

Bank of N.Y. Mellon v Lorig

2017 NY Slip Op 31271(U)

June 9, 2017

Supreme Court, Suffolk County

Docket Number: 602484/2015

Judge: Howard H. Heckman, Jr.

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SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

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

INDEX NO.: 602484/2015
MOTION DATE: 06/23/2016
MOTION SEQ. NO.: 002 MG
003 MD

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THE BANK OF NEW YORK MELLON, AS
TRUSTEE FOR CIT MORTGAGE LOAN TRUST
2007-1,

PLAINTIFFS' ATTORNEY:
DAVIDSON FINK, LLP
28 EAST MAIN ST., STE. 1700
ROCHESTER, NY 14614

Plaintiffs,

-against-

JON LORIG, DIANE MADONIA-CIARO,

DEFENDANT ATTORNEY:
CHRISTOPHER THOMPSON, ESQ.
33 DAVIDSON LANE EAST
WEST ISLIP, NY 11795

Defendants.
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Upon the following papers numbered 1 to 24 read on this motion _____; Notice of Motion/ Order to Show Cause and supporting papers 1-8 (#002) _____; Notice of Cross Motion and supporting papers 9-19 (#003) _____; Answering Affidavits and supporting papers 20-22 _____; Replying Affidavits and supporting papers 23-24 _____; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff the Bank of New York Mellon, seeking an order: 1) granting a default judgment; 2) substituting Francesca Horton, Christopher Horton and Gabriella Potente-Horton as named party defendants in place and stead of defendants designated as "John Doe" and "Mary Doe" and discontinuing the action against the remaining defendants designated as "John Doe" and "Mary Doe"; 3) deeming all defendants in default; 4) amending the caption; and 5) 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 Real Estate Defect Specialists, Ltd., seeking an order pursuant to CPLR 3211(a)(3)&(7), 3212, 3012(d), 3215(d) & 5015 granting summary judgment dismissing plaintiff's complaint or, in the alternative, granting defendant leave to vacate its default in serving an answer and permitting 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 \$233,600.00 executed by defendants Jon Lorig and Diane Madonia Cairo on October 11, 2005 in favor of BNC Mortgage, Inc. On the same date both defendants executed a promissory note promising to re-pay the entire amount of the indebtedness to the lender. The mortgage and note were later assigned to the plaintiff The Bank of New York Mellon on February 19, 2014. Plaintiff claims that the defendants defaulted in making timely monthly mortgage payments since April 1, 2013. Plaintiff commenced this action by filing the summons and complaint on March 13, 2015. Both mortgagor defendants thereafter defaulted in serving an answer. Records indicate that defendant Real Estate Defect Specialist, Ltd. (REDS) obtained title to the mortgaged premises from the mortgagors by deed dated August 28, 2014. The purchase price reflected in County Clerk records indicates that REDS paid to the owners the sum of \$3000.00. Defendant REDS also defaulted in serving a timely answer. Plaintiff's motion seeks an order granting a default judgment and for the appointment of a referee to compute the sums due and owing to the lender.

In opposition and in support of its cross motion, defendant Real Estate Defect Specialist, Ltd. submits an affidavit from its president and claims that this court lacks jurisdiction over the movant based upon plaintiff's failure to serve the summons and complaint in compliance with Business Corporation Law 306 requirements. Defendant REDS president's affidavit states that REDS never received the summons and complaint. Defendant also claims that even were the court to determine that plaintiff obtained personal jurisdiction over REDS, that it should be permitted to serve and file a late answer since defendant's attempt to serve a timely answer was only four days late. Defendant claims that since plaintiff failed to seek a default judgment within one year of defendant's default in answering the complaint the action must be dismissed. Counsel also claims that plaintiff's motion must be denied and the complaint should be dismissed based upon: 1) plaintiff's lack of standing to prosecute this action; 2) plaintiff's failure to submit admissible proof to establish defendant's default and service of the mortgage and RPAPL 1304 90-day pre-foreclosure default notices on the borrowers and service of RPAPL 1303 notices on the individual tenants residing at the premises; and 3) plaintiff's violation of the New York Banking Law 6-L & 6M. Counsel asserts that if the complaint is not dismissed that the defendant should be granted leave to serve a late answer.

