

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DUANE A. HART IA Part 18
Justice

WELLS FARGO BANK MINNESOTA, N.A., etc. x Index
Number 9588 2003

- against - Motion
Date June 8, 2005

FRANCES NIMMONS, et al. Motion
Cal. Numbers 46, 47

x

The following papers numbered 1 to 18 read on this motion by defendants Frances Nimmons and Kay Francis Jones to dismiss the complaint; and this motion by defendants Nimmons and Jones to vacate the "judgment and sale."

Papers
Numbered

Order to Show Cause - Affidavits - Exhibits 1-4
Notice of Motion - Affidavits - Exhibits 5-10
Answering Affidavits - Exhibits 11-18

Upon the foregoing papers it is ordered that the motions numbered 46 and 47 on the motion calendar for June 8, 2005 are joined for determination as follows:

Plaintiff commenced this action by filing a copy of the summons and complaint with the County Clerk on April 21, 2003. It seeks foreclosure of a mortgage given by defendants Nimmons and Jones on the property known as 95-15 Brisbin Street, Jamaica, New York, to secure a note evidencing an indebtedness in the principal amount of \$180,000.00, plus interest at 8.84% per annum. Plaintiff alleges it is the holder of the subject mortgage and note pursuant to an assignment and that defendants Nimmons and Jones defaulted under the terms of the mortgage and note by failing to pay the monthly mortgage installment payment due on January 9, 2003, and subsequent installments.

Plaintiff moved, *ex parte*, for leave to appoint a Referee to ascertain and compute the sums due and owing it, and to report whether the mortgaged premises can be sold in parcels. It alleged that defendants Nimmons and Jones had neither appeared in the action, nor served an answer to the complaint. By order dated October 29, 2003, the motion was granted.

Meanwhile, on October 25, 2003, defendants Nimmons and Jones, appearing together, *pro se*, moved to dismiss the complaint, asserting that the action is barred by the statute of frauds and that plaintiff has refused to accept their payments, which precipitated the alleged default under the mortgage. Their motion was made returnable for February 25, 2004.

Plaintiff's counsel states that he did not receive a copy of the motion to dismiss in the mail, and first obtained a copy of the motion papers when he was served with a copy of the order to show cause which had the motion papers annexed as an exhibit. Rather, plaintiff's counsel states that he received a one-page notice dated October 30, 2003 in the mail on or around November 6, 2003 from defendants Nimmons and Jones, indicating that they were serving plaintiff with a "notice of motion to dismiss its complaint in lieu of answering the complaint," and that the motion was returnable on February 25, 2004. He further states that because the notice did not state the basis for the motion to dismiss, he tried unsuccessfully to contact defendants by telephone and made a search of the court's computer dockets in a vain effort to verify the calendaring of such motion.

Thereafter, on December 4, 2003, counsel for plaintiff served defendants Nimmons and Jones by mail with a copy of the notice of entry of the October 29, 2003 order appointing the Referee, and on December 5, 2003, served a notice of the proposed computations of the Referee, indicating that any written opposition to the proposed computations was required to be submitted to the Referee, with service of a copy to plaintiff's counsel, at least five days before December 16, 2003.

Apparently in response to plaintiff's notices, defendants Nimmons and Jones, appearing *pro se*, obtained the instant order to show cause dated December 15, 2003, seeking, in effect, to vacate the October 29, 2003 order appointing the Referee to compute. They assert that plaintiff failed to provide them with notice of the motion, resulting in that order.

Plaintiff opposes both motions, asserting that defendants Nimmons and Jones were properly served with process, but failed to

answer, appear or move in relation to the complaint, within the time period fixed by statute. Plaintiff argues, therefore, it was not obligated to give them notice of its motion for leave to appoint a Referee to compute. Plaintiff also argues that the affirmative defenses raised by defendants Nimmons and Jones lack merit, and, thus, defendants Nimmons and Jones should not be permitted to serve a late answer, or to have their untimely motion to dismiss the complaint entertained by the court.

Plaintiff offers two copies of affidavits dated April 23, 2003, of a licensed process server, indicating service upon defendant Jones by in-hand delivery of a copy of the summons and complaint upon her on April 21, 2003, at 4:38 P.M. at the subject premises, and indicating service upon defendant Nimmons by delivery of a copy of the summons and complaint upon defendant Jones, as the mother of defendant Nimmons, and by a subsequent mailing of a copy of the summons and complaint to defendant Nimmons at the same address. The affidavits of service were filed with the County Clerk on April 24, 2003. These affidavits of service constitute prima facie evidence of proper service upon defendant Jones pursuant to CPLR 308(1) and upon defendant Nimmons pursuant to CPLR 308(2) (see Skyline Agency, Inc. v Ambrose Coppotelli, Inc., 117 AD2d 135, 139 [1986]).

