Green Tree Servicing LLC v Lindauer
2018 NY Slip Op 30828(U)
May 2, 2018
Supreme Court, Suffolk County
Docket Number: 38168/2010
Judge: Howard H. Heckman
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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.: 38168/2010
MOTION DATE: 04/27/2017
MOTION SEQ. NO.: #002 MG
#003 MD
CASE DISP

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GREEN TREE SERVICING LLC,

Plaintiff,

-against-

CHRISTOPHER LINDAUER A/K/A CHRISTOPHER M. LINDAUER, BLAKE WORSTER, et.al.,

Defendants.

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PLAINTIFF'S ATTORNEY:
BERKMAN, HENOCH, PETERSON, PEDDY & FENCHEL, P.C.
100 GARDEN CITY PLAZA
GARDEN CITY, NY 11530

DEFENDANT'S ATTORNEY:
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WEST ISLIP, NY 11795

Upon the following papers numbered 1 to 31 read on this motion ; Notice of Motion/ Order to Show Cause and supporting papers 1- 11 (#002) ; Notice of Cross Motion and supporting papers 12-28 (#003) ; Answering Affidavits and supporting papers 29-31 ; Replying Affidavits and supporting papers ____; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Green Tree Servicing LLC, seeking an order confirming the referee's report dated November 10, 2016 and granting a judgment of foreclosure and sale is granted; and it is further

ORDERED that the cross motion by defendant Blake Worster seeking an order pursuant to CPLR 317, 3012(d), 3211(a)(8), 3215(c), 3408 & 5015(a)(1)&(4) & RPAPL 1304: 1) denying plaintiff's motion and dismissing the complaint; or, in the alternative 2) vacating the Order (Farneti, J.) dated June 7, 2016 granting plaintiff's motion for a default judgment and the appointment of a referee: 3) vacating defendant's default in appearing and granting defendant leave to serve a late answer; 4) rejecting confirmation of the referee's report; and 5) remanding this action to the foreclosure settlement part for additional settlement conferences is denied.

Plaintiff's action seeks to foreclose a mortgage in the original sum of $246,400.00 executed by the defendants Christopher Lindauer and Blake Worster on February 21, 2006 in favor of U.S. Mortgage Corp. On that same date both defendants executed a promissory note promising to re-pay the entire amount of the indebtedness to the mortgage lender. The mortgage and note were subsequently assigned to the plaintiff. Plaintiff claims that the defendants have defaulted in making timely monthly mortgage payments beginning April 1, 2010 and continuing to date. Plaintiff commenced this action by filing a notice of pendency, summons and complaint in the Suffolk County Clerk's Office on October 18, 2010. Defendant Worster was served with the summons and complaint at the mortgaged premises on October 18, 2010 by substituted service pursuant to CPLR

308(2). Defendants defaulted in serving an answer. Plaintiff's unopposed motion seeking an order granting a default judgment and for the appointment of a referee was granted by Order (Farneti, J.) dated June 7, 2016.

Plaintiff's motion seeks an order confirming the referee's report and granting a judgment of foreclosure and sale. Defendant Worster's cross motion seeks an order denying plaintiff's motion and dismissing plaintiff's complaint or, in the alternative vacating Acting Justice Farneti's June 7, 2016 Order and granting defendant leave to serve a late answer. Defendant also seeks an order rejecting confirmation of the referee's report and remanding this action to the foreclosure settlement part.. Among the defenses asserted by the defaulting defendant are: 1) plaintiff lacks personal jurisdiction over Worster since she was never personally served with the summons and complaint; 2) plaintiff failed to prove compliance with RPAPL 1304 notice requirements; 3) plaintiff failed to seek judgment within one year of defendant's default as required pursuant to CPLR 3215(c); and as a result 4) plaintiff's complaint must be dismissed: or, in the alternative 5) the Order (Farneti, J.) granting a default judgment must be vacated and defendant Worster granted leave to serve a late answer; 6) the referee's report must be rejected on grounds that defendant is entitled to a hearing; and 7) the foreclosure action must be remanded to the foreclosure settlement part for additional settlement conferences.

