

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

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**VENTURES TRUST 2013-I-H-R BY MCM CAPITAL
PARTNERS, LLC, ITS TRUSTEE,**

Plaintiff,

-against-

**SUPPLEMENTAL
DECISION & ORDER**

**Index No. 58777/2015
Sequence Nos. 1&2**

**ARTHUR E. DIMELLA, JR. A/K/A ARTHUR DIMELLA,
JR., BOARD OF MANAGERS OF THE RESIDENCES
CONDOMINIUM I, HSBC BANK USA N.A., BARRY ALICEA
MASHACK, MICHAEL MASHACK, CHRISTOPHER
AROTTA, RACHEL SELTZER, and "JOHN DOE" and
"MARY DOE," (Said names being fictitious, it being the
intention of plaintiff to designate any and all occupants,
tenants, persons or corporations, if any, having or claiming
an interest in or lien upon the premises being foreclosed herein.),**

Defendants.

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WOOD, J.

The following papers were read in connection with plaintiff's ("the Lender") motion (001), and moving defendant Arthur E. Dimella, Jr. A/k/a Arthur Dimella, Jr., ("defendant") cross-motion (002):

Lender's Notice of Motion, Counsel's Affirmation, Foreclosure Settlement Conference Affirmation, Non-Military Affirmation, Representative Affidavit, Proposed Order, Exhibits. Defendants' Notice of Cross-Motion, Counsel's Affirmation in Opposition, Exhibits. Lender's Counsel's Reply Affirmation, Exhibit.

This is a foreclosure action on a note and mortgage executed by defendant. Due to defendant's non payments on the note, the Lender commenced the instant foreclosure action by filing the summons and complaint on May 15, 2015 in the Westchester County Clerk's Office. While defendant did attend foreclosure settlement conference, pro se, a settlement could not be reached and on April 13, 2016, the matter was released from the conference part and the Lender was advised it could proceed with the instant action. Lender failed to file an answer, did not appear in the action, and the time to do so was never extended. The Lender's current application is for an order appointing a referee to compute, and a default judgment against defendant, and other sought relief.

By the instant cross-motion, defendant seeks to vacate his default, and to have the court dismiss this action on the grounds that the court lacks personal jurisdiction over him due to the fact that he was never personally served with any notice in this action. In opposition to the cross motion, the Lender contends, *inter alia*, that defendant is in default; and was properly served with the summons and complaint. The Lender argues that all mandatory notices were properly sent to defendant; that defendant has not proffered a reasonable excuse for his default and a meritorious defense; and that the Lender is entitled to relief sought.

Having considered the papers in the motions before this court, on March 1, 2017, this court directed a traverse hearing be held, and that the motions were held in abeyance pending the traverse hearing. The traverse hearing was conducted before the Honorable Terry Jane Ruderman on May 16, 2017. The court found that plaintiff sustained its burden of proof, and that service upon defendant was made in accordance with the requirements of the CPLR and is valid. This matter was now referred back to this court for final determination of the motions herein. Based upon the foregoing, the motions are decided as follows:

As a general rule, a defendant seeking to vacate a default in appearing and answering the complaint and to compel the plaintiff to accept a late answer is required to provide a reasonable excuse for the default and demonstrate the existence of a potentially meritorious defense to the action (U.S. Bank Nat. Ass'n v Sachdev, 128 AD3d 807 [2d Dept 2015]). The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the court (Khanal v Sheldon, 74 AD3d 894 [2d Dept 2010]). Moreover, for the meritorious cause of action requirement, a moving party is only required to demonstrate the existence of a possibly meritorious defense that merely set forth facts sufficient to make out a prima facie showing (Quis v Bolden, 298 AD2d 375 [2d Dept 2002]). If the moving party fails to establish a reasonable excuse for the default, the court need not determine whether the party has established the merits of the claim or defense (Lutz v Goldstone, 31 AD3d 449, 450 [2d Dept 2006]).

