

Short Form Order

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

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.
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INDEX NO.:
MOTION DATE:12/22/2011
MOTION NO.: 002 MD; 003 CASEDISP

CITIMORTGAGE, INC.,
Plaintiff,

PLAINTIFF'S ATTORNEY:
ROSICKI, ROSICKI & ROSICKI
2 Summit Court, Suite 301
Fishkill, New York 12524

-against-

NATIONAL CITY BANK,
MKM ACQUISITIONS LLC ASSIGNEE OF
LEVITZ, BRUNILDA QUINTANA,
COMMISSIONER OF TAXATION AND FINANCE,
UNITED STATES OF AMERICA--INTERNAL
REVENUE SERVICE, PEOPLE OF THE STATE OF
NEW YORK,

DEFENDANTS' ATTORNEY:
R. DAVID MARQUEZ, P.C.
50 Clinton Street, Suite 214
Hempstead, New York 11550

Defendants.

REFEREE:
Paul R. Feuer, Esq.
124 Medford Avenue
Patchogue, New York 11772-1204

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Upon the following papers numbered 1 to 55 read on this motion for judgment of foreclosure and sale; Notice of Motion/ Order to Show Cause and supporting papers 1-9; Notice of Cross Motion and supporting papers 23-46; Answering Affidavits and supporting papers 10-22; 47-55; Reply Affidavits and supporting papers; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (motion sequence no. 002) of plaintiff for an order confirming the referee's report of amount due and for a judgment of foreclosure and sale is denied, and it is further

ORDERED that the cross-motion (motion sequence no. 003) of defendant-mortgagor Jose N. Taveras for an order (1) dismissing this action pursuant to CPLR R. 3211(a)(8) on the grounds that the Court has no jurisdiction of the person of defendant _____ s or, alternatively, setting this matter down for a traverse hearing; (2) dismissing this action pursuant to CPLR §3215(c) based upon plaintiff's failure to move for and obtain a default judgment within one year of the defendant's default; (3) dismissing this action with prejudice pursuant to CPLR R. 3211(a)(3) on the grounds that plaintiff lacks capacity and standing to commence and prosecute the within foreclosure action; (4) dismissing this action for plaintiff's failure to join a necessary party pursuant to CPLR §1001(a); or, alternatively (5) granting defendant leave to file and serve a late answer to plaintiff's complaint pursuant to CPLR §2004 and §3012(d), is granted to the extent that the complaint is dismissed pursuant to CPLR §3215(c).

Because it is potentially dispositive of this matter, the Court will first address defendant's claim that the Court lacks jurisdiction over him. In his affidavit sworn to November 16, 2011, defendant states that he was never personally served with any legal documents pertaining to this action, and that he first learned of the instant foreclosure action in March 2011 when he was served with notice of entry of the order of reference herein. Defendant further states that on April 8, 2008, the date that he was purportedly served, he was "to the best of my recollection...working for the Cornaga Deli Grocery Corp." He further states that it was his "custom and practice to

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work Monday through Saturday from 2 PM in the afternoon until 10 PM in the evening.” Defendant submitted copies of his income tax returns for 2008 and 2009 purportedly as proof of his employment during those years.

The presumption of proper service established by a process server’s affidavit of service may be rebutted by a defendant’s sworn denial of receipt of process, but the defendant must set forth “specific facts to rebut the statements in the process server’s affidavits” (*US Bank N.A. v Arias*, 85 AD3d 1014 [2d Dept 2011]). The affidavit of service of Ralph Vingo III, sworn to April 10, 2008, reflects that on April 8, 2008 at 7:32 p.m., defendant was served with the summons and verified complaint by personal delivery pursuant to CPLR §308(1) at the mortgaged premises. The bare denial by defendant, who concedes that he does not read or write English, that he ever received any legal papers pertaining to this matter; his inconclusive recollection regarding his place of employment at the time of the service; and his recitation of his usual work hours, together with the proffered income tax returns, are insufficient to rebut the affidavit of service or to raise a question of fact requiring a traverse hearing. Defendant does not refute the physical description set forth in the affidavit of service, and does not affirmatively state that he was at work or otherwise not at home at the time of the purported service. In light of the foregoing, so much of defendant’s cross-motion as seeks to dismiss the complaint pursuant to CPLR R. 3211(a)(8) is denied.

Also potentially dispositive of this matter is defendant’s motion to dismiss the complaint as abandoned pursuant to CPLR §3215(c), and accordingly the Court addresses this claim next. 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, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision does not constitute an appearance in the action.”

It is well established that in a mortgage foreclosure action, the plaintiff’s interposition of a motion for the appointment of a referee to compute within a year of the default constitutes the initiation of proceedings for the entry of a default judgment for purposes of CPLR §3215(c), as it is “a preliminary step towards obtaining a judgment of foreclosure” (*Home Savings of America, F.A. v. Gkanios* 230 AD2d 770 [2d Dept 1996]). Moreover, a plaintiff in a foreclosure action which has timely moved for an order of reference is not required to conclude proceedings for entry of a default judgment within one year of a default where it is “clear from the record that the plaintiff did not abandon the action” (*id.*) (noting that the delay in obtaining a report from the referee and a judgment of foreclosure and sale “was the result of numerous applications to the court by the [defendant].”

Here, it is undisputed that plaintiff moved for an order of reference within one year of defendant’s default in the action. The record reflects that the motion was granted pursuant to an order dated December 14, 2009 and entered on December 31, 2009. The report of the referee appointed therein is dated August 17, 2010, but the record reflects plaintiff did not file the instant motion for a judgment of foreclosure and sale until more than a year later, and nearly four years after defendant’s default. In making the instant motion, plaintiff, which acknowledged that all

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defaulting defendants were given notice pursuant to CPLR §3215(g)(1) as more than one year had elapsed since the default, failed to offer any explanation for its failure to promptly move for judgment of foreclosure and sale upon receipt of the referee's report or within a reasonable time thereafter.

It is well established that in order to meet its burden of proof on a motion, a party may not rely on proof submitted for the first time in a reply affidavit (*Rengifo v City of New York*, 7 AD3d 773 [2d Dept 2004]; *Feratovic v Lun Wah*, 284 AD2d 368 [2d Dept 2001]). Even if the Court were to consider the untimely arguments of plaintiff's counsel set forth in the reply and affirmation in opposition dated December 7, 2011, they fail to establish good cause for plaintiff's belated motion. Notably, the Court's records do not reflect that a foreclosure settlement conference was ever held or requested in this matter prior to submission of the instant motion; accordingly, the enactment of CPLR §3408 did not delay or impede proceedings in this matter, as implied by counsel's affirmation.

In light of the foregoing, the Court grants defendant's cross-motion to dismiss the complaint as abandoned in accordance with CPLR §3215(c). Plaintiff's motion for a judgment of foreclosure and sale is denied.

Dated: May 2, 2012

PAUL J. BAISLEY, JR.

J.S.C.