

Mortgage Elec. Registration Sys., Inc. v Folkes

2008 NY Slip Op 33732(U)

April 14, 2008

Supreme Court, New York County

Docket Number: 109824/05

Judge: Kibbie F. Payne

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 4

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MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC. "MERS" AS NOMINEE FOR
AMERICA'S WHOLESALE LENDER, ITS
SUCCESSORS AND ASSIGNS,

Plaintiff,

Index No. 109824/05

-against-

ORDER

CAROLE FOLKES, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK
CITY TRANSIT ADJUDICATION BUREAU, and
BARON ASSOCIATES, LLC.,

JOHN DOE (said name being fictitious,
it being the intention of plaintiff to
designate any and all occupants of
premises being foreclosed herein, and
any parties, corporations or entities,
if any, having or claiming an interest
or lien upon the mortgaged premises),
Defendants.

FILED
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COUNTY CLERK'S OFFICE
NEW YORK

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Kibbie F. Payne, J.:

In this action, plaintiff Mortgage Electronic Registration Systems, Inc., as nominee for America's Wholesale Lender, seeks to foreclose its mortgage interest on the property known as 468 West 168th Street, New York, New York 10031 (the Premises). In November 2004, plaintiff and defendant Carole Folkes (Folkes) executed a mortgage on the Premises, which was recorded in May 2005.

Folkes now moves, pursuant to CPLR 3211(a)(5), for an order dismissing this action on the ground that this court does not have personal jurisdiction over her. Although plaintiff served

the summons and complaint on Folkes several times, pursuant to both CPLR 308(2) and 308(4), Folkes argues that none of plaintiff's attempts to serve her were in accordance with CPLR 308.

Personal jurisdiction is obtained over a defendant if the summons is delivered "to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by . . . mailing the summons to the person to be served at his or her last known residence" (CPLR 308[4])¹. CPLR 308(4), otherwise known as "nail and mail," permits a plaintiff to affix "the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by . . . mailing the summons to such person at his or her last known residence."

Plaintiff alleges on July 11, 2005, it performed a "Skip Trace" search on Folkes to locate her whereabouts (Aff of Albert Rizzo, Ex 2), and was informed by the locator service that her address was 14917 Notley Road, silver Spring, MD, after a representative of the locator service spoke directly with Folkes (see id., ["We contacted the home number and spoke to Carole who

¹ Although CPLR 308 refers to service "within the state," these same methods are used to serve process on a defendant located outside of New York State (see CPLR 313)

stated that she lives at the new address listed above"])).

The July 29, 2005 affidavit of service filed in this action (Aff of Michael Cirrito, Ex B) indicates that, on July 27, 2005, in accordance with CPLR 308(4), Folkes was served with process by affixing a copy of the summons and complaint to the Notley Road address, after a neighbor verified that she resided at that address, and then by mailing the summons and complaint to that residence (id.). A subsequent affidavit of service (Cirrito Aff, Ex A) indicates that Folkes was served again on August 30, 2005, pursuant to CPLR 308(2), by leaving a copy of the summons and complaint at the Notely Road address with a person of suitable age and discretion, her sister "Cher Folkes" who affirmatively stated that Folkes resided there, and then by mailing those documents to the same residence (id.). Folkes further alleges she does not live at the Notley Road address and that she did not reside at that address at the time of the alleged service of process (id., ¶ 5), and that the Notley Road address was never her actual dwelling place or usual place of abode (id., ¶ 7). As proof of her residency at the serpentine terrace address, Folkes submits a copy of a March 14, 1997 Deed of Trust, dated March 14, 1997, which indicates that she (under her maiden name of Carole A. Ramphal) is the titled owner of the premises (see id., Ex E). Folkes also submits copies of her driver's license, issued on May 16, 2004, and her voter's registration card dated November 30,

2004, which both evidence the Serpentine Terrace address (see *id.*, Ex F).

