

**Option One Mtge. Corp. v Daddi**

2007 NY Slip Op 33598(U)

October 31, 2007

Supreme Court, Nassau County

Docket Number: 3574-05/

Judge: Antonio I. Brandveen

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

Present: ANTONIO I. BRANDVEEN  
J. S. C.

OPTION ONE MORTGAGE CORPORATION,  
Plaintiff,

TRIAL / IAS PART 32  
NASSAU COUNTY

Index No. 13574/05

- against -

Motion Sequence No. 002

ANTONIO DADDI, et. al.,

Defendants.

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits . . . . .	<u>1</u>
Answering Affidavits . . . . .	<u>2</u>
Replying Affidavits . . . . .	<u>3</u>
Briefs: Plaintiff's / Petitioner's . . . . .	<u>          </u>
Defendant's / Respondent's . . . . .	<u>          </u>

The defendant Antonio Daddi moves for an order to set aside the September 26, 2006 foreclosure sale in violation of RPAPL § 231, voiding the September 26, 2006 referee's deed in foreclosure, and voiding the judgment of foreclosure in the underlying action entered on December 21, 2005. The defendant Antonio Daddi claims the basis for this request is the foreclosure action was commenced without obtaining jurisdiction over the defendant. The plaintiff opposes the motion.

The underlying action was commenced by the filing of a summons and verified complaint in foreclosure on August 24, 2005 arising from this defendant's breach of payment obligation under the terms of the mortgage dated February 18, 2005 between the parties. The default was a first payment default beginning on May 1, 2005, and continuing. A process server, Pasquale R.

Sava, Jr. states, in an affidavit of service dated August 31, 2005, he personally served a copies of the summons and the verified complaint on the defendant at 843 Jerusalem Avenue, Merrick, New York. On October 11, 2005, this Court granted the plaintiff an order of reference which was entered on October 14, 2005, and on or about December 14, 2005, this Court granted the plaintiff a judgment of foreclosure and sale which was entered on December 21, 2005. On January 27, 2006, copies of the notice of entry of the judgment of foreclosure and sale was served upon all of the defendants. The foreclosure sale was subsequently scheduled for February 29, 2006, at 11:30 a.m.

The attorney for the defendant Antonio Daddi provides, in detail, in a supporting affirmation dated July 12, 2007, the background for the instant matter. The attorney for the defendant Antonio Daddi states the judgment of foreclosure and the sale should be set aside because the plaintiff lacked jurisdiction over the defendant, and the plaintiff failed to meet the requirements for the entry of a default judgment.

The attorney for the defendant Antonio Daddi points to the defendant's supporting affidavit dated July 12, 2007, where the defendant alleged he was never served with court papers notwithstanding, due to financial problems aggravated by a serious accident suffered in September 2005, the premises was put up for sale in a foreclosure action. The defendant claims he never met the process server who signed the affidavit of service, and he was at a meeting in Remsenberg, New York on August 31, 2005, at 7:58 a.m., the alleged date and time of the service of the papers by the process server. The defendant alleges he was never served with a copy of a notice of sale, and the plaintiff used the wrong address for service at 843 Jerusalem Avenue, Merrick, New York. The defendant asserts, just prior to the foreclosure sale, the

plaintiff misled him into thinking the sale would be postponed. The defendant admits the plaintiff returned money the defendant sent without an explanation, and, over the two weeks prior to the foreclosure sale date, the defendant attempted to call the plaintiff's attorney numerous times, sometimes spending two hours on his cell phone on hold to no avail.

