

SunTrust Mtge., Inc. v Leontev

2009 NY Slip Op 32782(U)

November 24, 2009

Supreme Court, New York County

Docket Number: 115268/2008

Judge: Paul G. Feinman

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PRESENT: HON. PAUL G. FEINMAN

PART 12

Justice

SUNTRUST Mortgage INC.

INDEX NO.

115268/08

MOTION DATE

MOTION SEQ. NO.

003

MOTION CAL. NO.

- v -
Serguei Leonov

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION AND ORDER.**

FILED

NOV 30 2009

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/24/09

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X

SunTrust Mortgage, Inc.,
Plaintiff,

against

Index Number 115268/2008
Mot. Seq. No. 003

Serguei Leontev a/k/a Sergmei Leontev a/k/a
Serguel Leontev a/k/a Serguri Leontev a/k/a
Serguei Geontev a/k/a Jergei Gowehev a/k/a
Serguei Ledntev a/k/a Serguei Tev Leon a/k/a
Serguel Leonateu a/k/a Segues Leontau a/k/a
Jerguei Leonte a/k/a Serguei J. Leonte a/k/a
Serguei Leonten a/k/a Serguen Leonten a/k/a
Serguer Leonteo a/k/a Serguei Leonter a/k/a
Serguel Leonter a/k/a Segues Leonteu a/k/a
Jerguei Leontev a/k/a Serguri Leontev a/k/a
Sergmei Leontev a/k/a Serguei Leontev a/k/a
Serguei Leontey a/k/a Sergueo Veonteu,
City of New York Environmental Control Board,
Defendants.

DECISION and ORDER

FILED
NOV 30 2009
NEW YORK
COUNTY CLERK'S OFFICE

-----X

For the Plaintiff:
Stein, Wiener & Roth, LLP
By: Gerald Roth, Esq.
One Old Country Road, Suite 113
Carle Place, NY 11514

For Individual Defendant:
Inna Khiterer, Esq.
PO Box 320160
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Papers considered in review of this order to show cause to vacate:

| Papers | Numbered |
|--|----------|
| Order to Show Cause, Affidavit, Exhibits | 1 |
| Affirmation in Opposition | 2 |
| Affirmation in Support of OSC | 3 |
| Supplemental Affirmation in Opposition | 4 |

PAUL G. FEINMAN, J.:

Defendant Serguei Leontev moves by order to show cause, which he filed and served while self-represented, for an order dismissing the above captioned case and vacating the Judgment of Foreclosure and Sale entered on default on April 22, 2009, signed by another justice

of this court.¹ Plaintiff SunTrust Mortgage, Inc. opposes; defendant City of New York Environmental Control Board has not appeared on the motion. For the reasons stated below, Leontev's motion is denied in its entirety.

Defendant seeks to vacate the judgment of Foreclosure and Sale filed on May 27, 2009, entered on a construction mortgage given by plaintiff covering premises located at 257 West 134th Street, New York, New York. He alleges that plaintiff did not release certain of the funds that were a part of the mortgage agreement, and he has been unable to renovate the property and pay various contractors. As for his failure to appear in the foreclosure proceeding, he offers several explanations: failure to receive a 90-day notice of foreclosure; failure to be properly served with process; and failure to be accorded a statutorily required settlement conference. His motion papers contain only his hand-written affidavit stating the allegations and defenses, without any documentary evidence to establish his claims.

In opposition, plaintiff includes among other documents, a copy of the affidavit of service of process upon defendant attesting that he was personally served at his Brooklyn residence on November 20, 2008, and a copy of the affidavit of service of a second copy of the summons and complaint at the same address by mail on December 18, 2008 (Roth Aff. in Opp. Ex. D, E).

At oral argument on July 15, 2009, defendant was granted permission for his newly hired attorney to file and serve supplemental papers by Monday, July 20, 2009. These papers, dated July 20, 2009, do not appear to have been timely filed or served. Plaintiff thereafter filed a

¹ It appears the Justice who signed the Judgment of Foreclosure and Sale recused herself when the instant order to show cause was presented for signature. Two other Justices of this court also then recused themselves from its consideration. When the matter was assigned to this court, the Administrative Judge signed the order to show cause as this Justice was then on vacation.

supplemental affirmation in opposition dated July 28, 2009, as well as a letter of the same date, objecting to their consideration by the court. Although the supplemental papers were untimely, even if the court considers the arguments made by defendant's attorney, defendant's motion to vacate the default cannot be granted.

