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Onewest Bank, FSB v Navarro
2013 NY Slip Op 52053(U)
Decided on November 11, 2013
Supreme Court, Suffolk County
Whelan, J.
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Decided on November 11, 2013

Supreme Court, Suffolk County

Onewest Bank, FSB, Plaintiff,

against

Maria B. Navarro, PORTFOLIO RECOVERY ASSOCIATES, LLC, CAPITAL ONE BANK, USA, NA and "JOHN DOE #1" through "JOHN DOE No.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 mortgage premises described in the complaint, Defendants.

33644-10

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Defendant

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CAPITAL ONE BANK USA NA

Defendant

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Thomas F. Whelan, J.

Upon the following papers numbered 1 to*13*read on this motion *by the plaintiff for an order fixing defaults and appointing a referee to compute among other things and cross motion by defendant to dismiss* ; Notice of Motion/Order to Show Cause and supporting papers *1 - 4*; Notice of Cross Motion and supporting papers*5-9*; Answering Affidavits and supporting papers*10-11*; Replying Affidavits and supporting papers*12-13*; Other; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (#001) by the plaintiff for an order fixing the defaults of all defendants in answering the summons and complaint, identifying certain unknown defendants and deleting the remaining unknowns as party defendants and an order appointing a referee to compute is considered under CPLR 3215; 1024, 1003 and RPAPL § 1321 and is

granted; and it is further

ORDERED that the cross motion (#002) by defendant Navarro to dismiss the complaint or to vacate her default in answering and for leave to file a late answer is considered under CPLR 3215(c) and is denied.

The plaintiff commenced this mortgage foreclosure action by the filing of the summons and complaint on September 13, 2010. The note and mortgage at issue herein was executed by defendant Navarro on December 14, 2007 in favor of IndyMac Bank, F.S.B. In its complaint, the plaintiff alleges that defendant Navarro defaulted in her payment obligations on March 1, 2010 and that such default remains unabated. Neither defendant Navarro nor any other of the defendants [*2]served with process including those occupying the premises as tenants or otherwise served answers in response to the process served upon them.

In November of 2011, the case was initialized by the filing of a Request for Judicial Intervention. Upon receipt thereof, personnel assigned to the specialized mortgage foreclosure part notified defendant Navarro that such a conference was scheduled for January 30, 2012. That conference was adjourned to April 16, 2012 in order to provide interpreter services to defendant Navarro. Two more conferences were scheduled, the last of which was held on August 29, 2012 when the matter was marked as "not settled". The case was then assigned to the IAS case inventory of this court.

Following the release of this action from the conference part, the instant motion by the plaintiff, which was served upon defendant Navarro notwithstanding her default in answering, was interposed in November of 2012. Because there was no responsive papers, the motion was forwarded to the legal staff of the specialized mortgage foreclosure part for their review of its substance and procedural regularity in accordance with local rules of practices and procedure. On May 3, 2013, the legal staff concluded its review and the staff attorney assigned thereto forwarded the motion to the calendar department. The motion, without notice to any party was, re-calendared for the date of May 17, 2013. Meanwhile, defendant Navarro's counsel, who was retained in December of 2010, secured a stipulation from the plaintiff's attorney which effected the first of several adjournments of the May 17, 2013 adjourn date. Further adjournments were applied for and granted in accordance 22 NYCRR 202.8. The plaintiff's motion (#001), together with the cross motion (#002) by Navarro for dismissal and other relief presently before the court, were finally marked

submitted on October 18, 2013.

