Matter of HSBC Bank USA, N.A. v Treanor
2017 NY Slip Op 32746(U)
December 12, 2017
Supreme Court, Suffolk County
Docket Number: 11977/2012
Judge: Martha L. Luft
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[* 1]

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Short Form Order

Index No. 11977/2012

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - COUNTY OF SUFFOLK

PRESENT:
Hon. Martha L. Luft
Acting Justice Supreme Court

DECISION AND ORDER

HSBC BANK USA, NATIONAL ASSOCIATION AS TRUSTE FOR OMAC 2005-3,

Plaintiff,

-against-

JOHN TREANOR A/K/A JOHN V. TREANOR, CHRISTINA TREANOR, JP MORGAN CHASE BANK, NA, THE BOARD OF DIRECTORS OF FOX RIDGE OF HOLTSVILLE HOMEOWNER'S ASSOCIATION AND "JOHN DOE", said names being fictitious, it being the intention of the Plaintiff to designate any and all occupants of premises being foreclosed herein and any parties, corporations, or entities, if any, having or claiming an interest or lien upon the mortgaged premises,

Respondents.

Mot Seq. No. 004 - **MD**
Orig. Return Date: 12/02/2015
Mot. Submit Date: 01/12/2016

PLAINTIFF'S ATTORNEY
Richard N. Franco, Esq.
Shapiro, Dicaro & Barak LLC
175 Mile Crossing Boulevard
Rochester, NY 14624

DEFENDANTS' ATTORNEYS
Christopher Thompson, Esq.
Attorney for John & Christina Treanor
33 Davison Lane East
West Islip, NY 11795

Upon reading and filing of the following papers: (1) Notice of Motion dated November 20, 2015 and supporting papers by defendants John Treanor and Christina Treanor; (2) Affirmation in Opposition dated January 19, 2016 by plaintiff; (3) Reply Affirmation in Further Support of Order to Show Cause dated February 2, 2016; it is

ORDERED, that defendants' motion to vacate the judgment of foreclosure and sale dated August 28, 2015, to vacate the order of reference dated February 9, 2015, to dismiss the complaint or in the alternative, for leave to file a late answer, is denied; and it is further

ORDERED, that the stay of foreclosure and sale contained in the November 20, 2015 order (Garguilo, J.) is vacated.

BACKGROUND:

This is an action to foreclose on consolidated mortgage dated August 11, 2011 on premises located at 7 Summerfield Drive in Holtsville, New York to secure the sum of $717,007.49. The action was commenced on April 16, 2012. The defendants defaulted by failing to answer the summons and complaint. A notice of appearance by Justin Lite of the law firm of Lite and Russell PLLC was filed on behalf of the defendants on August 1, 2013, more than a year after defendants' default. No affidavit of service of the notice of appearance is appended to defendants' motion papers. Lite and Russell filed no papers in this action. No motion to vacate the default was made at any time until the instant motion was filed by new counsel in November, 2015.

Plaintiff moved for a default judgment and order of reference in October, 2013. That unopposed motion was withdrawn by plaintiff on November 11, 2013. Plaintiff again moved for a default and an order of reference in June, 2014. The unopposed motion was granted on December 5, 2014.

Plaintiff moved for a judgment of foreclosure and sale on July 14, 2015. The motion was granted without opposition on September 21, 2015. Lite and Russell assert that these motions were not served upon their office. Defendants, however, admit that all of these motion papers were served upon them. The record contains an affidavit of service of the judgment and notice of entry by mail upon Justin Lite, Esq. at the same address as is listed in the notice of appearance.

The plaintiff had brought an earlier foreclosure action in 2009 (***HSBC Bank USA v Treanor,*** Suffolk County Index No. 35207/2009) ("2009 Foreclosure Action"). The defendants did not appear or answer in that action, but did attend several settlement conferences. The plaintiff filed a notice of discontinuance on November 28, 2011 in conformance with CPLR 3217(a)(1). It appears that the 2009 Foreclosure Action was resolved by the consolidated mortgage dated August 11, 2011, which is the subject of the instant foreclosure action.

THE INSTANT MOTION

Defendants' instant motion was brought by order to show cause. A TRO was granted in November, 2015 staying the foreclosure sale pending the return date. The order to show cause indicates that the defendants' motion seeks, *inter alia*, to vacate the judgment of foreclosure and

sale and the order of reference, dismiss the complaint, or in the alternative, leave to file a late answer. No CPLR sections are referenced in the order to show cause or the requests for relief. There was no request for extension of the TRO beyond the return date which was adjourned to January 12, 2016.[1]

Defendants' motion is predicated upon the following allegations:(1) law office failure on the part of their attorney for failure to answer the complaint; (2) although defendants admit that they were served with the motion for a default and an order of reference, their attorney did not receive copies; (3) the 2009 foreclosure action was pending at the time the RPAPL 1304 notice was mailed, violating RPAPL 1301; (4) plaintiff's failure to comply with RPAPL 1304; (5) the referee's reliance upon inadmissable business records; (6) attorneys' fees not properly established by adequate record; (7) plaintiff's lack of standing; (8) plaintiff's violation of the Truth in Lending Act, RESPA and the NY General Business Law ("GBL").

DEFENDANTS' DEFAULT

The defendants argue law office failure on the part of their attorneys as a reasonable excuse for their default. The fatal flaw in this argument, however, is that counsel did not appear until more than a year after the defendants already had defaulted in or about May, 2012. Thus, defendants offer no excuse, much less a reasonable one, for their default.

In order to be granted vacatur of an order or judgment defendants must establish both prongs of the test for such relief under CPLR 5015(a)(1) and/or CPLR 3012(d); a reasonable excuse for the default and a potentially meritorious defense. ***Deutsche Bank Natl. Assoc. v Kudfip,136*** AD3d 969, 25 NYS3d 653[2d Dept 2016]; ***Citimortgage, Inc. v Kowalski***, 130 AD3d 558, 13 NYS3d 468 [2d Dept 2015]; ***Emigrant Bank v Wiseman***, 127 AD3d 1013, 6 NYS3d 670 [2d Dept 2015].

Here, defendants proffer no excuse whatsoever for their default by way of their failure to answer. ***JP Morgan Chase Bank, N.A. v Russo***, 121 AD3d 1048, 996 NYS2d 68, [2d Dept 2014]; ***Bank of N.Y. v Young***, 123 AD3d 1068, 2 NYS3d 127, [2d Dept 2014]). Law office failure should not be excused and accepted as a reasonable excuse for delay where there has been a long period of unexplained inaction, a failed strategy, or no detailed or credible explanation. ***Star Industries, Inc. v. Innovative Beverage, Inc.***, 55 AD3d 903, 866 NYS2d 357 [2d Dept 2008]; ***Wells Fargo Bank, N.A. v. Cervini***, 84 AD3d 789, 921 NYS2d 643 [2d Dept 2011]; ***Bank of NY Mellon v Colucci***, 138 AD3d 1047, 30 NYS3d 667 [2d Dept 2016]; ***US Bank Natl***

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[1]The affirmation in support indicates that the defendants also are seeking to reargue, although it does not specify the order which they seek to reargue. Since, however, there is no order which was served with notice of entry less than thirty days before the order to show cause, there is no basis for reargument. CPLR 2221(d)(3).

Assn v Barr, 139 AD3d 937, 30 NYS3d 576 [2d Dept 2016]).

Defendants' admit that they were served with the motion for a default and for the order of reference as well as the motion for a judgment of foreclosure and sale. The fact that their attorney did not receive copies does not constitute a reasonable excuse to vacate the default in answering which occurred years earlier. Since no affidavit of service is appended to the notice of appearance contained in defendants' instant motion papers it has not been established that plaintiff was on notice that defendant had counsel representing them. ***Mortgage Electronic Registration Systems, Inc. v. Lopez,*** 38 Misc3d 1219(A), 967 NYS2d 868, 2013 WL 440508, 2013 N.Y. Slip Op. 50154(U) [Sup Ct Queens Cty 2013]. Furthermore, the defendants apparently received these motion papers and neglected to contact their attorneys. "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity." ***Kihl v. Pfeffer***, 94 NY2d 118, 123, 700 NYS2d 87 [1999].

Since the defendants " have not demonstrat[ed] a reasonable excuse for [their] failure to answer the complaint, [the court] need not consider whether [they] sufficiently demonstrated the existence of a potentially meritorious defense." ***Paulus v. Christopher Vacirca, Inc***., 128 AD3d 116, 119, 6 NYS3d 572, 574 [2d Dept 2015], *citing*, ***Cervini v. Cisco General Const., Inc***., 123 AD3d 1077, 1 NYS3d 195 [2d Dept 2014]; ***Cavalry SPV I, LLC v. Frenkel,*** 119 AD3d 724, 725, 989 NYS2d 344 [2d Dept 2014] ***; Manufacturers and Traders Trust Co. v. Consolidated Const. Group, LLC***, 114 AD3d 834, 980 NYS2d 793 [2d Dept 2014]. Nevertheless, defendants' defenses either have been waived or lack merit. Thus, there is no basis for vacating defendants' default.

