

JPMorgan Chase Bank N.A. v Hernandez

2018 NY Slip Op 32407(U)

September 24, 2018

Supreme Court, Suffolk County

Docket Number: 14327/12

Judge: Thomas F. Whelan

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COPY

SUPREME COURT - STATE OF NEW YORK
IAS PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 7/28/16
SUBMIT DATE 8/9/18
Mot. Seq. # 004 - MG
Mot. Seq. # 005 - XMD
CDISP Y X N

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JPMORGAN CHASE BANK NATIONAL :
ASSOCIATION, :
:

Plaintiff, :
:

-against- :
:

HENRY R. HERNANDEZ a/k/a HENRY :
HERNANDEZ, VINCENTE E. HERNANDEZ :
a/k/a VINCENTE HERNANDEZ, ISLAND :
SURGICAL AND VASCULAR GROUP, PC, :
IDALMIS NUNEZ, MIDLAND FUNDING LLC, :
d/b/a in New York as MIDLAND FUNDING OF :
DELAWARE, LLC, a/p/o HSBC, PEOPLE OF :
THE STATE OF NEW YORK, CLERK OF THE :
SUFFOLK COUNTY DISTRICT COURT, NEW :
YORK STATE DEPARTMENT OF TAXATION & :
FINANCE, INTERNAL REVENUE SERVICE- :
UNITED STATES OF AMERICA, MARY SMITH, :

Defendants. :
:

-----X

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Upon the following papers numbered 1 to 14 read on this motion for Judgment of Foreclosure and Sale, among other things and cross motion to vacate the order of reference among other things; Notice of Motion/Order to Show Cause and supporting papers 1 - 7; Notice of Cross Motion and supporting papers: 8-10; Opposing papers: 11-12; Reply papers 13-14; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

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ORDERED that this motion (#004) by the plaintiff for, among other things, confirmation of the referee's report and a Judgment of Foreclosure and Sale, is granted in its entirety; and it is further

ORDERED that the cross motion (#005) by the defendant, Henry R. Hernandez, to vacate the Order of Reference, dismiss the foreclosure action and for permission to serve a late answer to the complaint, is denied, in its entirety; and it is further

ORDERED that the proposed Judgment submitted by plaintiff, as modified by the court, is signed simultaneously herewith; and it is further

ORDERED that pursuant to RPAPL §1351, plaintiff is directed to schedule the sale of the premises pursuant to the underlying Judgment of Foreclosure and Sale, within ninety (90) days from the filing of the notice of entry; and it is further

ORDERED that plaintiff is directed to file a notice of entry within five days of receipt of this Order pursuant to 22 NYCRR § 202.5-b(h)(2).

This is a foreclosure action on property located in Brentwood, New York. In essence, on November 18, 2002, defendants Henry R. Hernandez and Vincente E. Hernandez, borrowed \$248,050.00 from the plaintiff's predecessor-in-interest and executed a promissory note and mortgage. Defendants defaulted on this loan by failing to make the March 1, 2011 monthly installment. The instant action was commenced by filing on May 8, 2012. Neither defendant answered the complaint. After various foreclosure settlement conferences, the matter was released and the Hon. Emily Pines, by order dated March 30, 2015, granted plaintiff's unopposed motion for an order of reference. A notice of appearance, dated July 28, 2016, was filed by Rashmi Attri, Esq., on behalf of defendant, Henry R. Hernandez, which "demands that you serve all papers upon the undersigned at the address stated below."

Plaintiff now moves (#004) for a Judgment of Foreclosure and Sale with a return date of July 28, 2016. By cross motion (#005), with a return date of September 22, 2016, defendant, Henry R. Hernandez, moved to vacate the order dated March 30, 2015 (Pines, J.S.C.), dismiss the complaint for lack of jurisdiction or, extend defendant's time to answer. Defendant, Vincente E. Hernandez, is in default of this action and currently resides in Wichita, Kansas, where his mail is forwarded.

After languishing in the court system, the matter was reassigned to this Part pursuant to Administrative Order No. 71-18, dated August 3, 2018.