A defendant seeking to vacate a default in appearing and answering a complaint must demonstrate both a reasonable excuse for the default and the existence of a potentially meritorious defense (*Eugene DiLorenzo, Inc. v. A.C. Dutton Lbr., Co.,* 67 NY2d 138, 501 NYS2d 8 (1986); *Deutsche Bank National Trust Co. v. Gutierrez,* 102 AD3d 825, 958 NYS2d 472 (2nd Dept., 2013); *U.S. Bank, N.A. v. Samuel,* 138 AD3d 1105, 30 NYS3d 305 (2nd Dept., 2016); *TCIF REO GCM, LLC v. Walker*, 139 AD3d 704, 32 NYS3d 223 (2nd Dept., 2016); CPLR 317 & 3012(d)). However, absent proper service of the summons and complaint upon a defendant, a court lacks jurisdiction and the complaint must be dismissed without the need to demonstrate an arguably meritorious defense (CPLR 5015(4); *Prudence v. Wright,* 94 AD3d 1073, 943 NYS2d 185 (2nd Dept., 2012); *Emigrant Mortgage Co., Inc. v. Westervelt,* 105 AD3d 896, 964 NYS2d 543 (2nd Dept., 2013); *Deutsche Bank National Trust Co. v. Pestano,* 71 AD3d 1074, 899 NYS2d 269 (2nd Dept., 2010)).

Ordinarily a process server's affidavit of service constitutes prima facie evidence of proper service (*U.S. Bank, N.A. v. Tauber,* 140 AD3d 1154, 36 NYS3d 144 (2nd Dept., 2016); *FV-1, Inc. v. Reid,* 138 AD3d 922, 31 NYS3d 119 (2nd Dept., 2016); *Wachovia Bank, N.A. v. Greenberg,* 138 AD3d 984, 31 NYS3d 110 (2nd Dept., 2016); *MERS v. Losco,* 125 AD3d 733, 5 NYS3d 112 (2nd Dept., 2015); *NYCTL v. Tsafatinos,* 101 AD3d 1092, 956 NYS2d 571 (2nd Dept., 2012)). A defendant may rebut the process server's affidavit by submitting an affidavit containing specific and detailed contradictions of the claims in the process server's affidavit, but bare, conclusory and unsubstantiated denials of service are insufficient to rebut the presumption of proper service (*U.S. Bank, N.A. v. Peralta,* 142 AD3d 988, 37 NYS3d 308 (2nd Dept., 2016); *Washington Mutual Bank v. Huggins,* 140 AD3d 858, 35 NYS3d 127 (2nd Dept., 2016); *Wells Fargo Bank, N.A. v. Christie,* 83 AD3d 824, 921 NYS2d 127 (2nd Dept., 2011); *U.S. Bank, N.A. v. Tate,* 102 AD3d 859, 958 NYS2d 722 (2nd Dept., 2013); *Beneficial Homeowner Serv. Corp. v. Girault,* 60 AD3d 984, 875 NYS2d 815 (2nd Dept., 2009)).

The record shows that the process server served defendant Worster by substituted service by delivery of the summons and complaint to an individual identified as "Anthony Ungaro (Co-tenant),

a person of suitable age and discretion, at defendant Worster's dwelling house (usual place of abode) at 8 McKinley Street, Copiague, NY which is the mortgaged premises. Defendant Worster submits an affidavit claiming that she no longer resided at the mortgaged premises when service was made having left the premises in the "summer or fall of 2008, when my marriage broke down..." Defendant claims she has since resided in Bellmore and now resides in Oceanside, New York.

Based upon this record the affidavit of the process server constitutes prima facie evidence of proper service pursuant to CPLR 308(2). Having established a showing of jurisdiction over the defendant, it is incumbent upon the defendant to rebut this prima facie showing by submission of specific and substantive evidence regarding lack of service. Defendant's affidavit wholly fails to rebut the presumption of due service upon her. Specifically, paragraph 15 of the mortgage agreement signed by the defendant provides in pertinent part that all notices be in writing and that: "The notice address (for notices required under the security agreement) is the address of the Property unless I give notice to Lender of a different address. I will promptly notify Lender of any change of address." Under these circumstances the mortgage lender had the right to serve the defendants at the mortgaged premises and absent defendant Worster's submission of evidentiary proof that she notified the mortgagee of her new address, service of the summons, complaint and RPAPL 1303 notice was proper and conferred personal jurisdiction over Worster. Having submitted self-serving denials of service and receipt of papers, the defendant's application to dismiss plaintiff's complaint for failure to obtain personal jurisdiction over her must be denied (*Wells Fargo Bank, N.A. v. Tricarico,* 139 AD3d 722, 32 NYS3d 213 (2nd Dept., 2016); *IndyMac Bank v. Hyman,* 74 AD3d 751, 901 NYS2d 545 (2nd Dept., 2010)).