Here, plaintiff established personal jurisdiction at the traverse hearing. Accordingly, based on the record, defendant has failed to establish a reasonable excuse for his failure in answering the complaint. Therefore, defendant's cross-motion is denied.

Turning to the Lender's motion-in-chief for an order of reference, a default judgment, and other relief sought, the court after reviewing the record finds that Lender has demonstrated prima facie entitlement to an order of reference by tendering proof of the mortgage, the note, and the borrower's default in payment (Mahopac Natl. Bank v Baisley, 244 AD2d 466, 467 [2d Dept 1997]).

In opposition, defendant raises that conditions precedents have not been complied with by the Lender. "[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of

establishing satisfaction of this condition (CitiMortgage, Inc. v Pappas, 147 AD3d 900, 901 [2d Dept 2017]).

Generally, a party in default may not appear in the action and contest the Lender's right to relief unless the defaulter can establish grounds for the vacatur of his default (Southstar III, LLC v Enttienne 120 AD3d 1332 [2d Dept 2014]) "Indeed, defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (Mortgage Elec. Registration Sys., Inc. v Smith, 111 AD3d 804, 805, 806 [2d Dept 2013]).

Based upon the record, the Lender demonstrated its entitlement prima facie to a default judgment against defendant, by submitting documentary proof showing, inter alia, that the defendant failed to answer the complaint within the time allowed, that it was the holder of the notes, evidence of the mortgagors' default, and as a preliminary step in obtaining a judgment of foreclosure, the appointment of a referee to compute the amount due on the mortgage (HSBC Bank USA, N.A. v Taher, 104 AD3d 815, 816 [2d Dept 2013]).

However, a defendant in default may properly assert non-compliance with the notice provisions of RPAPL §1304 and other like statutory provisions as a potentially meritorious defense to the action in support of such defendant's motion to vacate the default, whereas a waived standing defense may not be so asserted (HSBC Bank, USA v Dammond, 59 AD3d 679 [2d Dept 2009]). A defense premised upon a lack of compliance with the notice provisions of RPAPL §1304 may be raised by an answering defendant even if such defense was not asserted in his or her answer (Citimortgage, Inc. v Espinal, 134 AD3d 876 [2d Dept 2015]).

In light of his status as a party in default, and defendant's failure to establish that he is entitled to an order vacating his default in appearing or answering the complaint, defendant fails to rebut the Lender's sought relief. The Lender's alleged failure to satisfy a condition precedent even if true, does not deprive this court of jurisdiction for the relief sought here (Deutsche Bank Trust Co. Americas v Shields, 116 AD3d 653, 654, leave to appeal dismissed, 23 NY3d 1029 [2d Dept 2014]). Thus, a dismissal due to a failure to satisfy a statutory condition precedent is not an available remedy (Wassertheil v Elburg, LLC, 94 AD3d 753 [2d Dept 2012]).

In any event, the Lender asserts that it was not required to send defendant a 90 day notice prior to the commencement of this foreclosure action because the subject premises were not, and are not occupied by defendant as his principal dwelling.

Accordingly, based upon the totality of the circumstances presented here, and the equities involved, it is hereby

ORDERED, that the Lender's motion-in-chief- for default judgment, an order of reference appointing a referee to compute the amount due, and other relief sought in the Lender's motion (Seq 1) is granted, as modified in the proposed order appointing a referee to compute pursuant to RPAPL 1321 shall be signed coincident herewith; and it is further

ORDERED, that defendant's cross-motion (Seq 2) is denied; and it is further

ORDERED, that the Lender shall serve a copy of this order with notice of entry upon the parties within ten (10) days of entry, and file proof of service within five (5) days of service, in compliance with NYSCEF protocols.

The Clerk shall mark his records accordingly.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

Dated: September 18, 2017
White Plains, New York



HON. CHARLES D. WOOD
Justice of the Supreme Court

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