First considered is the cross motion (#002) by defendant Navarro wherein in she seeks, among other things, dismissal of the plaintiff's complaint pursuant to CPLR 3215(c), as determination thereof may render the plaintiff's motion-in-chief, academic. The provisions of CPLR 3215(c) require a plaintiff to move for judgment within one year after a default in answering to avoid dismissal due to abandonment, except in those cases wherein "sufficient cause is shown why the complaint should not be dismissed" (CPLR 3215[c]). Appellate case authorities have instructed that sufficient cause is measured, generally, by the proffer of a reasonable excuse for the delay in moving and a showing of the meritorious nature of the complaint (*see* ***Giglio v NTIMP, Inc.***, 86 AD3d 301, 926 NYS2d 546 [2d Dept 2011]). That which constitutes a reasonable excuse is a matter within the discretion of the trial court (*id.*, at 308).

Recent legislative enactments and court rules promulgated by court administrators aimed at resolving foreclosure actions in a manner favorable to mortgagors have dramatically slowed the pace of residential mortgage foreclosure actions pending or impending at the time of the adoption of such enactments and/or rules (*see* Laws of Laws of 2008, Ch. 472 § 3-a as amended by the Laws of 2009 Ch. 507 § 10; CPLR 3408; 22 NYCRR 202.12[a]). Among the various new procedures mandated by such legislation and/or rules is the requirement that the parties engage in settlement discussions at conferences conducted by judicial or quasi judicial officers of the court (*see* CPLR [*3]3408; 22 NYCRR 202-12-a[c]). The delay necessarily engendered by these conference requirements, coupled with the "stay" of all motions imposed by the provisions of 22 NYCRR 202.12—a (c)(7), have been held to constitute sufficient cause for not moving to fix defaults within the one year time period imposed by CPLR 3215 (c) (*see* ***Aurora Loan Serv., LLC v Brescia, Cach, LLC.***, 2013 WL 5823057 [Sup. Ct. Suffolk County 2013]; ***Deutsche Bank Natl. Trust Co. v Pascarella***, 39 Misc 3d 1227[A], 971 NYS2d 70 [Sup. Ct Suffolk County 2013]; ***BAC Home Loans Serv., LP v Maurer***, 36 Misc 3d 1210[A], 957 NYS2d 263, [Sup. Ct. Suffolk County 2012]). Where, as here, the plaintiff demonstrates that its motion to fix defaults was made within one year of the release of the action from the "conference part", the presumption of abandonment that would otherwise arise under CPLR 3215(c), is neutralized, if not negated, entirely. The court thus finds that defendant Navarro is not entitled to a dismissal of this action pursuant to CPLR 3215(c), as sufficient cause for the delay in moving and the meritorious nature of the plaintiff's claims for foreclosure and sale have been sufficiently established. Those portions

of defendant Navarro's cross motion wherein she seeks dismissal of the complaint pursuant to CPLR 3215 are thus denied.

Also denied are the remaining portions of defendant Navarro's cross motion wherein she seeks an order vacating her default and an order granting her leave to serve a late answer pursuant to CPLR 3012(d). It is well settled that a " defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action

