

LaSalle Bank, NA v Ferrari

2016 NY Slip Op 31838(U)

September 28, 2016

Supreme Court, Suffolk County

Docket Number: 32699-08

Judge: Daniel Martin

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SUPREME COURT OF THE STATE OF NEW YORK
I.A.S PART 9 - SUFFOLK COUNTY

INDEX NO.: 32699-08

PRESENT:

Hon. DANIEL MARTIN

MOTION DATE: 10-23-14 (002)
12-04-14 (003)
ADJ. DATE: 1-20-15 (002, 003)
Mot. Seq. # 002-ADJ FOR HEARING
003-ADJ FOR HEARING

LASALLE BANK, NA AS TRUSTEE FOR WAMU
MORTGAGE PASS-THROUGH CERTIFICATES
SERIES 2006 AR11, x

Plaintiff,

-against-

PLAINTIFF'S ATTY:

RAYMOND FERRARI; PATRICIA MURPHY;
WASHINGTON MUTUAL BANK; SUMMERFIELD AT
HOLTSVILLE HOMEOWNERS ASSOCIATION,
INC.; HEATHERWOOD HOUSE AT PORT
JEFFERSON, LLC; VELOCITY INVESTMENTS
LLC BANK OF AMERICA; SHERMAN ACQUISITION
LIMITED PARTNERSHIP; CAPITAL ONE BANK;
STATE OF NEW YORK; UNITED STATES OF
AMERICA-INTERNAL REVENUE SERVICE;
NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE; "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,

Rosicki, Rosicki & Associates, P.C.
26 Harvester Avenue
Batavia, N. Y. 14020

DEFENDANTS' ATTYS:

F. J. Romano & Associates, P.C.
41 East Main Street
Smithtown, N. Y. 11787

Jay L. Yackow, Esq.
1400 Old Country Road
Westbury, New York 11590

Defendants.

x

The following named papers have been read on this motion:

Notice of Motion for an Order of Reference	X
Cross-Motion	X
Answering Affidavits	X
Replying Affidavits	X

ORDERED that this motion (002) by the plaintiff, and the motion (003) by the defendant Patricia Murphy, which was improperly labeled a cross motion, are consolidated for the purposes of this determination and decided herewith; and it is

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ORDERED that this motion (002) by the plaintiff for, inter alia, an order fixing the defaults of the non-answering defendants pursuant to CPLR 3215 (f), appointing a referee to compute pursuant to RPAPL § 1321, and amending the caption is adjourned to December 2^o, 2016 for submission, as determination of this relief must be held in abeyance pending the court's determination of the jurisdictional matters, framed as the subject of the traverse hearing, scheduled above, and the plaintiff's submission of evidentiary proof of the defendant Raymond P. Ferrari's death; and it is

ORDERED that this motion (003) by the defendant Patricia Murphy for, inter alia, an order: (a) pursuant to CPLR 3211 (a) (8) dismissing plaintiff's complaint insofar as asserted against her on the ground that the court has no jurisdiction of her person; or, in the alternative, (b) pursuant to CPLR 3215 (c) dismissing the complaint insofar as asserted against her is adjourned to November 16, 2016 at 10 :00 a.m. for a traverse hearing which shall be held in the New York State Supreme Court, Part 9, located at 1 Court Street, Riverhead, N.Y.; and it is

ORDERED that there shall be no adjournments of the traverse hearing without a written order from this court; and it is

ORDERED that the plaintiff shall serve a copy of this order with notice of entry upon F. J. Romano & Associates, P.C., the attorneys for the defendant Patricia Murphy, pursuant to CPLR 2103 (b) (1), (2) or (3), and upon all other parties, if any, which have appeared herein and not waived further notice within thirty (30) days of the date herein, and shall promptly file the affidavits of service with the Clerk of the Court; and it is further

ORDERED that the defendant Patricia Murphy shall serve a copy of this order with notice of entry upon Rosicki, Rosicki & Associates, P.C., the attorneys for the plaintiff, pursuant to CPLR 2103 (b) (1), (2) or (3), and upon all other parties, if any, which have appeared herein and not waived further notice within thirty (30) days of the date herein, and shall promptly file the affidavits of service with the Clerk of the Court.

This is an action to foreclose a mortgage given by Raymond P. Ferrari ("Ferrari") on July 31, 2006 on real property known as 48 Peach Tree Court, Holtsville, New York 11742 ("the property"). By quitclaim deed dated December 11, 2006 ("the deed"), Ferrari transferred fee ownership of the property to himself and Patricia Murphy ("Ms. Murphy") as joint tenants with rights of survivorship.

The court notes that the deed, which was recorded on January 10, 2007, was made returnable by mail to Ms. Murphy at P.O. Box 243, Holbrook, New York 11741. The court also notes that section "11" of the note and section "18" of the mortgage provide, in sum and substance, that the lender may require immediate payment in full of all sums secured thereby if all or any part of the property, or if any interest in the property is sold or transferred without the lender's prior written permission.