The Court first turns to the merits of defendant's cross motion (#005) which seeks to vacate the March 30, 2015 Order pursuant to CPLR 5015(a). The Court notes that in addition to vacatur and dismissal, the defendant's notice of motion also seeks an Order granting the defendant leave to file and serve a late answer pursuant to CPLR 2004 and 3012(d).

Defendant's claim of lack of jurisdiction is based upon the following facts in the record. The real property at issue is located at 28 Clarke St., Brentwood, New York. The process server swears

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that on May 22, 2013 at 3:31 pm, he attempted service on the defendant at the above-mentioned premises, but was unable to do so because a person, Mary Smith, informed him that he did not live at that address. Thereafter, on June 23, 2012 at 1:07 pm, the process server spoke with a “Jervin Hernandez, son,” at 1788 Hechscher Ave., Bay Shore, “who verified that the intended recipient actually resided at this location.” On June 25, 2012, the statutory mailing was sent to the same address.

Thereafter, the Request For Judicial Intervention was forwarded to the Supreme Court, which listed the address for Henry R. Hernandez as 1788 Hechscher Ave., Bay Shore, New York (*see* Ex. K to the motion, last pages thereof). A Foreclosure Settlement Conference was held, at the Courthouse, on December 20, 2013 and then referred to the IAS Part. Thereafter, continued foreclosure conferences were held before Justice William G. Ford, Part 38, on February 22, 2016, which was adjourned, March 30, 2016, where the defendant, Henry R. Hernandez, appeared, and April 20, 2016, which was adjourned. Then Justice Ford signed a 90-day order, the same day, April 20, 2016. Foreclosure settlement conferences continued on June 23, 2016, which was adjourned, and August 1, 2016, where the defendant once again appeared, but the matter was marked “not settled.” By that time, plaintiff’s motion (#004) had been made, in compliance with the 90-day order and the notice of appearance, dated July 28, 2016, by counsel for defendant, Henry R. Hernandez, was filed. Eventually, as noted above, the motions were transferred to this Part.

Initially, the Court rejects the affidavit of defendant, Henry R. Hernandez, since it was executed in the State of Kansas and does not contain the appropriate certificate of conformity, in violation of Real Property Law §299-A and CPLR 2309© (*see JPMorgan Chase Bank v Diaz*, 56 Misc3d 1136, 57 NYS3d 358 [Sup. Ct. Suffolk County 2017]).

In any event, by the filing of the notice of appearance, defendant waived any claim of lack of personal jurisdiction. A “defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer” (CPLR 320[a]). Additionally, pursuant to CPLR 320(b), “[a]n appearance of the defendant is equivalent to personal service of the summons upon him, unless an objection to jurisdiction under [CPLR 3211(a)(8)] is asserted by motion or in the answer as provided in [CPLR 3211]” (CPLR 320[b]).

Because the defendant did not timely move to dismiss on the ground of lack of jurisdiction or assert it in a responsive pleading, the defendant has waived the defense of lack of personal jurisdiction (*see American Home Mtge. Serv., Inc. v Arklis*, 150 AD3d 1180, 1181–82, 56 NYS3d 332 [2d Dept 2017]; *Countrywide Home Loans Serv., LP v Albert*, 78 AD3d 983, 984, 912 NYS2d 96 [2d Dept 2010]; *Ohio Sav. Bank v Munsey*, 34 AD3d 659, 826 NYS2d 321 [2d Dept 2006]; *Matter of Woicik v Town of E. Hampton*, 207 AD2d 356, 357, 616 NYS2d 203 [1994]).

By his attorney’s actions, defendant waived the defense of lack of personal jurisdiction (*see Wilmington Sav. Fund Socy., FSB v Simmerman*, 157 AD3d 846, 69 NYS3d 654 [2d Dept 2018]; *American Home Mtge. Serv., Inc. v Arklis*, 150 AD3d 1180 *supra*; *Countrywide Home Loans Serv., LP v Albert*, 78 AD3d 983, *supra*; *Resolution Trust Corp. v Beck*, 243 AD2d 307, 664 NYS2d 522 [1st Dept 1997]). The portion of the cross motion seeking dismissal pursuant to CPLR 3211(a)(8) is, therefore, denied.