With respect to the Notley Road address, Folkes alleges that Cheron Ramphal, her sister, resides at that address, "with her paramour, Paul Jaikaran"²(*id.*, ¶ 9). Folkes alleges she is a victim of fraud in the sale of the Premises perpetrated on her by Jaikaran, and possibly her sister (*id.* ¶ 10). Folkes, additionally alleges that prior to her purchase, the Premises was previously sold by the same seller, Shelby Sullivan, to 468 West 146th Street Corp. Of which Jaikaran is the principal, and that a mortgage was given to defendant Baron Associates, LLP (*id.*, ¶¶ 14-16). Folkes also asserts that the deed and the mortgage relating to the purchase to 468 West 146th Street Corp. were not recorded until after Folkes' deed and mortgage were recorded (*id.* ¶15). In her final assertion, Folkes alleges that, based upon all these facts, "it is obvious why I received no notice of this action when the Summons and Complaint were served at my sister's residence" (*id.*, ¶ 17).

"The plaintiff bears the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process" (see *Bankers Trust Co. of California v Tsoukas*, 303 AD2d 343, 343 [2nd Dept

² Folkes asserts that although Jaikaran is identified as her brother in court papers, he is not her brother, and he is not related to her in any way (*id.*, ¶ 11)

2003]; *Frankel v Schilling*, 149 AD2d 657, 659 [2nd Dept 1989]). A process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to CPLR 308 (see *Johnson v Deas*, 32 AD3d 253, 254 [1st Dept 2006]; *NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459, 460 [1st Dept 2004]). However, where, as here, there is a sworn denial that delivery to the defendant was accomplished, the affidavit of service is rebutted, and plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing (see *Omansky v Gurland*, 4 AD3d 104, 108 [1st Dept 2004]; *Habermann v Simon*, 303 AD2d 181, 181 [1st Dept 2003]; *Ananda Capital Partners, Inc. v Stay Elec. Sys. (1994) Ltd.*, 301 AD2d 430, 430 [1st Dept 2003]). Even if a defendant eventually acquires actual notice of the lawsuit, actual notice alone "will not sustain the service or subject a person to the court's jurisdiction when there has not been compliance with prescribed conditions of service" (*Mortgage Access Corp. v Webb*, 11 AD3d 592, 593 [2nd Dept 2004]).

However, it is also well settled that a mere claim of improper service without more is insufficient to rebut an affidavit of service is improper is required (see *DeZego v Donald F. Bruhn, M.D., P.C.*, 67 NY2d 875, 876 [1987]; *Hinds v 2461 Realty Corp.*, 169 AD2d 629, 630-631 [1st Dept 1991]; also, see *Bankers Trust Co. Of California v Tsoukas*, 303 AD2d at 344 [a defendant may rebut the process servers' affidavit with a

"detailed and specific contradiction of the allegation in the process server's affidavit" sufficient to create a question of fact warranting a hearing)). In the absence of an affidavit with sufficient particularity as to why service was not made or was improper, a traverse hearing is not appropriate, and the motion to dismiss for lack of personal jurisdiction should be denied (see *Matter of Shaune TT*, 251 AD2d 758, 758-759 [3rd Dept 1998]).

This court finds that Folkes' sworn denial of receipt of process containing a "detailed and specific contradiction of the allegation in the process server's affidavit[s]," as well as her accompanying proof that she does not reside at the Notley Road address - Deed of Trust, driver's license and voter's registration card - are sufficient to rebut the affidavits of service, and to raise a question of fact as to whether she was properly served with the summons and complaint pursuant to CPLR 308. Accordingly, Folkes is entitled to a traverse hearing on the issue of personal service (see *Elm Mgt. Corp. v Sprung*, 33 AD3d 753, 754-755 [2nd Dept 2006; *NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459, 460 [2004], *supra*; *Omansky v Gurland*, 4 AD3d 104, 108 [2004], *supra*).

The court has considered the remaining claims, and finds them to be without merit. Accordingly, it is

ORDERED that the issue of whether plaintiff was properly served with the summons and complaint pursuant to CPLR 308 as

referred to a Special Referee to hear and report with recommendations, except that in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for the party seeking the reference or, absent such party, counsel for the plaintiff shall, within 30 days from the date of entry of this order, serve a copy of this order with notice of entry, together with a completed information sheet³, upon the Special Referee Clerk in the Motion Support Office in 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50R) for the earliest convenient date.

Date April 8, 2008

ENTER:

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KIBBIE F. PAYNE
J.S.C.

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³ Copies are available in the Supreme Court at 60 Centre Street, Room 119, New York, New York and on the Court's website.