Wells Fargo Bank, N.A. v Raghoo
2016 NY Slip Op 32128(U)
September 6, 2016
Supreme Court, Queens County
Docket Number: 709581/14
Judge: Darrell L. Gavrin

MEMORANDUM

SUPREME COURT: QUEENS COUNTY
IA PART 27

WELLS FARGO BANK, N.A.,	INDEX NO. 709581/14
Plaintiff,	MOTION DATE May 23, 2016
- against -	MOTION CAL. NO. 164
ELIZABETH S. RAGHOO A/K/A ELIZABETH RAGHOO, ASHLEY RAGHOO, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, VBN NEW YORK CORP., JOHN DOE (being fictitious, the names unknown to Plaintiff intended to be tenants, occupants, persons or corporations having or claiming an interest in or lien upon the property described in the complaint or their heirs at law, distributees, executors, administrators, trustees, guardians, assignees, creditors or successors,	MOTION SEQUENCE NO. 1
Defendants.	

Plaintiff commenced this action on December 15, 2014, to foreclose a consolidated mortgage encumbering the real property known as 113-10 95th Avenue, South Richmond Hill, New York, given by defendant, Elizabeth S. Raghoo, to secure payment of a consolidated note in the principal amount of $275,800.00 plus interest. In the complaint, plaintiff alleges that defendant, Elizabeth S. Raghoo, entered into a consolidation, extension and agreement (CEMA) dated August 13, 2003, with Wells Fargo Home Mortgage, Inc., whereby a mortgage recorded on May 13, 1998, and a mortgage recorded on September 1, 2004, were consolidated into a single mortgage lien in the principal amount of $275,800.00, plus interest. Plaintiff also alleges that it is the successor by merger to Wells Fargo Home Mortgage, Inc. Plaintiff further alleges that defendant, Elizabeth S. Raghoo, transferred title to the property to defendant, Ashley Raghoo, on March 23, 2009. Plaintiff additionally alleges that defendant, Elizabeth S. Raghoo, defaulted in paying the mortgage installment due on June 1, 2014, and subsequent payments, and as a consequence, it elected to accelerate the entire mortgage debt.

Defendant, VNB New York Corp., filed a notice of appearance and claim to any surplus. Defendants, Elizabeth S. Raghoo, Ashley Raghoo, New York City Environmental Control Board and Chris Singh s/h/a “John Doe,” are in default in appearing or answering. The matter was referred to the Foreclosure Settlement Conference Part (FSCP) where defendant, Elizabeth S. Raghoo, defaulted in appearing at the settlement conference held on March 6, 2015. By order of that date, the Court Attorney Referee noted the case met the criteria of the Part, but had

not settled and directed plaintiff to appear for a status conference, and file a foreclosure affirmation or certificate of merit pursuant to Administrative Order 208/2013 and an application for an order of reference by the status conference. By status conference order dated December 15, 2015, plaintiff was directed to appear at a final status conference scheduled to be held on August 2, 2016, and to file a foreclosure affirmation or certificate of merit pursuant to Administrative Order 208/2013 and an application for an order of reference by that date.

Plaintiff moves pursuant to RPAPL 1321 for leave to appoint a referee to ascertain the amount due and owing it and to report whether the mortgaged premises can be sold in parcels, for leave to amend the caption substituting Chris Singh as a party defendant in place of "John Doe," and to deem all non-appearing and non-answering defendants to be in default. In support of the motion, plaintiff submits, among other things, affidavits of service, an affirmation of its counsel, a certificate of merit, copies of the consolidated mortgage, note, assignment of mortgage and the CEMA, documents related to the merger of Wells Fargo Home Mortgage, Inc. into plaintiff, notices pursuant to RPAPL 1304 and of default, and an affidavit of Carmen Renata Ragsdale, Vice President Loan Documentation of plaintiff. Ms. Ragsdale states that, based upon plaintiff's business records and her review of those records, there was a default in payment of the loan, payment of the loan balance was accelerated, and a 90-day pre-foreclosure notice was sent to the borrower by certified and first class mail, and a notice of default was mailed to the mortgagor at the last known address provided to plaintiff by the mortgagor.

Defendants, Elizabeth S. Raghoo and Ashley Raghoo, oppose the motion by plaintiff and cross move, in effect, to vacate their defaults in answering the complaint and dismiss the complaint insofar as asserted against them based on lack of personal jurisdiction, or for leave to serve a late answer pursuant to CPLR 2004. They assert that they were not personally served with process. The remaining defendants have not appeared in relation to the motion or cross motion.