A motion to vacate a default judgment should not be vacated in the absence of a justifiable excuse for the default and a meritorious cause of action or defense (*Barasch v Micucci*, 49 NY2d 549 [1980]). The movant is required to show a meritorious defense, although not to establish a defense as a matter of law (*Kwong v Budge-Wood Laundry service, Inc.*, 97 AD2d 691 [1st Dept 1983]). An affidavit of merits by a party is essential in applications to excuse defaults (*LaBuda v Brookhaven Memorial Hosp. Med. Center*, 62 NY2d 1014 [1984]). Relief will not be granted in the absence of an affidavit of merit containing evidentiary facts by an individual with personal knowledge of the facts. An attorney's affidavit lacking personal knowledge has no probative value (*Barasch v Micucci*, 49 NY2d 594 [1980]).

Defendant argues that the court lacks personal jurisdiction due to the lack of service of process, and avers in his affidavit attached to the order to show cause, that he "was not served w/summons," and "was not served with any papers." As noted above, plaintiff submits two affidavits concerning service of copies of the summons and complaint on defendant in November and December 2008. However, defendant's attorney states "upon information and belief" that defendant was not in New York State at the time the papers were served on November 20, 2008, and that a visitor from Europe took the papers and mislaid them (Khiterer Aff. in Supp. ¶¶ 20, 21). The attorney's affirmation is insufficient to create an issue of fact as to service of process. Notably absent is an affidavit from the defendant with more than a conclusory denial of service.

It is well established that the affidavit of a process server constitutes *prima facie* evidence of proper service to establish personal jurisdiction over the defendant (*Matter of de Sanchez v JPMorgan Chase Bank*, 57 AD3d 452, 454 [1st Dept 2008]). The mere denial of receipt of service “is insufficient to rebut the presumption of proper service created by a properly executed affidavit of service.” (*Matter of de Sanchez* at 454). The affirmation by an attorney or an affidavit by anyone without personal knowledge concerning the service of the documents, is also insufficient to rebut the presumption (*Walkes v Benoit*, 257 AD2d 508 [1st Dept. 1999]). Defendant himself has not averred that he was out of the jurisdiction on the date of alleged service or any other facts that would raise an issue warranting a traverse; his motion to vacate the Judgment of Foreclosure and Sale must be denied on that ground alone.

Defendant’s claims that he was improperly denied a mandatory settlement conference under CPLR 3408 and was not served a 90-day notice under Real Property Action and Proceedings Law § 1304 are also unpersuasive. To have qualified for the conference under the then-existing statutory scheme, defendant’s mortgage would have to involve either a high-cost home loan consummated between January 1, 2003 and September 1, 2008, or be a sub-prime or nontraditional home loan, as those terms are defined in RPAPL § 1304. CPLR 3408 also requires that defendant be a resident of the property subject to foreclosure in order to trigger a mandatory settlement conference. Notably, the April 1, 2009, affirmation of plaintiff’s attorney, attached as part of the Judgment of Foreclosure and Sale, stated that review of the files in this matter shows that the proceeding does not involve a high-cost home loan or a sub-prime or nontraditional home loan, and that defendant is not a resident of the property subject to foreclosure (see OSC, Roth Aff. as to Subprime, High Cost and Nontraditional Home Loans ¶ 1). Plaintiff offers only conclusory statements otherwise, and does not rebut the apparent fact that

he did not and does not reside at the premises. In other words, these statutory provisions are inapplicable to the instant foreclosure action.

Accordingly, for all the above stated reasons, it is

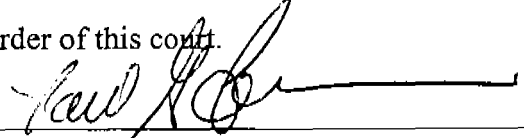
ORDERED that defendant's motion to vacate the Judgment of Foreclosure and sale originally signed on April 22, 2009 and entered on May 27, 2009, is denied; and it is further

ORDERED that any temporary restraining order signed as part of the order to show cause staying the sale of this action is vacated; and it is further

ORDERED that the previously appointed Referee of Sale shall give public notice of the time and place of the re-scheduled sale to be held on any Wednesday, except holidays, at the New York County Courthouse, 60 Centre Street, New York, NY in the New York Law Journal and shall otherwise adhere to the directives of the previously entered Judgment of Foreclosure and Sale.

This constitutes the decision and order of this court.

Dated: November 24, 2009
New York, New York



J.S.C.

FILED
NOV. 30 2009
NEW YORK
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