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 sufficient facts to require a trial on any issue of fact (CPLR 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted in favor of the movant 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 unpaid note, and evidence of default in payment (see *Wells Fargo Bank, N.A. v. Eroboho*, 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)). Where the plaintiff's standing is placed in issue by the defendant's answer, the plaintiff must also establish its standing as part of its prima facie showing (*Aurora Loan Services v. Taylor*, 25 NY3d 355, 12 NYS3d 612 (2015); *Loancare v. Firshing*, 130 AD3d 787, 14 NYS3d 410 (2nd Dept., 2015); *HSBC Bank USA, N.A. v. Baptiste*, 128 AD3d 77, 10 NYS3d 255 (2nd Dept., 2015)). In a foreclosure action, a plaintiff has standing if it is either the holder of, or the assignee of, the underlying note at the time that the action is commenced (*Aurora Loan Services v. Taylor, supra.*; *Emigrant Bank v. Larizza*, 129 AD3d 94, 13 NYS3d 129 (2nd Dept., 2015)). Either a written assignment of the note or the physical transfer of the note to the plaintiff prior to the commencement of the action is sufficient to transfer the obligation and to provide standing (*Wells Fargo Bank, N.A. v. Parker*, 125 AD3d 848, 5 NYS3d 130 (2nd Dept., 2015); *U.S. Bank, N.A. v. Guy*, 125 AD3d 845, 5 NYS3d 116 (2nd Dept., 2015)). A plaintiff's attachment of a duly indorsed mortgage note to its complaint coupled with an affidavit or certification in which it alleges that it had possession of the promissory note prior to commencement of the action constitutes due proof of the plaintiff's standing to prosecute its claim for foreclosure and sale (*see Nationstar Mortgage, LLC v. Catizone*, 127 AD3d 1151, 9 NYS3d 315 (2nd Dept., 2015)).

A defendant seeking to vacate its default in appearing in an action and seeking leave to serve a late answer must provide a reasonable excuse for the default and demonstrate a potentially meritorious defense (*see Eugene DiLorenzo, Inc. v. A.C. Dutton Lbr., Co.*, 67 NY2d 138, 501 NYS2d 8 (1986); *Deutsche Bank National Trust Co. v. Gutierrez*, 102 AD3d 825, 958 NYS2d 472 (2nd Dept., 2013); *U.S. Bank, N.A. v. Samuel*, 138 AD3d 1105, 30 NYS3d 305 (2nd Dept., 2016); *TCIF REO GCM, LLC v. Walker*, 139 AD3d 704, 32 NYS3d 223 (2nd Dept., 2016)). 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); *Emigrant Mortgage Company v. Westervelt*, 105 AD3d 896, 964 NYS2d 543 (2nd Dept., 2013); *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, 36 NYS3d 144 (2nd Dept., 2016); *FT-I, Inc. v. Reid*, 138 AD3d 922, 31 NYS3d 119 (2nd Dept., 2016); *Wachovia Bank v. Greenberg*, 138 AD3d 984, 31 NYS3d 110 (2nd Dept., 2016); *MERS v. Losco*, 125 AD3d 733, 5 NYS3d 112 (2nd Dept., 2015); *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. Peralta*, 142 AD3d 988, 37 NYS3d 308 (2nd Dept., 2016); *Washington Mutual Bank v. Huggins*, 140 AD3d 858, 35 NYS3d 127 (2nd Dept., 2016); *Wells Fargo Bank, N.A. v. Christie*, 83 AD3d 824, 921 NYS2d 127 (2nd Dept., 2011); *U.S. Bank, N.A. v. Tate*, 102 AD3d 859, 958 NYS2d 722 (2nd Dept., 2013); *Beneficial Homeowners Serv. Corp., v. Girault*, 60 AD3d 984, 875 NYS2d 815 (2nd Dept., 2009)).

Defendant's (REIDS) cross motion seeks to assert defenses on its own behalf and on behalf of the individual defendants/mortgagors and the individual tenants who reside in the premises. Clearly as to those defenses asserted by REIDS on behalf of the individual defendants, no legal basis exists to grant dismissal of the complaint based upon plaintiff's alleged failure to comply with Banking Law

6-L & 6-M and RPAPL 1303 & 1304 and mortgage requirements related to service of the pre-foreclosure notices of default, since those defenses are personal to the individual defendants/mortgagors and individual defendant/tenants (*see Wells Fargo Bank v. Bowie*, 89 AD3d 931, 932 NYS2d 702 (2nd Dept., 2011); *NY CTL 1996-1 Trust v. King*, 13 AD3d 429, 787 NYS2d 61 (2nd Dept., 2004)). Movant is without legal capacity to assert those defenses since they are personal to those defendants and can only be asserted by those individual defendants. The record reveals that REDS obtained title to the mortgaged premises for the sum of \$3000.00 by deed dated August 28, 2014. In this respect, while the defendant may have purchased title to the dwelling for this minimal amount (and presumably is profiting from the purchase by having the ability to rent the premises), REDS did not “purchase” the defenses the defaulting borrowers may have been entitled to assert; REDS’ “purchase” merely had the effect of foreclosing the mortgagors from seeking to assert those defenses.

With respect to the claims asserted on behalf of the defendant REDS itself concerning lack of jurisdiction, abandonment and for permission to vacate its default and to serve a late answer, the defendant has failed to submit sufficient credible, admissible evidence to support these claims. As to jurisdiction, the affidavit of the process server constitutes prima facie evidence of proper service of the summons and complaint upon defendant REDS by service upon the Secretary of State on April 8, 2015. Having established a prima facie showing of jurisdiction over the defendant pursuant to Business Corporation Law 306, it is incumbent upon the defendant to rebut the showing by submission of specific and substantive evidence regarding lack of service. The affidavit submitted by the defendant containing two seemingly contradictory statements to the effect that the summons and complaint was either not received or was received at an incorrect address by mail provides no credible proof to rebut the showing of due service upon it. No legal basis therefore exists to dismiss the complaint for failure to obtain personal jurisdiction over REDS (*see Wells Fargo Bank, N.A. v. Tricarico*, 139 AD3d 722, 32 NYS3d 213 (2nd Dept., 2016); *IndyMac Bank v. Hyman*, 74 AD3d 751, 901 NYS2d 545 (2nd Dept., 2010)).

Having failed to provide any reasonable excuse for its delay in serving an answer, it is unnecessary to consider whether the defendant has demonstrated the existence of an arguably meritorious defense to the foreclosure complaint (*Deutsche Bank National Trust Co. v. Rudman*, 80 AD3d 651, 914 NYS2d 672 (2nd Dept., 2011); *Deutsche Bank National Trust Co. v. Gutierrez*, 102 AD3d 825, 958 NYS2d 472 (2nd Dept., 2013); *Deutsche Bank National Trust Co. v. Pietranico*, 102 AD3d 724, 957 NYS2d 868 (2nd Dept., 2013); *Wells Fargo Bank, N.A. v. Russell*, 101 AD3d 860, 955 NYS2d 654 (2nd Dept., 2012)). Moreover, even were the court to consider the proposed defenses sought to be asserted, none of the defenses (which include lack of standing and failure to serve pre-foreclosure notices of default) raised in opposition to plaintiff’s motion are meritorious since the defendant waived its lack of standing defense by defaulting in serving an answer (*see HSBC Bank USA v. Angeles*, 143 AD3d 671, 38 NYS3d 580 (2nd Dept., 2016); *Nationstar Mortgage LLC v. Avella*, 142 AD3d 594, 36 NYS3d 679 (2nd Dept., 2016); *Bank of New York Trust Co., N.A. v. Chiejina*, 142 AD3d 570, 36 NYS3d 512 (2nd Dept., 2016); *U.S. Bank, N.A. v. Gulley*, 137 AD3d 1008, 27 NYS3d 601 (2nd Dept., 2016); *FCDB FFI 2008-1 Trust v. Videjus*, 131 AD3d 1004, 17 NYS3d 54 (2nd Dept., 2015); *Southstar III, LLC v. Entienne*, 120 AD3d 1332, 992 NYS2d 558 (2nd Dept., 2014); *BAC Home Loans Servicing, LP v. Reardon*, 132 AD3d 790, 18 NYS3d 664 (2nd Dept., 2015); *Wells Fargo Bank Minn., N.A. v. Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 (2nd Dept., 2007)). Moreover, even were the court to consider the underlying merits of plaintiff’s standing, the evidence submitted in the form of an affidavit from the mortgage servicer’s authorized signatory

dated February 25, 2016 provides sufficient evidence to prove that the plaintiff retains possession of the original promissory note and had possession prior to the date the action was commenced. This evidence, coupled with the fact that the note was affixed to the complaint, provides more than ample proof of plaintiff's standing to prosecute this action (*see Wells Fargo Bank, N.A. v. Thomas*, 2017 NY Slip Op 04318 (2nd Dept., 2017); *FNMA v. Yakaputrz II, Inc.*, 141 AD3d 506, 35 NYS3d 236 (2nd Dept., 2016); *JPMorgan Chase v. Weinberger*, 142 AD3d 643, 37 NYS3d 286 (2nd Dept., 2016); *Nationstar v. Cantizone*, 127 AD3d 1151, 9 NYS3d 315 (2nd Dept., 2015)).

