Bank of Am., N.A. v Lague
2016 NY Slip Op 32524(U)
September 16, 2016
Supreme Court, Suffolk County
Docket Number: 10-24307
Judge: W. Gerald Asher
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[* 1]

SHORT FORM ORDER

INDEX No. 10-24307

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 10-21-14 (002)
MOTION DATE 4-21-15 (003)
ADJ. DATE
Mot. Seq. #002 - MG
#003 - MD

BANK OF AMERICA, N.A. s/b/m to BAC HOME LOANS SERVICING, LP, F/K/A COUNTRYWIDE HOME LOANS SERVICING LP,

Plaintiff,

- against -

ROGER LAGUE and CONSTANCE LAGUE,

Defendants.

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Bay Shore, New York 11706

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Attorney for Defendants
Four Janet Street
Port Jefferson Station, New York 11776

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/~~Order to Show Cause~~ by the plaintiff, dated September 16, 2014, and supporting papers ~~(including Memorandum of Law dated ___)~~; (2) Notice of Cross Motion by the defendant, dated January 29, 2015, supporting papers; (3) Affirmation in Opposition by the plaintiff, dated April 20, 2015, and supporting papers; ~~(4) Reply Affirmation by the defendant, dated and supporting papers; (5) Other ___; (and after hearing counsels' oral arguments in support of and opposed to the motion);~~ and ~~now~~ it is

ORDERED that the motion (002) by plaintiff Bank of America, N.A. s/b/m to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing LP (plaintiff) for an order granting it a judgment of foreclosure and sale is granted; and it is further

ORDERED that this cross motion (003) by defendants Roger Lague and Constance Lague (defendants), for, *inter alia*, an order dismissing the action pursuant to CPLR 3211 and in the alternative, vacating the order of reference and all prior proceedings and granting defendants leave to appear by answer is considered under CPLR 5015(a), 3012 (d) and 317 and, is denied.

This is an action to foreclose a mortgage on a premises known as 2169 Sound Avenue, Calverton, New York. On April 26, 2007, defendants executed a fixed rate note in favor of American Brokers Conduit agreeing to pay the sum of $325,000.00 at the yearly interest rate of 6.250 percent. On the same date, defendants also executed a mortgage in the principal sum of $325,000.00 on the subject property. The mortgage indicated American Brokers Conduit to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of American Brokers Conduit as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on May 29, 2007 in the Suffolk County Clerk's Office. Thereafter, on June 28, 2010, the mortgage was transferred by assignment of mortgage from MERS, as nominee for American Brokers Conduit to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing LP. The assignment of mortgage was recorded on October 7, 2010 in the Suffolk County Clerk's Office.

After the commencement of this action by filing on July 7, 2010, defendants were served with the summons and complaint pursuant to CPLR 308(4)[1]. No timely appearance by answer or otherwise was made by the moving defendant. The Court's computerized records indicate that a foreclosure settlement conference was held on September 7, 2011 at which time this matter was referred as an IAS case since a resolution or settlement had not been achieved. Thus, there has been compliance with CPLR 3408 and no further settlement conferences are required. Plaintiff thereafter moved for an order of reference pursuant to RPAPL 1321 by an unopposed motion returnable before this Court. The application was granted by order dated April 8, 2013 (Asher, J.). Now, plaintiff moves for a judgment of foreclosure and sale. Plaintiff's submissions in support of its motion include among other things: its attorney's affirmation; the Referee's oath and report of amounts due dated December 31, 2013 indicating the amount due to be $420,865.12; plaintiff's affidavit of amounts due from Michael D. Heath, an officer of plaintiff; an order of reference dated April 8, 2013; the note, mortgage, assignment of mortgage; the pleadings; and, the affidavits of service of process. Defendants have submitted a cross motion seeking various forms of relief.