Ferrari allegedly defaulted on the note and mortgage by failing to make the monthly payment of principal and interest due on April 1, 2008, and each month thereafter. After Ferrari allegedly failed to cure the default in payment, the plaintiff commenced an action by the filing of the lis pendens, summons and complaint on August 27, 2008. In the complaint, a deficiency is sought as against Ferrari.

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By way of further background, a conference pursuant to CPLR 3408 was initially not held in this action because Ferrari, the sole mortgagor/obligor was deemed deceased, and, ostensibly, because the plaintiff had made a determination based upon its agent's representations in the affidavit of service upon Ms. Murphy that she did not occupy the property. Thereafter, by order dated April 29, 2014 (Martin, J.), the parties were directed to appear at a compliance conference before Foreclosure Conference Part 9 on July 28, 2014. The conference was continued for control purposes to September 23 and October 28, 2014. On the last conference date, this case marked to indicate that the parties were unable to modify the loan or otherwise settle this action. Accordingly, the conference mandates of CPLR 3408, if applicable, have been satisfied.

By Order dated August 14, 2009 (Costello, J.), a motion by the plaintiff for an order of reference was denied as moot because the motion had been subsequently withdrawn. The plaintiff now moves again for, inter alia, an order of reference pursuant to RPAPL 1321. In response, Ms. Murphy moves for, inter alia, an order: (a) pursuant to CPLR 3211 (a) (8) dismissing the plaintiff's complaint insofar as asserted against her on the ground that the court has no jurisdiction of her person; or, in the alternative, (b) pursuant to CPLR 3215 (c) dismissing the complaint insofar as asserted against her. Opposition has been filed by the plaintiff, and the Ms. Murphy filed a reply.

The court turns first to the branch of the plaintiff's motion to fix Ferrari's default. On October 10, 2008, Ferrari was allegedly served with a copy of the summons and complaint at 34 Ravenwood Road, West Hartford, CT 06107 ("the Conneticut address") by personal delivery of the same upon "Lila Ferrari, Wife," a person of suitable age and discretion pursuant to CPLR 308 (2). The plaintiff's agent further alleges that Lila Ferrari confirmed that the property was Ferrari's dwelling place/usual place of abode. On October 13, 2008, the plaintiff's agent then mailed copies of the summons and complaint in a pre-paid, sealed wrapper addressed to Ferrari at the Conneticut address by first-class mailing by depositing the same in a post office of the United States Postal Service within this State. The aforementioned affidavit contains the following comments from the plaintiff's agent: "Lila Ferrari states that her husband is not deceased" but "alive and on the premises and on the telephone."

In its moving papers, however, the plaintiff's counsel now avers that Ferrari is deceased, with no further specifics. In her affidavit in support of the cross motion, Ms. Murphy alleges, inter alia, that Ferrari died on March 3, 2008, never lived at the Conneticut property and was divorced from his ex-wife Sheila for about ten years at the time of his death. Parenthetically, neither the plaintiff nor Ms. Murphy have supplied the court with a copy of a Ferrari's death certificate, an affidavit of heirship, or a divorce decree, which would bear upon the allegations raised herein.

If Ferrari died prior to commencement, the complaint would be a nullity insofar as asserted against him (*see, Rivera v Bruchim*, 103 AD3d 700, 959 NYS2d 448 [2d Dept 2013]; *Dime Sav. Bank of N.Y., FSB v Luna*, 302 AD2d 558, 755 NYS2d 300 [2d Dept 2003]; *Deutsche Bank Natl. Trust Co. v Torres*, 24 Misc3d 1216 [A], 897 NYS2d 669 [Sup Ct, Suffolk County 2009]). It is well-settled that a party may not commence a legal action or proceeding against a dead person, but must instead name the personal representative of the decedent's estate (*Jordan v City of New York*, 23 AD3d 436, 437, 807 NYS2d 595 [2d Dept 2005]).

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Because Ferrari deeded his interest in the property to himself and Ms. Murphy as joint tenants with right of survivorship, even if he died prior to commencement, the fiduciary of his estate would not be a necessary party, unless the plaintiff moves for a deficiency judgment (*see, HSBC Bank USA v Ungar Family Realty Corp.*, 111 AD3d 673, 974 NYS2d 583 [2d Dept 2013]; *Financial Freedom Senior Funding Corp. v Rose*, 64 AD3d 539, 883 NYS2d 546 [2d Dept 2009]; *Countrywide Home Loans, Inc. v Keys*, 27 AD3d 247, 811 NYS2d 362 [1st Dept 2006]). On the other hand, if Ferrari died after commencement, in the absence of anyone to stand in for him in this action, a judgment by this court would be a nullity (*see, Matter of Vita V. (Cara B.)*, 100 AD3d 913, 954 NYS2d 582 [2d Dept 2012]; *Singer v Riskin*, 32 AD3d 839, 821 NYS2d 120 [2d Dept 2006]; *Waldman v Mech. Sys.*, 294 AD2d 354, 741 NYS2d 711 [2d Dept 2002]). Parenthetically, in the complaint, the plaintiff seeks a deficiency judgment against Ferrari, but in its instant moving papers the plaintiff requests that Ferrari be excised from the caption and deleted as a party to this action.

