

Plaintiff commenced this foreclosure action by filing a copy of the summons and complaint on June 18, 2007. Plaintiff alleged that it is the holder of a mortgage dated April 14, 2006, on the premises known as 11002 160th Street, Jamaica, New York executed and delivered by defendant Edward Hinds a/k/a Edward Hinds, to secure repayment of a note, evidencing a loan in the principal amount of \$436,000.00, with interest. Plaintiff further alleged that defendant Hinds defaulted under the terms of the mortgage and note by failing to make the monthly installment payment of interest due and owing on February 1, 2007, and that as a consequence, it elected to accelerate the entire mortgage debt.

Plaintiff obtained a judgment of foreclosure and sale dated August 14, 2008. A foreclosure sale was held on October 17, 2008, and the Referee appointed pursuant to the judgment of foreclosure and sale executed and delivered a deed to U.S. Bank National Association as Trustee. U.S. Bank National Association as Trustee commenced a summary holdover proceeding against defendants Guillaume and Hinds, among others.

Defendants Guillaume obtained the instant order to show cause, which provided a stay of the summary holdover proceeding and a temporary restraining order enjoining the enforcement of the judgment and interference with the use and occupancy of the subject premises by defendants Guillaume.

Defendants Guillaume assert that they are the record owners of the subject premises and are in occupancy there. They also assert that they never entered into the subject mortgage loan with plaintiff, and, therefore, are not in privity of contract with plaintiff. Defendants Guillaume claim that they “refinanced the property” with the “help” of defendant Hinds. According to defendants Guillaume, they paid each monthly mortgage installment to defendant Hinds, who in turn, was to pay the mortgagee.

Defendants Guillaume assert that at the time of the commencement of this action, they personally contacted counsel for plaintiff and informed him that they were the owners of record of the property, and were current in their mortgage payments to defendant Hinds. They further assert that sometime after October 2007, they retained the law firm of Lester & Associates, P.C. to appear on their behalf, and that their counsel’s attempt to resolve the matter was unsuccessful. Defendants Guillaume also assert they have learned that defendant Hinds defrauded them by keeping their money, rather than paying the subject mortgage.

Plaintiff opposes the motion.

At the outset, the court notes that an answer by defendant Rebert Guillaume, appearing pro se, was filed in the County Clerk’s office on August 1, 2007, and the affidavit of service filed therewith states that the answer was served upon counsel for plaintiff on

July 27, 2007. Such answer was timely served. To the degree that defendant Rebert Guillaume asserted lack of personal jurisdiction due to improper service of process as an affirmative defense in his answer, however, he failed to move to dismiss the complaint upon such ground within 60 days of service of a copy of the answer, and as a consequence, the defense is deemed waived (CPLR 3211[e]; *DeSena v HIP Hosp., Inc.*, 258 AD2d 555 [1999]; *Wade v Byung Yang Kim*, 250 AD2d 323 [1998]; *Fleet Bank, N.A. v Riese*, 247 AD2d 276 [1998]). A notice of appearance by Roy J. Lester, Esq. of Lester & Associates, P.C. was subsequently filed on behalf of defendant “Robert Guillaume” only on January 28, 2008.¹

Thus, with respect to defendant Rebert Guillaume, it appears that he is not in default in the action, and, therefore, would have had a meritorious defense to the motion for leave to enter a default judgment against him (*see generally Kumer v Passafiume*, 258 AD2d 625, 626 [1999]). Nevertheless, because defendant Rebert Guillaume defaulted with respect to appearing in opposition to the motion by plaintiff for leave to enter a judgment of foreclosure and sale, he must demonstrate a reasonable excuse for such default and a meritorious defense to the motion (*see CPLR 5015[a][1]*; *Yurteri v Artukmac*, 28 AD3d 545 [2006]; *Matter of Phillips v Goord*, 16 AD3d 422 [2005]; *Greene v New York City Hous. Auth.*, 283 AD2d 458, 459 [2001]; *Fennell v Mason*, 204 AD2d 599 [1994]).

Defendant Rebert Guillaume asserts that he did not receive a copy of the motion papers, but states that his (present) attorney recently informed him that plaintiff in fact served the motion upon defendants Guillaume. Moreover, the affidavit of service dated March 3, 2008 indicates that a copy of the notice of motion was served by plaintiff upon Roy J. Lester, Esq., of Lester & Associates, P.C. The nonreceipt of the motion papers by defendant Rebert Guillaume himself, therefore, is an insufficient excuse for his failure to oppose the motion. Plaintiff was not obligated to send a separate copy to defendant Rebert Guillaume upon being notified of the appearance of counsel on his behalf (CPLR 2103[b]), and in the absence of any notification that counsel for Rebert Guillaume had been discharged and Rebert Guillaume was appearing pro se, or with substituted counsel, the first attorney remained attorney of record (*see CPLR 321*).

To the extent Jeanne Guillaume seeks to obtain relief from the judgment, she makes no claim that the court lacks personal jurisdiction over her due to improper service of process. In any event, the affidavit of service dated June 26, 2007 presented by plaintiff is

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Although defendants Guillaume are now both represented by Rony Princivil, Esq., the records on file do not include a consent on the behalf of defendant Rebert Guillaume to change attorney.

prima facie proof of proper service upon defendant Jeanne Guillaume pursuant to CPLR 308(2) (*see Granite Mgt. & Disposition v Sun*, 221 AD2d 186, 186-187 [1995]; *Skyline Agency, Inc. v Ambrose Coppotelli, Inc.*, 117 AD2d 135, 139 [1986]).

CPLR 320(a) provides that a defendant may appear in an action in one of three ways, i.e. by serving an answer, serving a notice of appearance, or making a motion which has the effect of extending the time to answer. The telephone call made by defendant Jeanne Guillaume to plaintiff's counsel did not constitute an appearance in the action (*see* CPLR 320). Hence, to vacate her default in appearing or answering the complaint, defendant Jeanne Guillaume is required pursuant to CPLR 5015(a)(1) to establish the existence of both a reasonable excuse for her default and a meritorious defense to the action (*see Bank of New York v Segui*, 42 AD3d 555 [2007]; *Burnett v Renne*, 32 AD3d 450 [2006]; *Sorgie v Dalton*, 90 AD2d 790 [1982]).

Defendant Jeanne Guillaume asserts her default is excusable because she believed the complaint fails to state a cause of action against her. Contrary to such assertion, this belief does not constitute a reasonable excuse. A defendant who considers a complaint to fail to state a claim against him or her is required to make a pre-answer motion to dismiss the complaint based upon such ground, serve an answer asserting such a defense therein, or serve an answer and then make a postanswer motion on this ground (*see Butler v Catinella*, 58 AD3d 145 [2008]).

Furthermore, the instant complaint states a cause of action for foreclosure against defendant Jeanne Guillaume. Schedule B annexed to the complaint, specifically identified the Guillames as record owners, and hence, plaintiff did not misrepresent to the court the identity of the owner of the property in July 2007. The complaint alleged that defendant Hinds had encumbered the property with the subject mortgage, which had been recorded on July 1, 2006, and that the interest of defendants Guillaume in the property had accrued subsequent to the lien of such mortgage.

RPAPL 1311 provides that a necessary defendant is one "whose interest is claimed to be subject and subordinate to the plaintiff's lien." Section 1311(1) requires that "[e]very person having an estate or interest in possession, or otherwise, in the property as a tenant in fee, for life, by courtesy, or for years" and that every person entitled to "the reversion, remainder, or inheritance of the real property, or of any interest therein or undivided share thereof" be made a party. To the degree defendant Jeanne Guillaume obtained title to the property after the making of the mortgage loan, and before the filing of the notice of pendency, she took subject to such mortgage and is a necessary party because the property itself is primarily liable to satisfy the mortgage debt (*see Northeast Sav., F.A. v Bailey*, 143 AD2d 474 [1988]). Although defendant Jeanne Guillaume had originally obtained an

ownership interest in the property by virtue of the deed dated October 9, 2004 and recorded on June 16, 2005, the bargain and sale deed dated August 25, 2006 indicates a conveyance of the subject property from “Edward Hinds” to defendants Guillaume. Defendant Jeanne Guillaume does not explain the reason for the August 25, 2006 deed, and in particular, fails to deny having granted defendant Hinds any ownership interest in the property. Notably, defendant Jeanne Guillaume has not provided a copy of any title search showing the chain of title of the property through the relevant period, i.e. from the date of October 9, 2004 forward.

Under such circumstances, defendant Jeanne Guillaume has failed to offer any excuse for her default in appearing or answering the complaint and has failed to offer any evidence tending to show a meritorious defense.

As regards the assertion of defendant Jeanne Guillaume that she did not receive a copy of motion for leave to enter the default judgment, she was not entitled to such notice, because she failed to answer the complaint, or appear and demand such personal service (*see Polish Nat. Alliance of Brooklyn, U.S.A. v White Eagle Hall Co., Inc.*, 98 AD2d 400, 403 [1983]).

Neither defendant Rebert Guillaume nor Jeanne Guillaume seek to vacate the foreclosure sale based upon lack of notice of the sale or any claim of defective publication pursuant to Real Property Law § 231. Defendants Guillaume had the opportunity to redeem the property at any time before the actual sale under the judgment of foreclosure (*see RPAPL 1341; NYCTL 1996-1 Trust v LFJ Realty Corp.*, 307 AD2d 957 [2003], *lv dismissed* 1 NY3d 622 [2004]; *United Capital Corp. v 183 Lorraine Street Assoc.*, 251 AD2d 400 [1998]; *Finance Inv. Co. [Bermuda] Ltd. v Gossweiler*, 145 AD2d 463 [1988]). Additionally, since they failed to make a payment into court and to make a motion to stay the sale of the property as required by RPAPL 1341(2), their right to redemption expired (*see NYCTL 1996-1 Trust v LFJ Realty Corp.*, 307 AD2d 957 [2003], *lv dismissed* 1 NY3d 622 [2004], *supra*; *EMC Mtge. Corp. v Bobb*, 296 AD2d 476, 478 [2002]; *Green Point Sav. Bank v Oppenheim*, 237 AD2d 409, 410 [1997]).

Accordingly, the motion is denied.

Dated: June 8, 2009

J.S.C.