

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

JPMORGAN CHASE BANK, N.A.,

Plaintiff,

vs.

Case No. 2014-3361-CH

BANK OF AMERICA, N.A., PAUL
CLARK and LISA CLARK,

Defendants,

_____ /

OPINION AND ORDER

Plaintiff has filed a motion for entry of default judgment. Defendant Bank of America, N.A. (“Defendant Bank”) has filed a response and requests that the motion be denied.

In addition, Defendant Bank has filed a motion to set aside default. Plaintiff has filed a response and requests that the motion be denied.

Facts and Procedural History

The instant motion involves a mortgage priority dispute involving real property commonly known as 23704 Wagner Ave, Warren, MI (“Subject Property”).

On July 31, 1990, the Subject Property was conveyed to Defendant Lisa Clark f/k/a Lisa C. Binkley (“Defendant L. Clark”) pursuant to a warranty deed recorded on January 31, 1991.

On December 2, 1997, Defendant Paul Clark and Defendant L. Clark (collectively “Borrowers”) obtained a \$77,600 loan (“1997 Loan”) from MMS Mortgage Services, Ltd. (“MMS”). As security for the 1997 Loan, the Borrowers executed a mortgage encumbering the Subject Property in favor of MMS (“1997 Mortgage”). The 1997 Mortgage was recorded on February 2, 1998. The 1997 Mortgage was ultimately assigned to Fleet Mortgage Corp.

On January 5, 2001, the Borrowers obtained a home equity line of credit (“2001 Loan”) in the amount of \$39,300.00 from Fleet National Bank (“Fleet”). As security for the 2001 Loan, the Borrowers executed a mortgage encumbering the Subject Property in favor of Fleet (“2001 Mortgage”). The 2001 Mortgage was recorded on January 11, 2001. The 2001 Mortgage was subject and subordinate to the 1997 Mortgage. The 2001 Mortgage was later held by Washington Mutual Bank (“Washington Bank”) as a successor by merger, but is currently held by Defendant Bank as a successor by merger.

On November 29, 2007, the Borrowers obtained a \$69,377.00 loan (“2007 Loan”) from Washington Bank for the purpose of refinancing, paying off, and discharging the 1997 Loan and Mortgage. To secure the 2007 Loan, Borrowers executed a mortgage in favor of Washington Bank (“2007 Mortgage”). The 2007 Mortgage was recorded on December 13, 2007. \$68,325.00 of the proceeds of the 2007 Loan was used to pay off and discharge the 1997 Loan and Mortgage. On December 31, 2007, Washington Bank discharged the 1997 Mortgage.

On January 14, 2014, the Federal Deposit Insurance Corporation, as receiver for Washington Bank, assigned the 2007 Mortgage to Plaintiff pursuant to an assignment of mortgage recorded on January 29, 2014.

On August 25, 2014, Plaintiff filed its complaint in this matter seeking an order finding that the 2001 Mortgage is subject and subordinate to the 2007 Mortgage. On September 4, 2014, Plaintiff served a copy of the summons and complaint on Ashley Noble, an employee at Defendant Bank’s national headquarters in Charlotte, NC. In addition, on September 2, 2014, Plaintiff served a copy of the summons and complaint via certified mail addressed to Defendant Bank’s national headquarters in Charlotte, NC.

On October 3, 2014, a default was entered against Defendant Bank due to its failure to answer or otherwise respond to the complaint. On November 6, 2014, Plaintiff filed its instant motion for entry of a default judgment. Defendant Bank has filed a response and requests that the motion be denied. Defendant Bank has also filed a motion to set aside the default. Plaintiff has filed a response and requests that the motion be denied.

On December 15, 2014, the Court held a hearing in connection with the motions and took the matters under advisement.

Standards of Review

MCR 2.603(A)(1) provides that “[i]f a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party.” Pursuant to MCR 603(D)(1), “A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.”

Arguments and Analysis

In its motion to set aside the default, Defendant Bank contends that the Court lacks jurisdiction over it. Specifically, Defendant Bank contends that it is a national association, not a corporation, and that as a result Plaintiff could not effectuate service pursuant to MCR 2.105(D)(2). However, even if service pursuant to MCR 2.105(D)(2) does not expressly apply to banks, the Court is convinced that service of process in accordance with MCR 2.105(D)(2) satisfies the requirements of due process.

MCR 2.105(J)(3) provides that “[a]n action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in

these rules for service.” See also, *Bunner v Blow-Rite Insulation Co*, 162 Mich App 644, 674; 413 NW2d 474 (1987) (“Neither errors in content of service nor in the manner of service are to result in dismissal unless the errors are so serious as to cause the process to fail in its fundamental purpose.”) The goal of service is to ensure that the defendant has actual notice of the proceedings and an opportunity to be heard. See MCR 2.105(I)(1); *Bunner*, 162 Mich App at 674.

In this case, Defendant Bank does not appear to dispute that it received actual notice of this matter. Rather, Defendant Bank contends that it did not receive notice in the manner provided for by the court rules. However, given that notice was effectuated the Court is convinced that the manner of service utilized by Plaintiff was sufficient to satisfy the requirements of MCR 2.105 and due process. Consequently, the Court is convinced that Defendant Bank’s contention is without merit.

Next, Defendant Bank contends that the clerk erroneously entered the default. Specifically, Defendant Bank contends that the default was entered prior to its deadline to file an answer.

In this case, it is undisputed that an officer of Defendant Bank was personally served on September 4, 2014. Nevertheless, Defendant Bank contends that service was not completed until September 8, 2014, the first business day after it received the summons and complaint via certified mail. However, even assuming that Defendant Bank did not receive the certified mail until September 8, 2014, and assuming that service via certified mail and personal delivery must both be completed to effectuate service, the Court is convinced that service was completed on September 4, 2014.

The plain language of MCR 2.105 makes it sufficient to send a copy of the summons and complaint by certified mail to the principal office. *Clayton v Ann Arbor Motor Inn, Inc.*, 94 Mich App 370, 375; 288 NW2d 432 (1979). Proof of receipt of the complaint is not contemplated by the court rule. *Id.* Accordingly, as proof of receipt via service by certified mail is not contemplated, service was completed on September 4, 2014. As a result, the clerk did not error in entering the default on October 3, 2014, 29 days after service was effectuated. For these reasons, Defendant Bank's contention is without merit.

Finally, Defendant Bank maintains that it has a meritorious defense. However, MCR 2.603(D)(1) provides that a default may only be set aside if a defendant files an affidavit of facts showing a meritorious defense. In this case, Defendant Bank has not filed an affidavit as required by the court rule. Consequently, Defendant Bank's motion must be denied. Additionally, the Court is satisfied that Plaintiff's motion for a default judgment must be granted.

Conclusion

Based upon the reasons set forth above, Defendant Bank of America's motion to set aside default is DENIED, and Plaintiff's motion for a default judgment is GRANTED. Plaintiff shall submit a proposed judgment to the Court within 14 days of this Opinion and Order. This Opinion and Order resolves the last claim and CLOSES the case. *See* MCR 2.602(A)(3).

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: January 22, 2015

JCF/sr

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