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Wells Fargo Bank, N.A. v Forde-White
2013 NY Slip Op 50029(U)
Decided on January 2, 2013
Supreme Court, Kings County
Dear, J.
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Wells Fargo Bank, N.A., AS TRUSTEE FOR THE CERTIFICATE HOLDERS OF CARRINGTON MORTGAGE LOAN TRUST SERIES 2006-OPT1 ASSET BACKED PASS THROUGH CERTIFICATES, Plaintiffs,

against

Sonia Forde-White ET AL, Defendants,

29785/2010

Law Office of Alan H. Weinreb, for Plaintiff

Edward Roberts, Esq. for Defendant

Noach Dear, J.

In 2005, Sonia Forde-White (henceforth, "Defendant") refinanced her mortgage with Opteum Financial Services. Subsequently, the mortgage (and perhaps note) was assigned several times. Defendant defaulted in 2010 and Wells Fargo (henceforth, "Plaintiff") filed this lawsuit seeking to foreclose on the property securing the note. Defendant never answered the Summons and Complaint, but did attend several settlement conferences. On February 2, 2012, counsel for Forde-White entered an appearance and, in his Notice of Appearance, raised a jurisdictional [*2]challenge. Plaintiff sought an Order of Reference which was granted on default on April 20, 2012 when neither Defendant nor her attorney was present on the scheduled hearing date having already failed to submit written opposition. This Court ordered the Plaintiff to settle an order on notice within 90 days. It was not, however, until October that Plaintiff did so. Defendant submitted a competing order seeking dismissal for failure to comply with the April order. Subsequently, Defendant filed a Motion to Dismiss alleging that she was not properly served with the Summons and Complaint and that Plaintiff lacked standing to file this action. Plaintiff opposed and Defendant replied.

This opinion addresses both outstanding motions. The parties seek mutually exclusive remedies. If this Court grants an Order of Reference, it will not dismiss the case and, of course, the contrapositive is also illogical. As neither motion will be granted in its entirety, the submissions will be dealt with in chronological order.

Plaintiff's Failure to Settle and Order on Notice Within 90 Days

Pursuant to 22 NYCRR 202.48(a) and this Court's April 20, 2012 order, Plaintiff was required to settle an order on notice within 90 days (by July 19th). It is undisputed that nothing was submitted until October, a further two and a half months later, at which point the parties submitted competing orders.

"Failure to submit the order or judgment timely shall be deemed an abandonment of the motion or action, unless for good cause shown" (22 NYCRR 202.48[b]). "It is within the sound discretion of the court to accept a belated order or judgment for settlement" (*Russo v Russo***,** 289 AD2d 467, 468 [2d Dept 2001]). Factors to be considered include whether the party had a valid excuse for the delay, whether its actions were devoid of any intent to abandon the motion, and whether there is anything in the record showing that the other party was prejudiced by the delay (*see Neri's Land Imp., LLC v. J.J. Cassone Bakery, Inc.*, 65 AD3d 1312, 1314 [2d Dept 2009]). Additionally, a court should not deem a motion or action

abandoned when such a result "would not bring the repose to court proceedings that 22 NYCRR 202.48 was designed to effectuate, and would waste judicial resources (*Zaretsky v. Ok Hui Kim***,** 17 AD3d 455, 456 [2d Dept 2005][citations and internal quotation marks omitted]; *Meany v. Supermarkets General Corp.*,239 AD2d 393, 394 [2d Dept 1997]).

In this case, Plaintiff asserts that the "slight" delay[FN1] was caused by "clerical error" and that it caused no prejudice to Defendant. In similar contexts, law office failure may be accepted as an excuse for a default (*see* CPLR 2005; *Muir v Coleman*, 98 AD3d 569, 570 [2d Dept. 2012]) but should be rejected if vague, conclusory, and unsubstantiated. (*Glukhman v. Bay 49th St. Condominium, LLC*,100 AD3d 594, 594 [2d Dept. 2012]; *see also People's United Bank v. Latini Tuxedo Management, LLC*,95 AD3d 1285, 1286 [2d Dept 2012] ["Where a party asserts law office failure, it must provide a detailed and credible explanation of the default'"][citations omitted]). Merely blaming "clerical error" would, thus, be insufficient. It is true, however, that [*3]there is no evidence that Plaintiff intended to abandon the motion (and certainly none showing abandonment of the case) or that the delay caused any prejudice to Defendant.

Accordingly, this Court will look to which outcome will best resolve matters and conserve judicial resources. No matter the outcome of Plaintiff's motion, this case will continue. Even were the Motion to Dismiss to be granted, Plaintiff could and, likely, would refile. If the Order of Reference were granted, Defendant's allegations would, unless absolutely rejected in this opinion, still need to be addressed. In its discretion, then, this Court chooses to deem the Motion for an Order of Reference abandoned but not dismiss the action on that basis.

Defendant's Motion to Dismiss

Defendant asserts that this Court lacks personal jurisdiction over her since she was not properly served and that Plaintiff lacked standing to bring this action. As a threshold matter, this Court must determine whether these Defenses are available to her in light of her participation in foreclosure settlement conferences and her attorney's subsequent appearance prior to filing this motion.