DEFENDANTS' DEFAULT WAIVED THEIR DEFENSES

The September, 2015 judgment of foreclosure and sale is final as to all issues between the parties, including all matters of defense that were or could have been litigated. ***Signature Bank v Epstein***, 95 AD3d 1199, 945 NYS2d 347 [2d Dept 2012]; ***Dupps v Betancourt***, 121 AD3d 746, 994 NYS2d 633[2d Dept 2014]). Even if defendants had raised a valid defense, "a party may not move for affirmative relief of a non-jurisdictional nature, without having vacated his or her default." ***HSBC Mtge. Corp. v. Morocho***, 106 AD3d 875,876, 965 NYS2d 570 [2d Dept 2013]; ***U.S. Bank Natl. Assn. v. Gonzalez***, 99 AD3d 694, 952 NYS2d 59 [2d Dept 2012]; ***Holubar v. Holubar***, 89 AD3d 802, 934 NYS2d 710 [2d Dept, 2011].

RPAPL 1304 Defense

Defendants who default in appearing in an action by failing to answer a complaint waive defenses predicated upon statutory notice requirements such as those imposed by RPAPL 1304. Defaulting defendants may not assert these defenses against a foreclosing plaintiff unless they first can establish reasonable excuse for their default. ***PHH Mort Corp. v. Celestin***, 130 AD3d 703, 11 NYS3d 871 [2d Dept 2015] ; ***Citimortgage v Baser***, 137 AD3d 735, 26 NYS3d 352 [2d

Dept 2016]; ***HSBC Mtge. Serv. v Talip***, 111 AD3d 889, 975 NYS2d 887 [2d Dept 2013]). This result is dictated by the non-jurisdictional nature of a defense premised upon noncompliance with statutory notice requirements. ***PHH Mtge. Corp. v Celestin, Id.*** ; ***Citimortgage v Baser, Id.***; ***Summitbridge Credit Inv., LLC v Wallace***, 128 AD3d 676, 9 NYS3d 320 [2d Dept 2015]; ***Pritchard v Curtis***, 101 AD3d 1502, 1504, 957 NYS2d 440 [3d Dept 2012]; ***Deutsche Bank Natl. Trust Co. v Posner***, 89 AD3d 674, 933 NYS2d 52 [2d Dept 2011].

As to the merits, the RPAPL notice was in all respects proper and was mailed in accordance with the legal requirements. ***HSBC Bank USA Nat'l Assoc v Ozcan***, 154 AD3d 822, 2017 WL 4657992 [2d Dept 2017].

Standing Defense

Where, as here, the defendants fail to answer the complaint and do not make a pre-answer motion to dismiss the complaint, they waive the defense of lack of standing. ***HSBC Bank USA, N.A. v Taher***, 104 AD3d 815, 962 NYS2d 3011 [2d Dept 2013]; ***Bank of NY v Alderazi*** 99 AD3d 837, 951 NYS2d 900 [2d Dept 2012].

As to the merits, it is clear from defendants' exhibits that the plaintiff has standing because the note was indorsed to the plaintiff and the plaintiff is in possession of the note. ***Loancare v. Firshing***, 130 AD3d 787, 14 NYS3d 410 [2d Dept 2015]. "Either a written assignment of the underlying note or the physical delivery of it to the plaintiff prior to the commencement of the action is sufficient to transfer the obligation." ***Wells Fargo Bank, NA v. Parker***, 125 AD3d 84, 85 NYS3d 130 [2d Dept 2015].

GBL 349 Defense

Aside from the waiver of this defense due to their default, defendants bare conclusory allegations are insufficient as a matter of law since there is no particularized allegation as to the manner in which the defendants were misled or of the deceptive practices in which the plaintiff is alleged to have engaged. ***Emigrant Mtge. Co., Inc. v. Fitzpatrick***, 95 A.D.3d 1169, 945 N.Y.S.2d 697 [2d Dept 2012]; ***Deutsche Bank Nat. Tr. Co. v. Holler***, 56 Misc. 3d 1214(A) [N.Y. Sup. Ct. 2017].

RESPA Defense

As to the merits of the RESPA claims, the alleged violations do not render the mortgage invalid. ***Deutsche Bank Nat'l Trust Co. V Campbell***, 26 Misc3d 1206A; 906 NYS2d 799 [Sup Ct Kings Cty 2009]; ***Deutsche Bank Nat. Tr. Co. v. Holler***, supra, 56 Misc. 3d 1214(A) [Sup Ct Suffolk Cty 2017]

Truth in Lending Act ("TILA") Defense

Defendants' allegations that the plaintiff violated TILA is insufficient as a matter of law since the defendants were required to bring such a claim within one year of "the occurrence of the violation." 15 USCA 1640(e).

