobs' contention that plaintiff has failed to negotiate in good faith is unsupported. Defendant has failed to demonstrate that he is ready, willing, or able to pay-off the subject loan in full. Rather, Mr. Jacobs merely affirms that he can offer a short pay-off in the amount of \$400,000. However, a plaintiff is not required to accept payment short of the amounts due and owing (see Marine Midland Bank v Malmstrom, 186 AD2d 722 [2d Dept. 1992]; Bankers Trust Co. v Hoovis, 263 AD2d 937 [3d Dept. 1999]). Additionally, the court may not endeavor to force an agreement upon the plaintiff (see Wells Fargo Bank, N.A. v Meyers, 108 AD3d 9 [2d Dept 2013]). This Court notes that plaintiff has provided Mr. Jacobs with a loan modification application for review of workout options, but Mr. Jacobs failed to supply a complete package. Thus, Mr. Jacobs has failed to show that plaintiff has not negotiated in good faith or that there is a need for a further residential foreclosure conference.

Lastly, plaintiff did proffer sufficient proof that it complied with RPAPL 1304. RPAPL 1304 provides that at least 90 days before a lender begins an action against a borrower to foreclose on a mortgage, the lender must provide notice to the borrower that the loan is in default and his or her home is at risk (see Aurora Loan Services, LLC v Weisblum, 85 AD3d 95 [2d Dept. 2011]). "[P]roper service of the RPAPL § 1304 notice on the borrower or borrowers is a condition precedent to the commencement of the foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition" (Id. at

107). The presumption of receipt by the addressee "may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are properly addressed and mailed" (see Residential Holding Corp. v Scottsdale Ins. Co., 286 AD2d 679 [2d Dept. 2001]).

Plaintiff submits Mr. Killian's affidavit to demonstrate compliance with RPAPL 1304. Mr. Killian affirms that plaintiff sent the 90-day notice by both certified and first class mail to Mr. Jacobs at the subject property. A copy of the notice is annexed to the motion papers, dated November 16, 2012, and addressed to Mr. Jacobs at the mortgaged premises. Additionally, the Proof of Filing Statement is annexed to the motion papers. As Mr. Killian has identified that he personally reviewed plaintiff's business records and that the notice was sent to Mr. Jacobs, plaintiff has presented sufficient proof that it complied with RPAPL 1304. Moreover, Mr. Jacobs does not allege that he did not receive the notice. Rather, he alleges that plaintiff failed to comply with the strict compliance requirement of RPAPL 1304.

The remainder of Mr. Jacobs' opposition is insufficient to create an issue of fact to deny plaintiff's application.

Accordingly, plaintiff's motion is granted.

However, the granting of the within motion does not in any way eliminate the possibility that in the future a short sale, loan modification, forbearance, reinstatement and/or workout agreement may be entered into should Mr. Jacobs so qualify.

Order of Reference signed contemporaneously herewith.

Dated: Long Island City, N.Y.  
September 6, 2016

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**ROBERT J. McDONALD**  
**J.S.C.**