Concerning the branch of Murphy's motion for dismissal of the complaint as untimely insofar as asserted against her, CPLR 3215 (c) requires that a plaintiff commence proceedings for the entry of a default judgment within one year after the default or demonstrate sufficient cause why the complaint should not be dismissed. Where the plaintiff has made an application to the court for the entry of a default judgment within one year of the defendant's default, even if unsuccessful, the court may not later dismiss the complaint as abandoned pursuant to CPLR 3215 (c) (*see, Bono v DuBois*, 121 AD3d 932, 995 NYS2d 153 [2d Dept 2014]; *U.S. Bank N.A. v Poku*, 118 AD3d 980, 989 NYS2d 75 [2d Dept 2014]; *see also, Mortgage Elec. Registration Sys., Inc. v Smith*, 111 AD3d 804, 975 NYS2d 121 [2d Dept 2013]).

It is not necessary for a plaintiff to actually obtain a default judgment within one year of the default in order to avoid dismissal pursuant to CPLR 3215 (c) (*US Bank N.A. v Dorestant*, 131 AD3d 467, 469, 15 NYS3d 142 [2d Dept 2015]; *see, Wells Fargo Bank, N.A. v Combs*, 128 AD3d 812, 10 NYS3d 121 [2d Dept 2015]; *Mortgage Elec. Registration Sys., Inc. v Smith*, 111 AD3d 804, 806, 975 NYS2d 121 [2d Dept 2013]; *Jones v Fuentes*, 103 AD3d 853, 853, 962 NYS2d 263 [2d Dept 2013]; *Nowicki v Sports World Promotions*, 48 AD3d 435, 436, 851 NYS2d 270 [2d Dept 2008]). Nor is a plaintiff required to specifically seek the entry of a judgment within a year. "As long as proceedings are being taken, and these proceedings manifest an intent not to abandon the case but to seek a judgment, the case should not be subject to dismissal" (*US Bank N.A. v Dorestant*, 131 AD3d at 469, quoting *Brown v Rosedale Nurseries*, 259 AD2d 256, 257, 686 NYS2d 22 [1st Dept 1999] [internal quotation marks and citation omitted]; *see, Wells Fargo Bank, N.A. v Combs*, 128 AD3d 812, *supra*; *Klein v St. Cyprian Props., Inc.*, 100 AD3d 711, 712, 954 NYS2d 170 [2d Dept 2012]; *Pisciotta v Lifestyle Designs, Inc.*, 62 AD3d 850, 852, 879 NYS2d 179 [2d Dept 2009]; *Icon Equip. Distribs. v Gordon Env'tl. & Mech. Corp.*, 272 AD2d 579, 579, 709 NYS2d 426 [2d Dept 2000]; *Home Sav. of Am., F.A. v Gkanios*, 230 AD2d 770, 770-771, 646 NYS2d 530 [2d Dept 1996]).

In this case, in March, 2009, when the plaintiff took the preliminary step toward obtaining a default judgment of foreclosure and sale by moving for an order of reference, it initiated proceedings for entry of the default judgment of foreclosure and sale within one year of Ms. Murphy's default and, thus, did not abandon the action (*see, CPLR 3215 [c]; US Bank N.A. v Dorestant*, 131 AD3d 467, *supra*; *Wells Fargo Bank, N.A. v Combs*, 128 AD3d 812, *supra*; *Mortgage Elec. Registration Sys., Inc. v Smith*, 111 AD3d 804, *supra*; *Jones v Fuentes*, 103 AD3d 853, *supra*; *Klein v St. Cyprian Props., Inc.*, 100 AD3d 711,

