

Flagstar Bank, FSB v Farrell
2016 NY Slip Op 32174(U)
August 23, 2016
Supreme Court, Suffolk County
Docket Number: 16606/12
Judge: Howard Heckman Jr
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SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART 18 - SUFFOLK COUNTY

COPY

PRESENT:
HON. HOWARD H. HECKMAN JR., J.S.C.

INDEX NO.: 16606/12
MOTION DATE: 12/04/2014
MOTION SEQ. NO.: 001 MG
002 MD

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FLAGSTAR BANK, FSB,

Plaintiffs,

-against-

STEVE FARRELL aka STEVEN FARRELL,
MICHELE FARRELL aka MICHELLE FARRELL
aka MICHELE M. PADUANO ZANAZZI,

Defendants.

-----X

PLAINTIFFS' ATTORNEY:
PULVERS, PULVERS & THOMPSON, LLP
950 THIRD AVENUE, 11TH FLOOR
NEW YORK, NY 10022

DEFENDANTS' PRO SE:
STEVE & MICHELE FARRELL
160 IRVING AVENUE
DEER PARK, NY 11729

Upon the following papers numbered 1 to 26 read on this motion ; Notice of Motion/ Order to Show Cause and supporting papers 1- 7 ; Notice of Cross Motion and supporting papers 8-22 ; Answering Affidavits and supporting papers 23-24 ; Replying Affidavits and supporting papers 25-26 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Flagstar Bank, FSB, seeking an order: 1) granting summary judgment; 2) substituting CP-SRMOF II 2012-A Trust, U.S. Bank Trust National Association, Not In Its Individual Capacity but Solely as Trustee as the named party plaintiff in place and stead of Flagstar Bank, FSB; 3) discontinuing the action against defendants identified as "John Doe #1" to "John Doe #10"; 4) deeming all non-appearing defendants in default; 5) amending the caption; and 6) appointing a referee to compute the sums due and owing to the plaintiff in this mortgage foreclosure action is granted; and it is further

ORDERED that the cross motion by defendant Steven Farrell seeking an order pursuant to CPLR 3215(c) & 3012(d) dismissing plaintiff's complaint as abandoned or, in the alternative, permitting the defendant leave to serve a late answer is denied; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of the Court; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared and not waived further notice pursuant to CPLR 2103(b)(1),(2) or (3) within thirty days of the date of this order and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff's action seeks to foreclose a mortgage in the sum of \$343,406.00 executed by the

defendants Steven Farrell and Michelle Farrell on January 27, 2009 in favor of Mortgage Electronic Registration Systems, Inc. solely as a nominee for Flagstar Bank, FSB. On that same date defendant Steven Farrell executed a promissory note evidencing the mortgage indebtedness. By assignment of mortgage dated November 28, 2011 MERS assigned the mortgage to Flagstar Bank, FSB. By assignment of mortgage dated November 1, 2012 Flagstar Bank, FSB assigned the mortgage to the Secretary of Housing and Urban Development. By assignment of mortgage dated November 29, 2012 the Secretary of Housing and Urban Development assigned the mortgage to CP-SRMOF II 2012 Trust, U.S. Bank Trust, N.A. Plaintiff claims that the defendants have defaulted in making timely monthly mortgage payments since July 1, 2011. Plaintiff's motion seeks an order granting a default judgment based upon the Farrell defendants failure to serve an answer and for the appointment of a referee.

In support of the cross motion and in opposition to plaintiff's motion, defendant Steve Farrell submits an affidavit and an attorney's affirmation and claims that the lender's delay in prosecuting this foreclosure action requires that the complaint be dismissed since the bank delayed seeking judgment for nearly eighteen months after the defendant's default in appearing. Defendant Farrell claims that he was never personally served with the summons and complaint and did not receive copies of the pleadings from defendant Michelle Farrell by substituted service pursuant to CPLR 308(2) as alleged by the plaintiff's process server. Defendant contends that due to his wife's substance abuse issues even were the court to determine that she was served with the summons and complaint on her husband's behalf, she was not a person of "suitable discretion" sufficient to obtain personal jurisdiction over him. Defendant argues that he must be permitted to serve a late answer and claims that his proposed answer sets forth arguably meritorious defenses to plaintiff's foreclosure complaint including the lender's lack of standing, lack of good faith negotiating and predatory lending practices.

In reply, the plaintiff submits an attorney's affirmation and argues that no basis exists to dismiss the complaint for failure to timely prosecute the lender's claims within one year of the defendants' default since the record shows that during the interim period from service of the summons and complaint until service of this motion, the defendants were afforded a conditional forbearance agreement and attended settlement conferences pursuant to CPLR 3408. Plaintiff also claims that service of the summons and complaint was properly made on Farrell by hand delivery to Farrell's wife at the residential premises and argues that defendant's blanket denial of service raises no issue of fact sufficient to deny plaintiff's application. Plaintiff claims that the defendant's request for permission to serve a late answer must be denied since the defendant has failed to submit a reasonable explanation for his failure to timely answer and to provide an arguably meritorious defense to this foreclosure action.

A defendant seeking to vacate a default in appearing and answering a complaint must show both a reasonable excuse for the default and the existence of a potentially meritorious defense (*U.S. Bank, N.A. v. Samuel*, 138 AD3d 1105, 2016 NY Slip Op 03163 (2nd Dept., 2016); *TCIF REO GCM, LLC v. Walker*, 139 AD3d 704, 2016 NY Slip Op 03491 (2nd Dept., 2016); CPLR 317 & 3012(d)). However, absent proper service of the summons and complaint upon a defendant, a court lacks jurisdiction and the complaint must be dismissed without the need to demonstrate an arguably meritorious defense (CPLR 5015(4); *Prudence v. Wright*, 94 AD3d 1073, 943 NYS2d 185 (2nd Dept., 2012); *Deutsche Bank National Trust Co. v. Pestano*, 71 AD3d 1074, 899 NYS2d 269 (2nd Dept., 2010)).

Ordinarily a process server's affidavit of service constitutes prima facie evidence of proper service (*U.S. Bank, N.A. v. Tauber*, 140 AD3d 1154, 2016 NY Slip Op 05142 (2nd Dept., 2016); *NYCTL v. Tsafatinos*, 101 AD3d 1092, 956 NYS2d 571 (2nd Dept., 2012)). A defendant may rebut the process server's affidavit by submitting an affidavit containing specific and detailed contradictions of the claims in the process server's affidavit, but bare, conclusory and unsubstantiated denials of service are insufficient to rebut the presumption of proper service (*U.S. Bank, N.A. v. Tate*, 102 AD3d 859, 958 NYS2d 722 (2nd Dept., 2013); *Beneficial Homeowner Serv. Corp. v. Girault*, 60 AD3d 984, 875 NYS2d 815 (2nd Dept., 2009)).

The record shows that the process server served defendant Farrell by substituted service by delivery of the summons and complaint on Farrell's wife, a person of suitable age and discretion at defendant's usual place of abode on May 31, 2012. Defendant Farrell submits an affidavit claiming: 1) that he never received the summons and complaint from his wife; 2) that his wife was never served with those documents; 3) that the description of his wife was inaccurate based upon estimations of her height and weight; and 4) that even if process was served upon his wife, she was not a person of "suitable discretion" based upon her substance and alcohol abuse issues.

However, there is no other relevant, admissible evidence or any documentary proof submitted to support defendant's contentions. Attached to defendant's affidavit in opposition appears to be a three paragraph "proposed" affidavit from defendant's wife, Michelle Farrell, which states that she denies having been served and that she does not resemble the individual described in the process server's affidavit as she stands 5' 5" inches tall (not between 5'8" & 5'11") and weighs 120 pounds (not between 150 & 175 pounds). Near the bottom of the one page document states: "This will be the affidavit" with illegible initials immediately beneath the three paragraphs and defense counsel's professional card affixed near the bottom right corner of the page. There is, however, no affidavit signed by Michelle Farrell denying she received delivery of the summons and complaint, and no objective evidence to confirm her actual height, weight or mental condition. In this regard, defendant Farrell's affidavit sets forth four allegations concerning his wife's treatment for substance abuse and extreme emotional problems, yet fails to submit any other relevant proof or documentary evidence to support those claims. Nor is there any confirmation confirming the dates of any of the treatments rendered to Michelle Farrell, given the fact that the relevant time period to determine whether Farrell's wife was of "suitable discretion" was on or near the date of service of the complaint on May 31, 2012.

Based upon this record the affidavit of the process server constituted prima facie evidence of proper service pursuant to CPLR 308(2) and the claimed discrepancies between Michelle Farrell's physical height and weight contained in the process server's affidavit were minor and were never substantiated by the relevant, admissible proof submitted by the defendant other than his self-serving estimates of his wife's physical dimensions at the time process was served. Having submitted unsubstantiated and conclusory denials of service and receipt of papers, the defendant's application to dismiss plaintiff's complaint for failure to obtain personal jurisdiction over him must be denied (*Wells Fargo Bank, N.A. v. Tricarico*, 139 AD3d 722, 2016 NY Slip Op 03502 (2nd Dept., 2016); *IndyMac Bank v. Hyman*, 74 AD3d 751, 901 NYS2d 545 (2nd Dept., 2010)).