when . . . moving to extend the time to answer or to compel the acceptance of an untimely answer'" (*Maspeth Fed. Sav. & Loan Assn. v McGown*, 77 AD3d 890, 909 NYS2d 642 [2d Dept 2010], *quoting* *Lipp v Port Auth. of NY & NJ*, 34 AD3d 649, 649, 824 NYS2d 671 [2d Dept 2006]; *see also* ***Midfirst Bank v Al-Rahman***, 81 AD3d 797, 917 NYS2d 871 [2d Dept 2011]; ***Karalis v New Dimensions HR, Inc,*** 105 AD3d 707, 962 NYS2d 647 [2d Dept2013]; *Swedbank, AB v Hale Ave. Borrower, LLC*, 89 AD3d 922, 932 NYS2d 540 [2d Dept,2011]; *Community Preservation Corp. v Bridgewater*, 89 AD3d 784, 932 NYS2d 378 [2d Dept 2011]; *Deutsche Bank Natl. Trust Co. v Rudman*, 80 AD3d 651, 914 NYS2d 672 [2d Dept 2010]). This standard governs applications made both prior and subsequent to a formal fixation of a default on the part of the defendants by the court (*see* ***Bank of New York v Espejo***, 92 AD3d 707, 939 NYS2d 105 [2d Dept 2012]; ***Integon Natl. Ins. Co. v Norterile,*** 88 AD3d 654, 930 NYS2d 260 [2d Dept 2011]; ***Ennis v Lema,*** 305 AD2d 632, 760 NYS2d 197 [2d Dept 2003]; ***Landa, Picard & Weinstein v Ruesch***, 102 AD2d 813, 476 NYS2d 383 [2d Dept 1984]; *cf.*, *Guzetti v City of New York*, 32 AD3d 234, 820 NYS2d 29 [1st Dept 2006]). The failure to proffer an excuse found reasonable by the court obviates the need for inquiry into the issue of the existence of a meritorious defense (*see* ***Deutsche Bank Natl. Trust Co. v Pietranico***, 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]; ***Tribeca Lending Corp. v Correa***, 92 AD3d 770, 938 NYS2d 599 [2d Dept 2012]). Where the motion is supported only by an affirmation of counsel and a proposed answer that is verified only by counsel, who is without first hand knowledge of the facts alleged therein, no showing of a meritorious defense is made (*see* ***Karalis v New Dimensions HR, Inc,*** 105 AD3d 707, *supra*).

The excuses proffered by defendant Navarro for her delay in answering the summons and complaint are premised, in part, upon her inability to read or write English, her lack of knowledge [*4]and understanding of legal processes and procedures and her participation in

the court scheduled settlement conferences detailed above. However, recent appellate case authorities have instructed that confusion or ignorance of the law, legal processes and/or court procedures do not constitute reasonable excuses for the failure to answer or otherwise appear (*see* ***Garal Wholesalers, Ltd. v Raven Brands, Inc.***, 82 AD3d 1041, 919 NYS2d 358 [2d Dept 2011]; ***US Bank Natl. Assoc. v Slavinski***, 78 AD3d 1167, 912 NYS2d 285 [2d Dept 2010]; ***Yao Ping Tang v Grand Estate, LLC.***, 77 AD3d 822, 910 NYS2d 104 [2d Dept 2010]; ***Dorrer v Berry***, 37 AD3d 519, 830 NYS2d 277 [2d Dept 2007]; ***Awad v Severino***, 122 AD2d 242, 505 NYS2d 437 [2d Dept.1986]). Defendant Navarro's inability to read or write English may not serve as a reasonable excuse for her failure to answer. Persons under disabilities such as blindness or illiteracy are not per se excused from the terms of their contracts as they are obliged to employ reasonable efforts to understand the contents thereof prior to signing (*see* ***Sofio v Hughes***, 162 AD2d 518, 556 NYS2d 717 [2d Dept 1990]). A party whose mastery of English is imperfect must make reasonable efforts to have the document made clear to him or her (*see* ***Shklovskiy v Khan***, 273 AD2d 371, 709 NYS2d 208 [2d Dept 2000]).

The mortgage indenture signed by defendant Navarro conferred upon the lender, its successors and assigns the right to foreclose the lien arising thereunder upon a default in payment such as the one with which defendant Navarro is charged. While defendant Navarro claims that a family member read the contents of the summons and complaint and that such family member advised that the papers served "had to do with my home and mortgage" (*see* ¶ 4 of Affidavit of defendant Navarro in support of her cross motion), she failed to detail facts tending to show that such a reading satisfied her duty to undertake the requisite reasonable efforts to have the contents of the papers served made clear to her. Under these circumstances, any inability on the part of defendant Navarro to comprehend the words and warnings spread across the summons and warning notices included therein and on a separate paper served does not constitute a reasonable excuse for her default in answering (*see* ***Abdulayev v Yadgarov***, 105 AD3d 877, 964 NYS2d 545 [2d Dept 2013]).

