Citimortgage Inc. v Mulazhanov
2018 NY Slip Op 33236(U)
November 27, 2018
Supreme Court, Queens County
Docket Number: 710853/17
Judge: Darrell L. Gavrin

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

CITIMORTGAGE INC.,

Plaintiff,

- against-

YUSEF MULAZHANOV a/k/a YUZEF MULADZHANOV, 4 STELLA MANAGEMENT LLC, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU and "JOHN DOE #1" through "JOHN DOE #10," the last ten names being fictitious and unknown to the plaintiff, the person or parties intended being the person or parties, if any, having or claiming an interest in or lien upon the mortgaged Premises described in the Complaint,

Defendants.

Index No. 710853/17

Motion Date July 31, 2018

Motion Cal. No. 2

Motion Seq. No. 3

The following numbered papers read on this Order to Show Cause by defendants, Stella Management LLC (Stella) and Yusef Mulazhanov a/k/a Yuzef Muladzhanov (Muladzhanov), pursuant to CPLR 318 and/or 5015(a)(1), to vacate Stella's default in timely responding to the complaint, pursuant to CPLR 3211(a)(8), dismissing the complaint against Muladzhanov, pursuant to CPLR 306-b, dismissing the complaint against Muladzhanov, pursuant to CPLR 3211(a)(1), (3) and/or (5), dismissing the complaint against Muladzhanov, granting defendants an order directing the Clerk of this Court to strip plaintiff's mortgage from the property record, directing plaintiff to make any and all required reports to the three credit agencies to remove the mortgage default and foreclosure action from defendant, Muladzhanov's record.

	Papers Numbered
Order to Show Cause - Affirmation - Exhibits.....	EF 70-86 EF 90-91
Affirmation in Opposition - Exhibits.....	EF 92-99

Upon the foregoing papers, it is ordered that the application is determined as follows:

Plaintiff commenced this action by filing a copy of the summons and complaint with notice of pendency on August 8, 2017. The plaintiff seeks to foreclose on a mortgage given by the defendant, Muladzhanov, as record owner, on the subject real property known as 110-534 157th Street, Jamaica, New York, to secure a note in the amount of $500,000. The plaintiff alleges that it is the holder of the mortgage and underlying obligation and that the defendant, Muladzhanov, defaulted under the terms of the note and mortgage by failing to make the monthly installment payment due November 1, 2008, and as a consequence, it elected to accelerate the entire mortgage debt. The plaintiff commenced a prior foreclosure action entitled *CitiMortgage v Muladzhanov, et al.* (Queens County Sup. Ct. Index No. 17664/2009 on July 2, 2009. That action was dismissed in an order dated August 13, 2014. The defendant, Muladzhanov, transferred his interest in the property to the defendant Stella.

The defendant, Stella, has moved to vacate its default. Under CPLR 317 a defendant need not demonstrate a reasonable excuse for the default (*Eugene Di Lorenzo, Ino. v A.C. Dutton Lumber Co.*, 67 NY2d at 141; *Samet v Bedford Flushing Holding Corp.*, 299 AD2d 404 [2002]; *Trujillo v ATA Housing Corp.*, 281 AD2d 538, 539 [2006]; *Kavourias v Big Six Pharmacy Inc.*, 262 AD2d 456 [1999]). Rather, it must establish that he or she did not personally receive notice of the summons in time to defend itself and has a meritorious defense (*see Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co.*, 67 NY2d 138 [1986]; *Trujillo*, 281 AD2d at 538; *Kavourias*, 262 AD2d at 456). Here, the defendant, Stella, failed to establish that it did not receive notice of the summons in time to defend itself (*see U.S. Bank, N.A. v Hassan*, 126 AD3d 683 [2d Dept 2015]; *Bank of New York v Espejo*, 92 AD3d 707 [2d Dept 2012]). Here, the Stella has not put forth any evidence demonstrating its lack of notice as to the lawsuit. In fact the defendant Stella admits that it was served by service upon the Secretary of State. The mere denial of receipt by Stella of the summons and complaint is insufficient to warrant relief under CPLR 317.

The defendant, Stella, has also moved to vacate its default under CPLR 5015(a)(1). A defendant moving to vacate a default judgment under CPLR 5015(a)(1) must establish a reasonable excuse for the default and a potentially meritorious defense (*see Wells Fargo, N.A. v Cervini*, 84 AD3d 789 [2d Dept 2011]; *Midfirst Bank v Al-Rahman*, 81 AD3d 797 [2d Dept 2011]). The determination of what constitutes a reasonable excuse is left to the sound discretion of the court (*see Abrams v City of New York*, 13 AD3d 566 [2d Dept 2004]; *Scarlett v McCarthy*, 2 AD3d 623 [2d Dept 2003]). Here, the defendant, Stella, has not put forth any excuse for its default.

The defendant, Muladzhanov, has moved to dismiss the complaint based on lack of personal jurisdiction. The plaintiff first attempted to serve the defendant, Muladzhanov, pursuant to CPLR 308(2), at the subject premises. However, Muladzhanov has stated in an affirmation that the subject premises is not his place of business, dwelling place or usual place of abode. The plaintiff does not oppose this assertion. Therefore, the plaintiff has abandoned

relying on service, pursuant to CPLR 308(2), and the purported service, pursuant to CPLR 308(2), is not effective.

The plaintiff, however, states that service was effectuated, pursuant to CPLR 308(4). The plaintiff offers an affidavit of service dated December 11, 2017, which establishes that the defendant, Muladzhanov, was served, pursuant to CPLR 308(4). The affidavit of service lists the attempts made by the process server on different days and different times and is sufficient to establish due diligence to use CPLR 308(4) service. The affiant states that he affixed a copy to the door of Muladzhanov's residence on December 6, 2017. The affiant further states that he mailed a copy of the complaint on December 11, 2017. This affidavit constitutes *prima facie* proof of proper service upon defendant, Muladzhanov, pursuant to CPLR 308(4), (see *Chichester v Alal-Amin Grocery & Halal Meat*, 100 AD3d 820 [2d Dept 2012]; *US Natl. Bank Assn. v Melton*, 90 AD3d 742 [2d Dept 2011]). This affidavit of service was filed December 21, 2017.

The defendant, Muladzhanov, has also moved for dismissal under CPLR 306-b. Under CPLR 306-b, service of the summons and complaint shall be made within 120 days after the filing of the summons and complaint. Here, the summons and complaint was filed on August 8, 2017. While, the plaintiff affixed the summons and complaint at the defendant's residence on December 6, 2018, which was 120 days after the filing of the summons and complaint, service was not completed until December 31, 2017, 10 days after the filing of the affidavit of service on December 21, 2017. Inasmuch as service was not completed until December 31, 2017, which is more than 120 days after the filing of the summons and complaint, the service was not timely. Pursuant to CPLR 306-b, however, the court is permitted to grant an extension of time to serve process upon good cause shown or in the interests of justice. Furthermore, since the defendant has fully addressed the issue of whether plaintiff should be afforded relief pursuant to CPLR 306-b in its papers, the absence of a formal motion by plaintiff is not an impediment to this determination (*Slate v Schiavone Constr., Co.*, 10 AD3d 1 [1st Dept 2004]). "[G]ood cause may be found to exist where the plaintiff's failure to timely serve process is a result of circumstances beyond the plaintiff's control (*Bumpus v New York City Tr. Auth.*, 66 AD3d 26, 32 [2d Dept 2009]). Here, the plaintiff has not made such a showing and has thus not set forth good cause to extend the time to serve process. When good cause for an extension is not established the court must consider the interests of justice standard of CPLR 306-b (*id.* at 32). When considering the interest of justice prong the court can consider factors such as the length of delay in service, the promptness of the request by plaintiff and prejudice to defendant. Here, the plaintiff has shown that the delay was minimal and the defendant is not prejudiced by the granting of the extension, thus, in the interests of justice the time to extend service should be granted. Therefore the court finds that the service on defendant, Muladzhanov, pursuant to CPLR 308(4), though more than 120 days after the filing of the summons and complaint, is timely.

The court next turns to the motion to dismiss based on the expiration of the statute of limitations. First, while the plaintiff states that this issue cannot be raised by the defendant

because the defendant is in default and has waived this defense, in light of the fact, that the service was late and the court is only now granting plaintiff an extension of time to serve, the defendant, Muladzhanov, is not in default and can raise the affirmative defense of expiration of the statute of limitations. An action to foreclose a mortgage is governed by a six-year statute of limitations (CPLR 213[4]). With respect to a mortgage payable in installments, separate causes of action accrue for each installment that is not paid and the statute of limitations begins to run on the date each installment becomes due (*Wells Fargo Bank, N.A. v Cohen*, 80 AD3d 753 [2d Dept 2010]; *Loiacono v Goldberg*, 240 AD2d 476 [2d Dept 1997]). However, once a mortgage debt is accelerated the entire amount is due and the statute of limitations begins to run on the entire debt (*Wells Fargo Bank, N.A. v Burke*, 94 AD3d 980 [2d Dept 2012]; *EMC Mtge. Corp. v Patella*, 279 AD2d 604 [2d Dept 2001]). Where, as here, the acceleration of the debt is made optional to the holder of the note and mortgage, some affirmative act must be taken in order to evidence the holder's election to accelerate the debt. While, the defendant did not attach a copy of the complaint from the prior action to its motion, the plaintiff does not dispute that the prior action concerns the same mortgage. Furthermore, it is undisputed that the plaintiff in the prior action elected to accelerate the entire debt. The defendant has established that the loan was accelerated by commencement of the first foreclosure action on July 2, 2009. This action was not commenced until August 8, 2017, which is more than six-years after the acceleration in the complaint. The defendant has, thus, made a *prima facie* showing that this action was not commenced within the six-year statute of limitations, which began to run upon the filing of the complaint in the 2009 action (*see EMC Mtge. Corp. v Patella*, 279 AD2d at 605).

The burden shifts to plaintiff to raise a triable issue of fact as to whether the statute of limitations was tolled or is otherwise inapplicable or whether it actually commenced the action within the applicable limitations period (*see Farage v Ehrenberg*, 124 AD3d 159 [2d Dept 2014]; *QK Healthcare, Inc. v InSource, Inc.*, 108 AD3d 56 [2d Dept 2013]). While the plaintiff argues that the defendant did not prove that the plaintiff had standing to commence the first action, it was not defendant's burden to prove standing, but rather the burden of the plaintiff to raise the issue of standing in opposition to the motion to dismiss (*see Deutsche Bank Natl. Trust Co. Ams. v Bernal*, 56 Misc 3d 915 [Sup Ct, Westchester County 2017]; *see generally Milone v U.S. Bank, N.A.*, 164 AD3d 145 [2d Dept 2018]). Here, the plaintiff did not prove that it did not have standing to commence the first action. Thus, the plaintiff failed to raise any issue of fact as to whether the first action properly accelerated the loan.

The plaintiff next argues that the acceleration did not actually occur at the time of commencement of the first lawsuit. The plaintiff argues that because the mortgage gave the borrower a right to reinstate the loan if it follows certain steps and pays all arrears and other fees, that no actual acceleration occurs until final judgment of foreclosure and sale. The plaintiff argues that because it cannot reject the borrower's payment of arrears, which is the critical right bestowed by the acceleration clause, the commencement of the first action was insufficient to accelerate the debt. This argument is without merit. There is no question that the plaintiff demanded payment in full and in fact sued to recover the entire accelerated loan amount when it commenced the first action. The fact that the mortgage gives an option to the

borrower to reinstate the loan and requires the lender to revoke its acceleration, does not render the acceleration invalid for statute of limitations purposes. If the acceleration was not valid, then the plaintiff would be unable to bring an action for the entire loan amount. Therefore, the commencement of the first action was sufficient to accelerate the debt. Furthermore, in this case, there was no revocation, either by choice or by option of the borrower. The plaintiff did not raise any other issue concerning the acceleration of the loan or whether the statute of limitations was tolled. Therefore, the entire debt remained accelerated since the commencement of the first action, and this action was brought after the expiration of the statute of limitations. Thus, the motion to dismiss based on the expiration of the statute of limitations must be granted.

Accordingly, the branch of the motion to vacate the default of the defendant, Stella, is denied. The branch of the motion by the defendant, Muladzhanov, to dismiss based on lack of personal jurisdiction is denied. The branch of the motion by the defendant, Muladzhanov, to dismiss, pursuant to CPLR 306-b, based on failure to serve the summons and complaint within 120 days is denied. The branch of motion to dismiss by the defendant, Muladzhanov, on the ground that the statute of limitations has expired is granted and the complaint is dismissed only as against the defendant, Muladzhanov. All other requests for relief are denied.

Dated: November 27, 2018

DARRELL L. GAVRIN, J.S.C.