SHORT FORM ORDER **INDEX NO.: 26278/2009**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE of the SUPREME COURT

Motions Submit Date: 07/06/17
Mot Seq #: 002 - MD
Mot Seq #: 003 - MG; RTH

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JP MORGAN CHASE BANK, NATIONAL ASSOCIATION as Purchaser of the loans and other assets of WASHINGTON MUTUAL BANK, f/k/a WASHINGTON MUTUAL BANK, FA ("THE SAVINGS BANK") from the FEDERAL DEPOSIT INSUARANCE CORPORATION, acting as Receiver for the savings bank pursuant to its authority under the Federal Deposit Insurance Act, 12 U.S.C. § 1821(D),

Plaintiff,

-against-

ANJUM M. MALIK, SHAKIL AHMAD, ATLANTIC BANK OF NEW YORK, CAPITAL ONE, N.A., Successor by merger to NORTH FORK BANK, Successor by merger to GREENPOINT BANK f/k/a THE GREEN POINT SAVINGS BANK, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., as Nominee for MCS MORTGAGE BANKERS, INC., JOHN DOE & JANE DOE,

Defendants.

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PLAINTIFF'S COUNSEL:
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DEFENDANT'S COUNSEL:
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On the parties' respective motions, the Court considered the following:

1. Notice of Motion & Affirmation in Support for Judgment of Foreclosure & Sale dated October 28, 2015 and supporting papers;
2. Notice of Cross-Motion & Affirmation in Support to Vacate Summary Judgment & Order of Reference pursuant to CPLR 5015(a)(1) & (a)(4) & for Dismissal pursuant to CPLR

3211(a)(8) for lack of personal jurisdiction dated May 24, 2016 and supporting papers;
3. Affirmation in Opposition to Cross-Motion dated June 20, 2016 and supporting papers;
4. Reply Affirmation in Further Support dated July 5, 2016; it is

ORDERED that after due deliberation and full consideration, for the reasons set forth below, that plaintiff's motion for judgment of foreclosure and sale confirming the referee's report of amounts due and owing is hereby **denied** as follows, and it is further

ORDERED that defendant's cross-motion to vacate the order of reference and award of summary judgment for lack of jurisdiction or upon excusable default, or in the alternative to dismiss the complaint for lack of personal jurisdiction to plaintiff is **granted in part** as follows; and it is further

ORDERED that the prior orders of this court for order or reference and summary judgment is hereby **vacated and recalled** in accord with the dictates of the within decision and order; and it is further

ORDERED that the parties are directed to appear before this Court on **August 14, 2018 at 2:30 pm,** in IAS Part 38, Courtroom 229-A, 1 Court Street, Riverhead, New York, for an evidentiary ***Traverse*** hearing at which time plaintiff shall bear the burden of production and persuasion by competent and admissible evidence and witness testimony of establishing proper service of process and personal jurisdiction over the defendant; and it is further

ORDERED that plaintiff serve a copy of this decision and order with notice of entry **no later than** 30 days prior to the scheduled hearing on defendant's counsel by overnight mail, return receipt requested, if any, or in the alternative, personally on defendant at his actual place of residence pursuant to CPLR 308(1).

This is an action to foreclose a mortgage on premises more commonly known and referred to as 41 Kool Place, Port Jefferson Station, Town of Brookhaven, County of Suffolk, New York 11776. Defendant Anjum M. Malik ("defendant" or "borrower") executed a promissory note dated September 14, 2006 in favor of the Mortgage Electronic Registration Systems, Inc., as nominee for the Washington Mutual Bank, agreeing to pay $373,600 at 6.625% annual interest. The note was secured by a mortgage of the same date on the subject property recorded by the Suffolk County Clerk on October 12, 2006 at Liber 21399, page 542.

The promissory note bore an undated endorsement without recourse. The note was subsequently transferred by assignment, first form the Federal Deposit Insurance Corporation (FDIC) to plaintiff JP Morgan Chase Bank, NA by assignment dated March 28, 2014, and again from plaintiff to it servicer Bayview Loan Servicing by assignment dated September 15, 2014.

Based upon defendant's alleged default of his obligation to render a timely monthly payment due on his mortgage in or around November 1, 2008, plaintiff commenced this residential mortgage foreclosure action filing a summons and complaint, notice of pendency and other required notices on July 10, 2009. Defendant has not answered or joined issue and was found in default of appearance by previously issued decisions of Supreme Court.

Notably, Supreme Court (Tanenbaum, J.) granted plaintiff an order of reference in a Short-Form Decision & Order dated March 9, 2010, although defendant contends that that determination was never served with notice of entry. Subsequently, Supreme Court (Rebolini, J.) awarded summary judgment and

an order of reference to plaintiff by Long-Form Order dated October 21, 2010. Since then plaintiff moved for judgment of foreclosure and sale to confirm the appointed referee's report on November 19, 2015. Subsequently, Supreme Court (Rebolini, J.) recused itself from the matter and it was reassigned by order dated March 8, 2016 before Hon. Daniel Martin, AJSC. The matter was assigned to this Court on recusal order dated May 26, 2016.

