

Mohican Group, Ltd. Partnership v Mehmedovic
2009 NY Slip Op 30661(U)
March 27, 2009
Supreme Court, Greene County
Docket Number: 09-0051
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF GREENE

MOHICAN GROUP, LIMITED PARTNERSHIP,

Plaintiff,

DECISION and ORDER

INDEX NO. 09-0051

RJI NO. 19-09-4043

-against-

IZMIR MEHMEDOVIC,

Defendants.

Supreme Court Greene County All Purpose Term, March 13, 2009
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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Attorneys for Plaintiff
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Catskill, New York 12414

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Attorney for Defendant
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TERESI, J.:

Plaintiff commenced this action, by summons with a motion for summary judgment in lieu of a complaint pursuant to CPLR §3213, claiming defendant breached the Bond and Mortgage the parties entered into on March 31, 2005. Plaintiff has accelerated the total amount due on the Bond and Mortgage, and seeks judgment against defendant for the amount allegedly due. Defendant opposes the motion, without cross moving, by arguing in part that this action must be dismissed either because the plaintiff has not obtained personal jurisdiction over him, or because there is another substantially similar action pending. Because defendant failed to demonstrate that this Court lacks jurisdiction, that portion of his opposition is denied. However,

because defendant demonstrated the existence of an issue of fact, relative to the pendency of a substantially similar action, plaintiff's motion for summary judgment is also denied.

Considering defendant's jurisdictional challenge first, "[o]nce the objection was raised, the burden was on plaintiff to establish personal jurisdiction over defendant." (Janko Pool Service, Inc. v. Berelson, 145 AD2d 897 [3d Dept. 1988]).

Plaintiff's affidavit of service alleges proper service under CPLR §308(4). The process server's affidavit demonstrated his "due diligence" in attempting to serve defendant pursuant to CPLR §308(1 and 2). He alleged that service was attempted twice during the week and once on the weekend, all at various hours. (State Higher Educ. Services Corp. v. Sparozic, 35 AD3d 1069 [3d Dept. 2006]; State of N.Y. Higher Educ. Services Corp. v. Upshur, 252 AD2d 333 [3d Dept. 1999]). Moreover, the process server alleges that he spoke with defendant's neighbor, who confirmed the defendant's residence at the address where service was attempted. (Sparozic, supra). The process server alleges that, following his attempts at service, he "affixed" and "mailed" the plaintiff's papers in accord with CPLR §308(4)'s provisions. The affidavit of service was thereafter duly filed. As this process server's affidavit set forth each of CPLR §308(4)'s elements, it "constitutes prima facie evidence of proper service." (US Bank National Association v. Vanvliet, 24 AD3d 906, 908 [3d Dept. 2005]). Thus, the burden is shifted to defendant to rebut plaintiffs' affidavit "with a detailed and specific contradiction of the allegations in the process server's affidavit". (Id. quoting Bankers Trust Co. of Cal. v. Tsoukas, 303 AD2d 343, 344 [2d Dept. 2003]).

Defendant's opposition papers fail to offer, with admissible proof, a "detailed and specific contradiction" of plaintiff's affidavit of service. (Id.) Defendant's affidavit

acknowledges receipt of the plaintiff's process by regular mail. He does not allege any facts, upon his own knowledge, that specifically contradict the process server's allegations of attempted service. Nor does defendant deny, from his own knowledge, that the plaintiff's papers were affixed to his door. Rather, defendant's only factual allegations are derived from information he obtained from his parents, who live with him. Such allegations, however, are plain hearsay, are not properly before this court, raise no issue of fact and will not be considered on this motion. As defendant has failed to sufficiently rebut plaintiff's affidavit of service, his jurisdictional objection is denied.

Turning next to plaintiff's motion for summary judgment, it "seeks is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]). It is well established that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (Smalls v. AJI Industries, Inc., 10 NY3d 733 [2008] quoting Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]).

If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]; Manculich v. Dependable Auto Sales and Service, Inc., 39 AD3d 1070 [3d Dept. 2007]). In opposing a motion for summary judgment, one must produce "evidentiary proof in admissible form... mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (Zuckerman, supra at 562).

Here, plaintiff duly demonstrated its entitlement to judgment as a matter of law by introducing the “mortgage and unpaid note, together with evidence of the [defendant's] default”. (HSBC Bank USA v. Merrill, 37 AD3d 899 [3d Dept. 2007]). The Bond and Mortgage demonstrates the plaintiff’s obligation to pay, and plaintiff’s affidavit, made from personal knowledge, establishes defendant’s default. (Charter One Bank, FSB v. Leone, 45 AD3d 958 [3d Dept. 2007]). Such showing shifted the burden of proof on this motion to defendant.

Defendant’s opposing papers raise an issue of fact by arguing that a “prior action” is pending, between these parties which seeks the same relief, which requires dismissal of this action. CPLR §3211(a)(4) states that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that... there is another action pending between the same parties for the same cause of action in a court of any state...” “Courts enjoy broad discretion when considering whether to dismiss a claim on the ground that another matter is pending between the same parties dealing with a similar issue.” (Mann v. Malasky, 41 AD3d 1136 [3d Dept. 2007]).

Here, defendant demonstrates the existence of an action entitled Bayview Loan Servicing, LLC v. Izmir Mehmedovic, Mohican Group, Limited Partnership, Index No: 08-1777 (hereinafter “Bayview action”), which was commenced prior to this action. In Bayview, as its caption indicates, both of the parties herein are named defendants. Defendant submits the Verified Answer served by Mohican Group, Limited Partnership in the Bayview action. It not only answers that complaint, but also includes a cross-claim against Izmir Mehmedovic, the instant defendant. Such cross-claim asserts the existence of the same Bond and Mortgage as in this action, and alleges the same default. Both this action and the cross claim seek damages due

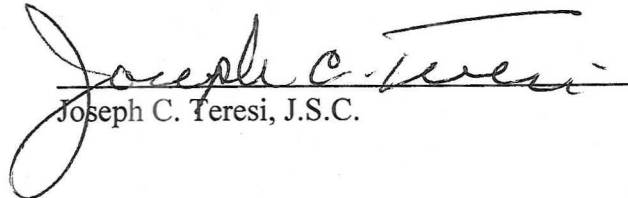
to such default. Based upon the foregoing, defendant has demonstrated that an issue of fact exists as to whether or not this action is subject to dismissal under CPLR §3211(a)(4), thereby precluding summary judgment. As defendant has not moved for dismissal, however, this Court declines to address the merits of defendant's claim.

Accordingly, plaintiff's motion for summary judgment is denied and this action is hereby converted to an ordinary action. The plaintiff shall serve its complaint within thirty days of the date of this Decision and Order (pursuant to CPLR §2103), and the defendant shall serve its answer within twenty days thereafter. This Decision and Order is made without prejudice to defendant moving for dismissal under CPLR §3211 at the appropriate time under the CPLR.

All papers, including this Decision and Order are being returned to the attorneys for the defendant. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel are not relieved from the applicable provisions of that section relating to filing, entry and notice of entry.

So Ordered.

Dated: March 27, 2009
Albany, New York


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated January 12, 2009, Notice of Motion, dated January 12, 2009, Affidavit of Steven St. Germain, dated January 8, 2009, with attached Exhibits "A" - "B".
2. Affirmation of Izmir Mehmedovic, dated March 5, 2009, with attached Exhibit "A".