Short Form Order

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

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

INDEX NO.: 18506/13
MOTION DATE: 11/21/2017
MOTION SEQ. NO.: 002 MG
003 MD

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BANK OF AMERICA, N.A.,

Plaintiffs,

-against-

BRIAN JONATHAN WELGA, TARA WELGA, et.al,

Defendants.

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PLAINTIFF'S ATTORNEY:
SHAPIRO, DICARO & BARAK, LLC
175 MILE CROSSING BLVD.
ROCHESTER, NY 14624

DEFENDANTS' ATTORNEY:
LESTER & ASSOCIATES, P.C.
600 OLD COUNTRY RD., STE. 229
GARDEN CITY, NY 11530

Upon the following papers numbered 1 to 25 read on this motion : Notice of Motion/ Order to Show Cause and supporting papers 1-14 ; Notice of Cross Motion and supporting papers 15-21 ; Answering Affidavits and supporting papers 22-23 ; Replying Affidavits and supporting papers 24-25 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Bank of America, N.A., seeking an order: 1) granting a default judgment; 2) substituting U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust as the named party plaintiff in place and stead of Bank of America, N.A. and discontinuing the action against defendants designated as "John 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 defendants Brian Jonathan Welga and Tara Welga for an order dismissing plaintiff's complaint as abandoned pursuant to CPLR 3215(c) or, in the alternative, denying plaintiff's motion for an order of reference, 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 original sum of $224,250.00 executed by defendants Brian Jonathan Welga and Tara Welga on December 20, 2005 in favor of American Brokers Conduit. On the same date the Welga defendants executed a promissory note promising to re-pay the entire amount of the indebtedness to the lender. Defendants subsequently executed a loan

modification mortgage agreement dated August 2, 2010, creating a single lien in the sum of $223,310.11. The mortgage and note were later assigned to plaintiff and thereafter assigned to U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust on August 17, 2016. Plaintiff claims that the defendant defaulted in making timely monthly mortgage payments since June 1, 2011. Plaintiff commenced this action by filing the notice of pendency, summons and complaint on July 16, 2013 and served the summons and complaint on the defendants on July 29, 2013. Defendant Tara Welga was served by personal, in-hand service pursuant to CPLR 308(1) on July 26, 2013; defendant Brian Jonathan Welga was served by substituted service pursuant to CPLR 308(2) by service to defendant Tara Welga on July 26, 2013, and by follow-up mailing on July 29, 2013. Defendants defaulted in serving an answer. By Order (Gazzillo, J.) dated July 28, 2015 defendants' motion seeking to vacate their default and for leave to serve a late answer was denied.

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 mortgage lender. Defendants' (Welgas') cross motion seeks an order dismissing the complaint as abandoned or, in the alternative, denying plaintiff's motion. Defendants claim that the complaint must be dismissed based upon plaintiff's failure to timely seek a default judgment within one year of their default and argue that significant facts exist concerning plaintiff's failure to submit sufficient admissible proof to establish defendants' default; plaintiff's lack of standing; plaintiff's waiver of defendants' default in making payment; and plaintiff's failure to timely comply with RPAPL 1306 filing requirements.

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. Erobobo*, 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 promissory note to its complaint or to the certificate of merit as required pursuant to CPLR 3012(b), coupled with an affidavit/attorney affirmation which alleges that the mortgage lender had possession of the note prior to commencement of the action, constitutes sufficient proof of a plaintiff's standing (*JPMorgan Chase Bank, N.A. v. Weinberger*, 142 AD3d 643, 37 NYS3d 286 (2nd Dept., 2016); *FNMA v. Yakaputz II, Inc.*, 141 AD3d 506, 35 NYS3d 236 (2nd Dept., 2016); *Deutsche Bank National Trust Co. v. Leigh*, 137 AD3d 841, 28 NYS3d 86 (2nd Dept., 2016); *Nationstar Mortgage LLC v. Catizone*, 127 AD3d 1151, 9 NYS3d 315 (2nd Dept., 2015)).

CPLR 3215(c) provides that "if the plaintiff fails to take proceedings for the entry of judgment within one year after a default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion unless sufficient cause is shown why the complaint should not be dismissed." It is however not necessary for a plaintiff to actually obtain a default judgment within one year to avoid dismissal but rather it is enough that the plaintiff timely takes preliminary steps toward a default judgment by moving for an order of reference to establish that it initiated proceedings for entry of judgment (CPLR 3215(c); *Wells Fargo Bank, N.A. v. Combs*, 128 AD3d 812, 10 NYS3d 121 (2nd Dept., 2015)). "As long as proceedings are being taken which manifest an intent not to abandon the case but to seek a judgment, the action shall not be subject to dismissal" (*Brown v. Rosedale Nurseries*, 259 AD2d 256, 686 NYS2d 22 (1st Dept., 1999); *Aurora Loan Services, LLC v. Gross*, 139 AD3d 772, 32 NYS3d 249 (2nd Dept., 2016)). Where no motion is interposed within the one year time limitation period, a plaintiff is required to establish "sufficient cause" why the complaint should not be dismissed which requires a showing of a reasonable excuse for the delay and of a potentially meritorious cause of action (*see Wells Fargo Bank, N.A. v. Bonanno*, 146 AD3d 844, 45 NYS3d 173 (2nd Dept., 2017); *Maspeth Federal Savings & Loan Association v. Brooklyn Heritage, LLC*, 138 AD3d 793, 28 NYS3d 325 (2nd Dept., 2016); *Aurora Loan Services, LLC v. Hiyo*, 130 AD3d 763, 13 NYS3d 554 (2nd Dept., 2015); *Pipinias v. J. Sackaris & Sons, Inc.*, 116 AD3d 749, 983 NYS2d 587 (2nd Dept., 2014); *Giglio v. NTIMP, Inc.*, 86 AD3d 301, 926 NYS2d 546 (2nd Dept., 2011)). The determination of whether an excuse is reasonable in any given instance is committed to the discretion of the motion court (*HSBC Bank USA, N.A. v. Grella*, 145 AD3d 669, 44 NYS3d 56 (2nd Dept., 2016); *Maspeth Federal Savings & Loan Association v. Brooklyn Heritage, LLC, supra.*)). Delays attributable to the parties participation in mandatory settlement conferences or in litigation communications, discovery, motion practice and other pre-trial proceedings have been held to negate any intention to abandon the action and are excusable under CPLR 3215(c) (*HSBC Bank USA, N.A. v. Grella, supra.; Brooks v. Somerset Surgical Associates*, 106 AD3d 624, 966 NYS2d 65 (2nd Dept., 2013); *Laourdakis v. Torres*, 98 AD3d 892, 950 NYS2d 703 (1st Dept., 2012)).