Defendant has cross-moved pursuant to CPLR 5015 (a)(1) &(a)(4) to vacate the previously issued order of reference and award of summary judgment arguing both lack of personal jurisdiction and excusable default. Furthermore, defendant alternatively moves to dismiss plaintiff's complaint under CPLR 3211(a)(8) arguing lack of personal jurisdiction, premised on ineffective or invalid service of process under CPLR 308(2). Plaintiff has opposed these applications in their entirety.

With the parties' applications fully briefed, the Courts turns to relevant analysis pertinent to each parties' arguments.

Where a defendant moves to dismiss the complaint pursuant to CPLR 3211(a)(8) on the ground of lack of personal jurisdiction, a plaintiff "need only make a *prima facie* showing" that such jurisdiction exists (***Lang v Wycoff Hgts. Med. Ctr.***, 55 AD3d 793, 794, 866 NYS2d 313, 313–14 [2d Dept 2008]).

While it is true that CPLR 308(2) permits service, *inter alia*, by delivery of the summons and complaint within the State to a person of suitable age and discretion at the defendant's dwelling place and mailing the summons to the defendant's last known residence, it is also settled that plaintiff bears the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process" (***Thacker v Malloy***, 148 AD3d 857, 857, 49 NYS3d 165, 166 [2d Dept 2017]; ***Bank of Am., N.A. v Latif***, 148 AD3d 967, 968–69, 50 NYS3d 437, 438 [2d Dept 2017]; ***Lazarre v Davis***, 109 AD3d 968, 969, 972 NYS2d 80, 81 [2d Dept 2013][The burden of proving that personal jurisdiction has been acquired over a defendant in an action rests with the plaintiff]).

Service of process must be made in strict compliance with statutory 'methods for effecting personal service upon a natural person' pursuant to CPLR 308." Therefore, it has been determined "axiomatic that the failure to serve process in an action leaves the court without personal jurisdiction over the defendant, and all subsequent proceedings are thereby rendered null and void.' " A defect in service is not cured by the defendant's subsequent receipt of actual notice of the commencement of the action (***Emigrant Mortg. Co., Inc. v Westervelt***, 105 AD3d 896, 896–97, 964 NYS2d 543, 544 [2d Dept 2013]).

A defendant seeking to vacate a default in answering or appearing upon the ground of excusable default must demonstrate a reasonable excuse for the default and a potentially meritorious defense to the action (***LaSalle Bank Nat. Ass'n v Calle***, 153 AD3d 801, 802, 61 NYS3d 104, 105 [2d Dept 2017]). Whether or not service was properly effectuated is a threshold issue to be determined before consideration of discretionary relief pursuant to CPLR 5015(a)(1) (***Marable ex rel. Ralph v Williams***, 278 AD2d 459, 459–60, 718 NYS2d 400, 401 [2d Dept 2000]). "The plaintiff bears the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process" and New York's appellate courts have clearly cautioned that the absence of proper service of process, renders a resulting default judgment was a nullity (***Pearson v. 1296 Pac. St. Associates, Inc.***, 67 AD3d 659, 660, 886 NYS2d 898 [2d Dept. 2009]).

Put somewhat differently, "[i]t is 'axiomatic that the failure to serve process in an action leaves the

court without personal jurisdiction over the defendant, and all subsequent proceedings are thereby rendered null and void' " and thus on an application falling under CPLR 5015(a)(4), a default judgment must be vacated once a movant demonstrates lack of personal jurisdiction (***Hossain v. Fab Cab Corp.***, 57 AD3d 484, 485, 868 NYS2d 746, 746 [2d Dept. 2008][internal citations omitted]). Where the defendant's only participation in the action is the submission of a motion to vacate a default judgment for lack of personal jurisdiction, the defense of lack of personal jurisdiction is not waived (***Cadlerock Joint Venture, L.P. v. Kierstedt***, 119 AD3d 627, 628, 990 NYS2d 522, 524 [2d Dept. 2014]).