The court further finds that participation in statutorily mandated settlement conferences, which are scheduled by court personnel after the time in which an answer is due, may not, in itself, serve as a de facto extension of the time to answer and/or a reasonable excuse for a default (*see* ***Bank of New York Mellon v Izmirligil***, 2010 WL 8412713 [Sup Ct. Suffolk County 2010], *aff'd* ***Mellon v Izmirligil***, 88 AD3d 930, *supra*; *see also* ***Deutsche Bank Natl. Trust Co. v Young***, 2012 WL 6019543 [Sup Ct. Suffolk County 2012]). To hold otherwise

would effect an unfounded judicial transformation of the limited scope and objectives of the simple settlement conference procedures legislatively imposed by CPLR 3408 into a revocation of longstanding rules and laws governing defaults which the legislature chose not to alter (*see e.g.*, CPLR 320; *cf.*, L.2008, c. 472, § 3, eff. Aug. 5, 2008; Amended L.2009, c. 507, § 9, eff. Feb. 13, 2010; L.2013, c. 306, § 2, eff. Aug. 30, 2013).

In addition, the court finds that the mere fact that parties to a foreclosure action engage in pre-action and/or post-action loan modification discussions is alone insufficient to constitute a reasonable excuse for a default in answering, especially where the default in answering remains unchallenged by the party in default for a lengthy period of time (*see* ***Deutsche Bank Natl. Trust Co. v Gutierrez***, 102 AD3d 825, 958 NYS2d 472 [2d Dept 2013]). Such is the case here, as defense [*5]counsel was retained some three years ago but no application to vacate the default was brought until this cross motion was made some ten months after the original November 12, 2012 return date of the plaintiff's motion in chief. In any event, a successful claim that settlement negotiations constitute a reasonable excuse for a default must be premised upon allegations of a good faith belief in potential settlement which finds substantial evidentiary support and a justifiable reliance upon such good faith belief (*see* ***Armstrong Trading, Ltd. v MBM Enter.***, 29 AD3d 835, 815 NYS2d 689 [2d Dept 2006]; ***American Shoring, Inc. v D.C.A. Constr., Ltd.***, 15 AD3d 431, 789 NYS2d 722 [2d Dept 2005]; *see also* ***BAC Home Loans Serv., LP v Maurer***, 36 Misc 3d 1210(A), *supra*; ***Bank of New York v Jayaswal***, 33 Misc 3d 1214[A], 941 NYS2d 536 [Sup. Ct. Suffolk County 2011). No such showing was made in the submissions of defendant Navarro. In addition, allegations regarding purported settlement negotiations and claims of executory promises regarding a possible loan modification have been held not to constitute a reasonable excuse for a default (*see* ***Karalis v New Dimensions HR, Inc.***, 105 AD3d 707, *supra*; ***Deutsche Bank Natl. Trust Co. v Gutierrez***, 102 AD3d 825, *supra*; ***Mellon v Izmirligil***, 88 AD3d 930, *supra*; ***Kouzios v Dery***, 57 AD3d 949, 950, 871 NYS2d 303 [2d Dept 2008]; ***Antoine v Bee***, 26 AD3d 306, 812 NYS2d 557 [2d Dept 2008]; ***DeRisi v Santoro***, 262 AD2d 270, 271, 691 NYS2d 111 [2d Dept 1999]; ***US Bank Natl. Ass'n v Orellana***, 40 Misc 3d 1204[A], 2013 WL 3336823, [Sup Ct. Suffolk County 2013]).

