

Deutsche Bank Natl. Trust Co. v Stevens

2016 NY Slip Op 32404(U)

December 7, 2016

Supreme Court, New York County

Docket Number: 104120/2008

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ

PART 13

Justice

DEUTSCHE BANK NATIONAL TRUST COMPANY, As Trustee
Plaintiff,

INDEX NO. 104120/2008
MOTION DATE 10/26/2016
MOTION SEQ. NO. 004
MOTION CAL. NO. _____

-against-

ROBERT STEVENS; CITY OF NEW YORK DEPARTMENT OF
TRANSPORTATION PARKING VIOLATIONS BUREAU; CITY OF
NEW YORK TRANSIT ADJUDICATION BUREAU; MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC., and
"JOHN DOE" #1 THROUGH "JOHN DOE" #10, the last 10
names being fictitious and unknown to the Plaintiff,
the person or parties intended being the person or parties,
if any, having or claiming an interest in or lien upon the
mortgaged premises described in the complaint,
Defendants.

The following papers, numbered 1 to 8 were read on this motion to vacate a default judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 5</u>
Answering Affidavits — Exhibits _____	<u>6 - 7</u>
Replying Affidavits _____	<u>8</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Robert Stevens' (herein "Defendant Stevens") motion to vacate a default judgment, submit an Answer to the Complaint, and/or tender full payment of all monies due on the mortgage, is denied.

Defendant Stevens was the owner of a building located at 11 East 129th Street, New York, New York (herein "the property") that had been in his family since 1960. In 2004, Defendant Stevens obtained a mortgage on the property from Washington Mutual Bank, FA (herein "WAMU") for the amount of \$506,000 (herein "the mortgage"). In 2006, Defendant Stevens moved with his family from the property to 19 Eastbourne Drive, Spring Valley, New York.

Plaintiff commenced this action by filing a Summons, Complaint, and Notice of Pendency on March 20, 2008, after Defendant Stevens fell behind on the mortgage payments. (Mot. Exh. A & Aff. In Opp. Exh. A). Defendant Stevens did not appear, answer or plead in this action, and Plaintiff moved for a default judgment and order of reference on June 10, 2008, which was granted on April 27, 2009.

On July 3, 2014, Defendant Stevens was served with notice of Plaintiff's motion to vacate the prior Order of Reference, and to grant a new Order of Reference which was granted on August 19, 2014. (Aff. In Opp. Exh. B). On January 8, 2015, Plaintiff moved for Judgment of Foreclosure and Sale (Aff. In Opp. Exh. C), which was granted on July 7, 2015. Plaintiff served Defendant Stevens with a Notice of Sale on August 31, 2015 (Aff. In Opp. Exh. D), and the property was sold on September 30, 2015. Defendant Stevens did not appear or oppose any of Plaintiff's motions from July 2014 through to the time of the sale.

Defendant Stevens moved by Order to Show Cause on February 1, 2016, to vacate the default Judgment of Foreclosure and Sale dated July 7, 2015, and for an Order staying the transfer of the property to any parties pending the outcome of the motion.

Defendant Stevens states that he paid the mortgage up until 2008, when he fell behind on the payments as a result of his extensive unemployment. That he made attempts to contact WAMU to seek a modification of the high interest loan, but was told that the loan had been transferred, and thereafter received mortgage statements from three different lenders. That he resumed trying to make payments on the mortgage but that the payments were rejected by WAMU unless full payment of the past due arrears were made. That Stevens again attempted to modify the terms of the loan with JP Morgan Chase as one of the successors to the original WAMU mortgage, but that these attempts were unsuccessful.

Defendant Stevens argues that due process in this action is lacking as he never received service of the Summons and Notice, and never received any of Plaintiff's motions thereafter, including the Judgment of Foreclosure and Sale. Stevens contends that he did not become aware of this action until one of the tenants from the property advised him that they had received a "10 Day Notice to Vacate." That immediately after receiving this notice he consulted with an attorney and that is when he was advised that the property had litigation pending since 2008, a default judgment granted in 2009, and that foreclosure was ultimately granted in 2015. Stevens also contends that he never received Notice of Entry of the Judgment which would have triggered his time to file a Notice of Appeal. That the property was sold by public auction to Plaintiff on October 6, 2015 (Mot. Exh. E), that Stevens will lose this property that has been in his family for more than three generations if his motion is not granted and the property is allowed to be sold to a third party, and that Plaintiff will suffer only minimal harm by allowing him to defend this case on the merits and/or

tender payment for the total amount due. At the very least, Stevens wants a traverse hearing in order to determine whether service was effective.

Plaintiff opposes the motion stating that Stevens was personally served with the Summons, Complaint and Notice of Pendency on April 3, 2008. (Aff. In Opp. Exh. A). Together with the Process Server's Affidavit of Service of the Summons and Complaint, is a print-out of a Department of Motor Vehicles search confirming that Defendant Stevens address is 19 Eastbourne Drive, Spring Valley, NY, the address listed as where Stevens was served. (Id.). Plaintiff also attaches Affidavits of Service confirming that Stevens was served, by regular mail, with the July 2014 Motion to Vacate the Order of Reference, the Motion for Judgment of Foreclosure, and the Notice of Sale at his address of 19 Eastbourne Drive, Spring Valley, NY. (Aff. In Opp. Exhs. B, C, & D).

