

U.S. Bank N A. v Alvarenga

2018 NY Slip Op 30861(U)

May 9, 2018

Supreme Court, Suffolk County

Docket Number: 17245/2008

Judge: Howard H. Heckman

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

PRESENT:

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

INDEX NO.: 17245/2008
MOTION DATE: 04/25/2018
MOTION SEQ. NO.: #003 MG
#004 MD
CASE DISP

-----X
U.S. BANK N.A.,

Plaintiff,

-against-

MANUEL ALVARENGA, PATRICIA
ALVARENGA, DONNA CIONI, JOSEPH CIONI,
AMBER ALVARENGA,

Defendants.

-----X

PLAINTIFF'S ATTORNEY:
LEOPOLD & ASSOCIATES, PLLC
80 BUSINESS PARK DR., STE. 110
ARMONK, NY 10504

DEFENDANT'S ATTORNEY:
RONALD D. WEISS, P.C.
734 WALT WHITMAN RD., STE. 203
MELVILLE, NY 11747

Upon the following papers numbered 1 to 25 read on this motion _____; Notice of Motion/ Order to Show Cause and supporting papers 1-7 (#003); Notice of Cross Motion and supporting papers 8-19 (#004); Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers 20-25; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff U.S. Bank, N.A. seeking an order confirming the referee's report dated June 8, 2015 and granting a judgment of foreclosure and sale is granted; and it is further

ORDERED that the cross motion by defendant Namuel Alvarenga seeking an order pursuant to CPLR 3211(a)(3)&(8), 3012(d), 3216, 3404, 3408, 5015(a)(1)&(4): 1) denying plaintiff's motion; 2) vacating the October 26, 2009 Order (Farneti, J.) granting a default judgment; 3) dismissing plaintiff's complaint for failure to obtain personal jurisdiction over the defendant; 4) dismissing plaintiff's complaint based upon abandonment and/or failure to prosecute; 5) vacating defendant's default and granting defendant leave to serve a late answer; and 6) directing a CPLR 3408 settlement conference is denied.

Plaintiff's action seeks to foreclose a mortgage in the original sum of \$418,000.00 executed by defendants Manuel Alvarenga and Patricia Alvarenga on January 14, 2005 in favor of Argent Mortgage Company LLC. 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 was subsequently assigned to the plaintiff by assignment dated January 14, 2005. Plaintiff claims that both mortgagors defaulted in making timely monthly mortgage payments beginning April 1, 2007 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 May 5, 2008. Defendants defaulted in serving an answer. By Order (Farneti, J.) dated October 26, 2009 plaintiff's unopposed motion for

an order granting a default judgment and for the appointment of a referee was granted.

Plaintiff's motion seeks an order confirming the referee's report and for a judgment of foreclosure and sale. Defendant Manuel Alvarenga submits a cross motion seeking an order denying plaintiff's motion, vacating the prior Order granting a default judgment, dismissing plaintiff's complaint or, in the alternative, granting leave for defendant to serve a late answer, and remanding this action to the foreclosure settlement part for a CPLR 3408 conference.

In support of the cross motion and in opposition to plaintiff's motion, defendant Alvarenga claims that plaintiff's complaint must be dismissed based upon the following grounds: 1) plaintiff's abandonment of prosecution of this action pursuant to CPLR 3404; 2) plaintiff's failure to prosecute this action pursuant to CPLR 3216; and 3) plaintiff's failure to prove it has personal jurisdiction over defendant Alvarenga. In the alternative, defendant Alvarenga seeks an order: 1) vacating Acting Justice Farneti's October 26, 2009 Order granting a default judgment based upon plaintiff's failure to prove service of process; 2) granting leave to permit defendant to serve a late answer; and 3) remanding this action to the foreclosure settlement part for a CPLR 3408 settlement conference.

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 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-I, 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 process server's affidavit states that the summons, complaint and RPAPL 1303 notice were served upon defendant Manuel Alvarenga by substituted service on "Amber Alvarenga, Daughter", a person of suitable age and discretion at the mortgaged premises on May 7, 2008 at approximately 7:02 p.m. The affidavit provides a description of the person served as a white female

with brown hair who was approximately 20 years old, approximately 5'4" tall and weighed approximately 113 pounds. The process server also claims that a follow up first class mailing marked "personal and confidential" was done on May 12, 2008. In opposition the defendant Manuel Alvarenga submits an affidavit claiming that his daughter Amber's hair color is black and that she weighed between 170 and 180 pounds when process was served ten years ago.

