Freemont Inv. & Loan v Gramse
2018 NY Slip Op 30572(U)
March 22, 2018
Supreme Court, Suffolk County
Docket Number: 19019-2008
Judge: C. Randall Hinrichs

SHORT FORM ORDER INDEX NO. 19019-2008

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 49 SUFFOLK COUNTY

PRESENT: HON. C. RANDALL HINRICHS
Justice of the Supreme Court

Motion Date: 007: 6/29/2016; 008: 9/28/2016
Adjourned Date: 10/13/2016
Motion Sequence: 007: MG; 008: MD

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FREEMONT INVESTMENT AND LOAN,

Plaintiff,

-against-

MICHAEL GRAMSE, MICHELE A. LAEZZA GRAMSE a/k/a MICHELE LAEZZA a/k/a MICHELE GRAMSE,

Defendants.

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Upon consideration of the notice of motion to confirm and ratify the referee's report, substitute plaintiff and for judgment of foreclosure and sale in favor of plaintiff ["the plaintiff"], the supporting affirmation, affidavit, and exhibits by plaintiff dated October 13, 2016 (Mot. Seq. 007); and the cross motion and attorney affirmation in opposition submitted on behalf of the defendants Michael and Michele Gramse ["the defendants Gramse"] dated October 13, 2016 (Mot. Seq. 008), it is

ORDERED that the plaintiff's motion to confirm and ratify the referee's report and for judgment of foreclosure and sale (007) is granted; and it is further

ORDERED that the plaintiff is substituted and the caption is hereby amended substituting Deutsche Bank National Trust Company as Trustee for GSAMP Trust 2006-FM3 Mortgage Pass-Through Certificates, Series 2006-FM3 as plaintiff in place of Fremont Investment and Loan; and its is further

ORDERED that the caption of this action hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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DEUTSCHE BANK NATIONAL TRUST COMPANY AS TRUSTEE FOR GSAMP TRUST 2006-FM3 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-FM3,

Index Number: 19019-2008

Plaintiff,

- against -

MICHAEL GRAMSE, MICHELE A. LAEZZA GRAMSE a/k/a MICHELE LAEZZA a/k/a MICHELE GRAMSE,

Defendants.

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ORDERED that cross-motion by defendants Gramse for an order 1) dismissing the action against the defendants Gramse for failure to prosecute pursuant to CPLR § 3215(c) and for lack of personal jurisdiction pursuant to CPLR 3211(a)(8); or in the alternative, 2) vacating the Order of Reference dated August 13, 2009 pursuant to CPLR 5015 and granting defendant leave to file a late answer pursuant to CPLR §§ 3012(d) and 2004; 3) restoring the matter to the Foreclosure Conference Part; 4) tolling interest accrued between 2009 and 2016 and 5) various other relief (008) is denied in its entirety; and it is further

ORDERED that plaintiff is directed to submit a proposed order of Judgment of Foreclosure and Sale to this Court; and it is further

ORDERED that plaintiff is directed to serve a copy of this order upon the Calendar Clerk of this Court and all defendants.

This is an action to foreclose a mortgage on real property located at 120 Norman Avenue, Amityville, New York, Suffolk County ["the subject premises"] commenced on May 21, 2008. Justice Jeffery Arlen Spinner granted plaintiff a default judgment and an Order of Reference by his order dated August 13, 2009. On January 25, 2010, plaintiff moved for Judgment of Foreclosure and Sale which was subsequently withdrawn to allow the parties the opportunity to participate in a foreclosure settlement conference. In January 2012, new plaintiff's counsel was substituted into the action. A settlement conference was held but on February 26, 2012 the matter was dismissed pursuant to order of Justice Spinner for failure to follow court directive to resume prosecution of the instant action. On August 20, 2013, plaintiff moved to substitute a referee, but plaintiff's motion was denied as the action had already been dismissed. On April 28, 2014, plaintiff moved to vacate the dismissal, restore the matter to the calendar and appoint a substitute referee. Though its initial motion to vacate was denied, Justice Spinner ultimately granted plaintiff's subsequent motion to vacate the dismissal, restore the matter to the calender and appoint a substitute a referee via unopposed long form order dated April 3, 2015.