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Moreover, the defendant, Henry R. Hernandez, was served with the ninety (90) day order of Justice Ford, dated April 20, 2016, at both addresses, at a time at which he claims to not be residing at the premises. Additionally, he appeared before Justice Ford on various occasions all prior to the making of this cross motion. Such actions waive jurisdictional claims.

Even on the merits of the application, it must be denied. It is well settled that a “process server’s affidavit of service constitutes prima facie evidence of proper service” (*Duran v Milord*, 126 AD3d 932, 7 NYS3d 176 [2d Dept 2015], citing *Youngstown Tube Co. v Russo*, 120 AD3d 1409, 1409, 993 NYS2d 146 [2d Dept 2014]; see *Deutsche Bank Natl. Trust Co. v Jagroop*, 104 AD3d 723, 960 NYS2d 488 [2d Dept 2013]; *U.S. Bank N.A. v Hossain*, 94 AD3d 979, 979, 943 NYS2d 140 [2d Dept 2012]). “Although a defendant’s sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server’s affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server’s affidavits” (*Deutsche Bank Natl. Trust Co. v Quinones*, 114 AD3d 719, 719, 981 NYS2d 107 [2d Dept 2014]; see *City of New York v Miller*, 72 AD3d 726, 727, 898 NYS2d 643 [2d Dept 2014]; *Emigrant Mtge. Co., Inc. v Westervelt*, 105 AD3d at 897, 964 NYS2d 543 [2d Dept 2013]; *US Natl. Bank Assn. v Melton*, 90 AD3d 742, 743, 934 NYS2d 352 [2d Dept 2011]). A defendant’s bare and unsubstantiated denial of receipt is insufficient to rebut the presumption of proper service (see *US Bank Natl. Assn. v Tate*, 102 AD3d 859, 859–60, 958 NYS2d 722 [2d Dept 2013], citing *Bank of NY v Espejo*, 92 AD3d 707, 708, 939 NYS2d 105 [2d Dept 2012]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 103, 923 NYS2d 609 [2d Dept 2011]; *Deutsche Bank Natl. Trust Co. v Hussain*, 78 AD3d 989, 989, 912 NYS2d 595 [2d Dept 2010]).

Henry R. Hernandez was served with the complaint by substituted service, by delivery thereof together with other initiatory papers to Jervin Hernandez, at which address was admitted to be the defendant’s residence (see CPLR 308[2]). The process server described Jervin Hernandez in detail, and noted that the mail component of CPLR 308(2) was accomplished thereafter. When the jurisdictional joinder of a defendant pursuant to CPLR 308(2) is challenged, all that is required is the delivery of the summons “within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend ‘personal and confidential’” (see CPLR 308[2]).

In his affidavit, Henry R. Hernandez avers that he was not residing at the property at the time of service, but he does acknowledge that Jervin Hernandez is his nephew. However, defendant fails to deny that he received the summons and complaint and, instead, simply states that he was never served. This conclusory denial of service is insufficient to rebut the presumption of proper service established by the affidavit of service (see *HSBC Bank USA v Dalessio*, 137 AD3d 860, 863, 27 NYS3d 192 [2d Dept 2016]; *HSBC Bank USA v Desrouillerer*, 128 AD3d 1013, 11 NYS3d 93 [2d Dept 2015]; *425 E. 26th St. Owners Corp. v Beaton*, 50 AD3d 846, 858 NYS2d 186 [2d Dept 2008]).

Importantly, there is no affidavit submitted from Jervin Hernandez, who accepted service on behalf of the defendant. Nor is there a denial of receipt from Jervin Hernandez. Moreover, the

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subject premises appears to be a rental property, since the mortgage, dated November 18, 2002, contained a 1-4 Family Rider, which did not require the borrower to occupy the premises (*see* section F). Also, this motion was served by mail upon the defendant at the address of service on June 23, 2016.

