SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

----------x

ARGENT MORTGAGE COMPANY, LLC
c/o America's Servicing Company
3476 Stateview Boulevard
Ft. Mill, SC 29715

Plaintiff,

-against-

PATRICK GATINS, CAMILLE GATINS, JOSEPHINE MARONE, Individually and as Surviving Spouse of Louis Marrone, Monarch Mortgage Services, LLC, New York City Environmental Control Board, New York City Transit Adjudication Bureau, New York Community Bank, Successor by Merger to Richmond County Savings Bank, New York State Commissioner of Labor, Anna Gatins,

Defendant.

----------x

Trial Part 9
Present:
Hon. Anthony I. Giacobbe

Decision and Order

Index No. 100360/06
Motion No. 001

The following papers numbered 1 to 2 were used on this motion the 26th day of October, 2007:

Order to Show Cause by Defendant Patrick Gatins with supporting papers (dated September 20, 2007)	1
Affirmation in Opposition with supporting papers (dated October 3,2007)	2

Upon the foregoing papers, defendant's motion to vacate plaintiff's Judgment of Foreclosure and Sale pursuant to CPLR 5015(a)(4) is granted.

On or about January 31, 2006, plaintiff Argent Mortgage Company LLC commenced this action to foreclose a mortgage executed by defendants Patrick Gatins, Esq., Camille Gatins, Josephine Marrone, and Anna Gatins. The mortgage covers property located at 27 Jaffe Street, Staten Island, New York, 10314, also known as Block 1483, Lot 12 (hereinafter the "mortgaged premises"). The action was commenced based upon defendants' alleged failure to pay the monthly mortgage payment due on October 1, 2005 and thereafter.

Plaintiff subsequently moved for an order of reference, which was granted on June 7, 2006, and a Judgment of Foreclosure and Sale, which was granted on November 28, 2006.

However, immediately prior to the sale, which had been scheduled for September 25, 2007, defendant Patrick Gatins filed the instant Order to Show Cause to vacate the judgment on the ground that neither himself nor the co-defendants Camille Gatins, Josephine Marrone, and Anna Gatins had been served with process, and that the Court lacked jurisdiction over them.

In opposition to the motion, plaintiff argues that all of the defendants were properly served. According to the affidavit of plaintiff's process server, defendant Patrick Gatins was served pursuant to CPLR 308(4) at 7:42 a.m. on February 6, 2006 by the affixation of a copy of the Summons and Complaint to the door of the mortgaged premises and the mailing of a copy of said process to the same address on the same date. Defendants Camille Gatins and Josephine Marrone were purportedly served in the same manner. To the extent relevant, the affidavits of service reflect previous attempts at service on February 3, 2006 at 5:01 p.m. and February 4, 2006 at 11:53 a.m. In addition, the affidavits of service provide that the process server confirmed with defendants' neighbor, Judge John Cannizzaro, a resident of 31 Jaffe Street, that neither Patrick Gatins, Camille Gatins nor Josephine Marrone were in active military service. Said affidavits of service were filed with the County Clerk on February 9, 2006.[1]

Based on the foregoing proof, plaintiff contends that its prima facie right to judgment has been established, and that defendants have failed to demonstrate either an excusable default or a meritorious defense.

In support of the instant motion, defendant Patrick Gatins affirms that he first obtained knowledge of plaintiff's ex-parte judgment on September 17, 2007, when he received written and telephonic notice of the scheduled sale from plaintiff's counsel. Mr. Gatins denies receipt of the mailed copy of the Summons and Complaint either at his residence or place of business, and asserts that "there was an adult person upon the premises" at all of the times when the process server claims to have attempted service.

Mr. Gatins also maintains that "at no time did Josephine Marrone receive a mailed copy

[1] Plaintiff has failed to produce an affidavit of service upon defendant Anna Gatins.

of the Summons and Complaint at her residence", and that said defendant "was at home and in residence at each of [the] times" when service was allegedly attempted. After speaking to Judge Cannizzaro, Gatins further claims that no inquiry was made as to his or Ms. Marrone's military status.

