

**NYCTL 1998-2 v T. Jan Realty Corp.**

2004 NY Slip Op 30310(U)

April 6, 2004

Supreme Court, New York County

Docket Number: 38848/01

Judge: Theodore T. Jones

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At an IAS Term, Part 14 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6<sup>th</sup> day of April, 2004

P R E S E N T:

HON. THEODORE T. JONES,

Justice.

-----X

NYCTL 1998-2 et ano,

Plaintiffs,

- against -

Index No. 38848/01

T. JAN REALTY CORP., et al,

Defendants.

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The following papers numbered 1 to 13 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	_____1-3_____
Opposing Affidavits (Affirmations)_____	_____4-7_____
Reply Affidavits (Affirmations)_____	_____8-9_____
_____Affidavit (Affirmation)_____	_____10-11_____
Other Papers_____	_____12-13_____

Upon the foregoing papers, plaintiffs NYCTL 1998-2 Trust (hereinafter NYCTL) and the Bank of New York, as collateral agent and custodian for the NYCTL, move for an order granting leave to renew and reargue defendant T. Jan Realty's May 28, 2003 motion, by order to show cause, to vacate the judgment of foreclosure and sale dated September 3, 2002, the Referee's computation and an April 26, 2002 order of reference. Flatbush-Pacific Development Corporation cross-moves for an order : (1) pursuant to CPLR 1012, granting

it leave to intervene in this action; (2) declaring that it is the proper title holder of the property located at 620 Pacific Street in Brooklyn; and (3) vacating the judgment of foreclosure and sale.

### ***FACTS AND PROCEDURAL HISTORY***

On or about October 12, 2001, NYCTL filed a summons and complaint and notice of pendency in the instant action for foreclosure of a tax lien on the subject property. Defendant failed to answer and on April 26, 2002 this court entered an order referring the instant matter to Referee Janice Taylor.<sup>1</sup> On July 11, 2002, the Referee executed a report finding that NYCTL was owed \$355,092.98 as of June 21, 2002. Thereafter, a judgment of foreclosure and sale was rendered on September 3, 2002 and a foreclosure sale was scheduled for June 4, 2003. Defendant then moved, by order to show cause dated May 28, 2003 to vacate the judgment of foreclosure and sale, the Referee's computation and order of reference. On June 4, 2003, this court permitted the foreclosure sale to go forward but stayed the transfer of the Referee's deed.<sup>2</sup> By short form order, dated June 4, 2003, this court adjourned defendant's order to show cause to July 2, 2003 to allow for a hearing to be held before a Referee so as to determine the "amounts due and owing to plaintiff." There were several adjournments to allow for discovery and said hearing was scheduled for October 17, 2003.

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<sup>1</sup> A subsequent order was entered appointing Donald Clarke to replace Janice Taylor as Referee.

<sup>2</sup> NYCTL was the successful bidder at the foreclosure sale.

NYCTL now moves for leave to renew and reargue T. Jan Realty's May 28, 2003 motion by order to show cause on the ground that it is now in possession of records from the Department of Environmental Protection allegedly indicating that defendant failed to comply with administrative procedures to challenge water and sewer charges assessed against the subject property. In this regard, NYCTL maintains that defendant is not entitled to judicial relief due to its alleged failure to follow administrative procedures and, as such, the court misapprehended the applicable law in rendering the June 4, 2003 short form order allowing a hearing to determine the validity of the charges.<sup>3</sup> NYCTL seeks vacatur of the June 4, 2003 order. Flatbush-Pacific cross-moves for leave to intervene, an order declaring that it is the rightful owner of the subject property and vacating the judgment of foreclosure and sale.

### ***DISCUSSION***

#### ***Defendant's Motion to Vacate the Judgment of Foreclosure and NYCTL's Motion to Renew and Reargue***

In its motion, by emergency order to show cause, defendant sought to vacate the judgment of foreclosure and sale, the Referee's computation and order of reference, on the ground that it was never served with the summons and complaint. According to the affidavit of service of the summons and complaint, NYCTL's process server served an individual by the name of "Mr. Tennenbaum", who refused to give his first name, at the premises located at 622 Pacific Street. Defendant points out that said service occurred at a location other than

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<sup>3</sup> NYCTL bases its argument on Title 15, Chapter 42, et seq of the Rules of the City of New York.

its place of business and that NYCTL is misspelled in the summons and complaint. Defendant maintains that its correct name is “T Jaw Realty Corp.” whereas the name listed in the summons and complaint is “T Jan Realty”, which is not listed with the Department of State as having a certificate of incorporation while the former has a certificate filed. Finally, defendant argues that the amounts claimed to be owed in the judgment of foreclosure are inaccurate.

