Ocwen Loan Servicing, LLC v Morgan
2016 NY Slip Op 32547(U)
November 25, 2016
Supreme Court, Suffolk County
Docket Number: 35834-10
Judge: Thomas F. Whelan

[* 1]

MEMO DECISION & ORDER

COPY

INDEX No. 35834-10

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 8/12/16
SUBMIT DATE: 11/4/16
Mot. Seq. # 003- MD
CDISP: Yes

OCWEN LOAN SERVICING, LLC Plaintiff, -against- ALVIN MORGAN, VINCENT McLEOD and "JOHN DOE #1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the plaintiff, the person or parties, if any, having or claiming an interest in or lien upon the Mortgage premises described in the Complaint, Defendants.	HOUSER & ALLISON, APC Attys. For Plaintiff 60 East 42nd Street - Suite 1148 New York, NY 19165 ANDREA S. GROSS, ESQ. Atty. For Moving Defendant McLeod 205-47 Linden Blvd. St. Albans, NY 11412 McCARTHY & McCARTHY, ESQS. Attys. For Defendant Morgan 132 Fifth Ave. Kings Park, NY 11754

Upon the following papers numbered 1 to 8 read on this motion for a stay of the impending sale, a vacatur of the of judgment of foreclosure and sale and dismissal of the action; Order to Show Cause and supporting papers 1 - 6; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 7-8; Replying Affidavits and supporting papers _____; Other _____; (~~and after hearing counsel in support and opposed to the motion~~, it is

ORDERED that this motion (#003) by defendant, Vincent McLeod, for an order staying the impending sale of the premises, vacating the judgment of foreclosure and sale and dismissing the complaint is considered under CPLR 5015(a)(4) and 5015(a)(1) and is denied.

The plaintiff commenced this action on September 23, 2010 to foreclose a June 5, 2007 mortgage given by defendants, Alvin Morgan and Vincent McLeod, in connection with their purchase of residential real property in Farmingdale, New York. The mortgage was given as security for a note of the same date in the principal amount of $391,500.00 that was executed solely by defendant Morgan.

In response to the plaintiff's service of the summons, complaint and the separate RPAPL § 1303 notice upon defendant, Alvin Morgan, on October 11, 2010, said defendant appeared herein by answer dated October 29, 2010. The moving defendant, Vincent McLeod, was served at the mortgaged premises with copies of those same papers on October 12, 2010, pursuant to CPLR 308(2) by delivery thereof to Beverly Ilgis, a co-tenant of defendant McLeod. In response to such service, defendant failed to appear herein by answer.

Notwithstanding his non-appearance herein by answer, defendant McLeod appeared herein by attorney, Vincent S. Alaimo, pursuant to a notice of appearance dated August 17, 2011 which was filed with the court. This appearance reflects that attorney Alaimo appeared with, or on behalf defendant McLeod, at the CPLR 3408 settlement conference that was scheduled and held on August 17, 2011, by quasi judicial personnel assigned to the specialized mortgage foreclosure conference part of this court. At the conclusion of the conference, the matter was marked "conference held" and the action was assigned to the civil case inventory of this part on August 22, 2011, as no settlement was reached.

In April of 2013, the plaintiff moved (#001) for summary judgment against answering defendant Morgan and a default judgment against moving defendant McLeod, together with the appointment of a referee to compute amounts due under the terms of the note and mortgage. That motion, which was opposed by defendant Morgan, was granted in Memo Decision and Order of this court dated July 29, 2013 and a referee was appointed in separate order of the same date. The default in answering of defendant Mcleod was therein fixed and determined pursuant to CPLR 3215 and RPAPL § 1321.

On February 6, 2016, the plaintiff's uncontested motion (#002) for an order confirming the report of the referee to compute and for the issuance of a judgment foreclosing the lien of the subject mortgage and directing a sale of the mortgaged premises was granted by this court. The referee of sale appointed therein scheduled the public sale of the premises pursuant to the terms of the judgment for July 21, 2016. One day prior thereto, defendant McLeod interposed the instant motion (#003) for a stay of the impending sale, vacatur of the February 16, 2016 judgment and a dismissal of the complaint on jurisdictional grounds due to purportedly defective service of the summons, complaint and other initiatory papers upon him.