With respect to defendant's claims concerning the plaintiff's alleged failure to serve mortgage and statutory pre-foreclosure notices, as set forth above this defendant is without capacity to assert these defenses since it is not a signatory to the note or mortgage and only the individual mortgagor defendants and/or tenant defendants have the right to contest foreclosure on these grounds. Moreover, even were the court to permit REDS to assert these defenses and conceding defendant's claim that ordinarily service of such notices are considered conditions precedent to a mortgage foreclosure action (*Aurora Loan Services, LLC v. Weisblum*, 85 AD3d 95, 923 NYS2d 609 (2nd Dept., 2011); *First National Bank of Chicago v. Silver*, 73 AD3d 162, 899 NYS2d 256 (2nd Dept., 2010)), the failure to comply with such provisions are not jurisdictional defects sufficient to provide independent grounds to vacate a default by a party who has otherwise defaulted in appearing in an action (*U.S. Bank, N.A. v. Carey*, 137 AD3d 894, 28 NYS3d 68 (2nd Dept., 2016); *PHH Mortgage Corp. v. Celestin*, 130 AD3d 703, 11 NYS3d 871 (2nd Dept., 2015); *Pritchard v. Curtis*, 101 AD3d 1502, 957 NYS2d 440 (3rd Dept., 2012); *Deutsche Bank National Trust Co. v. Posner*, 89 AD3d 674, 933 NYS2d (2nd Dept., 2011)). In this case, the defendant has failed to provide any reasonable excuse for its failure to timely serve an answer and the mere showing of an arguably meritorious defense (i.e. plaintiff's alleged failure to timely serve pre-foreclosure notices of default) is legally insufficient to provide grounds to set aside its continuing default in appearing in this action (*Flagstar Bank v. Jambelli*, 140 AD3d 829, 32 NYS3d 625 (2nd Dept., 2016); *Pritchard v. Curtis, supra.*; *Wassertheil v. Elburg*, 94 AD3d 753, 941 NYS2d 679 (2nd Dept., 2012)). Moreover, even were the court to also consider the merits of service of the default notices and the RPAPL 1303 notice, plaintiff has submitted sufficient evidence to establish that these notices were timely and properly served pursuant to the requirements of RPAPL 1303 & 1304 (3).

As to defendant REDS' claim that plaintiff's default judgment motion was abandoned as a result of not being timely made within one year of the defendant's default, the record shows that defendant's default occurred on May 8, 2015 and that plaintiff made its initial application for an order of reference (which was subsequently withdrawn) on April 13, 2016- prior to expiration of the one year period required pursuant to CPLR 3215. Based upon plaintiff's timely submission of that application within one year of the defendant's default, no basis exists to dismiss the complaint as abandoned as defined pursuant to CPLR 3215(c) (*see Wells Fargo Bank, N.A. v. Daskal*, 142 AD3d 1071, 37 NYS3d 353 (2nd Dept., 2016); *U.S. Bank, N.A. v. Dorestant*, 131 AD3d 467, 15 NYS3d 142 (2nd Dept., 2015); *Wells Fargo Bank, N.A. v. Combs*, 128 AD3d 812, 10 NYS3d 121 (2nd Dept., 2015); *MERS v. Smith*, 111 AD3d 804, 975 NYS2d 121 (2nd Dept., 2013)).

With respect to plaintiff's motion for a default judgment and the appointment of a referee to compute the sums due and owing to the mortgage lender, plaintiff has submitted sufficient evidence in the form of an affidavit from the mortgage service provider which satisfies the business records exception to the hearsay rule and which shows that the defendants have defaulted under the terms of the parties mortgage loan agreement by failing to make timely monthly payments since April 1,

2013. As the Appellate Division, Second Department, most recently ruled in *Wells Fargo Bank, N.A. v. Thomas, supra.* (May 31, 2017), prima facie entitlement to judgment as a matter of law is established in a foreclosure action by submission of the mortgage, the promissory note and an affidavit from a mortgage loan servicer's employee attesting to the default in payment. Such testimony from the loan servicer's representative does not require personal knowledge of the plaintiff's record-keeping practices and procedures when the loan servicer's representative attests, pursuant to the business records exception to the hearsay rule (CPLR 4518), that the records reflect the defendant's default (*Wells Fargo Bank, N.A. v. Thomas, supra.*; *Citigroup vs. Kopelowitz*, 147 AD3d 1014, 48 NYS3d 223 (2nd Dept., 2017)).

The bank, having proven entitlement to a default judgment, it is incumbent upon the defendant to submit relevant, evidentiary proof sufficiently substantive to raise genuine issues of fact concerning why the mortgage lender is not entitled to foreclose. Defendant has not submitted any evidence to contradict the fact that the original mortgagors who have defaulted in appearing in this action have failed to make timely mortgage payments since April, 2013. Accordingly the plaintiff is entitled to an award of judgment.

Defendant's cross motion is denied and plaintiff's motion for an order granting a default judgment and for the appointment of a referee to compute the sums due and owing to the plaintiff is granted. The proposed order appointing a referee has been signed simultaneously with the execution of this order.

Dated: June 9, 2017

Hon. Howard H. Heckman Jr.

J.S.C.