THERE WAS NO VIOLATION OF RPAPL 1301

Defendants raise a potential jurisdictional defense claiming that the plaintiff could not serve the RPAPL 1304 notice in this action because the 2009 Foreclosure Action still was pending. They rely upon RPAPL 1301(3), which provides that while an action to recover a mortgage debt is pending a foreclosure action may not be commenced. Here, the RPAPL 1304 notice did not commence the action, but merely was a condition precedent. More important, the 2009 action was not one to recover a mortgage debt, but, rather, was an action to foreclose on the mortgage. In addition, the 2009 Foreclosure Action had been discontinued in November 2011, months before the instant action was commenced in April 2012.

The affirmation in support asserts that the defendants had appeared in the 2009 Foreclosure Action such that a court order was necessary to discontinue that action under CPLR 3217(b). Since no court order was issued, defendants contend that the 2009 Foreclosure Action still is pending. Contrary to this allegation, the docket sheet for the 2009 Foreclosure Action attached as an exhibit to the affirmation does not indicate that an answer had been filed, such that a notice of discontinuance was required to discontinue the 2009 Foreclosure Action.

CPLR 3217 provides, in relevant part, that "[a]ny party asserting a claim may discontinue it without an order ... by serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading is served or, if no responsive pleading is required, within twenty days after service of the pleading asserting the claim and filing the notice with proof of service with the clerk of the court." CPLR 3217[a][1]. Thus, the statute provides a plaintiff with "an 'absolute and unconditional' right to discontinue an action prior to the service of a responsive pleading." ***Harris v. Ward Greenberg Heller & Reidy LLP***, 151 AD3d 1808–09, 58 NYS3d 769, 770 [4th Dept 2017]. Since there is no record of a responsive pleading in the 2009 Foreclosure Action, a court order was not necessary to discontinue the action. Thus,there was no violation of RPAPL 3101.

THE REFEREE'S REPORT WAS ACCEPTABLE IN ALL RESPECTS

With regard to the affidavit of merit upon which the referee's report was partially based, it is noted that a defendant in a foreclosure waives the right to a referee hearing by defaulting on the motion for an order of reference. ***Id.*** *See also*, ***Bank of New York Mellon v. Frazier***, 54 Misc3d 1217(A), 54 NYS3d 609 [Sup Ct Orange Cty 2017]. Since the defendants defaulted, they had no right to challenge the referee's findings.

As to the merits, defendants argue that it was improper for the referee to rely upon the loan servicers' affidavit and business records. However, it is well settled that a loan servicer may testify as to payment defaults and other matters relevant to a foreclosing plaintiff's *prima facie* case on records it maintains in the regular course of business. ***PennyMac Holdings, LLC v. Tomanelli***, 139 AD3d 688, 32 NYS3d 181 [2d Dept.2016]; ***Deutsche Bank Natl. Trust Co. v. Naughton***, 137 AD3d 1199, 28 NYS3d 444 [2d Dept.2016]; ***Deutsche Bank Natl. Trust Co. v. Abdan***, 131 AD3d 1001, 16 NYS2d 459 [2d Dept.2015]; ***Wells Fargo Bank, N.A. v. Arias***, 121 AD3d 973, 995 NYS2d 118 [2d Dept.2014]. This includes records and materials generated by predecessors-in-interest. ***Deutsche Bank Natl. Trust Co. v. Monica***, 131 AD3d 737, 15 NYS3d 863 [3d Dept 2015]. Further, the defendants have made no specific allegations as to why the referee's report is deficient. ***Deutsche Bank Nat. Trust Co. v. Zlotoff***, 77 AD3d 702, 908 NYS2d 612 [2nd Dept 2010]. No referee hearing is required where a defendant "waives his or her right to notice of the hearing by admitting the default and the amount due in his or her answer or otherwise." ***LBV Prop. v. Greenport Dev. Co.***, 188 AD2d 588, 591 NYS2d 70 [2d Dept 1992]. A defendant in a foreclosure waives the right to a referee hearing by defaulting on the motion for an order of reference. ***Id.*** *See also*, ***Bank of New York Mellon v. Frazier***, 54 Misc3d 1217(A), 54 NYS3d 609 [Sup. Ct., Orange Cty. 2017].

Finally, defendants' assertion that the attorneys fees are not substantiated is belied by the detailed hourly records and the reduction in requested fees, which are reflected in the documents appended as exhibits to defendants' motion papers.

ENTER

Date: December 12, 2017
Riverhead, New York

MARTHA L. LUFT, A.J.S.C.