Plaintiff now moves to confirm and ratify the referee's report, for a Judgment of Foreclosure and Sale in favor of plaintiff and to substitute Deutsche Bank National Trust Company as Trustee for GSAMP Trust 2006-FM3 Mortgage Pass-Through Certificates, Series 2006-FM3 as plaintiff in place of Fremont Investment and Loan. Defendants Gramse cross move to dismiss the action for failure of plaintiff to prosecute action pursuant to CPLR 3215 (c) and/or lack of personal jurisdiction over the defendants. In the alternative, plaintiff also moves to vacate the Order of Reference dated August 13, 2009 pursuant to CPLR § 5015 and grant defendant leave to file a late answer pursuant to CPLR §§ 3012(d) and 2004. Additionally, defendants Gramse request additional relief and allege several affirmative defenses including lack of standing.

CPLR § 3215 (c) provides, in pertinent part, that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the 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" (*see, Aurora Loan Servs., LLC v. Hiyo*, 130 A.D.3d 763, 763–64, 13 NYS3d 554 [2d Dept 2015]). "The language of CPLR § 3215 (c) is not, in the first instance, discretionary, but mandatory, inasmuch as courts 'shall' dismiss claims for which default judgments are not sought within the requisite one-year period, as those claims are then

deemed abandoned" (*see*, *Pipinias v J. Sackaris & Sons, Inc.*, 116 AD3d 749, 983 NYS2d 587 [2d Dept 2014] *quoting Giglio v NTIMP, Inc.*, 86 AD3d 301, 307-308, 926 NYS2d 546 [2d Dept 2011]). The defendant here is in default. Both parties concede that plaintiff moved for an Order of Reference on July 3, 2008, less that 60 days after filing the complaint. By order of Judge Spinner dated February 27, 2009, the plaintiff's initial motion was denied with leave to re-file with the appropriate affidavit of merit and required documentation. The plaintiff submitted its second motion for Order of Reference just under seven months latter on August 4, 2009. Here, it undisputed that an application was made or other proceedings undertaken by the plaintiff for the entry of a default judgment within the one year time period imposed by CPLR § 3215(c), the plaintiff did not abandon the action (*Klein v. St. Cyprian Properties, Inc.*, 100 A.D.3d 711, 712 [2d Dept. 2012][when plaintiff took the preliminary step toward obtaining a default judgment by moving for an Order of Reference within one year of the defendant's default he did not abandon the action]. The record clearly indicates that the plaintiff took steps toward an entry of judgment within a year of the defendants' default, thus defendants' motion to dismiss pursuant to CPLR § 3215(c) is denied.

As for the branches of defendants Gramse's cross motion arguing the jurisdictional defense of lack of personal jurisdiction by which the defendants move to dismiss the summons and complaint, or in the alternative, grant defendants leave to file late answer, both requests are denied as defendants failed to provide sufficient facts by which to controvert plaintiff's prima fascia evidence of sufficient service.

It is well settled that a defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action when moving to extend the time to answer or to compel the acceptance of an untimely answer (*see Maspeth Fed. Sav. & Loan Assn. v McGown*, 77 AD3d 890 [2d Dept 2010]; *Midfirst Bank v Al–Rahman*, 81 AD3d 797 [2d Dept 2011]; *Karalis v New Dimensions HR, Inc.*, 105 AD3d 707 [2d Dept 2013]). This standard governs applications made both prior and subsequent to a formal fixing of a default on the part of the defendants by the court (*see Bank of New York v Espejo*, 92 AD3d 707 [2d Dept 2012]). The determination as to what constitutes a reasonable excuse lies within the sound discretion of the trial court (*see Segovia v Delcon Constr. Corp.*, 43 AD3d 1143 [2d Dept 2007]; *Matter of Gambardella v Ortov Light.*, 278 AD2d 494 [2d Dept 2000]).

A process server's sworn affidavit of service constitutes prima facie evidence of proper service (see *ACT Prop., LLC v Ana Garcia*, 102 AD3d 712 [2d Dept 2013]; *Deutsche Bank Natl. Trust Co. v Pietranico*, 102 AD3d 724 [2d Dept 2013]). A defendant can rebut the process server's affidavit by a sworn denial of service in an affidavit containing specific and detailed contradictions of the allegations in the process server's affidavit (see *Bank of N.Y. v Espejo, supra; Bankers Trust Co. of California, NA v Tsoukas*, 303 AD2d 343 [2d Dept 2003]). Bare conclusory and unsubstantiated denials of receipt of process are insufficient to rebut the presumption of proper service created by the affidavit of the plaintiff's process server and to require a traverse hearing (see *U.S. Bank Natl. Assn. v Tate*, 102 AD3d 859 [2d Dept 2013]; *Irwin Mtge. Corp. v Devis*, 72 AD3d 743 [2d Dept 2010]). A defendant who fails to swear to specific facts to rebut the statements in the process server's affidavits is not entitled to a hearing on the issue of service (see *Chichester v Alal–Amin Grocery & Halal Meat*, 100 AD3d 820 [2d Dept 2012]; *US Natl. Bank Assoc. v Melton*, 90 AD3d 742 [2d Dept 2011]).

Here, the process server's affidavit provides sufficient prima fascia evidence that both defendants Gramse were served pursuant to CPLR § 308(1) and (2) as specified in the process server affidavits. Defendant Michael Gramse was served with the summons and complaint through substitute service of a person of suitable age and discretion pursuant to CPLR § 308(2). The process server's affidavit specifies that he served defendant Michael Gramse by serving a receptionist at defendant's place of business located at 317 Broadway, Amityville, New York. In addition, plaintiff provides a second affidavit of service by mailing to defendant Michael Grames at the same business address. Plaintiff's affidavits of service provide sufficient information to constitute prima fascia evidence of service of defendant Michael Grames (see, *Vid v. Kaufman*, 282 A.D.2d 739,[2d Dept. 2001][process was properly served to address which defendant held out as his actual place of business, even though he had in fact retired and sold his interest in practice prior to service]; *Edan v. Johnson*, 117 A.D.3d 528 [1st Dept. 2014][estate properly effected service upon the doctor by leaving summons and complaint with a receptionist]. Defendant Michael Gramse seeks to rebut the plainitiff's prima facia showing by stating he did not receive service and that he had recently moved from 317 Broadway, Amityville. In his affidivit, defendant Grames states that the location of service was no longer his business address and that "we had recently moved." He further avers that the person named in the process server's affidavit as accepting service on his behalf at his place of business, did not work for him. Yet he provides no specific facts regarding the new address of his place of business, his employees or evidence that he had actually moved. Defendant's denials are no more than conclusory statements that are not supported by any specific facts.

Similarly, the plaintiff's affidavit of service has established prima fascia evidence that defendant Michele Gramse was properly served at the subject property pursuant to CPLR 308(1). She attempts to rebut her service at the subject property pursuant to CPLR 308(1) though unsupported conclusory statements. She avers that she did not receive a copy of the summons and complaint and that the process server's affidavit is a "complete fabrication." She does not provide any facts that controvert the process server's affidavit.

Neither defendant Gramses' affidavits supply specific contradictions of facts which would call in to questions facts provided in the process servers' affidavits of service. The court is thus left with only the unsubstantiated and conclusory denials of service and/or receipt of any papers in this action that are advanced in the affidavits of the defendants on their cross motion. As indicated above, such denials are insufficient to rebut the prima facie showing of proper service created by the process servers' affidavits. Under these circumstances, the court finds that neither Gramse defendant provide sufficient information to controvert plaintiff's prima facia showing of the service within the dictates of CPLR 308(1) and (2). Accordingly, those portions of defendants' motion seeking to vacate their default due to a lack of personal jurisdiction, and thereby for dismissal of the complaint are denied.

A party may not move for affirmative relief of a non-jurisdictional nature, such as dismissal of a complaint without moving to vacate his or her default (*see HSBC Mtge. Corp. V. Morocho,* 106 AD3d 875, [2d Dept 2013]; *U.S. Bank Natl. Assn. V. Gonzalez,* 99 AD3d 694 [2d Dept 2012]; *Deutsche Bank Trust Co., Am. V. Stathaklis,* 90 AD3d 694 [2d Dept 2011]; *Holubar v. Holubar,* 89 AD3d 802 [2d Dept, 2011]).

Initially addressing defendant Gramse's cross motion, a defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action when moving to extend the time to answer or to compel the acceptance of an untimely answer (see *Maspeth Fed. Sav. & Loan Assn. v McGown*, 77 AD3d 890 [2d Dept 2010], quoting *Lipp v Port Auth. of N.Y. & NJ*, 34 AD3d 649 [2d Dept 2006]; see also *Karalis v New Dimensions HR, Inc.*, 105 AD3d 707 [2d Dept 2013]; *Midfirst Bank v Al–Rahman*, 81 AD3d 797[2d Dept 2011]; *Swedbank, AB v Hale Ave. Borrower, LLC*, 89 AD3d 922 [2d Dept 2011]). This standard governs applications made both prior and subsequent to a formal fixing of a default on the part of the defendants by the court (see *Bank of New York v Espejo*, 92 AD3d 707 [2d Dept 2012]; *Integon Natl. Ins. Co. v. Norterile*, 88 AD3d 654 [2d Dept 2011]; Ennis v Lema, 305 AD2d 632 [2d Dept 2003]). The determination as to what constitutes a reasonable excuse lies within the sound discretion of the trial court (see *Tuthill Finance, L.P. v Ujueta*, 102 AD3d 765 [2d Dept 2013], quoting *Segovia v Delcon Constr. Corp.*, 43 AD3d 1143 [2d Dept 2007]).

Here, defendant Gramse's papers fail to provide a reasonable excuse for the lengthy default that occurred almost eight years ago. Defendants' reliance upon settlement negotiations are insufficient as a reasonable excuse for her failure to serve an answer in this action (see *Community Preserv. Corp. v Bridgewater Condos., LLC*, 89 AD3d 784 [2d Dept 2011]; *Bank of N.Y. Mellon v Izmirligil*, 88 AD3d 930 [2d Dept 2011]; *Maspeth Fed. Sav. & Loan Assn. v McGown*, 77 AD3d 889 [2d Dept 2010]; *Emigrant Bank v Wiseman*, _AD3d_, 2015 NY Slip Op 03316 [2d Dept 2015]). The failure to advance a reasonable excuse warrants a denial of the defendants Gramse's cross motion (see *HSBC Mtge. Corp. v Morocho*, 106 AD3d 875 [2d Dept 2013]). Furthermore, "[w]hen a default results not from an isolated inadvertent mistake, but from repeated neglect . . there is no requirement that the court grant the requested relief" (see *Gutman v A to Z Holding Corp.*, 91 AD3d 718 [2d Dept 2012], quoting *Chery v Anthony*, 156 AD2d 414 [2d Dept 1989]). As previously noted, defendants' application for leave to file a late answer was filed more than eight years from the date this action was commenced. During that period, they demonstrated a pattern of neglect of the action by not moving to timely vacate their default while the case procedurally advanced from the settlement stage, to the filing of the Order of Reference, through several motions to vacate prior dismissals and now for the instant application for a Judgment of Foreclosure and Sale.

As the court concludes that defendants Gramse do not have a reasonable excuse for defaulting in the action, it is unnecessary to address whether they have a meritorious defense (see *Deutsche Bank Natl. Trust Co. v Pietranico*, 102 AD3d 724 [2d Dept 2013], citing *U.S. Bank N.A. v Stewart*, 97 AD3d 740 [2d Dept 2012]; *Reich v Redley*, 96 AD3d 1038 [2d Dept 2012]).

Furthermore, that defendants waived standing as a defense by failing to interpose an answer; and, that defendants' default should not be vacated as they have failed to demonstrate a meritorious defense and an excusable default.

The remaining portions of defendants' cross motion are also denied. A defendant seeking to vacate his or her default and leave to participate in the action upon the vacatur of the default by service of an answer under CPLR 5015(a)(1), 317 or 3012 must provide a reasonable excuse for the default and

show a potentially meritorious defense (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr., Co.*, 67 NY2d 138 [1986]; *ACT Prop., LLC v Ana Garcia*, 102 AD3d 712; *Deutsche Bank Natl. Trust Co. v Gutierrez*, 102 AD3d 825 [2d Dept 2013]). Where the only excuse offered is the defendants' unsuccessful claim that they were not served with process, a reasonable excuse is not established (*see ACT Prop., LLC v Ana Garcia*, 102 AD3d 712; *Deutsche Bank Natl. Trust Co. v Pietranico*, 102 AD3d 724; *Indymac Fed. Bank FSB v Quattrochi*, 99 AD3d 763 [2d Dept 2012]). As defendants offered no excuse for their default in answering other than their unsuccessful claim of a lack of or defects in service, the court need not address whether the defendants have a meritorious defense (*see Deutsche Bank Natl. Trust Co. v Gutierrez*, 102 AD3d 825; *Deutsche Bank Natl. Trust Co. v Pietranico*, 102 AD3d 724; *Wells Fargo Bank, N.A. v Russell*, 101 AD3d 860 [2d Dept 2012]; *HSBC Bank USA, N.A. v Rotimi*, 121 AD3d 855 [2d Dept 2014] ; *U. S. National Bank v Sachdev*, _AD3d_ , 2015 N.Y. Slip Op 04118 [2d Dept 2015]).

The court has considered the defendants' remaining contentions and finds them to be without merit.

DATED: March 22, 2018

C. RANDALL HINRICHS, JSC
J.S.C.

[✓] **FINAL DISPOSITION** [ ] **NON-FINAL DISPOSITION**