Initially addressing defendants' cross motion (003), in seeking to vacate a default, a defendant is required to demonstrate a reasonable excuse for the delay in appearing and answering the complaint and a potentially meritorious defense to the action (*see* CPLR 5015 [a] [1]), or, under the circumstances of this case, that service of the summons and complaint was defective (*see* CPLR 5015[a] [4]; ***Sime v Ludhar***, 37 AD3d 817, 830 NYS2d 775 [2d Dept 2007]). When a defendant seeking to vacate a default raises a jurisdictional objection pursuant to CPLR 5015 (a) (4), the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5015 (a) (1) (*see* ***Roberts v Anka***, 45 AD3d 752, 846 NYS2d 280 [2d Dept 2007];

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[1] The affidavit of service evinces that after attempts were made to serve the defendants at 2169 Sound Avenue, Calverton, New York on 7/17/10 at 12:40 PM, 7/20/10 at 8:03 AM, 7/22/10 at 8:14 PM, 7/28/10 at 3:48 PM and 8/2/10 at 9:31 AM., a copy of the summons and complaint was affixed to the door of the premises. A copy of the summons and complaint was thereafter mailed to defendants at the subject residence and the affidavits were filed with the Suffolk County Clerk's Office on August 4, 2010.

Marable v Williams, 278 AD2d 459, 718 NYS2d 400 [2d Dept 2000]; ***Taylor v Jones***, 172 AD2d 745, 569 NYS2d 131 [2d Dept 1991]).

It is well established that a process server's sworn affidavit of service constitutes prima facie evidence of proper service (*see* ***ACT Prop., LLC v Ana Garcia***, 102 AD3d 712, 957 NYS2d 884 [2d Dept 2013]; ***Deutsche Bank Natl. Trust Co. v Pietranico***, 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]; ***Bank of N.Y. v Espejo***, 92 AD3d 707, 939 NYS2d 105 [2d Dept 2012]; ***Deutsche Bank Natl. Trust Co. v Hussain***, 78 AD3d 989, 912 NYS2d 595 [2d Dept 2010]). A defendant can rebut the process server's affidavit by a sworn denial of service in an affidavit containing specific and detailed contradictions of the allegations in the process server's affidavit (*see* ***Bank of N.Y. v Espejo***, 92 AD3d 707; ***Bankers Trust Co. of California, NA v Tsoukas***, 303 AD2d 343, 756 NYS2d 92 [2d Dept 2003]). However, bare, conclusory and unsubstantiated denials of receipt of process are insufficient to rebut the presumption of proper service created by the affidavit of the plaintiff's process server and to require a traverse hearing (*see* ***U.S. Bank Natl. Assn. v Tate***, 102 AD3d 859, 958 NYS2d 722 [2d Dept 2013]; ***Stevens v Charles***, 102 AD3d 763, 958 NYS2d 443 [2d Dept 2013]; ***Irwin Mtge. Corp. v Devis***, 72 AD3d 743, 898 NYS2d 854 [2d Dept 2010]; ***Beneficial Homeowner Serv. Corp. v Girault***, 60 AD3d 984, 875 NYS2d 815 [2d Dept 2009]). A defendant who fails to swear to specific facts to rebut the statements in the process server's affidavits is not entitled to a hearing on the issue of service (*see* ***Chichester v Alai-Amin Grocery & Halal Meat***, 100 AD3d 820, 954 NYS2d 577 [2d Dept 2012]; ***Bank of N.Y. v Espejo***, 92 AD3d 707; ***US Natl. Bank Assoc. v Melton***, 90 AD3d 742, 934 NYS2d 352 [2d Dept 2011]).