"Ordinarily, a process server's affidavit of service establishes a prima facie case as to the method of service and, therefore, gives rise to a presumption of proper service" (***Bank of Am., N.A. v Welga***, 157 AD3d 753, 753–54, 66 NYS3d 889, 890 [2d Dept 2018]; ***U.S. Bank, N.A. v. Peralta***, 142 AD3d 988, 988, 37 NYS3d 308; *see* ***Citibank, N.A. v. Balsamo***, 144 AD3d at 964, 41 NYS3d 744). "However, when a defendant submits a sworn denial of receipt of service containing specific facts to refute the statements in the affidavit of the process server, the *prima facie* showing is rebutted and the plaintiff must establish personal jurisdiction by a preponderance of the evidence at a hearing" (***Fuentes v Espinal***, 153 AD3d 500, 501, 60 NYS3d 81, 83 [2d Dept 2017]; (***Purzak v Long Is. Hous. Services, Inc.***, 149 AD3d 989, 991, 53 NYS3d 112, 114–15 [2d Dept 2017]). However, courts remain cautioned that mere conclusory denials of service are insufficient to rebut the presumption of proper service arising from the process server's affidavit. Thus, to warrant a hearing to determine the validity of service of process, the denial of service must be substantiated by specific, detailed facts that contradict the affidavit of service, shifting the burden of proof to the plaintiff to establish jurisdiction at a hearing by a preponderance of the evidence (***Wells Fargo Bank, N.A. v Decesare***, 154 AD3d 717, 717, 62 NYS3d 446, 448 [2d Dept 2017]; *accord* ***US Bank Nat. Ass'n v Ramos***, 153 AD3d 882, 884, 60 NYS3d 345, 347 [2d Dept 2017]). Thus it remains settled that no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server affidavits" (*see* ***Countrywide Home Loans Servicing, LP v. Albert***, 78 AD3d 983, 984–985, 912 NYS2d 96; ***Scarano v. Scarano***, 63 AD3d 716, 716, 880 NYS2d 682; ***Rosario v. NES Med. Servs. of N.Y., P.C.***, 105 AD3d 831, 832, 963 NYS2d 295, 296–97 [2d Dept 2013]).

As concerns excusable default, a defendant who has failed to appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action to avoid the entering of a default judgment or to extend the time to answer (***Cummings v Rosoff***, 101 AD3d 713, 714, 955 NYS2d 193, 194 [2d Dept 2012]; ***Ennis v. Lema***, 305 A.D.2d 632, 633, 760 NYS2d 197, 198-99 [2d Dept. 2003]). The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the trial court (*see* ***McHenry v. San Miguel***, 54 AD3d 912, 864 NYS2d 541; ***Thompson v. Steuben Realty Corp.***, 18 AD3d 864, 795 NYS2d 470; ***Gambardella v. Ortov Lighting, Inc.***, 278 AD2d 494, 495, 717 NYS2d 923 [2d Dept. 2000]).

In support of his motion to vacate or dismiss, defendant submits a sworn affidavit of merit dated May 31, 2016 wherein he testifies that between September 14, 2006 and December 2013, he resided at the mortgaged premises subject to this action. Thus, he testifies that plaintiff's service of the pleadings on his brother-in-law, a putative person of suitable age and discretion pursuant to CPLR 308(2) on July 14, 2009 at the mortgaged premises was ineffective and improper service. Further, defendant states the plaintiff's follow up first class mailing of a copy of the pleadings at that addresses was similarly defective for the same reasons. Moreover, defendant swears that he did not receive a copy of the pleadings either from his brother-in-law or elderly father who resided at the premises. Rather, defendant testifies that he did not become aware of the pendency of the action until being informed by a clerk at the County Clerk's Offices sometime in February 2016. Therefore, defendant both contests service and

jurisdiction over his person, as well as argues excusable default for his failure to answer and appear in this action.

Opposing defendant's application, plaintiff stands by its process server and the resulting affidavit of service making conclusory arguments. Having reviewed all of the parties' submissions however, this Court is convinced that defendant has carried his burden under both CPLR 5015 and 3211 to raise a significant triable question of fact concerning the propriety of service of process and personal jurisdiction in this matter. This being said, this Court is also guided by precedent that the proper remedy is not dismissal of the pleadings, but instead submission of this matter to a *Traverse* evidentiary hearing where plaintiff shall bear the burden of establishing proper service of process by submission of competent and admissible proof. Therefore, defendant's motion is **granted** to the extent that the matter is referred over to a ***Traverse*** **hearing** for the resolution of the service and jurisdictional issues.

Accordingly, the prior determinations of this court for order of reference and summary judgment are **vacated** in accord with this decision and order as noted above.

The remaining contentions of defendant concerning the validity of plaintiff's service of statutorily mandated and required notice pursuant to RPAPL are left for determination on another day. Defendant has conceded that the mortgage loan in question was not "subprime", but still questions whether plaintiff has adequately established that it was not "high cost" within the meaning of Banking Law § 6-l. In response, plaintiff has supplied only counsel's hearsay on the matter, neither conclusively establishing or refuting the assertion one way or the other. At any rate, the issue may be rendered moot depending on the outcome of other proceedings, thus, that branch of defendant's motion is **denied without prejudice with leave to renew**.

The foregoing constitutes the decision and order of this Court.

Dated: May 9, 2018
Riverhead, New York

HON. WILLIAM G. FORD, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**