Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

BANK OF AMERICA, N.A.,

Plaintiff,

-against-

WILNER RENESCA, BETTY RENESCA, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, DIANA RENESCA,

Defendants.

Index No.: 1959/14

Motion Date: 8/29/17

Motion Seq. No.: 4

The following papers numbered 1 to 7 read on this motion by defendants, Betty Renesca(Betty) and Diana Renesca(Diana) for an Order pursuant to CPLR 3211(a)(8) dismissing the complaint, or pursuant to CPLR 5015(a)(1),(3) and/or (4) and in the interest of justice vacating the Order of Reference dated May 25, 2015 vacating their default in opposing the motion and allowing defendants to submit opposition to the motion and pursuant to CPLR 3012 and 2004 granting an extension of time to interpose an answer to the complaint.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	1 - 4
Answering Affidavits-Exhibits.....	5 - 7
Replying Affidavits.....	8 - 9

Upon the foregoing papers it is ordered that this motion is determined ass follows.

This is an action to foreclose a mortgage dated February 19, 2008 given by defendants, Wilner and Betty Renesca (mortgagors) to secure the repayment of a loan in the original principal amount of $278,1600.00 and encumbering real property known as 191-24 109th Ave., Saint Albans, NY 11412. The mortgagors failed to make the payment due under the note and mortgage on August 1, 2009 whereupon the plaintiff elected to accelerate the loan and commenced this action on February 6, 2014. The defendant, Diana was joined as a defendant in the action in her capacity as an

occupant of the premises. The defendants failed to answer the complaint or otherwise appear in the action. Defendants, although on notice by way of the court's letter dated March 28, 2014 also failed to appear for the residential foreclosure settlement conference on April 23, 2014.

On June 26, 2014 the plaintiff moved by Notice of Motion for appointment of a referee. The motion was submitted without opposition and an Order of Reference dated May 25, 2015 was entered on June 22, 2015.

The defendant, Diana, now moves to vacate her default in failing to appear in the action pursuant to CPLR 3211(a)(8) and CPLR 5015(a)(4), lack of personal jurisdiction on the grounds that she was not served with process. In the alternative, both Diana and Betty move pursuant to CPLR 5015(a)(1) move to vacate the Order of Reference and vacate their default in opposing the plaintiff's motion for an Order of Reference and for an extension of time to submit opposition to the motion.

When a defendant moves to vacate a default judgment and raises a jurisdictional objection pursuant to CPLR 3211(8) and CPLR 5015(a)(4) and, alternatively, seeks discretionary vacature pursuant to CPLR 5015(a)(1), the court must resolve the jurisdictional question before determining whether to grant a discretionary vacature of the default under CPLR 5015(a)(1) (see HSBC Bank USA, Nat. Ass'n v Miller, 121 AD3d 1044, 1045 [2014]; Canelas v Flores, 112 AD3d 871, 871 [2013]). In the absence of personal jurisdiction, a default judgment is a nullity (see Segway of New York, Inc. v Udit Group, Inc., 120 AD3d 789, 792 [2014]).

Regarding Diana's motion to vacate her default pursuant to CPLR 3211(a)(8) and CPLR 5015(a)(4) for lack of personal jurisdiction, a process server's affidavit of service constitutes prima facie evidence of proper service (see U.S. Bank N.A. v Hasan, 126 AD3d 683, 684 [2015]; Deutsche Bank Natl. Trust Co. v Quinones, 114 AD3d 719 [2014]).

The affidavit of service, avers that Diana was served pursuant to CPLR 308(1) on February 15, 2014 at the mortgaged premises, 191-24 109th Ave., Saint Albans, NY by delivering the summons and complaint and required notice to the defendant personally.

The affidavit of service with respect to the defendant, Betty, avers that defendant was served in accordance with CPLR 308(1) on February 15, 2014 at 192-55 Hollis Ave., Hollis NY. by

delivery of the summons and complaint and required notices to the defendant personally.

In support of her motion, Diana submitted her affidavit asserting that on the day of the alleged service she no longer resided at the premises having moved out in May, 2013 when she married. However, Diana has failed to submit any documentary evidence to support her conclusory claim that she no longer resided at the subject premises on the date of service so as to require a hearing (see Chichester v Alal-Amin Grocery & Halal Meat, 100 AD3d 820, 821 [2012]; Toyota Motor Credit Corp. v. Lam, 93 AD3d 713, 714 [2012]; U.S. Bank, N.A. v Arias, 85 AD3d 1014, 1016 [2011]).

In reply, plaintiff maintains that Diana was merely joined as an occupant of the premises. Thus, if she no longer resides at the premises, she is no longer a necessary party and plaintiff consents to the dismissal of the action as against Diana.

Accordingly, the branch of the defendants' motion to dismiss the complaint insofar as it is asserted as against Diana Renesca is granted.

A defendant seeking to vacate judgment entered upon her default pursuant to CPLR 5015(a)(1) must demonstrate both a reasonable excuse for the default in appearing and answering the complaint and a meritorious defense to the action (see; Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co., 67 NY2d 138, 141 [1986] ; Gray v B.R. Trucking Co., 59 NY2d 649 [1983]). A defendant seeking leave to interpose a late answer pursuant to CPLR 2004 and 3012(d) for leave to interpose a late answer, CPLR 3012(d) and CPLR 2004, must provide a reasonable excuse for the delay or default and demonstrate a potentially meritorious defense to the action (see HSBC Bank USA, N.A. v. Lafazan, 115 AD3d 647 [2014]; Community Preserv. Corp. v. Bridgewater Condominiums, LLC, 89 AD3d 784, 785 [2011]). The showing of reasonable excuse that a defendant must establish to be entitled to serve a late answer under CPLR 3012(d) is the same as that which a defendant must make to be entitled to the vacature of a default under CPLR 5015(a)(1) (see Stephan B. Gleich & Associates v Gritsipis, 87 AD3d 216 [2011]).

The defendant, Betty, has failed to demonstrate either a reasonable excuse for her default in appearing in the action or a meritorious defense.

In support of her motion, Betty, submitted her affidavit in which she does not assert lack of personal jurisdiction in that

she was not served with process as a reasonable excuse for her default in appearing in this action and failure to oppose the plaintiff's motion. Rather she asserts that in July, 2014 she retained an attorney to represent her in this action and she was unaware that counsel failed to appear and serve an answer on her behalf.

Defendant's claim that she relied on counsel to represent her interests, in effect, law office failure, may constitute a reasonable excuse for failure to answer the complaint under certain circumstances (see Roussodimou v Zafiriadis, 238 AD2d 568, 569 [1997]). In this case, however, Betty's time to answer or otherwise appear in this action expired on March 7, 2014, thus when she allegedly retained counsel in July, 2014, she was already in default in appearing in this action. Nor does such claim constitute a reasonable excuse for her failure to oppose the plaintiff's motion since the court records do not contain a notice of appearance and there is no evidence of a retainer agreement. The receipts of payments Betty made to an attorney merely indicate that she hired the attorney to review the file and to make a limited appearance for specific purposes.

Nor is her claim of having entered into a loan modification constitute a reasonable excuse for her default in answering the complaint since the alleged payments under the claimed modification were made in 2010 and 2011 before this action was commenced. Moreover, she also admitted that the loan modification was rejected by the bank since her former husband, who is a necessary party to any modification, refused to cooperate. Notwithstanding, the claim that defendant attempted to enter into a loan modification does not constitute reasonable excuse for her default (see Deutsche Bank Nat. Trust Co. v Gutierrez, 102 AD3d 825 [2013]).

Even if the court were to find that Betty established a reasonable excuse for her default, she has failed to allege much less demonstrate even an arguably meritorious defense to the action. A pending loan modification, if any, is not a meritorious defense to the foreclosure action as there is no guarantee the borrower will qualify for a loan modification. Moreover, a foreclosing plaintiff has no obligation to modify the terms of its loan before or after a default in payment as long as it has made a meaningful effort at reaching a resolution (see US Bank N.A. v Sarmiento, 121 AD3d 187[2014]; Wells Fargo Bank, N.A. v Van Dyke, 101 AD3d 638 [2012]).

Accordingly, the defendants' motion is granted only to the extent that the complaint, insofar as it is asserted against the

defendant, DIANA RENESCA is dismissed. The remainder of the defendants' motion is denied.

Dated: September 25, 2017
D# 56

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J.S.C.