Here, the process server's affidavit of service constituted prima facie evidence of proper service upon defendants pursuant to CPLR 308 (4) and defendant Constance Lague's conclusory and unsubstantiated denial of receipt of the summons and complaint is insufficient to rebut the presumption of proper service created by said affidavit (*see* ***Beneficial Homeowner Service Corp. v Girault***, 60 AD3d 984, 875 NYS2d 815 [2d Dept 2009]). The affidavit of Costance Lague dated January 29, 2015 claims that "...neither I or Roger were ever served by personal delivery and in fact, a review if [*sic*] the Affidavits of Service show that the summons was left inside the door of our property after the Plaintiff allegedly attempted to serve us. Neither of us ever saw a process server and we did not receive a copy of the Summons and Complaint by mail as required." In sum, all that is offered here in defendant's affidavit is a general denial of service (*cf.* ***US Bank, NA v Arias***, 85 AD3d 1014, 927 NYS2d 362 [2d Dept 2011]). Contrary to defendant's contentions, service pursuant to CPLR 308 (4) may be used where personal service under CPLR 308 (1) and (2) cannot be made with due diligence (*see* CPLR 308 [4]; ***JP Morgan Chase Bank, N.A. v Baldi***, 128 AD3d 777, 10 NYS3d 126 [2d Dept 2015]; *citing* ***Deutsche Bank Natl. Trust Co. v White***, 110 AD3d 759, 759-760, 972 NYS2d 664 [2d Dept 2013]). The term "due diligence", which is not defined by statute, has been interpreted and applied on a case-by-case basis (*see* ***JP Morgan Chase Bank, N.A. v Baldi***, 128 AD3d 777; *citing* ***Estate of Waterman v Jones***, 46 AD3d 63, 66, 843 NYS2d 462 [2d Dept 2007]). The affidavit of the process server demonstrated that five visits were made to the defendants' residence on five different occasions and at different times, when the defendants could reasonably have been expected to be found at that location (*see* ***Deutsche Bank Natl. Trust Co. v White***, 110 AD3d at 759-760). Furthermore, the process server averred that he confirmed with Julia Cebich that the defendants resided at the subject premises at which service was

attempted. Based upon the foregoing, the portions of the defendants' application seeking dismissal of the action or a vacatur of their default for lack of personal jurisdiction is denied.

The moving defendants' alternative claim for leave to serve and file a late answer is equally unavailing. To be entitled to such relief pursuant to CPLR 5015 (a)(1) or 3012, the moving defendants were required to set forth a justifiable excuse for their default and a meritorious defense (*see* ***Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr., Co.***, 67 NY2d 138, 501 NYS2d 8 [1986]; ***ACT Prop., LLC v Ana Garcia***, 102 AD3d 712, 957 NYS2d 884 [2d Dept 2013]; ***Deutsche Bank Natl. Trust Co. v Gutierrez***, 102 AD3d 825, 958 NYS2d 472 [2d Dept 2013]; ***Wells Fargo Bank, N.A. v Russell***, 101 AD3d 860, 955 NYS2d 654 [2d Dept 2012]). Here, the excuse offered by the defendants that they "lacked notice" due to improper service, is not a reasonable excuse as same has already been found to be unmeritorious. Likewise, the defendants' unsupported assertion that they "did not fall asleep on their rights but in fact acted affirmatively by seeking a Loan Modification for several years..." does not constitute a reasonable excuse (*see* ***Deutsche Bank Natl. Trust Co. v Gutierrez***, 102 AD3d 825, 825, 958 NYS2d 472 [2d Dept 2013]). As an additional reasonable excuse, defendants proffer the unsubstantiated claim that "the only reason the Answer was not served on time was due to the negligence of the former Attorney representing the Defendants". Here, the vague, nonspecific and uncorroborated factual assertions, upon which the claim of a reasonable excuse for a default are predicated, are insufficient to satisfy the reasonable excuse requirements (*see* ***Vardaros v Zapas***, 105 AD3d 1037, 963 NYS2d 408 [2d Dept 2013]; ***Wells Fargo Bank v Linzenberg***, 50 AD3d 674, 853 NYS2d 912 [2d Dept 2008]). Confusion or ignorance about legal procedures have been likewise held not to constitute reasonable excuses for the failure to answer or otherwise appear (*see* ***Wells Fargo Bank, NA v Besemer***, 131 AD3d 1047, 16 NYS3d 819 [2d Dept 2015]; *citing* ***U.S. Bank N.A. v Slavinski***, 78 AD3d 1167, 912 NYS2d 285 [2d Dept 2010]). Since the defendants have not offered a viable excuse for their default, they are not entitled to the relief demanded pursuant to CPLR 5015(a)(1) or 3012. The moving defendants' claim to one or more meritorious defenses is thus inconsequential and the Court need not determine whether defendant has demonstrated a meritorious defense (*see* ***Development Strategies Co., LLC v Astoria Equities, Inc.***, 71 AD3d 628, 896 NYS2d 396 [2d Dept 2010]).

