SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ *Justice* PART 13

BANK OF NEW YORK MELLON TRUST COMPANY, N.A., f/k/a THE BANK OF NEW YORK TRUST COMPANY, N.A., as Trustee for CHASE MORTGAGE FINANCE TRUST MULTI-CLASS MORTGAGE PASS-THROUGH CERTFICATES SERIES 2007-A1,

Plaintiffs,

-against-

RYAN NOHRENBERG, TOMOKO NOHRENBERG, NATIONAL CITY BANK, THE BOARD OF MANAGERS OF THE BRITANNIA CONDOMINIUM HOMEOWNERS ASSOCIATION, DEPARTMENT OF HOUSING PRESERVATION & DEVELOPMENT, EVEREST SCAFFOLDING INC., CITY OF NEW YORK ENVIRONMENTA CONTROL BOARD, CITY OF NEW YORK PARKING VIOLATIONS BUREAU, CITY OF NEW YORK TRANSIT ADJUDICATION BUREAU, STATE OF NEW YORK, JONATHAN AREND,

Defendants.

INDEX NO.	850312/13
MOTION DATE	03-07-18
MOTION SEQ. NO.	003
MOTION CAL. NO.	

The following papers, numbered 1 to 13 were read on this motion for a judgment of foreclosure and sale and cross-motion pursuant to CPLR §5015[a] and §317 to vacate the defendants default, CPLR §3025 amend answer, restoring this matter to the Settlement Conference Part and discharging the appointment of the Guardian Ad Litem:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits _____cross motion _____	5 - 8, 9 -10
Replying Affidavits _____	11 - 13

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiff's motion for a judgment of foreclosure and sale, is granted, plaintiff is directed to settled Order on notice. Defendants, Ryan Nohrenberg and Tomoko Nohenberg's cross-motion (A) pursuant to CPLR §5015 [a] and CPLR §317 to vacate their default; (B) vacating the prior Order entered November 21, 2016 that granted plaintiffs summary judgment and all orders subsequent pursuant to CPLR §5215[a] and CPLR §317 ; (C) permitting defendants to amend their Answer pursuant to CPLR §3025[b]; (D) restoring this matter to the Settlement Conference Part pursuant to CPLR §3408 and RPAPL §1304; and (E) discharging the appointment of the Guardian Ad Litem as unnecessary, is denied.

Plaintiff seeks to foreclose on a Consolidated Mortgage and note for $650,000.00 dated December 22, 2006 that was executed by defendants, Ryan Nohrenberg and Tomoko Nohenberg (hereinafter referred to as "defendants") to JPMorgan Chase Bank, N.A., for their condominium property located at 527 West 110th Street, Units 9 and 10 a/k/a 527 Cathedral Parkway Units 9 and 10, New York, New York, Section 7, Block 1882, Lot 1055/1056 (hereinafter referred to as the "property"). The Consolidated Mortgage consisted of, and modified, three mortgages for the property dated September 24, 2001, April 14, 2003 and December 22, 2006. The Consolidated Mortgage was recorded in the office of the City Register under CRFN 2007000100138 on February 7, 2007. The note and Consolidated Mortgage were transferred to The Bank of New York Mellon Trust Company, N.A. f/k/a The Bank of New York Trust Company, N.A. as trustee for Chase Mortgage Finance Trust Series 2007-A1 with an assignment of mortgage executed on February 10, 2010. The assignment of mortgage was recorded in the office of the City Register under CRFN 2010000063666 on February 24, 2010.

Plaintiff claim that on August 1, 2009 the defendants defaulted in making payments on the Consolidated Mortgage. A notice of default dated October 30,

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

2009 was sent from Chase Home Finance LLC, to the defendants at the property (NYSCEF Docket # 62). On April 30, 2012 plaintiff sent 90 day notices to the defendants at the property (NYSCEF Docket # 63). On October 18, 2013 plaintiff commenced this action and filed a Notice of Pendency (NYSEF Dockets # 1, 2, 64 and 65). Plaintiff alleges it is the holder of the note and Consolidated mortgage as demonstrated by the possession of the indorsed note prior to the commencement of this action (NYSCEF Docket # 61).

This Court's May 15, 2015 Decision and Order granted plaintiff's motion filed under Motion Sequence 001 on default to extend the time to serve the defendants by publication pursuant to CPLR §308[5] and §306-b. Defendants were served by publication in two New York daily newspapers. Michael Roberts, Esq. was appointed Guardian Ad Litem and Military Attorney for the defendants (NYSCEF Docket #45). Mr. Roberts served and filed an Answer on the defendants behalf on June 25, 2015 (NYSCEF Docket # 49). Plaintiff moved for summary judgment dismissing the defendants' Answer with prejudice under Motion Sequence 002. On November 29, 2016 plaintiff's motion for summary judgment filed under Motion Sequence 002 was granted on default (NYSEF Docket # 76).