Plaintiff argues that a Process Server's Affidavit of Service is prima facie proof of proper service, that Stevens does nothing to address any of the specific facts in the Affidavit, does not deny living at the address where service was affected, and that bare denials of service are not enough to warrant a traverse hearing or to rebut the prima facie proof of service. Plaintiff further argues that Stevens has failed to demonstrate a reasonable excuse for his default, or that he has a meritorious defense, and that Stevens' explanation that he was only made aware of this litigation after his tenant notified him of the "10 Day Notice to Quit", still bars the relief requested under Laches because of Stevens' delay in seeking the relief. That the "10 Day Notice to Quit" was served on November 23, 2015, that Stevens did not bring this Order to Show Cause until several months later, and that it is Plaintiff who will suffer if the default is vacated because Stevens has been collecting rent on the property for over eight years, while Plaintiff was deprived of the payments on the mortgage, and was paying other expenses such as taxes.

Plaintiff further contends that Stevens has not stated a basis to set aside the judicial sale under CPLR §2003, as there are no allegations of Plaintiff's failure to comply with the CPLR requirements regarding notice, time or manner of the foreclosure sale, nor are there any allegations that the judicial sale was tainted by fraud, collusion, mistake or misconduct.

Defendant Stevens' motion for vacatur does not cite the appropriate statute under which he is making his motion, only that the default judgment should be vacated for lack of due process and lack of service of the Summons and Complaint and subsequent motions. Upon review of all the motion papers, it appears that Stevens is moving under CPLR §5015(a)(4), and/or CPLR §2003.

CPLR §5015(a)(4) allows the court to vacate a default judgment where a party asserts a lack of jurisdiction to render the judgment. CPLR §2003 allows the court, within one year after a sale was made pursuant to a judgment or order, "to set the sale aside for a failure to comply with the requirements of the civil practice law and rules

as to the notice, time or manner of such sale, if a substantial right of a party was prejudiced by the defect.”

Defendant Stevens has failed to establish entitlement to vacatur under CPLR 5015(a)(4). Jurisdiction over a defendant is properly found in a mortgage foreclosure action where defendant provides only conclusory denials of service. (See U.S. Bank National Ass’n v. Martinez, 139 A.D.3d 548, 34 N.Y.S.3d 3 [1st Dept. 2016]). Defendant Stevens states only a conclusory denial of being personally served with the Summons and Complaint. “[I]t is well established that the affidavit of a process server constitutes prima facie evidence of proper service. The mere denial of receipt of service ‘is insufficient to rebut the presumption of proper service created by a properly executed affidavit of service.’” (In re de Sanchez, 57 A.D.3d 452, 870 N.Y.S.2d 24 [1st Dept. 2008]).

Further, Defendant Stevens claims not receiving Plaintiff’s subsequent motions, or the Notice of Sale, and argues that there is nothing in the Court file that shows a Notice of Entry or Affidavits of Service being filed with the Clerk’s office. This argument is also unavailing. Plaintiff attaches to its opposition several Affidavits of Service, including an Affidavit of Service for the Notice of Sale (Aff. In Opp. Exh. D). Defendant Stevens does not deny that the address listed on the Affidavits of Service as 19 Eastbourne Drive, Spring Valley, New York, is a proper address, and in fact admits in his motion that this has been his address since 2006.

A defendant’s unsuccessful claim that she was not properly served with process and conclusory denial of receipt of certain mailings are insufficient to overcome the presumption of delivery created by the affidavits of service reflecting such mailings and do not constitute a reasonable excuse for delay or a meritorious defense.” (See U.S. Bank National Ass’n, Supra). For these same reasons Defendant Stevens fails to establish any irregularities in the judicial sale under CPLR §2003 that would warrant the sale to be set aside. Further, Defendant Stevens’ conclusory assertions that he made unsuccessful attempts to address his non-payment of the mortgage back in 2008, without more, does not provide the Court with a reasonable excuse for his default or a meritorious defense. (See CPLR 5015(a)(1)).

Lastly, Defendant Stevens attempts to raise new arguments and issues in his Reply papers, including fraud and violations of T.I.A., R.E.S.P.A., and H.O.E.P.A. New arguments raised for the first time in reply papers, deprive the opposing party of an opportunity to respond, and are not properly made before the Court (Ambac Assur. Corp. v. DLJ Mtge. Capital Inc., 92 A.D. 3d 451, 939 N.Y.S. 2d 333 [1st Dept., 2012] and Chavez v. Bancker Const. Corp., Inc., 272 A.D. 2d 429, 708 N.Y.S. 2d 325 [2nd Dept., 2000]).