The instant motion (#003) is interposed by defendant McLeod on papers prepared by new counsel and is predicated upon claims by defendant McLeod that he was never served with process and that the court lacks jurisdiction over his person. In an affidavit attached to the moving papers, in which defendant McLeod claims personal knowledge of the facts asserted therein, he avers that he is a defendant, co-owner of the premises which is the subject of this action which the plaintiff commenced on September 23, 2010. Continuing, the defendant avers that he was never served with process by the plaintiff, its process server or by Beverly Igis, the person to whom process was delivered so to effect service upon defendant McLeod at the mortgaged premises pursuant to CPLR 308(2). The defendant also avers that he resides at the mortgaged premises with his three children and that Beverly Igis is not a co-occupant of his residence and is unknown to the defendant's family. He further avers that on the

date and time of service, no-one was home because the defendant was on vacation in Florida at the Miami Carnival. Although defendant McLeod does not deny receipt of the mailing of the summons, complaint and other documents pursuant to CPLR 308(2), he denies receipt of the mailing required by CPLR 3215(g). Defendant McLeod goes on to allege that "it is my belief that the Plaintiff and his attorneys misrepresented facts to me and this court" (*see* page one and two of the defendants' affidavit). This affidavit does not identify the venue where it was taken and the signature page containing the signature is not referable to the two page content portion of the affidavit.

In her affirmation in support of the instant motion, defense counsel characterizes her client's affidavit as one containing averments that "*he had no knowledge, record or information sufficient to form a belief that an action was being commenced against his* [sic], as Plaintiff and its agents failed to personally deliver a copy of the Notice, Summons and Complaint to the Defendant or a person of suitable age and discretion" [emphasis added]. This more expansive characterization of the moving defendant's factual averments is of concern to this court as the defendant did not expressly assert that he was unaware of the commencement or pendency of this action. Of more concern to the court is that the above quoted facts contained in counsel's affirmation are belied by the appearance of her client by attorney, Vincent S. Alaimo, Esq., at the settlement conference conducted on August 17, 2011, a fact which current defense counsel failed to reveal to the court in the motion papers put before it. While the court considers these circumstances and others apparent from the affirmation of defense counsel to border on irresponsible or frivolous advocacy (*see generally*, ***U.S. v Shyne***, 2007 WL 1075035 [SDNY 2007]), it will nonetheless consider the merits of the moving defendant's claims for relief.

As indicated above, the claim of a lack of jurisdiction over the moving defendant is premised upon unsubstantiated allegations that the person to whom process was delivered, namely Beverly Igis, *is* not a co-occupant of his residence and *is* unknown *to the defendant's family* and that she didn't re-deliver the summons and complaint to defendant McLeod It is further premised upon the unsubstantiated claim that the moving defendant was on vacation at the time of such service and that no-one was at the residence at that time. However, all that is required to effect the jurisdictional joinder of a defendant pursuant to CPLR 308(2) is delivery of the summons "within the state 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 by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend 'personal and confidential" (CPLR 308[2]).

Accordingly, there is no statutory requirement that the person to whom the summons was delivered on behalf of the defendant reside at the premises where such service was effected (*see* ***Bank of N.Y. v Espejo***, 92 AD3d 707, 939 NYS2d 105 [2d Dept 2012]). Nor is there any requirement for the re-delivery of the summons and complaint to the defendant by the person upon whom the service was effected (*see* CPLR 308[2]; *see also* Vincent C. Alexander, Practice Commentaries McKinney's ConsLaws of NY Book 7B CPLR 317:1). The court thus finds that the moving defendant's claims of a failure on the part of the plaintiff to effect due service of process upon him are insufficient to warrant dismissal of the complaint or a traverse hearing on the issue of service.

The defendant's claims for a discretionary vacatur of his default are also rejected as unmeritorious. The vacatur of a default on an excusable default ground that is expressly provided by statute is available under CPLR 317 to all persons to whom the summons with notice and/or complaint were delivered to the defendant or his or her agent other than by personal delivery under CPLR 308(1) (*see* ***Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.***, 67 NY2d 138, 501 NYS2d 8 [1986]). A defendant moving under CPLR 317 must establish that he or she did not personally receive notice of the summons in time to defend and that he or she possesses a meritorious defense to the claim of the plaintiff. No demonstration of a reasonable excuse is necessary, since the statute itself provides for same, namely, non-receipt of personal notice of the summons in time to defend (*id.*). However, the mere denial of receipt of the summons and complaint is insufficient to establish lack of notice of the action in time to defend for the purpose of CPLR 317 (*see* ***Hamilton Public Relations v Scientivity, LLC***, 129 AD3d 1025, 12 NYS3d 234 [2d Dept 2015]: ***Capital Source v AKO Med., P.C.***, 110 AD3d 1026, 973 NYS2d 794 [2d Dept 2013]; ***Wassertheil v Elburg, LLC***, 94 AD3d 753, 754, 941 NYS2d 679 [2d Dept 2012]).

If the motion is timely made and is granted, the moving defendant will be allowed to appear in the action and defend upon the merits and if successful in such defense, the court may order restitution as if any judgment rendered therein was reversed or modified on appeal (*see* CPLR 317; ***Maron v Crystal Bay Imports, Ltd.***, 99 AD3d 867, 952 NYS2d 602 [2d Dept 2012]). An affidavit of merit by the moving defendant or a proposed answer, verified by defendant containing assertion of facts which potentially constitute at least one bona fide defense, must thus be attached to the motion papers (*see* ***New York Hosp. Med. Ctr. of Queens v Insurance Co. of the State of Pennsylvania***, 16 AD3d 391, 791 NYS2d 145 [2d Dept 2005]; ***Thakurdyal v 341 Scholes St., LLC***, 50 AD3d 889, 855 NYS2d 641 [2d Dept 2008]; ***Hilldun Corp. v Scarboro Textiles, Inc.***, 73 AD2d 535, 422 NYS2d 417 [1st Dept 1979]).

A second statute which provides for the vacatur of defaults on excusable default grounds is CPLR 50105(a)(1). To succeed under this statute, the movant must establish a reasonable excuse for the default and a demonstration of a potentially meritorious defense, the material facts of which, must be are advanced in an affidavit of the defendant or proposed verified answer attached to the moving papers (*see* ***Gershman v Ahmad***, 131 AD3d 1104 16 NYS3d 836 [2d Dept 2016]; ***Citimortgage, Inc. v Kowalski***, 130 AD3d 558, 13 NYS3d 468 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Combs***, 128 AD3d 812, 10 NYS3d 121 [2d Dept 2015]; ***E*Trade Bank v Vasquez***, 126 AD3d 933, 7 NYS3d 285 [2d Dept 2015]; ***Karalis v New Dimensions HR, Inc.***, 105 AD3d 707, 962 NYS2d 647 [2d Dept 2013]; ***Citimortgage, Inc. v Stover***, 124 AD3d 575, 2 NYS3d 147 [2d Dept 2015]; ***Jefferson v Netusil***, 44 AD3d 621, 843 NYS2d 158 [2d Dept 2007]). Where the only excuse offered by the defendant is a claim of improper service which has been found to be unmeritorious, vacatur of the default is unwarranted (*see* ***U.S. Bank, Natl. Ass'n. v Smith***, 132 AD3d 848, 19 NYS3d 62 [2d Dept 2015]; ***Community W. Bank, N.A. v Stephen***, 127 AD3d 1008, 9 NYS3d 275 [2d Dept 2015]; ***U. S. Bank Natl. Assoc. v Harding***, 124 AD3d 766, 998 NYS2d 667 [2d Dept 2014]; ***HSBC Bank v Miller***, 121 AD3d 1044, 995 NYS2d 198 [2d Dept 2014]; ***Deutsche Bank Natl. Trust Co. v Pietrnaico***, 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]; ***Tadco Constr. Corp. v Allstate Ins. Co.***, 73 AD3d 1022, 900 NYS2d 687 [2d Dept 2010]).

Here, the court finds that the moving papers were insufficient to establish the defendant's entitlement to relief under CPLR 317 or CPLR 5015(a)(1). The mere denial of receipt of the summons and complaint was insufficient to establish defendant McLeod's lack of notice in time to defend as required by CPLR 317. In addition, because McLeod's only offer of a reasonable excuse was the unsuccessful claim of a lack of due service, relief pursuant to CPLR 5015(a)(1) is not warranted. Moreover counsel's assertion that her client possesses a myriad of meritorious defenses is procedurally defective and substantively lacking in merit under both statutes, as no affidavit of by defendant McLeod addressing the proposed meritorious defenses or proposed verified answer likewise addressing any such defenses was attached to the moving papers (*see* ***HSBC Bank USA v Desrouilleres***, 128 AD3d 1013, 11 NYS3d 93 [2d Dept 2015]).

Finally, the defendant's claim of a purported failure to comply with the notice requirements of CPLR 3215(g)(3) is unavailing. It is well established that a failure to supply a CPLR 3215(g)(3)(i) is not jurisdictional in nature and is unavailable to a defendant, like defendant McLeod, who has failed to establish discretionary grounds for the vacatur of his default (*see* ***Hamilton Public Relations v Scientivity, LLC***, 129 AD3d 1025, *supra*; ***Castle v Avanti, Ltd.***, 86 AD3d 531, 532, 926 NYS2d 169 [2d Dept 2011]; ***Peck v Dybo Realty Corp.***, 77 AD3d 640, 641, 908 NYS2d 364 [2d Dept 2010]; ***Mauro v 1896 Stillwell Ave., Inc.***, 39 AD3d 506, 833 NYS2d 206 [2d Dept 2007]).

In view of the foregoing, the instant motion (#003) by defendant McLeod for the relief outlined above is denied.

DATED: November 25 2016

THOMAS F. WHELAN, J.S.C.