American Home Mtge. Servicing, LLC v Abodalo
2018 NY Slip Op 32818(U)
November 5, 2018
Supreme Court, Suffolk County
Docket Number: 33968/2010
Judge: Thomas F. Whelan

[* 1]

COPY

SHORT FORM ORDER

INDEX No. 33968/2010

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 9/20/18
SUBMIT DATE: 10/5/18
Mot. Seq. 003 - MD
CDISP Y____ N __X__

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AMERICAN HOME MORTGAGE SERVICING, LLC,

Plaintiff,

-against-

JALAL ABODALO, HE DR. MOHAMMAD SAED ALKENDI, WASHINGTON MUTUAL BANK, f/k/ WASHINGTON MUTUAL BANK, FA and REEM ABODALO,

Defendants.

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Upon the following papers numbered 1 to 12 read on this motion to dismiss the complaint, among other things; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers: ____; Opposing papers: 5-6; Reply papers 7-8; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#003) by the defendants, Jabal Abodalo and Reem Abodalo, for an order dismissing the complaint or, in the alternative, vacating this Court's Order dated December 21, 2015, granting defendants leave to amend their answer, and compelling discovery, is denied in its entirety; and it is further

ORDERED that movant 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 an action to foreclose a mortgage on residential property situate in Northport, New York. In essence, on June 1, 2006, defendant, Jalal Abodalo, borrowed $300,000.00 from plaintiff's predecessor-in-interest and executed a promissory note and mortgage. Since January 1, 2010, the defendant has failed to pay the monthly installments due and owing. This action was commenced by filing on September 15, 2010. On January 29, 2011, Jalal Abodalo filed a Notice of Appearance, though counsel. No other defendants answered or otherwise appeared in the action. On October 9, 2015, the plaintiff moved (#001) for default judgments against the non-answering defendants, and for the appointment of a referee to compute. The motion was granted by this Court on December 21, 2015. Status conferences were thereafter held on August 4, 2016 and July 25, 2018. On August 1, 2018, plaintiff filed an *ex parte* application seeking an amendment to the December 21, 2015 Order to provide for compensation to the referee upon the filing of his report. The application was granted by Order dated August 8, 2018. On August 22, 2018, defendant, Jalal Abodalo, now through new counsel and together with defendant, Reem Abodalo, filed the instant motion (#003) seeking dismissal of the complaint pursuant to CPLR 3215(c) or, in the alternative, vacatur of the December 21, 2015 Order, leave to serve a late answer, and further discovery.

The defendants first contend that the plaintiff's motion for default and the appointment of a referee to compute filed in October, 2015 was untimely pursuant to CPLR 3215(c) and that the complaint should, therefore, be dismissed. CPLR 3215(c) provides that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned . . . unless sufficient cause is shown why the complaint should not be dismissed" (CPLR 3215[c]; ***HSBC Bank USA, N.A. v Hasis***, 154 AD3d 832, 833, 62 NYS3d 467 [2d Dept 2017], *citing* ***Wells Fargo Bank, NA v Bonanno***, 146 AD3d 844, 45 NYS3d 173 [2d Dept 2017]). To avoid dismissal, the plaintiff need not actually obtain nor specifically seek the default judgment within one year (*see* ***HSBC Bank USA, NA v Hasis***, 154 AD3d at 833, *supra; see also* ***Wells Fargo Bank, N.A. v Daskal***, 142 AD3d 1071, 1072, 37 NYS3d 353 [2d Dept 2016]). As long as "proceedings" are being taken that manifest "an intent not to abandon the case but to seek a judgment, the case should not be subject to dismissal" (***Wells Fargo Bank, NA v Daskal***, 142 AD3d 1071, 1073, 37 NYS3d 353 [2d Dept 2016], *citing* ***Brown v Rosedale Nurseries***, 259 AD2d 256, 257, 686 NYS2d 22 [1st Dept 1999], ***US Bank NA v Dorestant***, 131 AD3d 467, 469, 15 NYS3d 142 [2d Dept 2015]; ***Wells Fargo Bank, N.A. v Combs***, 128 AD3d 813,813, 10 NYS3d 257 [2d Dept 2015]; ***Klein v St. Cyprian Props., Inc.***, 100 AD3d 711, 712, 954 NYS2d 170 [2012]; ***Pisciotta v Lifestyle Designs, Inc.***, 62 AD3d 850, 852, 879 NYS2d 179 [2d Dept 2009]; ***Icon Equip. Distribs. v Gordon Envtl. & Mech. Corp.***, 272 AD2d 579, 579 709 NYS2d 426 [2d Dept 2000]).