Plaintiff's motion seeks a Judgment of Foreclosure and Sale granting the relief sought in the complaint.

Defendants oppose the motion and cross-move: (A) pursuant to CPLR §5015 [a] and CPLR §317 to vacate their default; (B) vacating the prior Order entered November 21, 2016 that granted plaintiffs summary judgment and all orders subsequent pursuant to CPLR §5215[a] and and CPLR §317; (C) permitting defendants to amend their Answer pursuant to CPLR §3025[b]; (D) restoring this matter to the Settlement Conference Part pursuant to CPLR §3408 and RPAPL §1304; and (E) discharging the appointment of the Guardian Ad Litem as unnecessary.

Pursuant to CPLR §317, a party served with the summons and complaint in a manner other than personal delivery or an agent designated for service , may vacate the default within one year of learning of the judgment, upon demonstrating that they lack notice and have a meritorious defense (Eugene Di Lorenzo, Inc. v. A.C. Dutton Lumber Co., Inc., 67 N.Y. 2d 138, 492 N.E. 2d 116, 501 N.Y.S 2d 8 [1986] and PHH Mortg. Corp. v. Muricy, 135 A.D. 3d 725, 24 N.Y.S. 3d 137 [2nd Dept., 2016]). A defendant is not entitled to CPLR §317 relief where the failure to obtain service or notice of the action was deliberate. A conclusory denial of receipt is insufficient to raise an issue of fact for purposes of vacating a judgment (HSBC Bank USA v. Desrouilleres, 128 A.D. 3d 1013, 11 N.Y.S. 3d 93 [2nd Dept. 2015] and Pina v. Jobar U.S.A. LLC, 104 A.D. 3d 544, 961 N.Y.S. 2d 150 [1st Dept., 2013]).

Defendants failed to show lack of notice of this foreclosure action or provide a reasonable excuse for the default in appearance. Debra Ali, plaintiff's process server, states in her affidavit that not long after the commencement of this action, on December 2, 2013, Tomoko Nohrenberg was contacted by telephone through her business. Debra Ali states that Tomoko Nohrenberg advised that she and Ryan Nohrenberg were in Japan and not planning to return to the United States anytime soon. Debra Ali also states that on December 3, 2013, Ryan Nohrenberg called the process server through a blocked telephone number, stated that he did not have an attorney in the United States, only in Japan, and refused to provide the attorney's contact information. Ryan Nohrenberg told the process server that the "documents that need to be delivered to him" in this action, which would include the summons and complaint, have to be delivered through "the Minato-Ku ward office in Japan and be translated into Japanese." The process server was unable to contact the defendants again (NYSCEF Docket #37).

On October 20, 2015, before plaintiff obtained summary judgment, Mr. Roberts submitted an Amended Report of Guardian Ad Litem and Military Attorney. At paragraph 10 of his affidavit, Michael Roberts states, "I contacted Ryan and explained to him that a foreclosure proceeding had been brought against him and Tomoko. And I was the the Guardian Ad Litem appointed to protect his interest." Mr. Roberts discussed with Ryan Nohrenberg the possibility

of selling the property or waiver of interest and permitting the bank to enter a judgment of foreclosure, but eventually lost contact and heard nothing further from the defendants. He reached the conclusion that the defendants are making a new life in Japan and have no interest in the New York residence they had occupied (NYSCEF Docket # 69).

Ryan Nohrenberg's affidavits stating that he was never served with notice or aware of the commencement of a foreclosure action are contradicted by the affidavit of the Process Server and the Amended Report of the Guardian Ad Litem and Military Attorney. The notice of default dated October 30, 2009 was sent to the defendants at the property, as was the 90 day notices that were sent to the property on April 30, 2012 (NYSCEF Docket # 62 and # 63). Any alleged lack of notice is the result of the defendants' deliberate actions. Defendants argument that the plaintiff was required to find out their address and serve of 90 day notice and any other notice on them in Japan prior to commencement of this action is unsupported and does not establish entitlement to CPLR §317 relief.

CPLR §5015[a] allows the court to vacate a default judgment where the defendant asserts a reasonable excuse for the default and raises a potentially meritorious defense (Caba v. Rai, 63 A.D. 3d 578, 882 N.Y.S. 2d 56 [1st Dept., 2009]). The Court in its discretion determines the sufficiency of the excuse proffered for the delay and the adequacy of the alleged meritorious defense (Gecaj v Gjonaj Realty & Management Corp., 149 A.D.3d 600, 51 N.Y.S. 3d 74 [1st Dept., 2017]). Vacatur pursuant to CPLR § 5015[a] is not appropriate absent a reasonable excuse for the default, regardless of whether the defendant has a meritorious defense (U.S. Bank Nat. Ass'n v. Brown, 147 A.D. 3d 428, 46 N.Y.S. 3d 107 [1st Dept., 2017] and Citibank, N.A. v. K.L.P. Sportswear, Inc., 144 A.D. 3d 475, 41 N.Y.S. 3d 29 [1st Dept., 2016]).