With respect to defendants' cross motion seeking dismissal, the record shows defendants were served the summons and complaint by July 29, 2013 and thereafter defaulted in serving an answer. Eight court mandated CPLR 3408 settlement conferences were held beginning January 30, 2014 and ending on February 26, 2015. Court records indicate that defendants were represented by counsel during each conference. Upon the action being marked "not settled" and remanded to an IAS Part, defendants' motion (which had been held in abeyance pending settlement discussions) seeking an order vacating their default and for leave to serve a late answer was submitted on May 14, 2015 and was denied by Order (Gazzillo, J.) dated July 28, 2015. Court records also indicate that substitute counsel representing plaintiff was filed on March 24, 2016; that plaintiff filed an

additional lis pendens in the County Clerk's Office on May 24, 2016; that defendants' appeal of Acting Justice Gazzillo's Order dated July 28, 2015 was perfected on November 2, 2016; and that plaintiff's counsel served respondent's brief with the Appellate Division, Second Department on February 2, 2017. Based upon plaintiff's active and continuous participation in court proceedings related to this action there was clearly never an intent to abandon prosecution of this foreclosure action and therefore plaintiff has provided a reasonable excuse for the mortgage lender's delay in serving its default judgment motion which was served on August 3, 2017.

With respect to the defenses asserted by the defaulting defendants in opposition to plaintiff's motion, Acting Justice Gazzillo's July 28, 2015 Order made a specific legal determination that plaintiff had submitted proof which established the bank's standing to maintain this action, as the holder of the note at the time the action was commenced, and that all required pre-foreclosure notices were served upon the defendants in compliance with mortgage and statutory requirements, and that defendants conceded that they had received the loan proceeds and had defaulted in making payments due under the terms of the parties agreement. Such findings are the "law of the case" and defendants are therefore foreclosed from seeking to raise these defenses again in opposition to plaintiff's default judgment motion (*see Martin v. City of Cohoes,* 37 NY2d 162, 371 NYS2d 687 (1975); *J-Mar Service Center, Inc. v. Mahoney, Connor & Hussey,* 45 AD3d 809, 847 NYS2d 130 (2nd Dept., 2007); *Vanguard Tours, Inc. v Town of Yorktown,* 102 AD2d 868, 477 NYS2d 40 (2nd Dept., 1984); *Holloway v. Cha Laundry, Inc.,* 97 AD2sd 385, 467 NYS2d 834 (1st Dept., 1983)).

Moreover, even were the court to consider these proposed defenses again, none of the defenses raised in opposition to plaintiff's motion are meritorious since the defendants clearly waived their 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 FF1 2008-1 Trust v. Videjus,* 131 AD3d 1004, 17 NYS3d 54 (2nd Dept., 2015); *Southstar III, LLC v. Enttienne,* 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)). With respect to defendants' defense claims concerning plaintiff's alleged failure to serve and file mortgage and statutory pre-foreclosure notices, while 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)), a failure to comply with such provisions are not jurisdictional defects sufficient to provide independent grounds for 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 defendants failed to provide any reasonable excuse for their failure to timely serve an answer and the mere showing of an arguably meritorious defense (i.e. plaintiff's alleged failure to timely serve and/or file pre-foreclosure notices of default) is legally insufficient to provide grounds to set aside their 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, plaintiff

has submitted sufficient evidence to establish that these notices were timely served and filed.

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, the law of the case prevents the defendants from again attempting to raise this defense since the July 28, 2015 Order (Gazzillo, J.) specifically found that sufficient proof was submitted by the plaintiff to establish the defendants' default. However, even were this Court to re-address this issue, 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 June 1, 2011. As the Appellate Division, Second Department held in *Wells Fargo Bank, N.A. v. Thomas,* 150 AD3d 1312, 52 NYS3d 894 (2nd Dept., 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 defendants to submit relevant, evidentiary proof sufficiently substantive to raise genuine issues of fact concerning why the mortgage lender is not entitled to foreclose. Defendants have not submitted any evidence to contradict the fact that they have failed to make timely mortgage payments since June, 2011. Accordingly the plaintiff is entitled to an award of judgment. Defendants' cross motion is denied in its entirety 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: January 24, 2018

HON. HOWARD H. HECKMAN, JR.

J.S.C.