A defendant may waive the right to seek relief under CPLR 3215(c) by serving an answer or taking "any other steps which may be viewed as a formal or informal appearance" (***HSBC Bank***

USA, Natl. Assn. v Grella, 145 AD3d 669, 44 NYS3d 56 [2d Dept 2016] *quoting* ***Meyers v Slusky***, 139 AD2d 709, 527 NYS3d 464 [2d Dept 1988]; *see* ***DeLourdes Torres v Jones***, 26 NY3d 742, 772, 27 NYS3d 468 [2016]; ***HSBC Bank USA v Lugo***, 127 AD3d 502, 503, 9 NYS3d 6 [2d Dept 2015]; ***Hodson v Vinnie's Farm Mkt.***, 103 AD3d 549, 959 NYS2d 440 [2d Dept 2013]; ***Gilmore v Gilmore***, 286 AD2d 416, 730 NYS2d 239 [2d Dept 2001]). The Second Department recently reaffirmed the rule that a defendant may waive the right to seek relief under CPLR 3215(c) by his or her conduct (*see* ***US Bank N.A. v Gustavia Home, LLC***, 156 AD3d 843, 844, 67 NYS3d 242 [2d Dept 2017]; ***Bank of America, N.A. v Rice***, 155 AD3d 593, 63 NYS3d 486 [2d Dept 2017]).

As noted above, Jalal Abodalo filed a Notice of Appearance through counsel on January 25, 2011. 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]). The defendant waived his right to seek a dismissal pursuant to CPLR 3215(c) by serving the notice of appearance on January 25, 2011, as such constituted a formal appearance in the action (*see* ***US Bank N.A. v Gustavia Home, LLC***, 156 AD3d at 844, *supra*, *citing* CPLR 320[a]; ***Bank of Am., NA v Rice***, 155 AD3d at 593, *supra*, ***Myers v Slutsky***, 139 AD2d 709, 710, 527 NYS2d 464 [2d Dept 1988]; *cf.* ***HSBC Bank USA, N.A. v. Grella***, 145 AD3d 669, 670, 44 NYS3d 56 [2d Dept 2016]). The Court, therefore, denies the defendant's application to dismiss the complaint as abandoned pursuant to CPLR 3215(c) .

The application also fails as to defendant Reem Abodalo, as said defendant, who is a party to the action by virtue of her residency at the premises, did not move for such relief until after the default judgment was entered against her by plaintiff per the December 21, 2015 Order (*see* ***Fuentes v Virgil***, 88 AD3d 643, 644, 930 NYS2d 479 [2d Dept 2011]). Where, as here, an issue is judicially determined, judges and courts of coordinate jurisdiction are precluded from further consideration of that issue under the doctrine of the "law of the case," which applies to any legal determinations that were necessarily resolved on the merits in a prior decision (*see* ***Martin v City of Cohoes***, 37 NY2d 162, 165, 371 NYS2d 687, 689 [1975]; ***Ahrorgulova v Mann***, 144 AD3d 953, 42 NYS3d 203 [2d Dept 2016]; ***Strujan v Glencord Bldg. Corp.***, 137 AD3d 1252, 29 NYS3d 398 [2d Dept 2016]).

Notwithstanding the above, the Court notes that the plaintiff has demonstrated its intent not to abandon the case by engaging in loss mitigation efforts and settlement communications with defendants, as well as, filing an additional notice of pendency. Delays attributable to the parties' engagement in mandatory settlement conference procedures, or other loss mitigation efforts including trial loan modifications and other settlement communications, motion practice and other pre-trial proceedings have been held to negate any intention to abandon the action and are thus

excusable under CPLR 3215(c) (*see* ***Brooks v Somerset Surgical Assocs.***, 106 AD3d 624, 966 NYS2d 65 [1st Dept 2013]; ***Laourdakis v Torres***, 98 AD3d 892, 950 NYS2d 703 [1st Dept 2012]). For these reasons, the branch of the motion seeking dismissal pursuant to CPLR 3215(c) is denied.

The defendants next seek vacatur of their default in opposing plaintiff's motion (#001) for default judgment and to appoint a referee to compute pursuant to CPLR 5015(a)(1). In order to do so, a party must demonstrate both a reasonable excuse for the default and a potentially meritorious opposition to the motion (*see* ***Hudson City Sav. Bank v Bomba***, 14 AD3d 704, 51 NYS3d 570 [2d Dept 2017]; ***Bank of New York v Young***, 123 AD3d 1068, 2 NYS3d 127 [2d Dept 2014]; ***Citibank [South Dakota], N.A. v Baron***, 115 AD3d 90, 982 NYS2d 396 [2d Dept 2014]). The determination of what constitutes a reasonable excuse lies within the sound discretion of the Court (*see* ***Hudson City Sav. Bank v Bomba***, 14 AD3d *at* 705, *supra*; ***Aurora Loan Servs. LLC v Ahmed***, 122 AD3d 557, 996 NYS2d 92 [2d Dept 2014]).

The defendants contend that the failure to oppose the motion resulted from law office failure attributed to prior counsel. Defendants submit that because prior counsel did not inform them of the plaintiff's motion and failed to oppose the motion, they have demonstrated a reasonable excuse for failing to oppse the motion.

The Court finds this proffered explanation unavailing. A Court has the discretion to accept law office failure as a reasonable excuse, "where the claim ... is supported by a 'detailed and credible' explanation of the default" (***Kim v Bishop***, 2017 WL 6504625 [2d Dept 2017]; *see* ***Kohn v Kohn***, 86 AD3d 630, 630, 928 NYS2d 55 [2d Dept 2011]; CPLR 2005; *see also* ***Strunk v Revenge Cab Corp.***, 98 AD3d 1029, 950 NYS2d 595 [2d Dept 2012]). However, "it was not the Legislature's intent to routinely excuse such defaults, and mere neglect will not be accepted as a reasonable excuse" (***Incorporated Vil. of Hempstead v Jablonsky***, 283 AD2d 553, 553-554, 725 NYS2d 68 [2d Dept 2001]; ***Onishenko v Ntansah***,145 AD3d 910, 43 NYS3d 504 [2d Dept 2016]).

Here, the defendants have failed to demonstrate a proper cause to vacate their default. The plaintiff's motion papers (#001) were properly served upon the defendant's counsel, and the bare allegation of law office failure is insufficient (*see* ***Strunk v Revenge Cab Corp.***, 98 AD3d 1029, *supra*; ***Bank of New York v Young***, 123 AD3d *at* 1069, *supra*; ***Onishenko v Ntansah***,145 AD3d *at* 911- 912, *supra*; ***Buchakian v Kuriga***, 138 AD3d 711, 28 NYS3d 724 [2d Dept 2016]).

Because the defendants have not demonstrated a reasonable excuse for the default in opposing plaintiff's motion for summary judgment, it is unnecessary to consider whether defendants demonstrated a potentially meritorious defense (*see* ***PNC Bank, N.A. v Bannister***, __ AD3d __, 2018 NY Slip Op 03718 [2d Dept], *citing* ***Bank of Am., N.A. v Agarwal***, 150 AD3d 651, 652, 57

NYS3d 153 [2d Dept 2017]).

The defendants' next request that the Court vacate its own judgment "for sufficient reason and in the interests of substantial justice" pursuant to CPLR 5015(a) (***Hudson City Sav. Bank v Cohen***, 120 AD3d 1304, 1305, 993 NYS3d 66 [2d Dept 2014] [citations omitted]). In such a case, the defendant would be required to provide evidence of fraud, mistake, inadvertence, surprise, or excusable neglect (*see* ***Wells Fargo Bank Minnesota, N.A. v Coletta***, 153 AD3d 757, 758, 60 NYS3d 320 [2d Dept 2017], *citing* ***HSBC Bank USA v Josephs–Byrd***, 148 AD3d 788, 790, 49 NYS3d 477 [2d Dept 2017]; ***40 BP, LLC v Katatikarn***, 147 AD3d 710, 711, 46 NYS3d 217 [2d Dept 2017]; *cf.* ***U.S. Bank NA v Losner***, 145 AD3d 935, 44 NYS3d 467 [2d Dept 2016]; ***Hudson City Sav. Bank v Cohen***, 120 AD3d 1304, *supra*; ***Wells Fargo Bank v Hodge***, 92 AD3d 775, 939 NYS2d 98 [2d Dept 2012]). Here, however, the defendants fail to set forth any facts demonstrating their entitlement to this relief.

In light of the above, the Court also denies the defendant's application seeking leave to appear herein by service of an answer pursuant to CPLR 3012(d). To successfully vacate the default in answering the complaint and to compel plaintiff to accept service of an untimely answer, a defendant must establish both a reasonable excuse for his/her failure to answer and the existence of a potentially meritorious defense to the action (*see* CPLR 3012[d], 5015[a][1]; ***US Bank N.A. v Samuel***, 138 AD3d 1105, 30 NYS3d 305 [2d Dept 2016]; ***SDF8 CBK, LLC v 689 St. Marks Ave., Inc.***, 131 AD3d 1037, 16 NYS3d 463 [2d Dept 2015]; ***Chase Home Fin., LLC v Minott***, 115 AD3d 634, 981 NYS2d 757 [2d Dept 2014]). As discussed above, the Court has determined that no reasonable excuse is offered (*see* ***Deutsche Bank Natl. Trust Co. v Patrick***, 136 AD3d 970, 971, 25 NYS3d 364 [2d Dept 2016]). The absence of a reasonable excuse for the default renders it unnecessary to determine whether defendant demonstrated the existence of a potentially meritorious defense (*see* ***LaSalle Bank N.A. v Calle***, 153 AD3d 801, 61 NYS3d 104 [2d Dept 2017]; ***Citimortgage, Inc. v Bustamante***, 107 AD3d 752, 968 NYS2d 513 [2d Dept 2013]; ***Wells Fargo Bank, N.A. v Cervini***, 84 AD3d 789, 921 NYS2d 643 [2d Dept 2011]).

Finally, the defendant's request for discovery is denied, as there is no showing as to how such discovery would have helped to defeat plaintiff's motion for summary judgment (*see* ***JPMorgan Chase Bank, Natl. Assn. v Weinberger***, 142 AD3d at 645-6, *supra*; ***American Prescription Plan, Inc. v American Postal Workers Union***, 170 AD2d 471, 565 NYS2d 830 [2d Dept 1991]).

In accordance with the above, the defendant's motion (#003) is denied in its entirety.

DATED: 11/5/18

THOMAS F. WHELAN, J.S.C.