

DLJ Mtge. Capital, Inc. v Lawrence

2009 NY Slip Op 30554(U)

February 25, 2009

Supreme Court, Nassau County

Docket Number: 007905-08

Judge: Edward G. McCabe

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

Present: **HON. EDWARD G. McCABE**
Justice

TRIAL/IAS PART 1
NASSAU COUNTY

DLJ MORTGAGE CAPITAL, INC.

INDEX NO.: 007905/08

Plaintiff,

Decision After Hearing

-against-

CLAUDE LAWRENCE "JOHN DOES" and "JANE DOES", said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises,

Defendants.

X

The above-entitled matter having been scheduled for a traverse hearing on January 28, 2009, to determine the validity of service in the subject mortgage foreclosure action. It was the Defendant, Claude Lawrence's position that Plaintiff failed to serve him at the address agreed upon for notices in paragraph 15 of the mortgage, that the property at which service was attempted was neither the subject property, his residence, his usual place of abode or his place of employment. The Defendant contends Plaintiff was on notice, by a prior affidavit in another proceeding (under Index No. 3919/07), that the Harman Avenue address was not his address for several years. The Defendant further alleged that

DLJ MORTGAGE vs. LAWRENCE (INDEX NO.: 7905/08)**2.**

Plaintiff failed to exercise due diligence prior to resorting to attempted service by nail and mail and that Plaintiff's process server's efforts at personal service were limited to weekday business hours and attempts at service were not made on the weekend or after business hours on a weekday evening. The Defendant's allegations raised a question of fact sufficient to rebut the process server's affidavit of service thereby requiring a hearing. See, Poet vs. Kolendo, 142 A.D. 2d 633, 530 N.Y.S. 2d 589 (Second Dept. 1988).

At the hearing, Alan Feldman of 18-45 179th Street in College Point, N.Y. testified that he was the process server who served the Defendant, Claude Lawrence, with a summons and complaint by substituted service. He testified that he attempted service at 24 Harman Street in Brooklyn, N.Y. on April 30, 2008 at 9:40 a.m., on May 1, 2008 at 12:55 p.m. and on May 2, 2008 at 6:15 p.m. Mr. Feldman further testified that on May 3, 2008, he affixed a copy of the summons and complaint in this action to the door at 24 Harman Street. On May 7, 2008, the process server stated he caused a copy of the summons and complaint to be mailed to the Defendant Lawrence in an envelope marked "personal and confidential". He gave no other description of the envelope. A copy of the affidavit of service was offered into evidence without opposition and marked Plaintiff's exhibit I. The

affidavit of service indicates he confirmed with a neighbor at 20 Harman St.

described as a male, 45 years old, 5"7", tan/black, who refused to give his name.

The Court observes that the box for military service on the affidavit of service was not checked and thus there is no averment that the Defendant is not in the military service of either New York State or the United States of America.

On cross-examination the process server produced his work order, marked as exhibit "A" for the Defendant. The work order does not make any reference to military service. However, Mr. Feldman testified it is his usual habit to ask if the Defendant lives at the premises and if the Defendant is in the military service. He further testified that he believes he did it in this case because that is his customary practice.

Claude Lawrence testified he lives at 766 East 221st Street in Bronx, N.Y. 10467. He does not claim to be in the military, nor does his age or appearance make that likely. He testified that he owns 24 Harman Street in Brooklyn, N.Y., but says the building is abandoned, although he admits to keeping a working telephone in an upstairs apartment and visiting the premises on a weekly basis. He admits his driver's license has the 24 Harman Street address. He also stated that he receives mail at that address and that he discovered there was a foreclosure action pending from private companies who were inquiring about it. The

DLJ MORTGAGE vs. LAWRENCE (INDEX NO.: 7905/08)**4.**

Defendant did not produce any evidence that he resides at 221st Street in the Bronx, N.Y. such as utility bills, telephone bills or cable/satellite television bills.

The Defendant asked the Court to take judicial notice of an action brought to foreclosure on the same premises under Index No. 003919/07, where the defense of lack of jurisdiction was raised by the Defendant as to service at the 24 Harman Street address.

The property that is the subject of the note and mortgage is 193 Belmont Blvd. in Elmont, N.Y. which is occupied by Anthony Garcia, whom the Defendant says has no lease and from whom he collects no rent. Apparently, in the original action, an attempt was made to serve the Defendant at the Belmont Blvd. address when the Plaintiffs were given the 24 Harman Street address for the Defendant.

