[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON.** JOAN A. MADDEN **PART** 11
Justice

CHURCH EXTENSION PLAN,

Plaintiff,

- v -

TEMPLO PENTECOSTAL MAR DE GALILEA, INC., et al **Defendant.**

INDEX NO.: 103581/08

MOTION DATE:

MOTION SEQ. NO.: 002

MOTION CAL. NO.:

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion
is determined in accordance with the annexed decision and order.

FILED

AUG 31 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: August 26, 2009

J.S.C.

Check one: [ ] **FINAL DISPOSITION** [X] **NON-FINAL DISPOSITION**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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CHURCH EXTENSION PLAN,

Plaintiff,

INDEX NO. 103581/08

-against-

TEMPLO PENTECOSTAL MAR DE GALILEA, INC. A/K/A IGLESIA PENTECOSTAL MAR DE GALILEA A/K/A MAR DE GALILEA PENTECOSTAL CHURCH A/K/A MAR DE GALILEA A/K/A PENTECOSTAL CHURCH OF GOD, INC. A/K/A SEA OF GALILEE PENTECOSTAL TEMPLE, INC., NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, PEOPLE OF THE STATE OF NEW YORK, JOHN DOE (Said name being fictitious, it being the intention of Plaintiff to designate any and all occupants of premises before foreclosed herein, and any parties corporations or entities, if any having or claiming an interest or lien upon the mortgaged premises),

Defendants.

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JOAN A. MADDEN, J.:

In this action for the imposition of a equitable mortgage on the church property known as 166-168 Eldridge Street, New York, New York, defendant Pentecostal Church of God, Inc. a/k/a Sea of Galillee Church (sued herein as Templo Pentecostal Mar de Galilea, Inc. a/k/a Iglesia Pentecostal Mar de Galilea a/k/a Mar de Galilea Pentecostal Church a/k/a Mar de Galilea a/k/a Pentecostal Church of God, Inc. a/k/a Sea of Galilee Pentecostal Temple, Inc.) (hereinafter "defendant Church" or "Church") moves for an order pursuant to CPLR 6514 cancelling the Notice of Pendency on the grounds that plaintiff: 1) failed to serve defendant Church within the time limit provided in CPLR 6512; 2) failed properly to serve defendant Church as required by

CPLR 311(a)(1); failed to comply with CPLR 6501 and 6511, and RPAPL 1331; and 4) failed to prosecute this action in good faith. Defendant Church also seeks an order directing plaintiff to elect a provisional remedy pursuant to CPLR 6001, an order enjoining or temporarily staying any foreclosure proceedings, and an order pursuant to CPLR 6514(c) directing plaintiff to pay defendant's attorney's fees and costs to date.

Plaintiff opposes the motion and cross-moves for an order "finding that defendant waived any and all objections to service, thereby making service of the Summons and Complaint valid," or "if the Court finds service invalid, approving *nunc pro tunc* the service method used by Plaintiff pursuant to CPLR 311(b) because personal service on Defendant was impracticable."

Plaintiff Church Extension Plan states that it is a "ministry providing premier financial and administrative services to churches and districts of the General Counsel of the Assemblies of God and their constituents, assisting them in fulfilling their vision of spreading the Gospel." Defendant Church states that it is a "New York State Not-for-Profit Church" and admits that it owns the church property located at 166-168 Eldridge Street, which is the subject of this action.

Plaintiff commenced this action on March 10, 2008, by filing a summons and complaint, and a notice of pendency. Asserting three causes of action for equitable relief and damages, the complaint alleges that on October 18, 1995, defendant submitted a loan application to plaintiff, in order to obtain financing for a construction project; on January 19, 1996, a loan for $609,000 was executed; and subsequently "there were numerous increases that of that amount, coupled with insufficient payments from Defendant, causing Defendant to currently owe Plaintiff in excess of $1 million." The first cause of action seeks the imposition of an equitable mortgage, specifically a declaration that defendant's fee interest in the premises is "subordinate to and burdened by"

plaintiff's equitable mortgage, *nunc pro tunc* from January 19, 1996, and that plaintiff is the owner and holder of an equitable mortgage on the subject premises as of January 19, 1996. The second cause of action seeks an order and judgment authorizing and directing the City Register of New York "to record the copy of the Equitable Mortgage as an original." The third cause of action seeks a judgment as to the amount due in the sum of $1,061,579.60, as of December 7, 2007, and a judgment of foreclosure and sale.

On or about May 5, 2008, defendant filed an Answer with Counterclaims. The answer consists of numerous and detailed denials and factual allegations, but does not delineate any affirmative defenses. Defendant denies the existence of an equitable mortgage on the premises, and claims that plaintiff is "predatory lender" engaging in "deceptive and illegal financing schemes, such as the one Defendant entered into here." Defendant admits that it was "struggling financially and needed money to finance a construction project" and that plaintiff loaned it money; defendant alleges the loan has been repaid by payments totaling $819,299.00 and the "approximately $199,000 in Sea of Galilee Church certificates" which plaintiff is purportedly "holding." Defendant alleges that plaintiff sold "certificates to the church's parishioners of modest to little means, with promises to return [their] . . . initial monies with interest over a period of time . . . to assist, renovate, construct and expand their church and congregation. Then, Church Extension Plan turns around and lends the church their parishioners' monies (against the certificate) charging the church higher and escalating fees and interest rates."

On or about July 28, 2008, plaintiff filed an amended complaint, which contains additional factual allegations and exhibits in support of the same three causes of action asserted in the original complaint. Those causes of action are virtually identical with the exception of the

first cause of action, which has been amended to addresses the provisions in the Religious Corporations Law and the Not-for-Profit Corporation Law, requiring court approval for the conveyance of property belonging to a religious corporation.

Defendant thereafter made the instant motion for an order pursuant to CPLR 6514 cancelling the notice of pendency, which was submitted to this court on December 23, 2009. While the motion was *sub judice*, defendant served an Answer to the Amended Complaint, dated January 12, 2009. In contrast to the original answer, the amended answer asserts 26 separate affirmative defenses and seven separate counterclaims.

CPLR 6514(a) provides for "mandatory cancellation" of a notice of pendency. The statute directs that "[t]he court, upon motion of any person aggrieved and upon such notice as it may require, shall direct any county clerk to cancel a notice of pendency, if service of a summons has not been completed within the time limited by section 6512." CPLR 6514(a). CPLR 6512 provides that "[a] notice of pendency is effective only if, within thirty days after filing, a summons is served upon the defendant or first publication of the summons against the defendant is made pursuant to an order and publication is subsequently completed." Reading these two statutes together, under CPLR 6512, a summons must be served on defendant within 30 days after the filing of a notice of pendency, and under CPLR 6514(a), if such service is not "completed" within that 30-day time period, the notice of pendency must be cancelled. See Deans v. Sorid, 56 AD3d 417 (2nd Dept 2008); Rabinowitz v. Larkfield Building Corp., 231 AD2d 703 (2nd Dept 1996).

Defendant has established sufficient grounds for mandatory cancellation of the notice of pendency pursuant to CPLR 6514(a). The uncontroverted record demonstrates that the method

plaintiff used to serve the summons and complaint on defendant Church was improper as a matter of law, so service of the summons was not completed with the 30-day time period as required by CPLR 6514(a). See Deans v. Sorid, supra; NYCTL 1999-1 Trust v. Chalom, 47 AD3d 779, 780 (2nd Dept 2008), lv app den 11 NY3d 709 (2008); Rabinowitz v. Larkfield Building Corp., supra.

It is not disputed that the Church is a corporation, and personal service on a corporation is governed by CPLR 311. CPLR 311(a)(1) provides for personal service on a corporation by "in-hand" delivery of the summons to an authorized corporate representative, such as "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." See Gleizer v. American Airlines, Inc., 30 AD3d 376 (2nd Dept 2006); Tadir Air, Inc. v. FGH Realty, Inc., 297 AD2d 230, 231 (1st Dept 2002). In the alternative, CPLR 311(a)(1) permits service on a corporation by personal delivery to the Secretary of State in accordance with Business Corporation Law §§306 and 307, and Not-for-Profit Corporation Law §§306 and 307. See Commissioners of State Insurance Fund v. Nobre, Inc., 29 AD3d 511 (2nd Dept 2006); Matter of Unsafe Building & Structure Number 1184-1194 River Ave v. Lite Ray Realty Corp., 268 AD2d 309, 310 (1st Dept 2000). Moreover, CPLR 311(b) provides that when service in accordance with CPLR 311(a)(1) is "impracticable," a corporation may be served "in such manner, and proof of service may take such form, as the court, upon motion without notice directs." See David v. Total Identity Corp., 50 AD3d 1484, 1485 (4th Dept 2008); Cives Steel Co. v. Unit Builders, Inc., 262 AD2d 164 (1st Dept 1999).

Plaintiff submits two affidavits of service. In the first one, process server Harry Torres states that on April 1, 2008, he went to the Church located at 166-168 Eldridge Street and found

that it "was not open and appeared to be vacant . . . . There was a black metal gate in the front that was closed and locked, preventing entry onto the premises. The building's windows were boarded up with bricks. . . . Although I walked around the entire boundary of the Church, I was unable to locate a point of entry." The second affidavit of service is by a different process server, Ting Ting Lai, who states that he went to the Church at 166-168 Eldridge Avenue on April 2, 2008 at 1:45 p.m., and it "was not open as there was a black metal gate in the front that was closed and locked preventing entry onto the premises. Windows were closed with bricks and half the Church appeared to be undergoing renovation. . . . The only sign I saw was in Spanish and I was unable to determine what it said. . . . Although I walked around the entire boundary of the Church, I was unable to locate a point of entry. . . . I attempted to locate neighbors of the Church that I could speak with, but was only able to speak with a representative of an automotive shop. Unfortunately, the gentleman I spoke with had not seen anyone recently at the Church and did not believe that it was open for business." The following day, April 3, 2008, the process server returned to the Church at 10:00 a.m. and 12:00 p.m., and "[i]t continued to appear that the Church remained vacant. . . . Because I was unable to pass the metal gate, I left the Documents posted onto the gate" and mailed an additional copy to the Church at the 166-168 Eldridge Avenue address.

The affidavits of service are facially insufficient. Unlike service on a natural person pursuant to CPLR 308, CPLR 311(a) does not authorize "nail and mail" as an acceptable method of personal service on a corporation. Plaintiff implicitly acknowledges this defect, by not arguing that defendant Church was properly served in accordance with CPLR 311(a), but instead cross-moving for a *nunc pro tunc* court order pursuant to CPLR 311(b) retroactively authorizing

the service method used on the grounds of impracticability. See DeCarvalhosa v. Adler, 298 AD2d 293 (1st Dept 2002). Plaintiff, however, does not provide an adequate basis for concluding that personal service on defendant by conventional means was "impracticable" within the meaning of CPLR 311(b). While plaintiff asserts that defendant's place of business was closed and defendant was not registered with the New York Secretary of State, plaintiff fails to indicate that it made any diligent, albeit unsuccessful, efforts to obtain information as to an alternative address for the Church or any of its corporate officers. See David v. Total Identity Corp., supra; Cives Steel Co. v. Unit Builders, Inc., supra. Plaintiff's cross-motion is therefore denied.

Plaintiff also argues that pursuant to CPLR 3211(e), defendant has waived its right to object to the manner in which the summons and complaint were served, since defendant did not assert in its answer the affirmative defense of lack of personal jurisdiction. This argument is misdirected, as defendant is not moving pursuant to either CPLR 3211 or CPLR 3212 for an order dismissing the complaint based the lack of personal jurisdiction. Plaintiff simply seeks an order canceling the notice of pendency based on a separate and distinct statutory provision, CPLR 6514(a), which requires service of a summons within 30 days after a notice of pendency is filed. As discussed above, CPLR 6514(a) authorizes, without exception, mandatory cancellation of a notice of pendency where service of the summons is not completed within such 30-day period. That statute imposes no time limit or any other restriction on a defendant's right to seek such relief. Thus, the issue of whether the jurisdictional defense has been waived for the purpose of seeking a judgment dismissing the complaint on such grounds, is irrelevant to a motion for mandatory cancellation of a notice of pendency pursuant to CPLR 6514(a).

Notwithstanding the foregoing conclusion, since the parties have directly raised, argued and fully briefed the issue of whether defendant waived its right to assert the affirmative defense of lack of personal jurisdiction, the court will determine that issue, especially in view of defendant's answer to the amended complaint which now includes a seventeenth affirmative defense that the court "lacks in personam jurisdiction over the Church." Under CPLR 3211(e), "the law is settled that a jurisdictional defense not asserted in the first responsive pleading, whether answer or pre-answer dismissal motion pursuant to CPLR 3211, is waived." McGowan v. Hoffmeister, 15 AD3d 297 (1st Dept 2005) (citing Adesso v. Shemtob, 70 NY2d 689 [1987]). Moreover, when the jurisdictional defense is based on improper service, defendant must "move for judgment on that ground" within 60 days after serving the answer containing that objection. CPLR 3211(e); Wiebusch v. Bethany Memorial Reform Church, 9 AD3d 315 (1st Dept 2004); Aretakis v. Tarantino, 300 AD2d 160 (1st Dept 2002).

Here, defendant did not make a pre-answer motion to dismiss, and its original answer did not contain any objection to service of process or any affirmative defense based on lack of personal jurisdiction. In any event, even if the jurisdictional defense had been properly asserted in the either the original answer or the answer to the amended complaint, defendant never timely moved for "judgment on that ground." For these reasons, defendant has waived its right to assert the defense of lack of personal jurisdiction based on improper service. See CPLR 3211(e); McGowan v. Hoffmeister, supra; Wiebusch v. Bethany Memorial Reform Church, supra;

Returning to the notice of pendency issues, defendant further argues that a notice of pendency is not appropriate in this case, as plaintiff is merely seeking money damages in connection with the repayment of a loan it made to defendant Church. This argument is without

merit, as the complaint clearly shows that plaintiff is seeking a declaration as to an equitable mortgage on the real property owned by defendant Church and ultimately a judgment of foreclosure on that mortgage. See 5303 Realty Corp. v. O & Y Equity Corp., 64 NY2d 313 (1984). Moreover, while ordinarily once a notice of pendency is cancelled or expires, plaintiff is prohibited from filing a second notice of pendency, in an action to foreclose a mortgage on real property, such as the instant action, a new notice of pendency may be filed, since the filing of such notice is a "statutory prerequisite essential" to a judgment of foreclosure. Horowitz v. Griggs, 2 AD3d 404, 406 (2nd Dept 2003); accord Campbell v. Smith, 309 AD2d 581, 582 (1st Dept 2003); Wasserman v. Harriman, 234 AD2d 596, 598 (2nd Dept 1996), app dism 89 NY2d 1086 (1997).

In light of the above determination, the court need not address the additional grounds raised by defendant for cancelling the notice of pendency. The portion of defendant's motion for an order enjoining or temporarily staying any foreclosure proceedings is denied as premature, since plaintiff cannot take any steps to foreclose on the mortgage until its claim for a declaration as to an equitable mortgage has been adjudicated. The portion of defendant's motion for an order directing plaintiff to elect a provisional remedy pursuant to CPLR 6001 is denied.

Finally, defendant seeks an award of attorney's fees pursuant to CPLR 6514(c). Under the circumstances presented in this action, the court in its discretion finds that an award of costs and expenses pursuant to CPLR 6514(c) is not warranted. See No. 1 Funding Center, Inc. v. H & G Operating Corp., 48 AD3d 908 (3rd Dept 2008); Rabinowitz v. Larkfield Building Corp., supra; Praver v. Remsen Assocs, 181 AD2d 723 (2nd Dept 1992); Josefsson v. Keller, 141 AD2d 700 (2nd Dept 1988).

Accordingly, it is hereby

ORDERED that the motion by defendant Church is granted only to the extent that the notice of pendency filed on March 10, 2008 is cancelled, and upon service of a copy of this decision and order with notice of entry, the County Clerk is directed to cancel the notice of pendency filed on March 10, 2008; and it is further

ORDERED that the balance of defendant's motion is denied; and it is further

ORDERED that plaintiff's cross-motion is denied; and it is further

ORDERED that the parties are directed to appear for the status conference previously scheduled for September 17, 2009 at 9:30 a.m., Part 11, Room 351, 60 Centre Street.

DATED: August 26, 2009 ENTER:

J.S.C.

FILED
AUG 31 2009
COUNTY CLERK'S OFFICE
NEW YORK