Defendants' alternative claim for vacatur of his default under CPLR 317 is likewise denied. This statute affords a defendant, not served by delivery in hand pursuant to CPLR 308(1), with an excusable default ground, namely, the non-receipt of personal notice of the summons in time to defend (*see* CPLR 317). As in the case of other excusable default grounds, the moving defendant must demonstrate his or her possession of a meritorious defense to the claims asserted (*see* CPLR 317; ***Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.***, 67 NY2d 138, 501 NYS2d 8 [1986]). Due proof of the claimed non-receipt of personal notice of the summons in time to defend is required (*see* ***Jackson v Professional Transp. Corp.***, 81 AD3d 602, 916 NYS2d 159 [2d Dept 2011]; ***Essex Credit Corp. v Theodore Tarantini***, 179 AD2d 973, 579 NYS2d 235 [3d Dept 1992]), as a mere denial of receipt and/or an unsubstantiated claim of lack of service of the summons and complaint are insufficient to establish a lack of personal notice of the action in time to defend (*see* ***Bank of New York v Samuels***, 107 AD3d 653, 968 NYS2d 93 [2d Dept 2013]). Here, defendants contention that they failed to receive notice of the summons and complaint in time to defend is unsubstantiated. The foregoing, coupled with the inordinate delay in the interposition

of this cross motion[2], warrant the denial of the defendants' application for relief pursuant to CPLR 317 without consideration of the issue of the defendants' possession of any meritorious defense.

Addressing defendants' assertion which raises an allegation of lack of standing, it is well established that "where a defendant does not challenge a plaintiff's standing, the plaintiff may be relieved of its obligation to prove that it is the proper party to seek the requested relief." (***Wells Fargo Bank Minnesota Natl. Assn. v Mastropaolo***, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). The Second Department further reasoned that "an argument that a plaintiff lacks standing, if not asserted in the defendant's answer or in a pre-answer motion to dismiss the complaint, is waived pursuant to CPLR 3211(e)" [citations omitted] (*see* ***Wells Fargo Bank Minn., NA v Mastropaolo***, 42 AD3d 239; *see also* ***HSBC Bank, USA v Dammond***, 59 AD3d 679, 875 NYS2d 490 [2d Dept 2009] [waived standing issues does not constitute meritorious defense on application to vacate default]; ***US Bank, NA v Emmanuel***, 83 AD3d 1047, 921 NYS2d 320 [2d Dept 2011]; ***Deutsche Bank Natl. Trust Co. v Hussain***, 78 AD3d 989, 912 NYS2d 595 [2d Dept. 2010]; ***Countrywide Home Loans Serv., LP v Albert***, 78 AD3d 983, 912 NYS2d 96 [2d Dept 2010]). Since the moving defendants' default has not been vacated, they may not seek the affirmative relief of dismissal on their waived standing defense (*see* ***US Bank N.A. v Gonzalez***, 99 AD3d 694, 952 NYS2d 59 [2d Dept 2012]; ***Deutsche Bank Trust Co., Ams. v Stathakis***, 90 AD3d 983, 935 NYS2d 651 [2d Dept 2011]). Based upon the foregoing, defendants' assertion of a standing defense is unavailing.

Lastly, in light of defendants' status as a party in default, they are not entitled to affirmative relief of a non-jurisdictional nature. Since the defendants have failed to establish that they are entitled to an order vacating their default in appearing or answering the complaint and compelling the plaintiff to accept a late answer, they are not entitled to affirmative relief of a non-jurisdictional nature. Accordingly, the defendants' contentions, which are non-jurisdictional in nature, are summarily rejected by the Court.

Based upon the foregoing, plaintiff's motion is granted and defendants' cross motion is denied in its entirety. The proposed judgment of foreclosure and sale is signed as modified by the Court.

Dated: September 16, 2016

W. Gerard Asher
J.S.C.
HON. W. GERARD ASHER
J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

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[2] Defendants' cross motion was made almost five years from the date they were required to interpose an answer in this action.