Also unavailing is defendant Navarro's further claim that she did not answer due to her reliance upon contrary advisory statements purportedly uttered by representatives of the plaintiff whom defendant Navarro called shortly after receipt of the summons and complaint. These allegations sound in claims of intrinsic fraud which, like other claims of fraud, must be

stated in other than conclusory, non-specific terms and find some evidentiary support in the record (*see* ***Citimortgage, Inc. v Brown,*** ___ AD3d ___, 2013 WL 5926998, [2d Dept 2013]; ***Empire State Conglomerates v Mahbur***, 105 AD3d 898, 963 NYS2d 330 [2d Dept 2013]; ***U.S. Bank Natl. Ass'n v Allen***, 102 AD3d 955, 958 NYS2d 737 [2d Dept 2013]; ***Bank of New York v Stradford***, 55 AD3d 765, 869 NYS2d 554 [2d Dept 2008]; ***Wells Fargo Bank v Linzenberg***, 50 AD3d 674, 853 NYS2d 912 [2d Dept 2008]; ***Mortgage Elec. Sys., Inc. v Schotter,*** 50 AD3d 983, 857 NYS2d 592 [2d Dept 2008]; ***Aames Capital Corp. v Davidsohn***, 24 AD3d 474, 808 NYS2d 229 [2d Dept 2005]; ***Miller v Lanzisera***, 273 AD2d 866, 709 NYS2d 286 [4th Dept 2000]; ***BAC Home Loans Serv., LP v Maurer,*** 36 Misc 3d 1210[A], *supra*; ***Deutsche Bank Natl. Trust Co. v Gillio***, 22 Misc 3d 1131[A], 881 NYS2d 362 [Sup Ct. Suffolk County 2009). The bald, conclusory and unsubstantiated claims of defendant Navarro regarding purported utterances and representations made by the plaintiff's agents that deterred defendant from timely appearing herein by answer or otherwise are insufficient to constitute a reasonable excuse for her default.

Even if a reasonable excuse had been advanced in the cross moving papers of defendant Navarro, no potentially meritorious defense was established therein. The claim of a purported lack of standing on the part of the plaintiff is not jurisdictional in nature (*see* ***HSBC Bank USA, N.A. v Taher***, 104 AD3d 815, 962 NYS2d 301 [2d Dept 2013]; ***Deutsche Bank Natl. Trust Co. v Hunter***, 100 AD3d 810, 954 NYS2d 181 [2d Dept 2012]; ***Bank of NY v Alderazi***, 99 AD3d at 838, 951 NYS2d 900 [2d Dept 2012]; ***U.S. Bank v Emmanuel***, 83 AD3d 1047, 921 NYS2d 320 [2d Dept 2011]; ***Wells Fargo Bank Minn., N.A. v. Mastropaolo***, 42 AD3d 239, 243—244, 837 NYS2d 247 [*6][2d Dept 2007]). Nor is the issue of the plaintiff's standing an element of its claim for foreclosure and sale in the first instance (*see* ***Deutsche Bank Natl. Trust Co. v Whalen***, 107 AD3d 931, 969 NYS2d 82 [2d Dept 2013]; ***Wells Fargo Bank Minnesota, Natl. Ass'n v Mastropaolo***, 42 AD3d 239, *supra*). In any event, the record reflects that the mortgage note was indorsed in blank and delivered to the plaintiff following its purchase of the note and loan from the original lender's receiver in March of 2009, which was well before the commencement of this action which is sufficient to establish the lack of merit in any standing defenses (*see* ***JP Morgan Chase Bank, Natl. Ass'n v Shapiro,*** 104 AD3d 411, 959 NYS2d 918 [1st Dept. 2013]; ***JP Morgan Chase Bank Natl. Ass'n v Miodownik***, 91 AD3d 546, 937 NYS2d 192 [1st Dept 2012]; *see also* UCC §1-201 [20]; §3-202; §3-204; §9-203[g]; ***Spielman v Manufacturers Hanover Trust Co.***, 60 NY2d 221,469 NYS2d 69 [1983]; ***Deutsche Bank Trust Co. Am. v Codio***, 94