Lastly, Gatins claims that an examination of the Court files reveals no affidavits of service upon either Camille Gatins and Anna Gatins.

CPLR 5015(a)(4) provides that the court which rendered a judgment or order may relieve a party from it upon such terms as may be just on the ground of lack of jurisdiction.

Although plaintiff opposes the instant motion by claiming that the moving defendants has failed to articulate a meritorious defense, this Court finds that the presence or absence of a meritorious defense is irrelevant to the question of whether a judgment should be vacated for lack of personal jurisdiction (*see, Chase Manhattan Bank, N.A. v. Carlson*, 113 AD2d 734 [2nd Dept. 1985]).

On the question of jurisdiction, the seminal issue in this case is whether plaintiff satisfied the due diligence requirement with respect to the service of process under CPLR 308(4). The foregoing subdivision, commonly known as "nail and mail" service, provides that it may be used only where service under CPLR 308(1) and 308(2) cannot be made with "due diligence" (*see, County of Nassau v. Letosky*, 34 AD3d 414 [2nd Dept. 2006]). It is well settled that due diligence refers to the quality of the efforts made to effect personal service and not their quantity or frequency (*see Estate of Waterman v. Jones*, __AD3d__, 843 NYS2d 462 [2nd Dept. 2007]). Thus, due diligence may require relatively few visits to a defendant's residence or place of business at different times when he or she could reasonably be expected to be found at such location (*id*. at 464-465).

Here, it is the opinion of this Court that the attempts at personal service made by the plaintiff's process server fail to satisfy the due diligence requirement. In this regard, while plaintiff correctly asserts that a process server's affidavit constitutes prima facie evidence of

proper service, it is familiar law that the affidavit of service is not conclusive once there has been a sworn denial of receipt (*see, Green Point Savings Bank v. Taylor*, 92 AD2d 910 [2nd Dept. 1983]). In addition, defendants at bar raise an issue of credibility by asserting that "there was an adult person upon the premises" at all of the times that the process server allegedly attempted service.

The issue of credibility aside, it appears that two of the three attempts at service were made on weekdays during hours when it reasonably could have been expected that defendants were either working or in transit to or from work (*see, County of Nassau v. Letosky, supra* at 415). Moreover, there is no indication that the process server made any attempt to locate these defendants' business addresses in order to attempt personal service at said locations before resorting to "nail and mail" service (*ibid.*; *see,* CPLR 302[2]; *O'Connell v. Post*, 27 AD3d 630, 631 [2nd Dept. 2006]). Pertinent in this regard is that while the process server claimed to have spoken to defendants' neighbor, there is no claim of any attempt to ascertain where the defendants' were likely to be found (*cf., Estate of Waterman v. Jones, supra* at 465). Finally, while defendants do not deny receipt of the Summons and Complaint affixed to the door of their residence, "when the requirements for service of process have not been met, it is irrelevant that defendant may have actually received the documents" (*County of Nassau v. Letosky, supra* at 415, quoting *Raschel v.Rish*, 69 NY2d 694, 697 [1986] [internal quotation marks omitted]).

For all these reasons, it is the opinion of this Court that the purported service of process upon these defendants pursuant to CPLR 308(4) was ineffective, and that plaintiff's default judgment against them must be vacated unconditionally (*see, Chase Manhattan Bank, N.A. v. Carlson, supra* at 735).

Accordingly, it is

ORDERED that the motion is granted and that the Judgment of Foreclosure and Sale dated November 28, 2006 is hereby vacated as to defendants Patrick Gatins, Camille Gatins,

Josephine Marrone and Anna Gatins; and it is further

ORDERED that the Clerk shall mark his records accordingly.

ENTER,

_____

J.S.C.

Dated: December 3, 2007