In opposition to the motion, NYCTL contends that service upon defendant was proper and that defendant has failed to raise an issue of fact as to personal service. NYCTL maintains that defendant has failed to demonstrate that “Mr. Tennenbaum”, who allegedly identified himself to the process server as “District Sales Manager” of “T Jan Realty”, was not an individual authorized to accept service. In addition, NYCTL asserts that under CPLR 311, it is irrelevant that service occurred at a location other than the subject premises as it is not necessary that a corporate representative be served at the corporation itself. NYCTL further contends that defendant’s name was misspelt by one letter and as such, defendant was “fairly appraised that it was the intended party, and thus was not prejudiced by the misspelling” (sic) (*see Gajdos v Houghton Elevator, Div. Of Reliance Elec. Co.*, 131 AD2d 428). With respect to defendant’s claims that the calculations of the amounts owed in the referee’s reports are inaccurate, NYCTL arrgues that defendant has submitted no proof that indicates that they are otherwise inaccurate. Finally, NYCTL contends that defendant has failed to submit a reasonable excuse for its default or a meritorious defense to the action.

Flatbush Pacific submits an affirmation in support of defendant's motion, in which it maintains that it was the prior owner of record of the subject premises and that the property was fraudulently transferred to defendant by a former shareholder of the corporation. In this regard, Flatbush Pacific asserts that the judgment of foreclosure should be set aside on the grounds that it was not named as a defendant in the foreclosure action, the named defendant in the complaint does not exist and the foreclosure judgment is based upon estimated charges rather than actual charges.

In reply, defendant counters that Flatbush Pacific has no standing to interpose an affirmation in the instant action and that the subject property was properly transferred to it.<sup>4</sup> In addition, defendant points out that Flatbush Pacific has failed to explain why it is contesting the conveyance of the subject property for the first time several years after its occurrence.

On June 4, 2003, while the court allowed the foreclosure sale to take place it stayed the transfer of the deed to the subject property. Moreover, there has been no determination of defendant's May 28, 2003 motion to vacate the September 3, 2002 judgment of foreclosure and sale in order to allow consideration of NYCTL's motion to renew and reargue said motion. However, insofar as NYCTL seeks to vacate the June 4, 2003 short form order which adjourns said motion to allow for a hearing to be held before a referee so as to determine the "amounts due and owing to plaintiff", the court notes that defendant has

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<sup>4</sup> Defendant submits a copy of the deed dated December 5, 1996.

raised an issue with respect to proper service of the summons and complaint in the foreclosure action.

Pursuant to CPLR 311 (a):

Personal service upon a corporation or governmental subdivision shall be made by delivering the summons as follows: 1. upon any domestic or foreign corporation, to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. A business corporation may also be served pursuant to section three hundred six or three hundred seven of the business corporation law . . .

Notably, where personal jurisdiction and proper service are not established, a default judgment is a nullity and must be vacated (*see Greenpoint Sav. Bank v Mione*, 213 AD2d 375, 376; *Anello v Barry*, 149 AD2d 640, 641; *Ariowitsch v Johnson*, 114 AD2d 184, 186). A showing of a meritorious defense is not required where the defendant has not received proper service of process (*see Anello*, 149 AD2d at 641; *Ariowitsch*, 114 AD2d at 186). As a result, the court has to address the issue of service of process first before determining whether defendant's default was excusable in the foreclosure action.

It is well established that a process server's affidavit of service constitutes prima facie proof of service (*see Kaywood v Cigpak, Inc.*, 258 AD2d 623; *Manhattan Sav. Bank v Kohen*, 231 AD2d 499). However where there is a sworn denial of service by the party allegedly served, the affidavit of service is rebutted and jurisdiction must be established by a preponderance of evidence at a hearing (*see New Island Investors v Wynne*, 251 AD2d 560;

*Matter of Griffin v Griffin*, 215 AD2d 386; *Grosvenor, Inc v Fur Galleria*, 202 AD2d 548).

Contrary to defendant's assertions, service upon a corporate representative may be effectuated anywhere where he or she may be found and does not have to occur at the corporation itself. In addition, the court notes that defendant's name on the face of the deed is handwritten and could easily be mistaken for "T Jan Realty" as opposed to "T Jaw Realty". Nevertheless, NYCTL's process server notes on the affidavit of service that he served the summons and complaint upon a "Mr. Tennenbaum" who refused to give his first name but identified himself as the "District Sales Manager" of "T Jan Realty", a non-existent corporation. The foregoing, combined with defendant's denial of service raises an issue of fact with respect to service. Accordingly, pursuant to Article 122 of the Judiciary Law and in accordance with the provisions of Part 122 of the Rules of the Chief Administrator of the Courts (22 NYCRR Part 122) the court directs a traverse hearing before a Judicial Hearing Officer of the JHO Part in order to determine the issue of whether proper service was effectuated upon defendant. If it is found that defendant was properly served a hearing determining the amounts owed to NYCTL will be held.

***Flatbush Pacific's Motion to Intervene***

In support of its cross motion for leave to intervene, Flatbush Pacific asserts that it is the rightful owner of the subject property and that it was fraudulently conveyed to defendant by Elliot Leffel, a former shareholder of said corporation, without the knowledge or consent of the actual shareholders of said corporation (Adam Mocio, John Mocio and

Howard Nelson). In this regard, Flatbush Pacific seeks an order declaring that it is the rightful owner of the subject property. Flatbush Pacific further maintains that Elliot Leffel informed the shareholders that the property was “lost” due to nonpayment of taxes. Flatbush Pacific contests the taxes assessed against the subject property on the ground that the property has been vacant and vandalized for the past few years.

In opposition to Flatbush Pacific’s motion, defendant argues that the motion is procedurally defective in that Flatbush Pacific has failed to attach a proposed pleading to the motion in compliance with statutory requirements. In addition, defendant asserts that the statute of limitations bars any claim by Flatbush Pacific that the conveyance of the subject property was fraudulent. Defendant maintains that Flatbush Pacific has failed to explain how it came to discover that an allegedly fraudulent transaction had taken place or demonstrate that it could not have discovered it earlier upon the exercise of reasonable diligence. Defendant points out that Flatbush Pacific attributes its lack of knowledge to the misrepresentation by a former shareholder of the corporation that the subject premises had been “lost” due to nonpayment of taxes.

Defendant submits various court documents filed in this court indicating that Elliot Leffel was a principal of Flatbush Pacific even after the property was conveyed to defendant. In support of this assertion, defendant points to an action entitled *Peter Tang v Flatbush -Pacific Cor;., People of the State of New York, People of the City of New York, “John Doe #1” through “John Doe #10”* (Index #16904/94) in which Flatbush Pacific was

one of the defendants. Defendant also proffers a “consent to change attorneys” form filed by Flatbush Pacific signed by Elliot Leffel in February, 1995, authorizing the substitution of Cecilia N. Anekwe, Esq for Paul Savad, Esq as the attorney of record in said foreclosure proceeding. Defendant also proffers an affirmation submitted by Cecilia N. Anekwe in support of her motion to be relieved as attorney of Flatbush Pacific, as well as the court order granting the motion, a notice of settlement dated January 24, 1996, a notice of entry dated July 23, 1996, in the said proceeding in which the affidavit of service lists Elliot Leffel.

In opposition to Flatbush Pacific’s cross motion, NYCTL argues that Flatbush Pacific’s motion is barred by the statute of limitations and that Flatbush Pacific has failed to attach a proposed pleading thus rendering the motion procedurally defective. NYCTL further argues that the instant action “is not the proper forum to determine the validity” of the deed which was tendered four years ago. NYCTL maintains that the tax lien has priority over any claims asserted by Flatbush and that the proper approach is to resolve the tax issues first and then “commence an action to expunge the deed or to quiet title”.

Pursuant to CPLR 1013, “[u]pon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person’s claim or defense and the main action have a common question of law or fact.” In addition, “a motion to intervene shall be accompanied by a proposed pleading setting forth the claim or defense for which intervention is sought”. Flatbush Pacific has failed to submit a proposed pleading with its motion and, as such, the

court denies its motion without prejudice to renew upon submission of its proposed pleadings annexed to its motion papers. However, the court is inclined to point out that with regard to its fraudulent conveyance claim, the statute of limitations is six years from the time of commission of the fraud or two years from the date the fraud could reasonably have been discovered, whichever is later [*see Lefkowitz v Appelbaum*, 258 AD2d 563; CPLR 213 (8)]. The burden is upon Flatbush Pacific to establish that the fraud could not have been discovered before the two year period prior to the commencement of the action (*see id.*).

### **CONCLUSION**

Accordingly, the court directs a traverse hearing before a Judicial Hearing Officer in the JHO Part in order to determine whether proper service was effectuated upon defendant. The date will be fixed by the Clerk of the Part. If it is determined that defendant was properly served a hearing will be scheduled to determine the amounts due and owing to plaintiff. Flatbush Pacific's motion to intervene is denied without prejudice to renew pending submission of a proposed pleading with its motion papers. Accordingly, NYCTL's motion to vacate the June 4, 2003 short form order is held in abeyance pending the traverse hearing.

The foregoing constitutes the decision, order and judgment of the court.

E N T E R,



J. S. C.

**HON. THEODORE T. JONES**