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Bank of Am., NA v Simon
2015 NY Slip Op 50363(U)
Decided on March 24, 2015
Supreme Court, Suffolk County
Whelan, J.
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<p style="text-align:center">Bank of America, NA, Plaintiff,</p> <p style="text-align:center">against</p> <p>Mirtha Simon and "JOHN DOE" and "JANE DOE" the last two names being fictitious, said parties intended being tenants or occupants, if any, having or claiming an interest in, or lien upon the premises described in the complaint, Defendants.</p>
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Thomas F. Whelan, J.

Upon the following papers numbered 1 to 5 read on this motion *by the defendant to dismiss this action* ; Notice of Motion/Order to Show Cause and supporting papers 1-3; Opposing Papers: 4-5; Reply papers; it is,

ORDERED that this motion (#001) by the defendant in this mortgage foreclosure action for an order dismissing this action pursuant to CPLR 3211(a)(2) and/or (a)(8) is considered thereunder and under CPLR 3012 and is denied.

The plaintiff commenced this action on May 12, 2014 to foreclose the lien of a June 2, 2008 mortgage given by defendant Simon to a predecessor-in-interest of the plaintiff to secure a mortgage note of the same date in the principal amount of \$362,137.00. Defendant Simon defaulted in answering the summons and complaint which was served upon her on

June 2, 2014 pursuant to CPLR 308(2), as did others persons served as unknown defendant occupants of the mortgaged premises.

Following the initialization of this action, a settlement conference of the type mandated by CPLR 3408 was scheduled by quasi-judicial personnel assigned to the specialized mortgage foreclosure conference part for December 15, 2014. Defendant Simon's failed to appear for such conference and such failure was duly noted in the record maintained in this action. On December 16, 2014, this action was assigned to the case inventory of this court.

On February 3, 2015, defendant Simon appeared by the uploading of a notice of appearance by her counsel in the NYS Courts E-Filing System and the simultaneous upload of the instant motion to dismiss the complaint. The grounds for the motion relief are two in number, the first being a purported lack of personal jurisdiction over defendant Simon due to improper service pursuant to CPLR 3211(a)(8). The second ground is characterized by defense counsel as one to dismiss for lack of subject matter jurisdiction pursuant to CPLR 3211(a)(2). The plaintiff opposes the motion in papers which challenge each predicate ground for the relief requested as lacking in merit. For the reasons stated below, the motion is denied.

"A process server's affidavit of service constitutes prima facie evidence of proper service" (*Scarano v Scarano*, 63 AD3d 716, 716, 880 NYS2d 682 [2dDept 2009]; see *NYCTL 2009—A Trust v Tsafatinos*, 101 AD3d 1092, 1093, 956 NYS2d 571 [2d Dept 2012]). "Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavits" (*Countrywide Home Loans Serv., LP v Albert*, 78 AD3d at 984—985, 912 NYS2d 96 [2d Dept 2010; internal quotation marks and citation omitted]; see *Mortgage Elec. Registration Sys., Inc. v Losco*, 125 AD3d 733, 2015 WL 542795 [2d Dept 2015]; *JPMorgan Chase v Todd*, 125 AD3d 953, 2015 WL 775077 [2d Dept 2015]; *Emigrant Mtge. Co., Inc. v Westervelt*, 105 AD3d 896, 897, 964 NYS2d 543 [2d Dept 2013]; *Countrywide Home Loans Serv., LP v Albert*, 78 AD3d 983, 984—985, *supra*).

Here, the affidavit of service of the plaintiff's process server constituted prima facie evidence of proper service pursuant to CPLR 308(2) (*see ACT Prop., LLC v Garcia*, 102 AD3d 712, 957 NYS2d 884 [2d Dept. 2013]; *Bank of NY v Espejo*, 92 AD3d 707, 708, 939 NYS2d 105 [2d Dept 2012]; *US Natl. Bank Assn. v Melton*, 90 AD3d 742, 743, 934 NYS2d 352 [2d Dept 2011]), and the affidavit submitted by the defendant Simon was insufficient to rebut the presumption of proper service (*see JPMorgan Chase v Todd*, 125 AD3d 953, *supra*; [Carver Fed. Sav. Bank v Supplice](#), 109 AD3d 572, 970 NYS2d 706 [2d Dept 2013]; *Bank of NY v Espejo*, 92 AD3d 707, 708, *supra*). Those portions of this motion wherein defendant Simon seeks a dismissal of the complaint pursuant to CPLR 3211(a)(8) is thus denied.

The remaining portions of the this motion to dismiss the complaint are also denied. Therein, defendant Simon claims that the court lacks subject matter jurisdiction over the plaintiff's pleaded claim for foreclosure and sale and thus demands dismissal of the complaint pursuant to CPLR 3211(a)(2). Underlying this claim are allegations as to the invalidity or unenforceability of the mortgage due to purported violations of federal regulatory underwriting standards on the part of the originator of the subject loan and its purported acts of fraud in violation of federal Fair Housing and Predatory Lending statutes.

However, the court rejects this claim as wholly lacking in merit. "Subject matter jurisdiction has been defined as the power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case, arising, or which is claimed to have arisen, under that general question" (*Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159, 166, 278 NYS2d 793 [1967], *quoting Hunt v Hunt*, 72 NY 217, 229 [1878]). As "a court of original, unlimited and unqualified jurisdiction" (*Matter of Fry v Village of Tarrytown*, 89 NY2d 714, 718, 658 NYS2d 205 [1997], *quoting Kagen v Kagen*, 21 NY2d 532, 537, 289 NYS2d 195 [1968]), this court is vested with general original jurisdiction and is competent to entertain all causes of actions (*see McKinney's NY Const. Art. 6, § 7[a]*), and it may do so unless it is specifically proscribed elsewhere in our State Constitution or in the Constitution of the United States or under some pre-emptive federal statute (*see Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159, *supra*). Neither an act of our state legislature nor contractual

terms between parties can divest this court of its general original jurisdiction (*see Pollicina v Misericordia Hosp. Med. Ctr.*, 82 NY2d 332, 604 NYS2d 879 [1993]; *Lischinskaya v Carnival Corp.*, 56 AD3d 116, 865 NYS2d 334 [2d Dept 2008]).

That this court's general original jurisdiction extends to mortgage foreclosure actions is unquestionable (*see Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 242-244, 837 NYS2d 247 [2d Dept 2007]; *Security Pacific Natl. Bank v Evans*, 31 AD3d 278, 820 NYS2d 2 [1st Dept 2006]). The moving papers of defendant Simon failed to allege, let alone demonstrate, that this court has been divested of its general, original, subject matter jurisdiction over this mortgage foreclosure by competent constitutional provisions or acts of federal law.

Defendant Simon's attempt to recast any claims or defenses predicated upon federal statutory/regulatory violations she may have into a jurisdictional one sounding in a lack of subject [*2]matter jurisdiction so as to avoid the consequences of her default in answering and her concomitant waiver of her right to assert any standing defense or others premised upon alleged statutory/regulatory violations to support this motion to dismiss the complaint is flatly rejected by this court as unmeritorious (*see Deutsche Bank Trust Co. Americas v Cox*, 110 AD3d 760, 973 NYS2d 662 [2d Dept 2013]; *see also Browne v Board of Educ.*, 122 AD3d 563, 996 NYS2d 96 [2d Dept 2014]; *Southstar III, LLC v Enttienne*, 120 AD3d 1332, 992 NYS2d 548 [2d Dept 2014]; *New York Commercial Bank v J. Realty F Rockaway, Ltd.*, 108 AD3d 756, 969 NYS2d 796 [2d Dept 2013]; *Aurora Loan Serv., LLC v Dimura*, 104 AD3d 796, 962 NYS2d 304 [2d Dept 2013]; *Ferri v Ferri*, 71 AD3d 949, 896 NYS2d 890 [2d Dept 2010]).

In view of the foregoing, the instant motion (#001) by defendant Simon to dismiss the complaint served in this foreclosure action is in all respects denied.

DATED: March 24, 2015

THOMAS F. WHELAN, J.S.C.

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