With respect to the defendant's application seeking leave to serve a late answer, the law requires proof to establish a reasonable excuse for the defendant's failure to timely serve an answer and a showing of an arguably meritorious defense (*see Deutsche Bank National Trust Co. v. Gutierrez,* 102 AD3d 825, 958 NYS2d 478 (2nd Dept., 2013); *Deutsche Bank National Trust Co. v. Karlis,* 138 AD3d 915, 30 NYS3d 228 (2nd Dept., 2016); *U.S. Bank , N.A. v. Cherubin,* 141 AD3d 514, 36 NYS3d 154 (2nd Dept., 2016)). Defendant has wholly failed to provide any reasonable excuse for her default in timely answering the plaintiff's complaint. Absent any credible explanation for her continuing default, the defendant's application must be denied regardless of whether she has demonstrated the existence of a potentially meritorious defense to plaintiff's action (*U.S. Bank, N.A. v. Cherubin, supra.; Aurora Loan Services, LLC v. Lucero,* 131 AD3d 496, 15 NYS3d 707 (2nd Dept., 2015)). The absence of a reasonable excuse renders it unnecessary to determine whether the defendant demonstrated the existence of a potentially meritorious defense to the action (*see Summitbridge Credit Investments, LLC v. Wallace,* 128 AD3d 676, 9 NYS3d 320 (2nd Dept., 2015); *Deutsche Bank National Trust Co. v. Rudman,* 80 AD3d 651, 914 NYS2d 672 (2nd Dept., 2011); *Deutsche Bank National Trust Co., v. Gutierrez, supra.; Deutsche Bank National Trust Co. v. Pietranico,* 102 AD3d 724, 957 NYS2d 868 (2nd Dept., 2013); *Wells Fargo Bank, N.A. v. Russell,* 101 AD3d 860, 955 NYS2d 654 (2nd Dept., 2012)).

With respect to defendant's remaining claims seeking dismissal of the complaint based upon plaintiff's alleged failure to serve 90-day notices in compliance with RPAPL 1304 and based upon plaintiff's failure to seek a default judgment withing one year of defendant's default (CPLR 3215(c)), the doctrine of res judicata prevents a party from litigating a claim which has already been litigated or which ought to have been litigated (see *Siegel, "New York Civil Practice",* Sections 444204443, page 585). The principle is grounded upon the premise that "once a person has been afforded a full

and fair opportunity to litigate a particular issue, that person may not be permitted to do so again." (*see Gramatan Homes v. Lopez,* 46 NY2d 484, 414 NYS2d 308 (1979); *Davey v. Jones Hirsch Connors & Bull,* 138 AD3d 417, 27 NYS3d 867 (1st Dept., 2016); *Matter of JPMorgan Chase,* 135 AD3d 762, 24 NYS3d 667 (2nd Dept., 2016)). The related "law of the case" doctrine is a rule of practice which provides that once an issue is judicially determined either directly or by implication, it is not to be reconsidered by judges or courts of coordinate jurisdiction in the course of the same litigation (*see Martin v. City of Cohoes,* 37 NYK2d 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 AD2d 385, 467 NYS2d 834 (1st Dept., 1983)).

In this case the issue of whether plaintiff "abandoned" prosecution of this foreclosure action pursuant to CPLR 3215(c) was clearly determined by Acting Justice Farneti's June 7, 2016 Order granting plaintiff's motion seeking a default judgment. Such decision is the law of the case and no legal basis exists to re-visit this issue. Similarly the issue of whether plaintiff served a timely 90-day notice in compliance with RPAPL 1304 was determined in the motion court's award of a default judgment since all required elements to grant judgment were necessarily determined to have been proven. Accordingly no basis exists to dismiss plaintiff's complaint on these grounds particularly in view of the fact that the party making these claims has defaulted in appearing in this action.

