

Wall St. Mtge. v Lorence

2007 NY Slip Op 30224(U)

March 19, 2007

Supreme Court, Kings County

Docket Number: 0023041

Judge: Jack M. Battaglia

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(12)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS:

-----X
WALL STREET MORTGAGE,

Plaintiff,

Index No. 23041/06

Foreclosure of:
408 Greene Avenue
Brooklyn, NY
Block 1797, Lot 51

-against-

DECISION AND ORDER

Jack M. Battaglia
Justice, Supreme Court

NILDA LORENCE; FERNANDO LORENCE; NEW YORK CITY TRANSIT ADJUDICATION BUREAU; NEW YORK CITY ENVIRONMENTAL CONTROL BOARD; NEW YORK CITY PARKING VIOLATIONS BUREAU; 'JOHN DOES' and 'JANE DOES,' said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises,

Defendants.

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Recitation in accordance with CPLR 2219(a) of the papers considered on Plaintiff's application for, among other things, a default judgment and an order of reference:

- Order Appointing Referee to Compute Attorney's Affirmation Affidavit of Merit Exhibits

In this mortgage foreclosure action filed on August 2, 2006, Plaintiff makes *ex parte* application for, among other things, a default judgment and an order of reference. The property is located at 408 Greene Avenue, Brooklyn; the mortgagors are Nilda Lorence and Fernando Lorence. Because the Court finds service defective, the application is denied.

According to the Affidavits of Service dated August 7, 2006, the Summons and Complaint were served on Nilda Lorence and Fernando Lorence by "nail and mail" (*see* CPLR 308 [4]), after four unsuccessful attempts at delivery to the defendant or a person of suitable age and discretion at the defendant's residence. Those attempts were made on Wednesday, August 2,

at 3:31 p.m.; and 8:40 p.m.; and Thursday, August 3, at 9:03 a.m. and 6:41 p.m.

“CPLR 308 (4) authorizes ‘nail and mail’ service to be used only where personal service under CPLR 308 (1) and (2) cannot be made with ‘due diligence’.” (*County of Nassau v Letosky*, 34 AD3d 414 [2d Dept 2006].) “The due diligence requirement of CPLR 308 (4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received.” (*Id.* [quoting *Gurevitch v Goodman*, 269 AD2d 355].)

Service under circumstances virtually identical to those here was found insufficient to confer personal jurisdiction in *O’Connel v Post* (27 AD3d 630 [2d Dept 2006].) “[Three] of the attempts at service occurred on weekdays during hours when it reasonably could have been expected that the defendant was either working or in transit to and from work.” (*See id.*, at 631.) and there is no indication that the process server made any “effort to determine [Ms. Lorence’s or Mr. Lorence’s] business address in order to attempt personal service thereat pursuant to CPLR 308 (2) before resorting to ‘nail and mail’ service.” (*Id.*) (*See also County of Nassau v Yohannan*, 34 AD3d 620 [2d Dept 2006].) Indeed, a mortgagee would be expected to have a business address for its mortgagor.

Moreover, there is no explanation for attempted service in August 2006 at 295 DeKalb Avenue when the default letter dated August 18, 2006 (for which there is no proof of service) was addressed to 480 Greene Avenue.

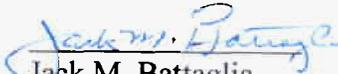
The Affirmation of Merit was executed and notarized in Illinois. It is not accompanied by a certificate of conformity, and, therefore, cannot provide evidence on this application. (*See Daimler Chrysler Services North America LLC v Tamaro*, 2006 NY Slip Op 52506 [U], * 1 [App Term, 2d Dept]; *Bath Medical Supply, Inc. v Allstate Indemnity Co.*, 13 Misc 3d 142 [A], 2006 NY Slip Op 52273 [U], * 1- * 2 [App Term, 2d Dept].) Moreover, the Affidavit is made by an “attorney in fact” who does not assert personal knowledge or facts from which personal knowledge might be inferred.

The submission includes numerous documents that purportedly support the relief sought, but many of the documents are not identified by anyone with personal knowledge, and are not authenticated or otherwise rendered admissible as evidence. They are not even separately designated as exhibits, or incorporated in any affidavit or affirmation. Not only is the submission procedurally defective, it is not supported by evidence.

The non-military affidavits executed on August 7, 2006 as part of the affidavits of service of the summons and complaint, are both premature (*see U.S. Bank NA v Coaxum*, 2003 NY Slip Op 51384 [U], * 2- * 3 [Sup Ct, Westchester County 2003]; *see also Citibank, N.A. v McGarvey*, 196 Misc 2d 292, 299 [Civ Ct, Richmond County 2003]; *National Bank of Far Rockaway v Van Tassel*, 178 Misc 776, 776-79 [Sup Ct, Queens County 1942]); and stale (*see Sunset 3 Realty v Booth*, 12 Misc 3d 1184 [A], 2006 NY Slip Op 51441 [U], * 3 [Sup Ct, Suffolk County 2006]; *New York City Housing Authority v Smithson*, 119 Misc 2d 721, 723-24 [Civ Ct, NY County 1983].)

There is no evidence of compliance with the additional-mailing requirement of CPLR 3215 (g) (4) (i). (See *Bunch v Dollar Budget, Inc.*, 12 AD3d 391, 391-92 [2d Dept 2004]; *Schilling v Maren Enterprises, Inc.*, 302 AD2d 375, 376 [2d Dept 2003]; *Media Neurology, PC v State National Ins. Co.*, 2003 NY Slip Op 50856 [U], * 2 [App Term, 2d Dept].)

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Jack M. Battaglia
Justice, Supreme Court