AD3d 1040, *supra*; ***Mortgage Elec. Registration Sys., Inc. v Coakley***, 41 AD3d 674, 838 NYS2d 622 [2d Dept. 2007]; ***First Trust Natl. Ass'n v Meisels***, 234 AD2d 414, 651 NYS2d 121 [2d Dept 1996]; ***Deutsche Bank Natl. Trust Co. v Pietranico***, 33 Misc 3d 528, 928 NYS2d 818 [Sup. Ct. Suffolk County 2011], *aff'd*, 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]). The defendant's alternate claim of a lack of insufficiency in the plaintiff's proof of the elements of its claim for foreclosure and sale are without merit (*see* ***Woodson v Mendon Leasing Corp.***, 100 NY2d 62, 68 760 NYS2d 727 [2003]; ***Farm Credit Leasing Serv. Corp. v Rubashkin***, 107 AD3d 663, 967 NYS2d 96 [2d Dept 2013]).

In view of the foregoing, the cross motion (#002) by defendant Navarro to dismiss the complaint or for leave to vacate her default in answering and for leave to serve a late answer is denied.

Next considered is the plaintiff's motion-in-chief (#001) for an order fixing the defaults in answering of all defendants, the identification of four unknown defendants pursuant to CPLR 1024 and the deletion of the rest, together with a caption amendment to reflect same and the appointment of a referee to compute amounts due under the subject mortgage. Entitlement to such relief is available to a foreclosing plaintiff pursuant to RPAPL 1321 and CPLR 3215 upon a showing of 1) the joinder of the targeted defendants by service of process; 2) a default by such defendants in answering the process served; and 3) facts constituting cognizable claims for foreclosure and sale and such other relief incidental thereto as may be requested (*see* ***Woodson v Mendon Leasing***, 100 NY2d 62, 71, *supra*; ***Green Tree Serv., LLC v Cary***, 106 AD3d 691, 965 NYS2d 511 [2d Dept 2013]; ***Dupps v Betancourt***, 99 AD3d 855, 855, 952 NYS2d 585 [2d Dept 2013]; ***LIUS Group Intern. Endwell, LLC v HFS Intern., Inc.***, 92 AD3d 918, 939 NYS2d 525 [2d Dept 2012]). The elements of a claim for foreclosure and sale are the mortgagor's execution of a note and mortgage and a default in a payment obligation or some other term set forth therein (*see* ***GRP Loan, LLC v Taylor***, 95 AD3d 1172, 1173, 945 NYS2d 336 [2d Dept 2012]; ***Deutsche Bank Natl. Trust Co. v Posner***, 89 AD3d 674, 674—675, 933 NYS2d 52 [2d Dept 2011]). Because defaulters, such as the defendants here, are deemed to have admitted all of the factual allegations contained in the complaint and all reasonable inferences that flow from them, no evidentiary showing of the elements of the plaintiff's claim is required for the fixation of their defaults (*see* ***Feffer v Malpeso***, 210 AD2d 60, 619 NYS2d 46 [1st Dept 1994]). Instead, the plaintiff need only advance facts sufficient to demonstrate that it has a viable cause of action for foreclosure and sale by production of the [*7]documentation set forth in CPLR 3215(f) (*see* ***Woodson v***

Mendon Leasing, 100 NY2d 62, 71, *supra*).

Here, the plaintiff's moving papers sufficiently demonstrated service of the summons and complaint upon the known defendants and upon four persons found at the premises who were served as unknown defendants as well as the defaults of all such defendants in answering and the facts constituting the claims for foreclosure and sale. The requirements for entry of default judgment have thus been met (*see* CPLR 3215(f); ***Green Tree Serv., LLC v Cary***, 106 AD3d 691, *supra*). The court thus grants the plaintiff's motion for the fixation of the defaults in answering of all defendants served with process, the appointment of a referee to compute amounts due under the subject note and mortgage and the other incidental relief demanded therein.

Proposed order appointing a referee to compute, as modified by the court, signed simultaneously herewith.

Dated: November 11, 2013_____

THOMAS F. WHELAN, J.S.C.

[Return to Decision List]