

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CHARLES J. MARKEY
Justice

IA Part 32

	x	Index Number <u>30025</u> 2007
US BANK, etc.		
- against -		Motion Date <u>April 2,</u> 2009
JAMSHAID ZAFAR, etc., et al.		Motion Cal. No. <u>18</u>
	x	Motion Seq. No. <u>3</u>

The following papers numbered 1 to 8 read on this motion by defendant Jamshaid Zafar (Zafar) to vacate the judgment of foreclosure and sale; stay the enforcement of the judgment; and stay the scheduled auction.

	<u>Papers Numbered</u>
Order to Show Cause - Affidavits - Exhibits	1-5
Answering Affidavits - Exhibits	6-8
Letter by Satish K. Bhatia, Esq., dated June 26, 2009, invited by the Court.....	9

Upon the foregoing papers, the defendant Zafar’s motion, by order to show cause, is determined as follows:

On or about December 4, 2007, plaintiff commenced this action to foreclose a mortgage executed by Zafar that secures a note on property located at 90-26 215th Place, Queens Village, New York 11428 (the premises). Upon Zafar’s default in answering or appearing the court granted a judgment of foreclosure and sale. Pending the hearing of this motion, a temporary restraining order was issued that, in effect, stays the sale of the mortgaged premises.

Zafar argues for vacatur based on a lack of personal jurisdiction (*see* CPLR 5015[a][4]), asserting that he was not properly served with process. According to the

process server's affidavit, service was effected by personal delivery to "Amara Zafar (wife)" at the premises, denoted Zafar's "PLACE OF RESIDENCE" on the affidavit, and by regular mail to Zafar at the premises. This constitutes prima facie evidence of proper "deliver-and-mail" service under CPLR 308(2) (*Swedish v Beizer*, 51 AD3d 1008, 1009 [2d Dept. 2008]; *see*, Siegel, NY Prac § 72, at 113 [4th ed]).

In an affidavit submitted in support of the motion, Raffay Abid (Abid), Zafar's self-avowed attorney-in-fact, states that "neither [Zafar] nor his spouse has received any Summons" or "were served with the Summons and Complaint." Abid further contended that plaintiff failed to comply with certain notice provisions in the mortgage agreement.

Zafar submitted a copy of a durable general power of attorney, executed in favor of Abid, pursuant to Article 5, Title 15 of the New York General Obligations Law. The undersigned, by telephone calls of June 26, 2009, with counsel for both parties, invited further briefing, at their option, describing the circumstances that would require Abid to be named an attorney-in-fact. Responding to the Court's concern, Satish K. Bhatia, Esq., counsel for Abid, sent a letter to the Court, saying that Abid visited his offices explaining that Zafar was out of the country and had appointed him pursuant to a power of attorney on matters involving real estate and litigation. Mr. Bhatia, upon further inquiry to Abid, was informed that "Zafar is not in New York and he often travels out of New York."

However, "[t]he statutory powers granted to an attorney in fact under section 5-1501 of the General Obligations Law ... do not include the power to swear or sign an affidavit in the name of the principal. Such a purported affidavit lacks any probative effect" (*Reboul, MacMurray, Hewitt, Maynard & Kristol v Quasha*, 90 AD2d 466 [1st 1982]). "[A]n attorney in fact may not swear to the truth of allegations which are made by a principal from the principal's own personal knowledge and which are not personally known to the attorney in fact" (1 NY Jur 2d, Acknowledgments, Affidavits, Oaths, Notaries, and Commissioners, § 41). Accordingly, Zafar's motion is not supported by proper affidavits, and must therefore be denied (*Cymbol v Cymbol*, 122 AD2d 771, 772 [2nd Dept. 1986]).

But even assuming, arguendo, that Abid did establish that his affidavit was based on personal knowledge, vacatur would still not be warranted. Vacatur for improper service (*see* CPLR 5015[a][4]) would not be proper because Abid "failed to allege specific facts to rebut the statements in the process server's affidavit" (*Silverman v Deutsch*, 283 AD2d 478, 479 [2nd Dept. 2001]; *see Swedish*, 51 AD3d at 1010). Nor has Zafar demonstrated entitlement to vacatur for "excusable default," which requires a justifiable excuse for the default and a meritorious defense to the action (*see* CPLR 5015[a][1]; *NYCTL 1996-1 Trust v Jellerette*, 48 AD3d 769, 770 [2nd Dept. 2008]). Zafar has failed to put forth any excuse at all for the default, much less a justifiable one. Moreover, Zafar's sole substantive

defense-that plaintiff failed to send a default notice in accordance with the mortgage documents-is not meritorious, as plaintiff submitted, in opposition, a copy of a proper default notice and proof of mailing to Zafar at the premises.

Accordingly, Zafar's motion is denied in all respects.

The foregoing constitutes the decision and order of the Court.

Hon. Charles J. Markey
Justice, Supreme Court, Queens County

Dated: Long Island City, New York
July 1, 2009

Appearances: _____

For the Plaintiff: Pollack Cooperman & Fisher, P.C., by Howard Pollack, Esq., 5372 Merrick Rd., ste. 200, Massapequa, NY 11758

For the Defendant: Law Offices of Bhatia & Associates P.C., by Satish K. Bhatia, Esq., 38 West 32 Street, ste. 1511, NY, NY 10001