The attorney for the defendant Antonio Daddi states the plaintiff apparently has failed to meet the notice requirements set forth in CPLR 3215 to obtain a default judgment. The attorney for the defendant Antonio Daddi asserts an additional copy of the summons was sent by first class mail to the defendant at his last place of residence in an envelope marked *personal and confidential*, but did not indicate the correspondence emanated from an attorney or concerned a debt. The attorney for the defendant Antonio Daddi avers the defendant was not properly served with a notice of sale because the defendant was allegedly served with a copy of a notice of sale at 843 Jerusalem Avenue, Merrick, New York which was not the defendant's address pursuant to the terms of the mortgage. The attorney for the defendant Antonio Daddi opines the defendant was not personally served with the notice of sale. The attorney for the defendant Antonio Daddi points out these circumstances necessarily inhibited the attendance of the defendant, thus affected a substantial right of the defendant to obtain the fair market value of his property which was purchased for \$1,000.00 by the plaintiff.

The plaintiff's attorney states, in detail, in an opposing affirmation dated August 15, 2007, the foreclosure action was in all respects proper, and provides, in detail, the background of the underlying circumstances of the instant matter, including the process server visited the premises sought to be foreclosed on August 31, 2005, and determined the premises were vacant and under construction. The plaintiff's attorney states the defendant contacted the office of the

plaintiff's counsel on February 22 and 27, 2006 regarding possible postponement of the foreclosure sale alleging hardship and injuries due to an accident. The plaintiff's attorney points out the plaintiff attempted to work with defendant, to wit by postponing the February 29, 2006 foreclosure sale for 60 days to allow the defendant to bring the loan current, and again agreeing on May 1, 2006, to rescheduling the foreclosure sale in exchange for a non-refundable \$2,500.00 deposit. On September 26, 2006, at 11:30 a.m., the foreclosure sale was conducted, and the property was sold back to the plaintiff as the highest bidder for \$1,000.00. The plaintiff's attorney states on or about October 16, 2006, the defendant was served with a notice to quit the premises, and on October 25, 2006, the defendant's attorney telephoned the attorney for the plaintiff seeking to negotiate a stipulation to voluntarily vacate the premises in exchange for the first option to purchase the property from the plaintiff, but stated a challenge to the eviction. On or about October 27, 2007, the plaintiff filed a motion for possession in this matter returnable on November 24, 2006. On or about November 6, 2006, the defendant filed a separate action, and order to show cause against several others, including the plaintiff seeking restoration of possession to the premises and damages

The plaintiff's attorney notes, in commencing the related action for damages arising from eviction proceedings, the defendant impliedly acknowledged the validity of the foreclosure action, thus entering into a November 9, 2006 so-ordered stipulation of settlement before Nassau County Supreme Court Justice Thomas P. Phelan where the plaintiff agreed to vacate the premises which settled both the instant order to show and the underlying motion for possession. The plaintiff's attorney indicates the defendant consented to vacate the premises by January 7, 2007, and consented to the issuance of a warrant of eviction in the foreclosure action in exchange

for the withdrawal of the motion for possession in the foreclosure action, but on or about July 16, 2007, the defendant filed the instant order to show cause. The plaintiff's attorney contends the defendant expressly ratified the foreclosure action, so the plaintiff is entitled to denial of the instant order to show cause in its entirety together with an award of attorneys' fees and costs incurred upon the defense of the instant motion under the terms of the mortgage, or in the alternative under Uniform Trial Court Rule 130-1.1 on the grounds the within application is frivolous.

The attorney for the defendant Antonio Daddi states in a reply affirmation dated August 27, 2007, no jurisdiction over the defendant was obtained in the foreclosure action. The defense attorney contends the plaintiff attorney's argument concerning the defendant's participation in the November 9, 2006 stipulation of settlement was not a consent to personal jurisdiction in the underlying foreclosure action. The attorney for the defendant Antonio Daddi remarks there is no reference to the foreclosure action in the stipulation. The attorney for the defendant Antonio Daddi avers the defendant may have preferred to avoid the stressful situation resulting from an imminent forced eviction, and does not mean the defendant acknowledged the validity of the foreclosure judgment nor the defendant's consent to jurisdiction in another action, especially when the defendant was not properly served, and the foreclosure action was patently defective. The attorney for the defendant Antonio Daddi claims the cases relied upon by the plaintiff are inapposite because those cases involved consent to jurisdiction in the same action, and not jurisdiction being conferred upon that party in another action. The attorney for the defendant Antonio Daddi reiterates the arguments and assertions made in the sworn statements dated July 12, 2007. The attorney for the defendant Antonio Daddi asserts the plaintiff's attorney is