With regard to the specific issue of service of an RPAPL 1304 notice as a "condition precedent" to a foreclosure action, this court notes that such defense is not a jurisdictional defense sufficient to provide independent grounds for vacating a default judgment by a party who has otherwise defaulted in appearing in an action such as defendant Worster (*U.S. Bank, N.A. v. Carey,* 137 AD3d 894, 28 NYS3d 68 (2nd Dept., 2016); *Pritchard v. Curtis,* 101 AD3d 1502, 957 NYS2d 440 (3rd Dept., 2012)). In this respect defendant Worster, as a defaulting party, is required to vacate her default prior to asserting any defense (other than a jurisdictional one), such as an RPAPL 1304 defense, and having failed to provide any reasonable excuse for her default in serving an answer, there are no grounds to dismiss the complaint under these circumstances (*see Flagstar Bank, FSB v. Jambelli,* 140 Ad3d 829, 32 NYS3d 625 (2nd Dept., 2016); *Wassertheil v. Elburg, LLC,* 94 AD3d 753, 941 NYS2d 69 (2nd Dept., 2012); *Hosten v. Oladapo,* 44 AD3d 1006, 844 NYKS2d 417 (2nd Dept., 2007)).

With respect to the issue of whether the referee's report should be confirmed, the law provides that references to hear and report are advisory only leaving the court as the ultimate arbiter of the issues referred (CPLR 4311; RPAPL 1321; *see Deutsche Bank National Trust Co. v. Williams,* 134 AD3d 981, 20 NYS3d 907 (2nd Dept., 2015); *Deutsche Bank National Trust Co. v. Zlotoff et al.,* 77 AD3d 702, 908 NYS3d 612 (2nd Dept., 2010); *Shultis v. Woodstock Land Development Associates,* 195 AD2d 677, 599 NYS2d 340 (3rd Dept., 1993); *Woodridge Hotel LLC v. Hotel Lake House Inc.,* 281 AD2d 778, 711 NYS2d 275 (3rd Dept., 2001)). In this case the evidence submitted in support of plaintiff's application to confirm the referee's report consists of a deposition transcript from plaintiff's assistant vice president testifying to the contents of the business records maintained by the mortgage lender (which is admissible pursuant to CPLR 4518), together with documentary evidence which includes a simple computation sheet calculating the interest due as a result of defendant's continuing default, the advances for real estate taxes and hazard insurance, and charges related to property inspections, preservation and escrow advances. While the defaulting defendant claims she has a "right" to a hearing, the law does not award a hearing under circumstances where

the referee's report consists of a mere ministerial mathematical computation together with a simple finding to report whether the premises can be sold in one or more parcels (*see Zaslavskaya v. Boyanzhu,* 144 AD3d 675, 41 NYS3d 237 (2nd Dept., 2016)). Moreover, the defaulting defendant has the option of submitting relevant, admissible proof to contradict the referee's findings since it is the court's ultimate decision to confirm the computations set forth in the referee's report. Having failed to submit any such evidence in opposition to plaintiff's motion, the only admissible, credible proof submitted relevant to the amount of damages to be awarded to the plaintiff is the evidence submitted by the plaintiff, and therefore plaintiff's motion for an order confirming the referee's report must be granted.

Finally defendant is not entitled to an additional CPLR 3408 court settlement conference. Court records show that a CPLR 3408 conference was scheduled for April 16, 2015 and upon the mortgagors failure to appear the action was remanded to an IAS Part. The defaulting defendant has provided no reasonable explanation for this court to further delay prosecution of this action, particularly in view of defendant's failure to make any payments due under the terms of the parties agreement for the past eight years.

Accordingly, defendant's cross motion is denied in its entirety and plaintiff's motion is granted. The proposed judgment of foreclosure and sale has been signed simultaneously with execution of this order.

Dated: May 2, 2018

HON. HOWARD H. HECKMAN, JR.

J.S.C.