

HSBC Mtge. Corp. (USA) v Packu
2008 NY Slip Op 30503(U)
February 21, 2008
Supreme Court, Richmond County
Docket Number: 0102317/2007
Judge: Anthony Giacobbe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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HSBC MORTGAGE CORPORATION (USA)

Plaintiff,

TP9
Present:
Hon. Anthony I. Giacobbe

-against-

ALBERT PACKU, a/k/a ALBERT PACUKU TEUTA PACKU, a/k/a TEUTA PACUKU, MUSA PACKU, a/k/a MUSA PACUKU, WACHOVIA BANK, NATIONAL ASSOCIATION COMMISSIONER OF LABOR OF NEW YORK STATE, THE CITY OF NEW YORK PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT AUTHORITY TRANSIT ADJUDICATION BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, "JOHN DOE" #1 THROUGH "JOHN DOE" #12, the last twelve names being fictitious and unknown to Plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any having or claiming an interest in or lien upon the premises described in the complaint,

Decision and Order

Index No. 102317/07
Motion Nos. 001, 002

Defendants.

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The following papers numbered 1 to 5 were used on these motions the 4th day of January, 2008:

	Pages Numbered
Notice of Motion for Judgment of Foreclosure, with supporting papers (dated November 5, 2007)	1
Notice of Motion to Vacate Notice of Settlement by Defendant Musa Packu with supporting papers (dated November 15, 2007)	2
Affirmation in Further Support of Plaintiff's Motion for Judgment of Foreclosure with supporting papers (dated December 3, 2007)	3
Affidavit in Opposition to Plaintiff's Motion by Defendant Musa Packu (dated December 20, 2007)	4
Plaintiff's Reply with supporting papers (dated January 3, 2008)	5

Upon the foregoing papers, plaintiff's motion (No. 001) is granted; defendant's cross motion (No. 002) is denied.

This is an action for the foreclosure of a mortgage in which plaintiff, HSBC Mortgage Corporation (USA) (hereinafter "HSBC"), the present holder of the mortgage, claims that the pro se defendant Musa Packu a/k/a Musa Pacuku (hereinafter "defendant"), is alleged to be in default as a result of her having failed to make the required payments since February, 2007.

To the extent relevant, defendant, along with co-defendants Albert Packu and Teuta Packu, obtained a mortgage loan from Mortgage Electronic Registration Systems, Inc. as nominee for Flagstar Bank, FSB in the amount of \$450,000 on or about November 28, 2005, covering the premises known as 312 Elverton Avenue, Staten Island, New York 10308. The mortgage was subsequently assigned to HSBC.

On April 3, 2006, defendant and co-defendants Albert Packu and Teuta Packu secured an additional mortgage loan in the amount of \$125,140.67 through HSBC. On the same date, said defendants executed a modification agreement to consolidate the two mortgage loans (Plaintiff's Exhibit "C-5"), forming a single lien in the amount of \$574,000.00.

The underlying foreclosure action was commenced by the filing and service of a summons, verified complaint and notice of pendency on or about June 13, 2007. An answer subsequently interposed by co-defendant Albert Packu was rejected as untimely by HSBC on or about August 29, 2007. An Order of Reference (Plaintiff's Exhibit "B") was subsequently granted on or about September 27, 2007, and in his Report dated October 24, 2007, the Referee computed \$601,789.42 as the total amount due (Plaintiff's Exhibit "C").

Pursuant to CPLR 3215(g)(3) and RPAPL 1320, HSBC mailed the required additional notice and special summons to the defendants on November 5, 2007. Pro se defendant Musa Packu responded by serving a purported "Answer," but it was rejected as untimely by HSBC on or about November 27, 2007.

In its motion, HSBC seeks (1) a Judgment of Foreclosure and Sale; (2) confirmation of the Report of Referee dated October 24, 2007; and (3) counsel fees in the amount of \$5,500.00.

In opposition, defendant cross-moves, in effect, to dismiss the foreclosure action and to "vacate the [proposed] notice of settlement." In support of the cross motion, defendant alleges the

defective service of process.

CPLR 308(2) authorizes personal service upon a natural person, inter alia, by delivery of the summons and complaint within the state to a person of suitable age and discretion at defendant's dwelling place and by mailing the summons to the defendant at his or her last known residence (*see, Bankers Trust Co. of California v. Tsoukas*, 303 AD2d 343 [2nd Dept. 2003]). Although it is the plaintiff who bears the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was properly obtained, a process server's sworn affidavit constitutes prima facie evidence of proper service (*id.*). Nevertheless, a defendant can rebut a process server's affidavit by a detailed and specific contradiction of the allegations of fact contained therein (*id.*).

Here, on the issue of service HSBC has provided this Court with a copy of an affidavit of a licensed process server (Plaintiff's Exhibit "D"), dated June 18, 2007, indicating service upon Albert Packu, identified as the son of defendant Musa Packu, by in-hand delivery of the summons, verified complaint and RPAPL 1303 Homeowners Foreclosure Notice, on June 13, 2007, at 4:50p.m. at 312 Elverton Avenue, and the subsequent mailing of a copy of same to defendant at the same address on June 15, 2007. The affidavit of service was filed with the County Clerk on June 19, 2007.

In opposition, defendant does not provide a sworn denial of service, or proffer specific facts intended to rebut the statements in the process server's affidavit (*see, Puco v. DeFeo*, 296 AD2d 571[2nd Dept. 2002]). Rather, defendant requests that "plaintiff provide... a description of the alleged person who the plaintiff has named Albert Pacuku", and claims that "Ben Cohen, process server, did not personally served [sic] a true copy of the Summons/Complaint to Albert Pacuku, there is no description of Albert Pacuku". However, the affidavit of service clearly sets forth a physical description of the individual served as "Sex: M; Skin Color: White; Hair Color: Black; Age (Aprx): 30; Height (Aprx): 5'6"; Weight (Aprx): 170." As none of these descriptions has been specifically challenged, the process server's affidavit stands as prima facie evidence that the defendant was properly served pursuant to CPLR §308(2) (*see, Roberts v. Anka*, 45 AD3d 752 [2nd Dept. 2007]). As a result, a hearing on the issue of proper service is not warranted (*see, American Business Credit*,

Inc. v. Sanabria, 19 AD3d 624 [2nd Dept.], *lv dismissed*, 6 NY3d 806 [2005]; *Chemical Bank v. Darnley*, 300 AD2d 613 [2nd Dept. 2002], *lv dismissed*, 1 NY3d 593 [2004]; *Manhattan Savings Bank v. Kohen*, 231 AD2d 499 [2nd Dept. 1996], *lv denied*, 91 NY2d 802 [1997]).

To the extent that defendant seeks to vacate her default pursuant to CPLR 5015(a)(1), and extend her time to answer pursuant to CPLR 3012[d], she has failed to offer a reasonable excuse for her delay in answering the complaint or show a meritorious defense (*see, Palermo v. Rodriguez*, 255 AD2d 567 [2nd Dept. 1998]). In this regard, defendant's excuse that she failed to receive timely notice of the action must be rejected in view of the contents of the un rebutted affidavit of service (*see NYCTL-1 Trust v. Liberty Bay Realty Corp.*, 21 AD3d 1013, 1014 [2nd Dept. 2005], *lv dismissed*, 6 NY3d 772 [2006]). Moreover, her service of an "Answer" in response to the additional notice required for a default judgment by CPLR 3215(g)(3) (*see*, RPAPL 1320) was clearly untimely.

While defendant asserts that her answer was timely as it was served on the day following her receipt of the additional notice referred to above, defendant was required to answer, appear or otherwise move with respect to the complaint within 30 days after the completion of service of a copy of the summons and complaint, which occurred on or about June 29, 2007 (CPLR 308[2]; 320[a]; 3012[c]).

Nor has defendant tendered a meritorious defense to the action (*see* CPLR 5015[a][1]; *cf.*, *Alaska Seaboard Partners Limited Partnership v. Grant*, 20 AD3d 436 [2nd Dept. 2005]). Here, in response to plaintiff's prima facie case for foreclosure (*see, Campaign v. Barba*, 23 AD3d 327 [2nd Dept. 2005]; *Ocwen Federal Bank FSB v. Miller*, 18 AD3d 527 [2nd Dept.], *lv dismissed*, 5 NY3d 824 [2005])¹, defendant does not offer any proof that the mortgage was not in arrears at the time of the commencement of this action.

Lastly, HSBC seeks attorneys' fees in the amount of \$5,500.00. In New York, an attorney's fee is merely an incident of litigation, and is not recoverable absent a specific contractual provision

¹HSBC has produced a copy of the notes, mortgages and assignment of mortgages, together with an affidavit from its attorney-in-fact attesting to defendant's default in payment; the date thereof; and the sums allegedly due under the mortgage obligation (Plaintiff's Exhibit "C").

or statutory authority (*see, Levine v. Infidelity, Inc.*, 2 AD3d 691 [2nd Dept. 2003], *lv dismissed*, 3 NY3d 656 [2004]). Since there is no statute authorizing the recovery of an attorney's fee in a mortgage foreclosure action, such a fee may only be recovered if it is contractually authorized (*id.*). Thus, an attorney's fee may be recovered in a mortgage foreclosure action if, *e.g.*, the mortgage document obligates the mortgagor to pay such a fee for the expenses incurred in that action (*id.*). The mortgage agreements in this case contain the following provision (Item 22, Plaintiff's Exhibits C-2, C-4, C-5):

In any lawsuit for Foreclosure and Sale, Lender will have the right to collect all costs and disbursements and additional allowances allowed by Applicable Law and will have the right to add all reasonable attorneys' fees to the amount I owe Lender, which fees shall become part of the Sums Secured.

As a result, plaintiff's recovery of an attorney's fee is contractually authorized, and may be awarded subject to the Court's discretion upon the submission of an appropriate judgment as provided for herein.

Accordingly, it is

ORDERED that plaintiff's motion is granted; and it is further

ORDERED that the cross motion by defendant Musa Packu a/k/a Musa Pacuku is denied; and it is further

ORDERED that plaintiff settle a judgment on not less than twenty (20) days notice.

ENTER,

J.S.C.

Dated: February 21, 2008