mistaken in the claim in order to vacate a default both a meritorious defense and excusable neglect is necessary, rather a showing of a lack of jurisdiction is all that is necessary. The attorney for the defendant Antonio Daddi challenges the validity of the foreclosure sale on the grounds there are fatal defects, to wit including the chilling effect of paragraph 13 of the sale terms, and a lack of compliance with paragraph six of the sale terms among others. The attorney for the defendant Antonio Daddi argues the deed is void, that the referee could not have granted the deed to a party who was neither the bidder nor had any right to the bid at the time the deed was executed. The attorney for the defendant Antonio Daddi avers the plaintiff appears to have defrauded the defendant in proceeding with the foreclosure sale where just prior to the sale the plaintiff misled the defendant into thinking the sale was postponed since the plaintiff returned money sent by the defendant, and thwarted the defendant's effort to resolve the situation, including attempts to call the plaintiff's attorney numerous times. The attorney for the defendant Antonio Daddi asserts the plaintiff's request for attorneys' fees and costs is neither warranted by contract nor statute.

RPAPL § 231 (6) provides:

At any time within one year after the sale, but not thereafter, the court, upon such terms as may be just, may set the sale aside for failure to comply with the provisions of this section as to the notice, time or manner of such sale if a substantial right of a party was prejudiced by the defect.

The Court has carefully reviewed and considered all of the parties' submissions on this motion. The defendant has not met the burden with respect to this motion. The Second Department has held that even the failure to serve mortgagors with the notice of foreclosure sale after their default in appearing in foreclosure action did not support mortgagors' motion to vacate and set

aside foreclosure sale, given mortgagors' default and lack of entitlement to notice of sale under forbearance agreement" (*Olympia Mortgage Corp. v. Ramirez*, 9 A.D.3d 401, 780 N.Y.S.2d 611 [2d Dept., 2004]). And, "A defect in personal jurisdiction may be waived where a party submits to the court's jurisdiction by stipulating to settle an action" (*White House Manor, Ltd. v. Benjamin*, 42 A.D.3d 450, 451, 839 N.Y.S.2d 550 [2d Dept., 2007]). Here, the defendant "failed to establish a reasonable excuse for [the] default (see CPLR 5015[a])" (*NYCTL-1 Trust v. Liberty Bay Realty Corp.*, 21 A.D.3d 1013, 801 N.Y.S.2d 346 [2d Dept., 2005]). The defendant's other contentions regarding procedural and jurisdictional defects, and the price of the winning bid are merit less (see *NYCTL-1 Trust v. Liberty Bay Realty Corp.*, 21 A.D.3d 1013, *supra*; *Alaska Seaboard Partners Ltd. Partnership v. Grant*, 20 A.D.3d 436, 799 N.Y.S.2d 117 [2d Dept., 2005]). However, the plaintiff has demonstrated entitlement to attorneys' fees and costs incurred upon the defense of the instant motion under the terms of the mortgage.

Accordingly, the motion is denied in all respects. An inquest is ordered on the issue of the amount of attorneys' fees and costs incurred upon the plaintiff's defense of the instant motion. A copy of this order shall be served and accompany the note of issue when filed to add this matter to the Calendar Control Part of this court for inquest on November 28, 2007, on that issue. So ordered.

Dated: **October 31, 2007**

ENTER:



J. S. HON. ANTONIO I. BRANDVEIN

**ENTERED**

NOV 02 2007

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

FINAL DISPOSITION    NON FINAL DISPOSITION XXX