With respect to the defendant's application seeking leave to serve a late answer, the law requires proof to establish a reasonable excuse for the defendant's failure to timely serve an answer and a showing of an arguably meritorious defense (*see Deutsche Bank National Trust Co. v.*

Gutierrez, 102 AD3d 825, 958 NYS2d 478 (2nd Dept., 2013); *Deutsche Bank National Trust Co. v. Karlis*, 138 AD3d 915, NY Slip Op 02958 (2nd Dept., 2016); *U.S. Bank, N.A. v. Cherubin*, 2016 NY Slip Op 05365 (2nd Dept., 2016)). Defendant has wholly failed to provide any reasonable explanation for his default in timely answering the plaintiff's complaint. Absent such explanation the defendant's application must be denied regardless of whether the defendant has demonstrated the existence of a potentially meritorious defense to plaintiff's action (*U.S. Bank, N.A. v. Cherubin, supra.*; *Aurora Loan Services, LLC v. Lucero*, 131 AD3d 496 (2nd Dept., 2015)).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material question of fact from the case. The grant of summary judgment is appropriate only when it is clear that no material and triable issues of fact have been presented (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957)). The moving party bears the initial burden of proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851 (1985)). Once such proof has been proffered, the burden shifts to the opposing party who, to defeat the motion, must offer evidence in admissible form, and must set forth facts sufficient to require a trial of any issue of fact (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 (1979)).

Entitlement to summary judgment in favor of the foreclosing plaintiff is established, prima facie by the plaintiff's production of the mortgage and the unpaid note, and evidence of default in payment (*see Wells Fargo Bank N.A. v. Eraboba*, 127 AD3d 1176, 9 NYS3d 312 (2nd Dept., 2015); *Wells Fargo Bank, N.A. v. Ali*, 122 AD3d 726, 995 NYS2d 735 (2nd Dept., 2014)).

CPLR 3215(c) provides that "if the plaintiff fails to take proceedings for the entry of judgment within one year after a default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion unless sufficient cause is shown why the complaint should not be dismissed." It is, however, not necessary for a plaintiff to actually obtain a default judgment within one year to avoid dismissal but rather it is enough that the plaintiff timely takes preliminary steps toward a default judgment of foreclosure and sale by moving for an order of reference to establish that it initiated proceedings for entry of judgment (CPLR 3215(c); *Wells Fargo Bank, N.A. v. Combs*, 128 AD3d 812, 10 NYS3d 121 (2nd Dept., 2015)). "As long as proceedings are being taken which manifest an intent not to abandon the case but to seek a judgment, the action should not be subject to dismissal" (*Brown v. Rosedale Nurseries*, 259 AD2d 256, 686 NYS2d 22 (1st Dept., 1999); *Aurora Loan Services, LLC v. Gross*, 139 AD3d 772, NY Slip Op 03691 (2nd Dept., 2016)).

Plaintiff has submitted evidence to prove the bank's entitlement to a default judgment. The submission of an affidavit from an assistant vice president of the mortgage servicer satisfies the business records exception to the hearsay rule and establishes the fact that the defendants have defaulted under the terms of the January 27, 2009 mortgage by failing to make timely monthly mortgage payments since July 1, 2011. The bank, having proven entitlement to summary judgment, it is incumbent upon the defendant to submit relevant, evidentiary proof sufficiently substantive to raise genuine issues of fact concerning why the lender is not entitled to foreclose the mortgage. Defendant has wholly failed to do so. The only remaining claims set forth in the defendant's cross

motion are with respect to the lender's alleged abandonment and they are not supported by this record. The record shows plaintiff never abandoned prosecution of this action since commencing it on May 30, 2012. Court records indicate that three court settlement conferences (CPLR 3408) were conducted on October 19 2012, August 8, 2013 and October 30, 2013 and that the parties agreed to enter into a conditional forbearance agreement during the August 8, 2013 conference. The terms of that agreement began in September, 2013 and ended in April, 2014. This motion dated December 4, 2014, seeking a default judgment, was filed on December 19, 2014. Under these circumstances plaintiff has provided a reasonable explanation for the delay in seeking its default judgment and no basis exists to dismiss the complaint for failure to prosecute (CPLR 3215(c); *Aurora Loan Services, LLC v. Gross, supra.*; *LNV Corp v. Forbes*, 122 AD3d 805, 996 NYS2d 66 (2nd Dept., 2014)). Accordingly defendant's cross motion is denied and plaintiff's motion seeking an order granting a default judgment and for the appointment of a referee is granted. The proposed order for the appointment of a referee has been signed simultaneously with the execution of this order.

Dated: August 23, 2016


J.S.C.

HON. HOWARD HECKMAN JR.