Defendants Nimmons and Jones make no specific claim that the court lacks personal jurisdiction over them due to improper service of process. In addition, they have failed to address the contents of the April 23, 2003 affidavits, and instead, merely state "the action was commenced by the service of a summons and complaint ... upon the defendant on the 29th day of September, 2003." Under these circumstances where defendants Nimmons and Jones have failed to swear to specific facts to rebut or dispute the veracity or content of the statements in the process server's affidavits (see Manhattan Sav. Bank v Kohen, 231 AD2d 499, 500 [1996]), a hearing on the issue of proper service is not warranted (see Chemical Bank v Darnley, 300 AD2d 613 [2002]; Wieck v Halpern, 255 AD2d 438 [1998]; Green Point Sav. Bank v Clark, 253 AD2d 514 [1998]).

Contrary to the assertion of defendants Nimmons and Jones, their October 30, 2003 notice and their motion to dismiss were untimely, insofar as they were not served before the expiration of the time period in which service of their answer was required (CPLR 3211[e]). Defendant Jones was required to answer, appear or otherwise move with respect to the complaint within 20 days after service of the complaint (CPLR 308[1], 320[a], 3012[a]), or by May 11, 2003, and defendant Nimmons was required to answer, appear

or otherwise move with respect to the complaint within 30 days after completion of service of copy of the summons and complaint (CPLR 308[2], 320[a], 3012[c]), or by June 3, 2003. Defendants Nimmons and Jones offer an affidavit of service, indicating that service of their motion to dismiss was made upon counsel for plaintiff by mail on October 25, 2003, and plaintiff offers a copy of the envelope its counsel received containing the October 30, 2003 notice which is postmarked October 30, 2003. Furthermore, even assuming plaintiff's counsel received the actual copy of the motion to dismiss (see e.g. Engel v Lichterman, 62 NY2d 943, 944-945 [1984]), plaintiff may not be considered to have waived its late service by failing to reject it, because the original return date of the motion was set for February 25, 2004, and plaintiff had until seven days before that date to respond to the motion (see CPLR 2214[b]; Nasca v Gertel, 5 AD3d 361 [2004]; cf. Ligotti v Wilson, 287 AD2d 550 [2001]). Hence, since the time of defendants Jones and Nimmons to answer, appear or move in relation to the complaint, had already expired by May 11, 2003 and June 3, 2003, respectively, defendants Jones and Nimmons were in default in the action when plaintiff made the application for an order appointing a Referee. Thus, defendants Nimmons and Jones were not entitled to notice of the motion seeking the appointment of the Referee (CPLR 2103[e]; see Kraus Bros. v L.V. Hoffman & Co., Inc., 99 AD2d 401 [1984]).

To the extent defendants Nimmons and Jones seek to vacate their default pursuant to CPLR 5015(a)(1), and to extend their time, to answer or move to dismiss the complaint, pursuant to CPLR 3012(d), on the ground they did not receive timely notice of the action, such excuse must be rejected inasmuch as they have offered nothing to rebut the contents of the April 23, 2003 affidavits of service (see NYCTL 1997-1 Trust v Nillas, 288 AD2d 279 [2001]; Silverman v Deutsch, 283 AD2d 478 [2001]).

Nor have defendants Nimmons and Jones presented any meritorious defense to the action (see CPLR 3012[d], 5015[a][1]). Their claimed defense of the bar of the statute of frauds has no relevance to this case where plaintiff has offered copies of the mortgage and note executed by defendants Nimmons and Jones. Furthermore, under the terms of the subject mortgage, the mortgagee had the right to reject any tender of the arrears after it notified the mortgagors of the acceleration of the entire debt (see Albertina Realty Co. v Rosbro Realty Corp., 258 NY 472 [1932]; Dime Sav. Bank of N.Y. v Dooley, 84 AD2d 804 [1981]). Plaintiff has submitted copies of a default notice dated February 11, 2003, and a notice of acceleration dated March 31, 2003, which it caused to be sent to defendants Nimmons and Jones. Defendants Nimmons and

Jones have failed to offer any proof that they were not in arrears at the time of the commencement of this action, or that they tendered arrears prior to plaintiff's acceleration of the indebtedness.

Under such circumstances, defendants Nimmons and Jones were in default in the action at the time of their service of the October 30, 2003 notice and the making of their motion to dismiss, and have failed to present any basis for vacatur of their default, or for leave to extend their time to answer or to move to dismiss the complaint (CPLR 3012[d]).

Because defendants Nimmons and Jones were not entitled to notice of the application to appoint a Referee to compute, and have not asserted any other basis to vacate the resulting order dated October 29, 2003, the motion to vacate such order is denied.

In view of the default by defendants Nimmons and Jones in serving the motion to dismiss the complaint in a timely fashion, and their failure to establish a basis for vacating such default or granting them leave to extend the time to serve such motion, the motion to dismiss shall not be considered by the court. The court further notes that defendants Nimmons and Jones, having now appeared in the action, are entitled to service of all papers and notice of all proceedings through and subsequent to judgment (see CPLR 2103; Home Savs. Bank v Chiola, 203 AD2d 525 [1994], lv to appeal denied 84 NY2d 813 [1995]).

Dated: August 11, 2005

J.S.C.