Additionally, although the defendant notes that he was residing at a separate address at the time of service, his only real support for that claim is a temporary visitor driver licence with the State of New York Department of Motor Vehicle. In the face of the presumption of proper service, only a sworn denial containing a detailed and specific contradiction of the allegations in the process server's affidavit will defeat the presumption of proper service and require the court to schedule a traverse hearing (*see Deutsche Bank Natl. Trust Co. v O'King*, 148 AD3d 776, 51 NYS3d 523 [2d Dept 2017]; *Sileo v Victor*, 104 AD3d 669, 960 NYS2d 466 [2d Dept 2013]; *Emigrant Mtge. Co. v Westervelt*, 105 AD3d 896, 964, NYS2d 543 [2d Dept 2013]). The defendant's conclusory allegations are insufficient in this regard.

The Court turns then to defendant's application pursuant to CPLR 3012(d). 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 (*see* CPLR 2004, 3012[d]; *HSBC Bank USA, Natl. Assn. v Rotimi*, 121 AD3d 855, 855, 995 NYS2d 81 [2d Dept 2014] *citing Chase Home Fin., LLC v Minott*, 115 AD3d 634, 981 NYS2d 757 [2d Dept 2014]; *Community Preserv. Corp. v Bridgewater Condominiums, LLC*, 89 AD3d 784, 932 NYS2d 378 [2d Dept 2011]; *Taddeo-Amendola v 970 Assets, LLC*, 72 AD3d 677, 897 NYS2d 642 [2d Dept 2010]).

Here, as established above, the defendant fails to assert a reasonable excuse for his failure to respond to the complaint, as the Court finds that service upon the defendant was proper. Inasmuch as the defendant failed to advance a reasonable excuse in support of his application to vacate his default in answering and for leave to extend his time to answer under CPLR 2004 and 3012(d), it is unnecessary to address whether defendant has demonstrated a potentially meritorious defense (*see BAC Home Loans Serv., LP v Readon*, 132 AD3d 790, 18 NYS3d 664 [2d Dept 2015]; *Citimortgage, Inc. v Kowalski*, 130 AD3d 558, 13 NYS3d 468 [2d Dept 2015]; *Emigrant Bank v Wiseman*, 127 AD3d 1013, 6 NYS3d 670 [2d Dept 2015]).

The Court, rejects defendant's reply papers since such is not permitted with a cross motion (*see* CPLR 2214, 2215). Therefore, the Court denies defendant's cross motion (#005) in its entirety.

The Court turns then to plaintiff's motion (#004) and the referee's findings and report (*see US Bank N.A. v Saraceno*, 147 AD3d 1005, 48 NYS3d 163 [2d Dept 2017]; *Mortgage Elec. Registration Sys., Inc. v Holmes*, 131 AD3d 680, 17 NYS3d 31 [2d Dept 2015]; *HSBC Bank USA, N.A. v Simmons*, 125 AD3d 930, 5 NYS3d 175 [2d Dept 2015]). Although the court is not bound by the referee's findings, the report of a referee should be confirmed whenever the findings are substantially supported by the record (*see Citimortgage, Inc. v Kidd*, 148 AD3d 767, 49 NYS3d 482 [2d Dept 2017]; *Matter of Cincotta*, 139 AD3d 1058, 32 NYS3d 610 [2d Dept 2016]; *Hudson v Smith*, 127 AD3d 816, 4 NYS3d 894 [2d Dept 2015]).

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Here, the referee submitted ample documentary evidence to support the amounts due and owing plaintiff. The computation was premised upon business records produced by plaintiff in support of its initial motion for summary judgment and in support of the instant motion (*see Galasso, Langione & Botter, LLP v Galasso*, 89 AD3d 897, 933 NYS2d 73 [2d Dept 2011]; *cf. Citimortgage, Inc. v Kidd*, 148 AD3d 767, *supra*).

The portion of plaintiff's motion seeking attorney's fees is also granted, as the terms of the subject loan documents allows for same. Here, plaintiff has supplied the Court with an affirmation of services requesting a total of \$3,500.00. The Court finds this amount to be reasonable, and will award plaintiff same (*see Vigo v 501 Second Street Holding Corp.*, 121 AD3d 778, 994 NYS2d 354 [2d Dept 2014]).

In light of the above, the plaintiff's motion (#004) is granted in its entirety, and defendant's cross motion (#005) is denied. The Court simultaneously signs the proposed Judgment submitted by plaintiff, as modified.

DATED: 9/24/18



THOMAS F. WHELAN, J.S.C.