The affidavits of service dated December 31, 2014, of a licensed process server indicate that defendants, Elizabeth S. Raghoo and Ashley Raghoo, were each served with process on December 26, 2014 at 3:50 P.M. by delivery of two copies of the summons and complaint, and a RPAPL 1303 notice printed on colored paper, to "CHRIS SINGH, NEPHEW" at 113-10 95th Avenue, South Richmond Hill, New York, the place of residence of defendants, Elizabeth S. Raghoo and Ashley Raghoo, and subsequent mailings on December 30, 2014 of a copy of those documents to each of them at the same address. These affidavits constitute *prima facie* proof of proper service of process upon defendants, Elizabeth S. Raghoo and Ashley Raghoo, 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]).

Defendant, Elizabeth S. Raghoo, states that she never authorized anyone to accept service on her behalf, including anyone named "Chris Singh," and that she never received a copy of the summons and complaint in the mail.

CPLR 308(2) does not require the person to whom the process is delivered, be a person authorized to accept service on behalf of 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, Elizabeth S. Raghoo, does not deny that Chris Singh, or someone matching his physical description set forth in the affidavit, accepted delivery of the summons at the premises at the date and time of service, or was possessed with sufficient age and discretion to accept service of process intended for her. Nor has she offered an affidavit by Chris Singh in support of her cross motion (*see C & H Import & Export, Inc. v MNA Global, Inc.*, 79 AD3d 784 [2d Dept 2010]; *Roberts v Anka*, 45 AD3d 752, 754 [2d Dept 2007]). In addition, her conclusory denial of receipt of the mailing is insufficient to overcome the presumption of delivery created by the affidavit of service reflecting such mailing (*see Engel v Lichterman*, 95 AD2d 536 [2d Dept 1983], *affd* 62 NY2d 943 [1994]; *Facey v Heyward*, 244 AD2d 452 [2d Dept 1997]; *Colon v Beekman Downtown Hosp.*, 111 AD2d 841 [2d Dept 1985]).

To the extent defendant, Ashley Raghoo, also asserts that she was not properly served with process, she has made no sworn denial of any facts contained in the process server's affidavit. Hence, there is no rebuttal to the presumption of proper service upon her established by the process server's affidavit (*see Scarano v Scarano*, 63 AD3d 716, 716 [2d Dept 2009]), and no hearing is required (*see Bank of New York v Samuels*, 107 AD3d 653 [2d Dept 2013]; *Christiana Bank & Trust Co. v Eichler*, 94 AD3d 1170, 1170–1171 [3d Dept 2012]).

Under such circumstances, there is insufficient basis to vacate the defaults by defendants, Elizabeth S. Raghoo and Ashley Raghoo, in answering pursuant to CPLR 5015(a)(4), or to dismiss the complaint insofar as asserted against defendants, Elizabeth S. Raghoo or Ashley Raghoo, based upon lack of personal jurisdiction (CPLR 3211[a][8]). That branch of the cross motion by defendants, Elizabeth S. Raghoo and Ashley Raghoo, to, in effect, vacate their default in answering pursuant to CPLR 5015(a)(4) and to dismiss the complaint insofar as asserted against them based upon lack of personal jurisdiction pursuant to CPLR 3211(a)(8) is denied.

A defendant seeking to vacate a default in answering a complaint and to compel the plaintiff to accept an untimely answer must show both a reasonable excuse for the default and the existence of a potentially meritorious defense (*see* CPLR 2004, 3012[d]; *One West Bank, FSB v Valdez*, 128 AD3d 655 [2d Dept 2015]; *Citimortgage, Inc. v Stover*, 124 AD3d 575 [2d Dept 2015]; *Chase Home Fin., LLC v Minott*, 115 AD3d 634 [2d Dept 2014]; *Taddeo–Amendola v 970 Assets, LLC*, 72 AD3d 677 [2d Dept 2010]). Here, defendants, Elizabeth S. And Raghoo and Ashley Raghoo, have failed to demonstrate a reasonable excuse for their default. In light of their failure to offer any reasonable excuse, it is unnecessary to consider whether they sufficiently demonstrated a potentially meritorious defense (see *Citimortgage, Inc. v Stover*, 124 AD3d 575 [2d Dept 2015]; *HSBC Bank USA, N.A. v Lafazan*, 115 AD3d 647, 648 [2d Dept 2014]; *see also HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 567 [2d Dept 2011]). That branch of the cross motion by defendants, Elizabeth S. Raghoo and Ashley Raghoo, for leave to serve a late answer is denied.

