

Deutsche Bank Natl. Trust Co. v Durant

2020 NY Slip Op 31739(U)

May 29, 2020

Supreme Court, Queens County

Docket Number: 704245/2015

Judge: Mojgan C. Lancman

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Short Form Order

FILED

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HONORABLE MOJGAN C. LANCMAN

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DEUTSCHE BANK NATIONAL TRUST COMPANY,

COUNTY CLERK
QUEENS COUNTY

IAS Part 20

Plaintiff,

-against-

Index No.: 704245/2015

ELMA DURANT, *et al.*,

Motion Seq. No.: 2

Defendants.

Motion Date: 11.25.2019

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The following papers numbered 1 to 7 read on the motion of the defendant Elma Durant (the “Defendant”) for an Order, *inter alia*, dismissing this action pursuant to CPLR § 3215 [c].

Order to Show Cause – Affirmation in Support – Exhibits	1-3
Affirmation in Opposition – Exhibits	4-5
Reply Affirmation – Exhibits	6-7

Upon the foregoing papers, it is ordered that this motion is decided as follows:

The plaintiff, Deutsche Bank National Trust Company, as Trustee for Carrington Mortgage Loan Trust, Series 2005 OPT2, Asset Backed Pass-Through Certificates (the “Plaintiff”), brought this action to foreclose a mortgage encumbering the real property located at 193-32 Williamson Avenue, Springfield Gardens, New York 11413 (the “Property”).

Presently before the Court is the Defendant’s motion, brought on by order to show cause, to (1) dismiss this action pursuant to CPLR § 3215 [c]; and (2) in the alternative, and in effect, reinstate a prior Order that dismissed this cause. The motion is opposed by the Plaintiff.

I. Factual Background

The Defendant borrowed the sum of \$380,000.00 from the original lender, Option One Mortgage Corporation (“OOMC”), on January 28, 2005. In exchange, the Defendant executed a note (the “Note”) and a mortgage (the “Mortgage”) on said date in favor of OOMC. The Mortgage encumbers the Property.

The Plaintiff alleges that the Defendant defaulted under the terms of the Note and the Mortgage by failing to make the payment due on August 1, 2013 and all subsequent payments.

II. Procedural History

The Plaintiff commenced this cause on April 28, 2015 by filing the summons and complaint with the Queens County Clerk. Although the Defendant was served with process on May 9, 2015, she failed to answer or appear.

By Order dated November 18, 2016 and entered on December 12, 2016, the Honorable Marguerite A. Grays dismissed this action. In so doing, Justice Grays confirmed the Hear and Report Recommending Dismissal of Court Attorney-Referee Tracy Catapano-Fox, dated November 4, 2016 and entered on December 12, 2016.

In essence, Justice Grays accepted the recommendation of the Court Attorney-Referee that this cause be dismissed due to the Plaintiff's non-compliance with Orders dated August 10, 2015 and May 10, 2016 that required the filing of application for an Order of Reference.

On June 15, 2017, the Plaintiff served and filed a motion: (1) to vacate the dismissal of this action; (2) to restore this action to the active calendar; (3) for a default judgment against the defendants; (4) to appoint a referee; and (5) to amend the caption. An affidavit of service reveals that the motion was mailed to the Defendant at "192-32 Williamson Avenue, Springfield Gardens, New York 11413 [emphasis added]." However, as stated, the Defendant's address is 193-32 Williamson Avenue, Springfield Gardens, New York 11413 [emphasis added]."

The Plaintiff's motion was granted without opposition pursuant to the Decision/Order of Justice Leslie J. Purification, dated June 5, 2018 and entered on June 15, 2018 (the "Decision").

The Decision directed the Plaintiff to submit an Order of Reference. Although the Plaintiff complied with this directive, it mailed the proposed order to the wrong address for the Defendant, 192-32 Williamson Avenue, Springfield Gardens, New York 11413 [emphasis added]). Justice Purification subsequently signed an Order of Reference on February 5, 2019, which was entered on February 22, 2019 (the "Order of Reference").

The Court now turns to the Defendant's motion.

III. The Branch of the Motion to Vacate the Order of Reference

The Defendant argues that the Order of Reference should be vacated because the motion that gave rise to same was not served upon her. Here, the Defendant contends that the motion was mailed to the wrong address, 192-32 Williamson Avenue, Springfield Gardens, New York 11413, and that she never received same.

Preliminarily, it is clear that the Defendant was entitled to notice of the motion for an Order of Reference. In *Wilmington Savings Fund Society, FSB v Hakam*, 170 AD3d 924, 925 [2d Dept 2019], it was held as follows:

Pursuant to CPLR 3215(g)(1), whenever application is made to the court or to the clerk, any defendant who has appeared is entitled to at least five days' notice of the time and place of the application, and if more than

one year has elapsed since the default any defendant who has not appeared is entitled to the same notice unless the court orders otherwise. Here, since more than one year elapsed since the defendant's default, he was entitled to notice of the motion for an order of reference under CPLR 3215[g][1] [internal quotation marks and citations omitted].

The Defendant was served on May 9, 2015 and has never answered the Complaint. She was thus in default for over one year when the Plaintiff made the motion on June 15, 2017 for an Order of Reference and other relief. Accordingly, the Defendant was entitled to notice of said motion (*see id.*; *Citimortgage, Inc. v Reese*, 162 AD3d 847 [2d Dept 2018]).

The next issue is the effect of the Plaintiff's improper service of the motion. Here, as stated, the Plaintiff did not mail the motion to the Defendant at the Property, but rather to a wrong address. The recent case of *MTGLQ Investors, L.P. v White*, 179 AD3d 790, 791-792 [2d Dept 2020], makes it clear that the Order of Reference must be vacated:

The failure to give a party proper notice of a motion deprives the court of jurisdiction to entertain the motion and renders the resulting order void... At the time [the defendant's] attorney brought to the Supreme Court's attention that the attorney had not received the motion for summary judgment and, in response, the plaintiff failed to submit any proof of service of the motion, the court was presented with evidence that the order dated June 25, 2015, was a nullity. Under such circumstances, there was never a default in opposing the motion for summary judgment, and thus, there was no need for [the defendant] to demonstrate a reasonable excuse or a potentially meritorious opposition to the motion. Accordingly, the Supreme Court should have ... vacated so much of the order dated June 25, 2015, as granted the summary judgment motion [internal quotation marks and citations].

The Plaintiff's assertion that the presumption of service of the motion is not rebutted is baseless. "Although it is well settled that, as a general rule, proof of proper mailing gives rise to a presumption that the item was received by the addressee, the [Defendant] successfully rebutted that presumption by submitting evidence that the [motion was] ... mailed to the wrong address [citations omitted]" (*Holland v New York City*, 271 AD2d 609, 610 [2d Dept 2000]).

Equally without merit is the Plaintiff's argument that the Defendant must show both a reasonable excuse for not opposing its prior motion and a potentially meritorious opposition thereto. Lack of proper notice of the motion renders same a nullity. Thus, the Defendant never defaulted in opposing the motion, and was not required to demonstrate a reasonable excuse or a potentially meritorious opposition (*see MTGLQ Investors, L.P. v White*, 179 AD3d 790).

The Plaintiff's opposition based upon the law of the case doctrine also fails. Here, there has never been a prior judicial determination as to the propriety of the service of the motion for the Order of Reference and other relief (*see Mosby v Parilla*, 140 AD3d 1129 [2d Dept 2016]; *Ramanathan v Aharon*, 109 AD3d 529 [2d Dept 2013]).

Lastly, the Plaintiff's argument that this motion should be denied because the Defendant does not seek to vacate her default in answering the Complaint is devoid of merit. As explained above, the Plaintiff's prior motion for an Order of Reference and other relief is a nullity because it was improperly served and the Defendant never defaulted in opposing same (*see MTGLQ Investors, L.P. v White*, 179 AD3d 790). The Defendant was thus not obligated to vacate her default in answering the Complaint before seeking to vacate the Order of Reference.

Accordingly, for the reasons stated above, the Decision dated June 5, 2018 and the Order of Reference dated February 5, 2019 are vacated (*see Wilmington Savings Fund Society, FSB v Hakam*, 170 AD3d 924; *Citimortgage, Inc. v Reese*, 162 AD3d 847; *MTGLQ Investors, L.P. v White*, 179 AD3d 790).

IV. The Remaining Branches of the Defendant's Motion

The branch of the motion to dismiss this cause pursuant to CPLR § 3215 [c] is denied. The Decision dated June 5, 2018 and the Order of Reference dated February 5, 2019, *inter alia*, vacated the dismissal of this cause and restored it to the active calendar. For the reasons stated above, the subject Decision and Order of Reference are vacated. Accordingly, the Order dated November 18, 2016 that dismissed this cause is reinstated. These determinations render the Defendant's CPLR § 3215 [c] application academic.

The branch of the motion to vacate "all orders in this action in favor of the [P]laintiff" is granted solely to the extent that the Decision dated June 5, 2018 and the Order of Reference dated February 5, 2019 are vacated.

V. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that the Defendant's motion is granted in part and denied in part; and it is further,

ORDERED, that the Decision/Order dated June 5, 2018 and entered on June 15, 2018 and the Order of Reference dated February 5, 2019 and entered on February 22, 2019 are vacated; and it is further,

ORDERED, that the Order of Dismissal dated November 18, 2016 and entered on December 12, 2016 is reinstated; and it is further,

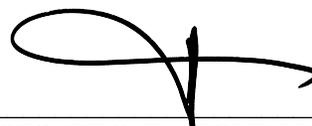
ORDERED, that all other branches of the Defendant's motion are denied.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
May 29, 2020

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MOJGAN C. LANCMAN, A.J.S.C.

4