Waiver of Defenses

"A party appears in an action by serving and filing a notice of appearance or an answer or by making a motion that serves to extend the time to answer (*see* CPLR 320). a party which has not formally appeared may nonetheless be deemed to have appeared informally, and thus have conferred jurisdiction on the court despite its lack of a formal appearance, by actively litigating the merits of an issue without raising any jurisdictional objection." (*NYCTL 1998-1 Trust v. Prol Properties Corp.*, 18 AD3d 525, 525 [2d Dept 2005]). Defendant filed neither an answer nor a pre-answer motion within the time allotted by the CPLR and, thus, did not formally appear. It is less clear whether she actively litigated the merits. Per her affidavit, she attended foreclosure settlement conferences on three occasions. There appears to be a dearth of cases discussing the effect of doing so.

Pursuant to CPLR 3408(a), "the court shall hold a mandatory conference for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to determining whether the parties can reach a mutually agreeable resolution to help the defendant avoid losing his or her home, and evaluating the potential for a resolution in which payment schedules or amounts may be modified or other workout options may be agreed to, and for whatever other purposes the court deems appropriate." While the parties are supposed to discuss merits of the case, their relative rights and obligations, the primary purpose is to reach a satisfactory resolution and avoid pursuing the formal litigation. In this Court's view, participation in mandatory settlement conferences is an "attempt to participate" sufficient to stave off a default, but not an "informal appearance" such to confer jurisdiction. Thus, it should not prejudice a party's right to assert its defenses, whether by filing a late answer or a pre-answer motion. (*See, similarly, HSBC Bank [*4]USA, N.A. v. Cayo*, 34 Misc 3d 850, 855 [Sup Ct, Kings County 2011] ["Certainly, the time frame of negotiations in the Settlement Conference Part of the court, should not be calculated into the consideration when faced with a motion for leave to file a late answer . To penalize a defendant who is participating in settlement negotiations in the court, by holding that time period against him or her, is to penalize a litigant who follows the rules of this court. That is certainly not in line with the intention of the legislature."]; *Chase Home Fin. LLC v Adetula*, 32 Misc 3d 1236(A), 2011 NY Slip Op. 51593(U) [Sup Ct, Kings County 2011] [Participation in settlement conference did not waive jurisdictional defense]).

Defendant's attorney filed a "Notice of Appearance and Jurisdictional Objections" on February 2, 2012. Ordinarily, an appearance by counsel confers jurisdiction over the party

represented absent a timely Motion to Dismiss or raising the issue in a responsive pleading (*see Countrywide Home Loans Servicing, LP v Albert*, 78 AD3d 983, 984 [2d Dept 2010]). Logic dictates that counsel's filing herein should be characterized as an appearance but not a consent to jurisdiction.

Once lack of jurisdiction (or of standing) is raised in an pleading, the party must move to dismiss on those grounds within 60 days (CPLR 3211[e] ["an objection that the summons and complaint ... was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading"]). A Notice of Appearance is not a pleading (*see* CPLR 3011). Thus, Defendant's jurisdictional defense should be considered despite the Motion to Dismiss being filed more than 60 days thereafter.

Personal Jurisdiction

"While [a] process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service, where there is a sworn denial that delivery to the defendant was accomplished, the affidavit of service is rebutted and the plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing" (*Toyota Motor Credit Corp. v. Hardware Lam*, 93 AD3d 713, 713 [2d Dept 2012]). An unsubstantiated denial of receipt, however, is insufficient to necessitate a traverse hearing (*Bank of New York v. Espejo*, 92 AD3d 707, 708 [2d Dept 2012]; *Bankers Trust Co. of California, N.A. v. Tsoukas*, 303 AD2d 343, 344 [2d Dept 2003]["A defendant can rebut a process server's affidavit by a detailed and specific contradiction of the allegations in the process server's affidavit."]).

While Defendant did not set out much detail in her sworn denial, enough information was provided to rebut the presumption created by the affidavit of service. Accordingly, a traverse hearing will be held on March 8, 2013 at 9:30 AM in room 1101 of 141 Livingston Street.

Standing

A plaintiff has standing to bring a mortgage foreclosure action "where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at [*5]the time the action is commenced" (*Bank of NY v. Silverberg*, 86 AD3d 274, 279 [2d Dept

2011]). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation" (*U.S. Bank, N.A. v. Collymore*, 68 AD3d 752, 754 [2d Dept 2009]). Here, Plaintiff claims to have been both the assignee and actual holder of the mortgage and note prior to its filing of the case. Defendant has, however, raised questions as the chain of title and as to the role of Liquenda Allotey who, within a short time, appears to have assigned the mortgage on behalf of different entities.

Depending on the outcome of the traverse hearing, the issue of standing might be moot. Nonetheless, on the day of the hearing, Plaintiff should bring detailed proof of standing (beyond the recorded assignments, if possible) and someone sufficiently familiar with the assignment history to explain the various transactions including when and how the note was transferred and the role of Liquenda Allotey.

Based on the above it is hereby

ORDERED that Plainitff's proposed Order of Reference and Defendant's proposed Order of Dismissal are both rejected**;** it is further

ORDERED that Defendant's Motion to Dismiss is DENIED; and it is further

ORDERED that a traverse hearing will be held on March 8, 2013 to determine whether Defendant was properly served; and it is further

ORDERED that, on the day of the traverse hearing, Plaintiff is to bring proof of standing and someone able to address the various assignments and transfers of the note and mortgage.

The foregoing constitutes the decision and order of the Court.

ENTER:

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Hon. Noach Dear, A.J.S.C.

Footnotes

Footnote 1: This Court begs to differ. Plaintiff took nearly double the allotted time to submit an order and, when it did, submitted basically the same formulaic Order of Reference that this Court usually receives. Relative to the amount of time necessary to draft the document, two and a half months is far from a "slight" delay.

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