That branch of the motion by plaintiff for leave to amend the caption substituting Chris Singh as a party defendant in place of "John Doe" is granted.

With respect to that branch of the motion by plaintiff for an order of reference and to deem defendants in default in appearing or answering, defendant, Elizabeth S. Raghoo, asserts that she was not served with an "additional notice" in compliance with CPLR 3215(g)(3). According to an affidavit of service dated December 21, 2014 of a licensed process server, an additional copy of the summons was mailed on December 30, 2014, by first-class mail to defendant, Elizabeth S. Raghoo, at the mortgaged premises. Such affidavit creates a presumption of proper mailing and receipt, and defendant, Elizabeth S. Raghoo, has failed to adequately rebut that presumption (*see Thas v Dayrich Trading, Inc.*, 78 AD3d 1163 [2d Dept 2010]).

Plaintiff has demonstrated its entitlement to an order of reference and to deem defendants in default in appearing or answering by submitting proof of service of the summons and complaint, proof that defendant, Elizabeth S. Raghoo, defaulted in her payment obligations, and proof that defendants failed to appear or answer within the time allowed (*see* CPLR 3215[f]; RPAPL 1321; *Flagstar Bank, FSB v Jambelli*, 140 AD3d 829 [2d Dept 2016]; *U.S. Bank N.A. v Gulley*, 137 AD3d 1008 [2d Dept 2016]; *Deutsche Bank Natl. Trust Co. v Kuldip*, 136 AD3d 969 [2d Dept 2016]; *U.S. Bank N.A. v Wolnerman*, 135 AD3d 850, 850–851 [2d Dept 2016]). Plaintiff has shown it has a reasonable excuse for its delay in seeking an order of reference following the release of the action from the FSCP on March 6, 2015 (*see* CPLR 3215[c]). Plaintiff placed the action on hold on June 3, 2015 while considering defendants for possible loan mitigation. On December 10, 2015, plaintiff's counsel was informed that loss mitigation was unsuccessful.

To the extent defendant, Elizabeth S. Raghoo, asserts that plaintiff failed to provide her with the notice pursuant to RPAPL 1303, the affidavit of service dated December 26, 2014, constitutes proof of proper service of the notice required by RPAPL 1303. Defendant, Elizabeth S. Raghoo's bare and unsubstantiated denial of receipt is insufficient to rebut the presumption of proper service (*see U.S. Bank N.A. v Tate*, 102 AD3d 859 [2d Dept 2013]; *see also Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 106 [2d Dept 2011]). To the extent defendant, Ashley Raghoo, asserts that plaintiff failed to provide her with the notice pursuant to RPAPL 1303, that statute is inapplicable to her because she is neither the mortgagor nor a tenant (RPAPL 1303[1]).

Defendants, Elizabeth S. Raghoo and Ashley Raghoo, assert plaintiff has failed to comply with RPAPL 1304. However, since they have failed to establish that they are entitled to an order vacating their default in answering the complaint and granting leave to file a late answer, they are precluded from raising plaintiff's alleged failure to comply with the notice provisions of RPAPL 1304 as a defense to this action (*see PHH Mtge. Corp. v Celestin*, 130 AD3d 703 [2d Dept 2015]).

The claim by defendants, Elizabeth S. Raghoo and Ashley Raghoo, that the complaint lacks an affirmative allegation of compliance with Banking Law § 6-m is without merit (*see*

paragraph 12 of the complaint).

Defendant, Elizabeth S. Raghoo, claims that plaintiff failed to negotiate in good faith regarding a loan modification. According to defendant, Elizabeth S. Raghoo, plaintiff has acted in bad faith by refusing to enter into a permanent loan modification agreement with her. Pursuant to CPLR 3408(f), the parties at a mandatory foreclosure settlement conference are required to negotiate in good faith to reach a mutually agreeable resolution (*see* CPLR 3408[f]; *U.S. Bank N.A. v Smith*, 123 AD3d 914, 916 [2d Dept 2014]). Defendant, Elizabeth S. Raghoo, failed to appear at the conference. In addition, she has failed to demonstrate plaintiff was obligated under the terms of the purported trial modification or the subject mortgage, to enter into a permanent loan modification with her. She has failed to submit a copy of the trial modification agreement, and proof of her full performance of the obligations thereunder.

That branch of the motion by plaintiff for an order of reference and to deem defendants, VNB New York Corp., Elizabeth S. Raghoo, Ashley Raghoo, New York City Environmental Control Board and Chris Singh, to be in default in the action is granted.

Settle order.

DATED: September 6, 2016

DARRELL L. GAVRIN, J.S.C.