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supra). Further, settlement conferences were held in this action, as indicated above, and the plaintiff's instant motion preceded Ms. Murphy's for dismissal (*see, Citimortgage, Inc. v Sterling*, 2015 NY Misc LEXIS 3340, 2015 WL 5555825, 2015 NY Slip Op 31748 [U] [Sup Ct, Suffolk County 2015]; *Wells Fargo Bank, N.A. v Miah*, 48 Misc3d 1223 [A], 2015 NY Misc LEXIS 2957, 2015 NY Slip Op 51195 [U] [Sup Ct, Queens County 2015]). Thus, the totality of the circumstances indicate that the plaintiff did not abandon this action. In any event, Ms. Murphy, a non-obligor/mortgagor, who was deeded an interest in the property, ostensibly, without the lender's prior written permission or an assumption of the mortgage, has neither demonstrated nor alleged that she sustained any prejudice herein (*see, LNV Corp. v Forbes*, 122 AD3d 805, 996 NYS2d 696 [2d Dept 2014]; *Iorizzo v Mattikow*, 25 AD3d 762, 807 NYS2d 663 [2d Dept 2006]; *Bank of Am., N.A. v Uvino*, 2015 NY Misc LEXIS 2377, 2015 WL 4207090, 2015 NY Slip Op 31142 [U] [Sup Ct, Suffolk County 2015]). Additionally, it appears from the moving papers that the plaintiff has a meritorious claim for the foreclosure and sale of the property. Accordingly, the motion by the pursuant to CPLR 3215 (c) to dismiss the complaint insofar as asserted against Ms. Murphy as abandoned is denied.

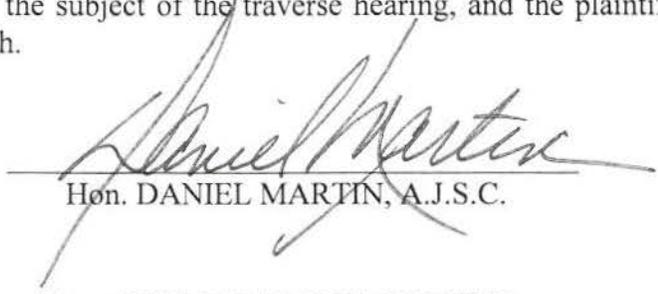
The court next turns to the branch of the motion by Ms. Murphy pursuant to CPLR 3211 (a) (8) dismissing plaintiff's complaint insofar as asserted against her on the ground that the court has no jurisdiction of her person. With respect to personal jurisdiction over defendants, the burden of proving that personal jurisdiction has been acquired over a defendant in an action rests with the plaintiff (*see, Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d 343, 756 NYS2d 92 [2d Dept 2003]). A process server's affidavit of service establishes a prima facie case as to the method of service and, therefore, gives rise to a presumption of proper service (*see, Household Fin. Realty Corp. of N.Y. v Brown*, 13 AD3d 340, 785 NYS2d 742 [2d Dept 2004]). However, where there is a specific sworn denial that a defendant was served with process, the affidavit of service is rebutted, and the plaintiff must establish jurisdiction at a hearing by a preponderance of the evidence (*see, Washington Mut. Bank v Murphy*, 127 AD3d 1167, 10 NYS3d 95 [2d Dept 2015]; *Mortgage Access Corp. v Webb*, 11 AD3d 592, 784 NYS2d 116 [2d Dept 2004]).

A prima facie case of due service was made by the affidavit of service upon Ms. Murphy (*see, Household Fin. Realty Corp. of N.Y. v Brown*, 13 AD3d 340, *supra*). On October 1, 2008, Ms. Murphy was allegedly served with a copy of the summons and complaint at 610 Madison Avenue, Lindenhurst, New York 11757 ("the Lindenhurst address") by personal delivery of the same upon "ROBERT MURPHY, BROTHER", a person of suitable age and discretion pursuant to CPLR 308 (2). The plaintiff's agent further alleges that Robert Murphy confirmed that the property was Ms. Murphy's dwelling place/usual place of abode. On October 3, 2008, the plaintiff's agent then mailed copies of the summons and complaint in a pre-paid, sealed wrapper addressed to Ms. Murphy at the Lindenhurst address by first-class mailing by depositing the same in a post office of the United States Postal Service within this State. Nevertheless, Ms. Murphy's assertions, inter alia, that she never resided at the Lindenhurst address, that said Robert Murphy is not her brother, and that she does not know anyone who has ever resided at that address are thus sufficient to render the affidavit of service upon her inconclusive, creating factual issues that must be resolved at a hearing (*see, Central Mtge. Co. v Ward*, 127 AD3d 803, 9 NYS3d 61 [2d Dept 2015]; *Lazarre v Davis*, 109 AD3d 968, 972 NYS2d 80 [2d Dept 2013]; *Zion v Peters*, 50 AD3d 894, 854 NYS2d 670 [2d Dept 2008]; *Matter of TNT Petroleum, Inc. v Sea Petroleum, Inc.*, 40 AD3d 771, 833 NYS2d 906 [2d Dept 2007]).

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The instant motions are therefore adjourned for a traverse hearing, as indicated above. The court reserves its decision on the remaining portions of the plaintiff's motion for an order of reference pending determination of the jurisdictional issue that is the subject of the traverse hearing, and the plaintiff's submission of evidentiary proof of Ferrari's death.

Dated: September 28, 2016
Riverhead, NY


Hon. DANIEL MARTIN, A.J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION