

<b>LaSalle Bank N.A. Trustee v Caffrey</b>
2007 NY Slip Op 30391(U)
March 6, 2007
Supreme Court, Suffolk County
Docket Number: 0009227
Judge: Jeffrey Arlen Spinner
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**SUPREME COURT-STATE OF NEW YORK  
I.A.S. PART XXI-SUFFOLK COUNTY**

**HON. JEFFREY ARLEN SPINNER**

Justice of the Supreme Court

**LaSALLE BANK NATIONAL ASSOCIATION  
TRUSTEE,**

Plaintiff,

- against -

**TIMOTHY CAFFREY, NEW YORK STATE  
DEPARTMENT OF TAXATION AND  
FINANCE, THE CITIGROUP/CONSUMER  
FINANCE INC. and UNITED STATES OF  
AMERICA ACTING THROUGH THE IRS,**

Defendants

Index No.: 2006-09227

Mot. Seq. 003-MD CASEDISP

Original Return Date: January 23, 2007

Final Submit Date: February 28, 2007

**ORDER UPON APPLICATION**

**ATTORNEYS FOR PLAINTIFF**

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**REFEREE**

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This is an action wherein the Plaintiff claims foreclosure of a mortgage which encumbers real property commonly known as 7 Stony Hollow Court, Greenlawn, Town of Huntington, New York. The Plaintiff's Summons, Complaint and Notice of Pendency were filed with the Clerk of Suffolk County on March 28, 2006 and, following the usual calendar practice, an Order of Reference was granted and thereafter, on October 12, 2006, a Judgment of Foreclosure and Sale was granted by the Court (Hon. Daniel Loughlin, J.S.C.). In pursuance thereof, the Referee scheduled a foreclosure sale for January 12, 2007.

Thereafter and on January 10, 2007, Special Term Part II of this Court (Hon. Ralph F. Costello, J.S.C.) Granted an Order To Show Cause in favor of the Defendant TIMOTHY McCaffrey which served to stay the sale scheduled for January 12, 2007. The same was served upon counsel for Plaintiff and the Referee and was returnable on January 23, 2007. On The return date, only counsel for the Defendant appeared and requested an adjournment. The same

was granted up to February 28, 2007 with the stay of proceedings extended up to the date of the determination of the Defendant's application by this Court. Plaintiff's opposing papers by David Lee Esq. dated January 19, 2007 were received by the Court on January 22, 2007.

The Defendant's application is made pursuant to CPLR 5015(a)(1) and includes an Affidavit from the Defendant asserting that he was never served with process in this action and that the first time he became aware of a foreclosure action was upon receiving a Notice of Sale, annexed to the moving papers as Exhibit A.

In response, the Plaintiff denies the Defendant's claim of non-service and includes copies of Affidavits of Service pursuant to CPLR 306 which reflect "affix and mail" service pursuant to CPLR 308(4) upon the said Defendant.

Invoking the provisions of CPLR 5015(a)(1), the Defendant asserts that his "excusable default" under that statute arises as a result of the lack of service of the Summons and Complaint. This claim for relief necessarily brings into play the provisions of CPLR 317 which require the movant to demonstrate not only a reasonable excuse for the default but a meritorious defense to the underlying action as well, else the application must fail, Choudhry v. Edward 300 AD 3d 529 (2<sup>nd</sup> Dept. 2002) Henry v. Kuveke 9 AD 3d 476 (2<sup>nd</sup> Dept. 2004). It is within the sound discretion of the trial court to determine the reasonableness of the proffered excuse for the default Barbagallo v. Nationwide Exterminating & Deodorizing Inc. 260 AD 2d 518 (2<sup>nd</sup> Dept. 1999).

The undated Affidavit of one Alexander Printz asserts that on April 5, 2006 at 5:30 p.m. he affixed a copy of the Summons and Complaint to the door at 7 Stony Hollow Court, Greenlawn followed by mailing a copy of the same on April 10, 2006. The Affidavit also states that he had made previous unsuccessful attempts to serve the Defendant on April 4, 2006 at 6:40 p.m., April 3, 2006 at 8:15 a.m., April 1, 2006 at 11:40 a.m. and March 31, 2006 at 1:30 p.m. The enumerated attempts on different days and at various times would appear to constitute "due diligence" as contemplated by the statute, Rodriguez v. Khamis 201 AD 2d 715 (2<sup>nd</sup> Dept. 1994), Marballie v. Lefrak 201 AD 2d 707 (2<sup>nd</sup> Dept. 1994). Moreover, an affidavit that conforms to the requirements of CPLR 306 constitutes *prima facie* evidence of due and proper service, Maldonado v. County of Suffolk 229 AD 2d 376 (2<sup>nd</sup> Dept. 1996). This creates a presumption, albeit a rebuttable one, that the matters set forth in the affidavit are true, unless the movant offers evidence to the contrary, Simonds v. Grobman 277 AD 2d 369 (2<sup>nd</sup> Dept. 2000).

The Defendant's affidavit states, in pertinent part, in Paragraph 3 thereof that "...I was never served with a Summons and Complaint." Although a meritorious defense is not specifically enumerated, the Defendant makes reference to fruitless attempts to negotiate a payment plan with the Plaintiff, indicating that he was indeed in default on his obligation. In the view of this Court, such an assertion, without more, does not constitute a meritorious defense to the Plaintiff's action. Too, the Defendant's mere denial of service, without more, is legally insufficient to rebut the presumption of proper service in the process server's affidavit, Manhattan Savings Bank v. Kohen 231 AD 2d 499 (2<sup>nd</sup> Dept. 1996) leave to appeal denied 91 NY 2d 802, Carrenard v. Mass 11 AD 3d 501 (2<sup>nd</sup> Dept. 2004).

Based upon the foregoing, the Court is constrained to determine that the Defendant has failed to satisfy the statutory requirements for relief pursuant to CPLR 5015(a)(1).

It is, therefore,

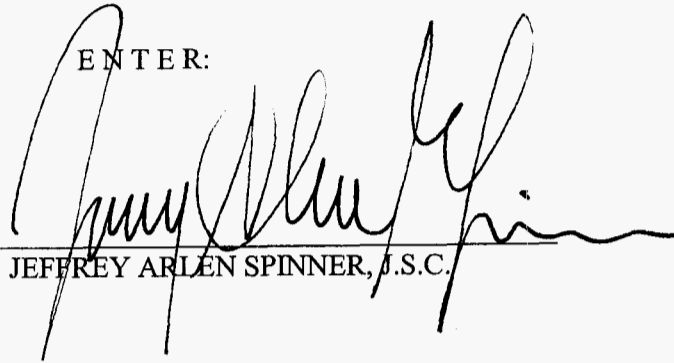
ORDERED that the application of the Defendant TIMOTHY CAFFREY is hereby denied in its entirety; and it is further

ORDERED that the stay of proceedings heretofore granted by this Court shall be and the same is hereby vacated, dissolved and of no further force and effect.

This shall constitute the decision, judgment and order of this Court.

Dated: March 6, 2007  
Riverhead, New York

ENTER:



JEFFREY ARLEN SPINNER, J.S.C.

FINAL DISPOSITION

SCAN

NON-FINAL DISPOSITION

DO NOT SCAN