

Citimortgage, Inc. v American Home Mtge.
2013 NY Slip Op 30953(U)
April 16, 2013
Supreme Court, New York County
Docket Number: 114203/11
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
DONNA M. MILLS, J.S.C. Justice

PART 58

CITIMORTGAGE, INC.,

Plaintiff,

-against-

AMERICAN HOME MORTGAGE, et al.,
Defendants.

INDEX NO. 114203/11

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion for _____

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits _____

Answering Affidavits- Exhibits _____

Replying Affidavits _____

CROSS-MOTION: YES NO

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: _____

4/16/13

Donna M. Mills
J.S.C.

DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58**

CITIMORTGAGE, INC.,

**INDEX NO.
114203/11**

Plaintiff,

- against -

**AMERICAN HOME MORTGAGE, AMERICAN
HOME MORTGAGE ACCEPTANCE, INC.,
SPECIALIZED LOAN SERVICING, LLC,
GREENPOINT MORTGAGE FUNDING, INC.,
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC., and ROGER H. STEIN,
Defendants.**

DECISION/ORDER

DONNA M. MILLS, J:

In this quiet title action, plaintiff, Citimortgage, Inc., ("CITI") seeks a default judgment against defendant's American Home Mortgage, American Home Mortgage Acceptance, Inc., Specialized Loan Servicing, LLC, Greenpoint Mortgage Funding, Inc., Mortgage Electronic Registration Systems, Inc., and Roger H. Stein ("Mr. Stein"). Mr. Stein is the only defendant to submit opposition, and also cross-moves to dismiss the complaint pursuant to CPLR §3211(a)(8) for lack of jurisdiction, CPLR §3211(a)(7) for failure to state a cause of action and CPLR §3211(a)(1) for a defense founded on documentary evidence, or, alternatively, compel acceptance of its Answer, Affirmative Defenses and Counterclaims.

In the underlying action, CITI is the current holder of a consolidated mortgage in the principal amount of \$5,110,000.00, pursuant to a consolidation extension modification agreement dated September 10, 2008, and recorded in the New York Office of the City Register on October 23, 2008 (the "Plaintiff's Mortgage" or the subject mortgage"). This matter involves multiple assignments of various mortgages and consolidation extension modification agreements executed by Mr. Stein, culminating with the Plaintiff's Mortgage. CITI in its claim seeks to expunge and vacate two erroneously filed satisfactions of

mortgage and to reinstate, of record, nunc pro tunc, CITI's mortgage interest in the parcel of real property commonly known as 514 Broome Street, in New York County, as recorded in the New York Office of the City Register on June 15, 2001. CITI also seeks to reform, nunc pro tunc, two assignments of mortgage recorded in the New York Office of the City Register on November 18, 2004 and September 15, 2006.

This action was commenced with the filing of a Summons and Verified Complaint in the New York County Clerk's Office on December 19, 2011. Copies of the affidavits of service upon the Defendants, are annexed to the moving papers for a default judgment. The Defendants had not appeared, served any answer, or otherwise moved with respect to the complaint, which led to the instant motion for a default.

Mr. Stein is the only named defendant that has opposed the motion and cross-moves to dismiss he complaint. He offers, inter alia, the following reasons why CITI's motion for a default judgment should be denied and his cross-motion should be granted because a copy of the summons was not mailed to his home or business and even if he had been properly served, the parties' have been in active and continuous negotiations to modify the loan would offer a reasonable excuse for his delay in responding to the summons and complaint.

CPLR § 308(2) is as follows:

"by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be

served, such delivery and mailing to be effected within twenty days of each other.”

“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 (see Skyline Agency v Coppotelli, Inc., 117 AD2d 135, 139 [1986]), 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 Servicing, LP v Albert, 78 AD3d 983, 984-985 [2010]).

Importantly, Mr. Stein does not dispute the first prong of service pursuant to CPLR § 308(2): delivery to a person of suitable age and discretion. Nowhere in his papers does he deny that the summons and complaint were delivered to Ms. Boeshena, the individual identified in the affidavit of service. Rather, he claims that it was the mailing prong of CPLR § 308(2) that allegedly renders service defective, because, he claims, he never received the mailed papers. The affidavit of service clearly states that the summons and complaint were mailed to Mr. Stein at his premises. Mr. Stein does not deny that he lived at that address on the date of mailing. As such, the mere conclusory denial of receipt of service is insufficient to rebut the presumption that service was proper (see Matter of De Sanchez, 57 AD3d 452, 454 [1st Dept 2008]).

Mr. Stein seeks permission to file a late answer approximately sixteen months after service of the summons pursuant to CPLR 3012(d). The statute provides “[u]pon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.” To “compel the plaintiff to accept an untimely answer as timely, a defendant must provide a reasonable excuse for the delay and demonstrate a potentially meritorious defense to the action” (Ryan v. Breezy Point Coop., Inc., 76 A.D.3d 523, 524, 904 N.Y.S.2d 910). The determination of what constitutes

a reasonable excuse lies within the sound discretion of the Supreme Court (Maspeth Fed. Sav. & Loan Assn. v. McGown, 77 A.D.3d 889, 909 N.Y.S.2d 403 [2d Dept.2010]). Plaintiff opposes the motion on several grounds, including lack of a reasonable excuse for the delay, lack of meritorious defense and prejudice to the plaintiff.

The record belies Mr. Steins contention that settlement negotiations is a reasonable excuse for not timely answering the complaint in this action. Mr. Stein's claim of a reasonable excuse hinges upon alleged negotiations to reinstate and modify his loan. This action however, does not involve any default in payments under the Plaintiff's Mortgage. This is an action to quiet title. Accordingly, Mr. Stein's claim that he has been negotiating with CITI regarding a potential mortgage modification after he fell behind on his mortgage payments is immaterial herein and would, arguably, only be considered an excuse for his delay if this were a foreclosure action or an action to recover amounts due under the note.


Accordingly it is,

ORDERED that plaintiff, CITI's motion is granted in its entirety pursuant to the annexed Judgment; and it is further.

ORDERED that defendant, Roger Stein's cross-motion is denied in its entirety.

Dated: 4/16/13

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.