Given the fact the Defendant failed to offer any evidence as to his alleged Bronx address, the fact he acknowledges keeping a telephone at the Harman Street address, receiving mail there and most importantly continues to use it as his legal address with the Department of Motor Vehicles, as evidenced by his current driver's license, leads the Court to conclude service was properly effectuated at the Harman Street address and the Court has acquired jurisdiction over the Defendant. See, DiLorenzo, Inc. vs. A.C. Dutton Lumber Co., Inc., 67 N.Y. 2d 138, 501 N.Y.S. 2d 8 (1986) for the holding "if the use of an incorrect address is a

DLJ MORTGAGE vs. LAWRENCE (INDEX NO.: 7905/08)**5.**

direct result of the alleged non-recipient's own failure to keep a current address on file with the appropriate governmental entities (e.g. Dept. of Motor Vehicles), the Court has the discretion to consider various factors, including "the length of time for which the address had not been kept current" in determining whether the default is to be excused." In the subject action, the Defendant claims the Harman Avenue address was not his residence for several years, but offers no explanation why he didn't notify the N.Y.S. Department of Motor Vehicles to update their records with his current address.

The Defendant's objections with respect to Plaintiff's due diligence are rejected, as the process server's attempts at service were not limited to weekday business hours. The affidavit of service states an attempt was made on May 2, 2008 at 6:15 p.m. and on May 3, 2008 at 7:35 a.m., in addition to the attempts made on April 30, 2008 at 9:40 a.m. and May 1, 2008 at 12:55 p.m. The process server also states he mailed a copy of the summons and complaint to the 24 Harman Street address on May 7, 2008, in an envelope marked personal and confidential, to the same address the Defendant continues to use as his official legal address with the N.Y.S. Dept. Of Motor Vehicles and to the address where he acknowledges receiving mail and maintaining a private telephone line.

DLJ MORTGAGE vs. LAWRENCE (INDEX NO.: 7905/08)

6.

The Federal and State Soldiers and Sailors Civil Relief Acts require that before a default judgment can be entered against a natural person who has otherwise not answered or appeared in an action or proceeding, the party seeking to enter the default judgment must submit an affidavit to the Court showing that the defaulting party is neither in active military service nor dependent on anyone else who is. 50 U.S.C. aff §303(1), 306 (Mc Kinney's 2003); Citibank, N.A. vs. McGarvey, 765 N.Y.S. 2d 163 (2003), 144 Misc. 723, 545 N.Y.S. 2d 259 (Civ. Ct. Kings Co., 1989). As set forth in Cassano vs. Gutkowski, 15 Misc. 3d 1118 (A), 839 N.Y.S. 2d 432 (2007), "In view of the war in Iraq, as well as the domestic war against terror, the necessity of determining the military status of a defaulting litigant has taken on a new vitality to protect persons on active military duty and their dependents from the entry of default judgments against them without their knowledge."

However, the purpose of the act is to prevent default judgments from being entered against the military personnel without their knowledge. See,, Title Guarantee Trust Co. vs. Duffy, 267 A.D. 444, 46 N.Y.S. 2d 441, Burgess vs. Burgess, 234 N.Y.S. 2d 87. Once the litigant knew of the action and authorized his attorney to appear on his behalf, the Appellant was no longer entitled to further benefits under the Soldiers' and Sailors' Civil Relief Act of 1940. Roslyn B. vs.

DLJ MORTGAGE vs. LAWRENCE (INDEX NO.: 7905/08)

7.

Alfred G. 222 A.D. 2d 581 (1985) and Matter of Title Guarantee Trust Co., supra.

See also, 1986 Army Law 17, which explains Section 520 specifies that there must be a default on any appearance by the Defendant. Therefore the benefits of §520 are made to depend on an absence of any appearance which includes a special as well as general appearance. Appearances include filing an answer through counsel, as the Defendant has done in this case, in addition to appearing and participating in the traverse hearing without raising any such objection.

Accordingly, based upon the foregoing, it is hereby

ORDERED, that the Defendant's application for the dismissal of the mortgage foreclosure complaint in this matter on the basis of the Court's lack of personal jurisdiction over him, is denied.

This constitutes the decision and order of the Court.

ENTER:

Dated: February 25, 2009
Mineola, NY



HON. EDWARD G. McCABE
J.S.C.

ENTERED
MAR 03 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

FAX/MAIL TO:

MARGARET BURKE TARAB, ESQ.
ROY J. LESTER, ESQ.
600 OLD COUNTRY ROAD, STE. 229
GARDEN CITY, NY 11530
TELE: (516) 357-9191
FAX: (516) 357-9281

ROSICKI, ROSICKI & ASSOC., P.C.
26 HARVESTER AVENUE
BATAVIA, NY 14020
TELE: (516) 741-2585
FAX: (516) 622-9434

CLAUDE LAWRENCE
766 EAST 221ST STREET
BRONX, NY 10467