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 prima facie 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. The affidavit submitted on behalf of the defendant wholly fails to rebut the presumption of due service upon him. Defendant's affidavit fails to provide sufficient credible proof which would contradict the process server's affidavit and merely provides a wholly self-serving statement concerning his daughter's appearance at the time service was made ten years ago without providing an affidavit from his daughter denying such service and/or confirming the description of her physical appearance as stated in her father's affidavit. Neither has the defendant submitted an affidavit from a disinterested witness or any other individual familiar with his daughter's appearance or any documentary evidence in the form of a copy of his daughter's driver's license or some other form of identification which would provide corroborating details of the defendant's claims and therefore also provide contradictory proof to the process server's description. Absent such evidentiary proof corroborating defendant's unsubstantiated and self-serving denial of service and receipt of papers at this late stage of this proceeding, the claims made by the defendant are insufficient to provide a credible factual and legal foundation to grant defendant's application to dismiss plaintiff's complaint for failure to obtain personal jurisdiction over him (*see 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 defendant's claim that the complaint must be dismissed for failure to prosecute, a court's power to dismiss a complaint sua sponte is to be used sparingly and only when extraordinary circumstances exist to warrant dismissal (*see Chase Home Finance, LLC v. Kornitzer*, 139 AD3d 784, 31 NYS3d 559 (2nd Dept., 2016); *Wachovia Bank, N.A. v. Akojenu*, 138 AD3d 1112, 30 NYS3d 659 (2nd Dept., 2016)). While defendant's argument recites CPLR 3404 as legal grounds for "dismissal of abandoned cases", that statute pertains only to actions where a note of issue has been filed and the action has been "stricken" from the court calendar by the court based upon inactivity. In this case no note of issue has ever been filed and defendant's reference to the action as having been "purged" was merely a clerical error since the clerk's office retains no authority to legally purge and to dismiss an action. The legal grounds for dismissing a pre-note of issue action is dictated by the requirements of CPLR 3216 which statute does not permit dismissal "unless a written demand is served upon the party against whom such relief is sought requiring the plaintiff to serve an file a note of issue within ninety (90) days of receipt of the demand (CPLR 3216(b); *see BankUnited v. Kheyfets*, 150 AD3d 948, 57 NYS3d 159 (2nd Dept., 2017)). In this case no written demand has been served upon the plaintiff as the defendant remains in default and no extraordinary circumstances exist which could possibly warrant dismissal of plaintiff's complaint (*see Deutsche Bank National Trust Co. v. Cotton*, 147 AD3d 1020, 46 NYS3d 913 (2nd Dept., 2017); *Deutsche Bank National Trust Co. v. Rauf*, 139 AD3d 789, 29 NYS3d 811 (2nd Dept., 2016)).

With respect to the defendant's application seeking an order vacating Acting Justice Farneti's October 26, 2009 Order and granting defendant 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 his default in timely answering the plaintiff's complaint. Absent any credible explanation for his continuing default, the defendant's application must be denied regardless of whether he 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, 14 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); *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., v. Chiejina*, 142 AD3d 570, 36 NYS3d 679 (2nd Dept., 2016); *Chase Home Finance, LLC v. Garcia*, 140 AD3d 820, 31 NYS3d 894 (2nd Dept., 2016); *Flagstar Bank, FSB v. Jambelli*, 140 AD3d 829, 32 NYS3d 625 (2nd Dept., 2016); *Wassertheil v. Elburg, LLC*, 94 AD3d 753, 941 NYS2d 679 (2nd Dept., 2012); *Hosten v. Oladapo*, 44 AD3d 1006, 844 NYS2d 417 (2nd Dept., 2007)).

With respect to defendant's claim that plaintiff has failed to negotiate in good faith to offer the mortgagor a loan modification, there is no evidence submitted to support defendant's assertion. Plaintiff has no obligation to offer defendant a loan modification and the failure to do so provides no legal grounds to vacate defendant's default in appearing. Moreover, defendant's claim that Alvarenga was not afforded the opportunity for a settlement conference is contradicted by the exact language contained in the Order of Reference signed by Acting Justice Farneti on October 26, 2009. That Order has a handwritten addition which has been initialed by Acting Justice Farneti in the margin of the first page stating: "and the Court having complied with the notice requirement of L. 2008, ch. 472, 3-a,." While defendant states that "there were not any conferences scheduled and held by the Court", clearly defendant had notice of his right to a conference based upon the evidence submitted and no legal or equitable basis exists to further delay prosecution of this action given the fact that the mortgagor has not made a mortgage payment in more than eleven (11) years.

With respect to plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale, the mortgage lender's submission of proof establishes its entitlement to a judgment of foreclosure and sale based upon the referee's report and findings (*see U.S. Bank, N.A. v. Saraceno*, 147 AD3d 1005, 48 NYS3d 163 (2nd Dept., 2017); *HSBC Bank USA, N.A. v. Simmons*, 125 AD3d 930, 5 NYS3d 175 (2nd Dept., 2015); *CitiMortgage, Inc. v. Kidd*, 148 AD3d 767, 49 NYS3d 482 (2nd Dept., 2017); *Matter of Cincotta*, 139 AD3d 1058, 32 NYS3d 610 (2nd Dept., 2016)). In this case the plaintiff submitted sufficient evidence in the form of an affidavit from an assistant vice president employed by the plaintiff, together with sufficient documentary evidence to establish the accuracy of the referee's computations and to confirm the finding that the mortgaged premises should be sold in one parcel (*CitiMortgage, Inc. v. Kidd, supra.*; *Hudson v. Smith*, 127 AD3d 816, 4 NYS3d 894 (2nd Dept., 2015)).

Accordingly defendant's cross motion is denied in its entirety, and plaintiff's motion seeking an order confirming the referee's report and for a judgment of foreclosure and sale is granted. The proposed judgment of foreclosure and sale has been signed simultaneously with the execution of this order.

Dated: May 9, 2018

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