Defendants have not stated a reasonable excuse for their default in appearing to and oppose the motion for summary judgment under Motion Sequence 002. Ryan Nohrenberg's affidavit stating that he believed Mr. Roberts "was a real estate agent trying to get me to sell our apartment" is unsupported and fails to provide a reasonable excuse for not attempting to make arrangements to verify whether in fact the defendants were in default or that a foreclosure action was pending against them. There is no need to address the alleged meritorious defenses and plaintiff's arguments that the Guardian Ad Litem's failure to raise them in the answer resulted in waiver. In any event, defendants provide no proof in support of Mr. Nohrenberg's alleged belief that "I was current with this loan up until at least 2012," further warranting denial of the CPLR §5015[a] relief.

Defendants have not shown that service of the notice was defective pursuant to RPAPL §1304. The plaintiff's notice was sent to the property which was plaintiff's last know residence for the defendants. There is no proof that plaintiff or JPMorgan Chase Bank, N.A. had notice of their move to Japan, or that the plaintiff was required to find the proper address in Japan for purposes of serving notice, warranting denial of the RPAPL §1304 relief.

Defendants have also not shown that plaintiff lacked standing in this foreclosure action. An affidavit stating the date the note was physically delivered prior to commencement of the action, with a copy of the endorsed original note, the mortgage, and evidence of the defendant's default is sufficient to state a claim in a foreclosure action. A statement of the manner in which possession of the note was obtained provides clarity, but is not necessary (Aurora Loan Servs. LLC v. Taylor, 25 N.Y. 3d 355, pgs. 366-367, 34 N.E. 3d 363,12 N.Y.S. 3d 612 [2015]). Plaintiff attached a copy of the original endorsed note, the mortgage and evidence of default, which is sufficient to establish standing to commence this action.

Leave to amend pleadings pursuant to CPLR § 3025[b] should be freely given "absent prejudice or surprise resulting directly from the delay" (Anoun v. City of New York, 85 A.D.3d 694, 926 N.Y.S.2d 98 [1st Dept., 2011] citing to, Fahey v. County of Ontario, 44 N.Y.2d 934, 935, 408 N.Y.S.2d 314, 380 N.E.2d 146 [1978]), "or if the proposed amendment is palpably improper or insufficient as a matter of law" (McGhee v. Odell, 96

A.D.3d 449, 450, 946 N.Y.S.2d 134 [1st. Dept., 2012]). Leave to amend the answer should not be granted where the proposed amendments are not sufficient to defeat plaintiff's action (Blueberry Investors Co. V. Ilana Realty, 184 A.D. 2d 906, 585 N.Y.S. 2d 564 [3rd Dept.,1992]).

Defendants are seeking to amend the answer submitted on their behalf by the Guardian Ad Litem after it was stricken and plaintiff was granted summary judgment under Motion Sequence 002. Defendants having failed to state a basis to vacate their default on the summary judgment motion, have not shown that their answer should be restored and then amended pursuant to CPLR § 3025[b]. Defendants have also not shown that the proposed amendments to the answer would be able to defeat the claims asserted in the complaint warranting denial of the relief.

Defendant is not entitled to CPLR §3408 relief referring this case back to the Foreclosure Conference Part for settlement negotiations. The parties were only required to enter into good faith negotiations, which was done with the Guardian Ad Litem on behalf of the defendants. There is no need to obtain mutually agreeable resolution. The Court may not force an agreement on the parties (Citibank, N.A. v. Barclay, 124 A.D. 3d 174, 999 N.Y.S. 2d 375 [1st Dept. 2014]).

Plaintiff is entitled to a judgment of foreclosure and sale. The Guardian Ad Litem is no longer required to provide any services and there is no need for the remainder of the relief sought by the defendants on this motion to vacate their default.

Accordingly, it is ORDERED that plaintiff's motion for a judgment of foreclosure and sale, is granted, and it is further,

ORDERED, that plaintiff is directed to settle order on notice by serving upon the defendants and the General Clerk's Office (Room 119 - Order Section) a copy of the settled order together with a copy of this Order with Notice of Entry, and it is further,

ORDERED that defendants, Ryan Nohrenberg and Tomoko Nohrenberg's cross-motion (A) pursuant to CPLR §5015 [a] and CPLR §317 to vacate their default; (B) vacating the prior Order entered November 21, 2016 that granted plaintiffs summary judgment and all orders subsequent pursuant to CPLR §5215[a] and CPLR §317 ; (C) permitting defendants to amend their Answer pursuant to CPLR §3025[b]; (D) restoring this matter to the Settlement Conference Part pursuant to CPLR §3408 and RPAPL §1304; and (E) discharging the appointment of the Guardian Ad Litem as unnecessary, is denied.

ENTER:

MANUEL J. MENDEZ,
J.S.C.

Dated: March 14, 2018

MANUEL J. MENDEZ
J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE