

Federal Natl. Mtge. Assn. v Suarez
2018 NY Slip Op 31578(U)
March 20, 2018
Supreme Court, Queens County
Docket Number: 22799/09
Judge: Bernice D. Siegal
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

MEMORANDUM

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 25
Justice

-----X
Federal National Mortgage Association,

Plaintiff,

-against-

Rodolfo Suarez, et al.,

Defendants.
-----X

Index No.: 22799/09
Motion Date: 3/20/2018
Motion Cal. No.: 50
Motion Seq. No.: 2

The following papers numbered 1 to 15 read on this motion for an order to a Referee to compute the sums due and owing to Plaintiff, pursuant to RPAPL §1321; to grant Plaintiff default judgment against all defendants, pursuant to CPLR §3215; to amend the caption.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Notice of Cross-Motion to Extend Time to Answer.....	5 - 9
Affirmation in Opposition to Defendant’s Cross-Motion....	10 - 12
Affirmation in Reply.....	13 - 15

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Plaintiff, Federal National Mortgage Association ("Fannie Mae" or "Plaintiff") moves for an Order of Reference in the underlying foreclosure action, awarding the Plaintiff a default judgment against the defaulting parties; replacing "Federal National Mortgage Association" as a party Plaintiff in this action with "Nationstar Mortgage LLC"; striking the names of "John Doe" and "Jane Doe" as party defendants in this action and replacing with "Rodolfo Suarez" and amending the caption to so reflect.

Defendant cross-moves for an order denying the plaintiff's motion for an Order of Reference, dismissing the action in its entirety pursuant to CPLR Rule 3211(a)(8), and to extend the defendant's time to answer pursuant to CPLR §§ 3012(d) and/or 2004.

For the reasons set forth below, Plaintiff's motion is granted and Defendant's cross-motion is denied.

Facts

The undisputed facts show that the Defendant Rodolfo Suarez (“Defendant” or “Suarez”) executed a Note and Mortgage on May 30, 2008, in favor of Mortgage Electronic Registration Systems, Inc. as nominee for Golden First Mortgage Corp., in the principal amount of \$674,670 on real property located 68-37 76th Street, Middle Village, New York 11379. The mortgage was recorded on June 24, 2008, at CRFN: 2008000253173. The Note and Mortgage were transferred to Fannie Mae and memorialized by an Assignment of Mortgage dated July 31, 2009. The assignment was recorded on October 19, 2009, at CRFN: 2009000339129. The Defendant failed to make payment on the mortgage on March 1, 2009, as well as subsequent payments. Plaintiff sent a Default notice to Defendant on May 7, 2009 and commenced its foreclosure action by filing the summons and complaint on August 24, 2009. Defendant claims that he and/or his wife were not properly served with the summons and complaint, as attested to by the plaintiff's process server on August 26, 2009.

On December 30, 2009, Joseph Canepa, Esq. filed a notice of appearance on behalf of the Defendant.

On December 27, 2016, Barry Schneps, Esq. moved, on behalf of the Defendant for a motion to dismiss the within action.

On October 12, 2017, the law firm of Petroff Amshen, LLP filed a consent to change attorney.

Settlement conferences were held from June 9, 2010 to September 21, 2011, during which time the Defendant was offered a loan modification which was rejected. The Plaintiff transferred the servicing of the loan to Nationstar Mortgage LLC on May 24, 2013 and the assignment of the mortgage was recorded on March 10, 2015 in CRFN: 2015000079947. The defendant filed for Chapter 13 Bankruptcy on October 14, 2012, under case number 12-47285, which was later converted to a Chapter 7 Bankruptcy before being dismissed altogether on April 1, 2014. The Defendant filed for Chapter 13 Bankruptcy on April 27, 2014, under case number 14-42053, during which, another offer of a loan modification was denied by the Defendant and an order granting Relief from the Automatic Stay was signed on November 14, 2016. The defendant filed a motion to dismiss the plaintiff's action on November 30, 2016, which was subsequently denied on June 30, 2017.

Discussion

Personal Jurisdiction

Defendant contends that the foreclosure action should be dismissed for lack of personal jurisdiction pursuant to CPLR §3211(a)(8). Defendant argues that his wife, Silvia Suarez, was never served with the Summons and Complaint despite having an undivided interest in the whole of the subject premises.

"As the party seeking to assert personal jurisdiction, the plaintiff bears the ultimate burden on this issue... However, in opposing a motion to dismiss pursuant to CPLR §3211(a)(8) on the ground that discovery on the issue of personal jurisdiction is necessary, plaintiffs need not make a

prima facie showing of jurisdiction, but instead must only set forth a sufficient start, and show their position not to be frivolous." (*Doe v. McCormack*, 100 A.D.3d 685 [2nd Dept. 2012]; quoting *Shore Pharmaceutical Providers, Inc. v. Oakwood Care Center, Inc.*, 65 A.D.3d 623 [2nd Dept. 2009]; *Peterson v. Spartan Industries, Inc.*, 33 N.Y.2d 463 [1974].) Courts have held that a defendant's spouse is not a necessary party to a foreclosure action when they are not named on the mortgage note. (*State St. Bank & Trust Co. v Calandro*, 243 A.D.2d 705, 706 [2nd Dep't 1997].); see also (*Slutsky v. Blooming Grove Inn, Inc.*, 147 A.D.2d 208 [2nd Dep't 1989]; *Dashew v. Cantor*, 85 A.D.2d 619 [2nd Dep't 1981].) As Silvia Suarez was not named on the mortgage note, Plaintiff's failure to serve Silvia Suarez does not warrant dismissal.

The Defendant, by his affidavit, argues that service was never properly effectuated upon himself and therefore the within action should be dismissed. "An appearance by a defendant in an action is deemed to be the equivalent of personal service of a summons upon him [or her], and therefore confers personal jurisdiction over him [or her], unless he [or she] asserts an objection to jurisdiction either by way of motion or in his [or her] answer." (*Ohio Sav. Bank v Munsey*, 34 AD3d 659, 659 [2nd Dept. 2006], quoting *Skyline Agency v Coppotelli, Inc.*, 117 AD2d 135, 140 [2nd Dept. 1986]; see CPLR 320; *National Loan Invs., L.P. v Piscitello*, 21 AD3d 537, 537-538 [2nd Dept. 2005].) "The filing of a notice of appearance in an action by a party's counsel serves as a waiver of any objection to personal jurisdiction in the absence of either the service of an answer which raises a jurisdictional objection, or a motion to dismiss pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction." (*U.S. Bank National Association v. Pepe*, 161 A.D.3d 811 [2nd Dept 2018]; *American Home Mortg. Servicing, Inc. v. Arklis*, 150 A.D.3d 1180 [2nd Dept 2017].) In *Pepe*, the Court also found that Defendant waived his right to move to dismiss on jurisdictional grounds when

he failed to move within three years of filing a notice of appearance. (*U.S. Bank National Association v. Pepe*, supra.) Herein, Defendant waited nearly nine years, from the time a notice of appearance was filed in December of 2009, to bring the within motion. Furthermore, Defendant, by prior counsel, moved for an Order to dismiss and said application was denied by Order dated June 30, 2017.

Accordingly, Defendant's motion to dismiss the within action pursuant to CPLR §3211(a)(8) on the basis that the Court lacks personal jurisdiction is denied.

Cross-Motion

Defendant also cross-moved for an order extending defendant's time to interpose an answer. Defendant contends that, if the action is not dismissed for lack of personal jurisdiction, he has a reasonable excuse for his default pursuant to CPLR Rules §§ 3012(d) and/or 2004. Defendant contends that ineffective assistance and substitution of counsel is a reasonable excuse. Defendant also contends that plaintiff's failure to comply with all pre-commencement conditions outlined in the mortgage is a meritorious defense.

"A defendant seeking to vacate a default in answering a complaint and to compel the plaintiff to accept an untimely answer as timely must show both a reasonable excuse for the default and the existence of a potentially meritorious defense." (*Chase Home Fin., LLC v Minott*, 115 A.D.3d 634 [2nd Dept. 2014]; see also *Community Preserv. Corp. v Bridgewater Condominiums, LLC*, 89 AD3d 784 [2nd Dept. 2011]; *Taddeo-Amendola v 970 Assets, LLC*, 72 AD3d 677 [2nd Dept. 2010]; *Perfect Care, Inc. v Ultracare Supplies, Inc.*, 71 AD3d 752, 753, [2nd Dept. 2010].) "The determination of what constitutes a reasonable excuse lies within the sound discretion of the Supreme Court."

(*Maspeth Fed. Sav. & Loan Assn. v McGown*, 77 AD3d 889 at 890 [2nd Dept. 2010]; see also *Star Indus., Inc. v Innovative Beverages, Inc.*, 55 AD3d 903 at 904 [2nd Dept. 2008]; *Antoine v Bee*, 26 AD3d 306 [2nd Dept. 2006].)

Initially, as set forth earlier, Defendant failed to raise the issue of personal jurisdiction in an answer or a timely motion to dismiss and therefore waived that defense. (*U.S. Bank National Association v. Pepe*, supra., *Ohio Sav. Bank v Munsey*, at 659, quoting *Skyline Agency v Coppotelli, Inc.*, at 140; see CPLR 320; *National Loan Invs., L.P. v Piscitello*, supra.) Accordingly, Defendant has failed to set forth a reasonable excuse for his default.

Here, the defendant's excuse of law office failure does not establish a reasonable excuse. "While law office failure can be accepted as a reasonable excuse in the exercise of a court's sound discretion, the movant must submit supporting facts to explain and justify the default, and mere neglect is not accepted as a reasonable excuse." (*Nakollofski v. Kingsway Properties, LLC*, 157 A.D.3d 960, 961 [2nd Dept 2018] quoting *Ogunmoyin v. 1515 Broadway Fee Owner, LLC*, 85 A.D.3d 991 [2nd Dept 2011].) "Conclusory, undetailed, and uncorroborated claim of law office failure does not amount to a reasonable excuse." (*White v. Daimler Chrysler Corp.*, 44 A.D.3d 651, 651 [2nd Dept. 2007]; see also *Matter of ELRAC, Inc. v Holder*, 31 AD3d 636, [2nd Dept. 2006]; *Matter of Denton v City of Mount Vernon*, 30 AD3d 600 [2nd Dept. 2006].) Herein, Defendant's prior counsel not only appeared at Settlement Conferences but also filed a motion to dismiss on the Defendant's behalf. In addition, Defendant fails to set forth additional facts to support a claim of law office failure. Accordingly, Defendant has failed to establish law office failure.

"Since the Defendant failed to establish a reasonable excuse for his default, it is not necessary to establish whether a potential meritorious defense exists." (*Bank of N.Y. Mellon v Colucci*, 138

A.D.3d 1047 [2nd Dept. 2016] see also *Morgan Stanley Mtge. Loan Trust 2006-17XS v Waldman*, 131 AD3d 1140 at 1141 [2nd Dept. 2015]; *SDF8 CBK, LLC v 689 St. Marks Ave., Inc.*, 131 AD3d 1037 at 1038 [2nd Dept. 2015].)

Order of Reference

A mortgagee establishes its prima facie case for foreclosure when it produces both the mortgage and unpaid note, together with the evidence of the mortgagor's default. (*Citibank, N.A. v Van Brunt Props., LLC*, 95 A.D.3d 1158 [2nd Dept. 2012]; see also *Zanfina v Chandler*, 79 AD3d 1031 at 1032 [2nd Dept. 2010]; *HSBC Bank USA v Merrill*, 37 AD3d 899 at 900 [2nd Dept. 2007]; *Household Fin. Realty Corp. of N.Y. v Winn*, 19 AD3d 545 at 546 [2nd Dept. 2005].) A plaintiff can demonstrate the existence of a default through an affidavit attesting to the circumstances of such default. (*Mishal v. Fiduciary Holdings, LLC.*, 109 A.D.3d 885 [2nd Dept. 2013] see also *Solomon v Burden*, 104 AD3d 839 [2nd Dept. 2013]; *Wells Fargo Bank v. Das Karla*, 71 AD3d 1006 [2nd Dept. 2010].)

Plaintiff produced both the unpaid note and mortgage in exhibit F of their motion for an Order of Reference. Plaintiff also provided evidence of the defendant's default by including outstanding balances of money owed as attested to in the Affidavit of Tracy Armstrong. However, it is well settled that the defense of standing is waived if it is not first raised in an answer or a pre-answer motions to dismiss the complaint. (*Bank of N.Y. v Cepeda*, 120 A.D.3d 451 [2nd Dept. 2014]; see also *Freedom Mtge. Corp. v Toro*, 113 AD3d 815 [2nd Dept. 2014]; *JP Morgan Mtge. Acquisition Corp. v Hayles*, 113 AD3d 821 [2nd Dept. 2014].)

Conclusion

For the reasons set forth above, Defendant's cross-motion to dismiss the foreclosure action

and to extend time interpose an answer pursuant to CPLR §3211(a)(8) and CPLR §§ 3012(d) and/or 2004 respectively, is denied.

Plaintiff's motion for an order pursuant to RPAPL § 1321 to appoint a referee to compute sums due and owing to plaintiff and to amend the caption is granted.

Settle Order.

Dated:

Bernice D. Siegal, J. S. C.