

**Banco Popular N. Am. v TNT Wholesalers, Inc.**

2010 NY Slip Op 30849(U)

April 9, 2010

Supreme Court, New York County

Docket Number: 112967/09

Judge: Doris Ling-Cohan

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4-14-10

**SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY**  
**PRESENT: Hon. Doris Ling-Cohan, Justice** **Part 36**

**BANCO POPULAR NORTH AMERICA,**

**Plaintiff,**

**-against-**

**TNT WHOLESALERS, INC. and WILLIAM BESSETTE,**

**Defendants.**

INDEX NO. 112967/09

MOTION SEQ. NO. 001

**FILED**

APR 14 2010

NEW YORK COUNTY CLERK'S OFFICE

The following papers, numbered 1 - 5 were considered on this motion for summary judgment in lieu of complaint:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>5</u>
Replying Affidavits _____	_____
Cross-Motion: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	<u>3, 4</u>

Upon the foregoing papers, it is ordered that this motion and cross motion are decided as indicated below.

Plaintiff Banco Popular North America commenced this action against defendants TNT Wholesalers, Inc. ("TNT") and William Bessette ("Bessette"), by moving for summary judgment in lieu of complaint, pursuant to CPLR 3213. Plaintiff seeks judgment in the amount of \$75,535.88, plus interest, late charges, costs and disbursements including attorneys' fees, based on a small business line of credit agreement it entered into with defendant TNT and a personal guaranty signed by defendant Bessette. Defendants cross-move to dismiss, pursuant to CPLR 3211, for lack of personal jurisdiction due to plaintiff's alleged failure to properly serve defendants.

CPLR 3213 is accelerated relief, appropriate when plaintiff is suing on an instrument for the payment of money only. A plaintiff seeking to use CPLR 3213 procedures must make out a prima facie

\*2]  
showing based on the terms of the instrument and a defendant's failure to make payments. *A. Stanley Proner, P.C. v Julien & Schlesinger, P.C.*, 134 AD2d 182, 183 (1st Dep't 1987). Once the plaintiff has made such a showing, the defendant must demonstrate the existence of a triable issue of fact to defeat the motion. *Silber v Muschel*, 190 AD2d 727, 728 (2d Dep't 1998).

Summary judgment is granted as to plaintiff's claim against TNT. Defendant TNT has not put forth any argument against granting that portion of the motion, in that it does not deny it entered into a business line of credit agreement with plaintiff, nor does it deny its responsibility for the amount being sought in this action. Further, attached to plaintiff's moving papers is a copy of the Small Business Line of Credit Agreement, signed by TNT, which includes a provision for reasonable attorneys' fees for its collection efforts. See Isak Karlsson, Exh A.

Although both defendants appear to contest personal jurisdiction for failure to be properly served, defendant TNT does not adequately challenge service of process. The only discussion of service on TNT, by its president, is as follows: "A copy of each of the Summons and Motion for Summary Judgment in Lieu of Complaint were also mailed to TNT and me at my home address, 20 North Broadway, #C111, White Plains, New York." Bennette Aff ¶ 16. However, defendant TNT has not argued, or shown, that the service on TNT via the Secretary of State, as stated in the Affidavit of Service of the Summons and Notice of Motion for Summary Judgment in Lieu of Complaint and Affidavit (attached to the moving papers), was improper or invalid. As such, summary judgment is granted in favor of plaintiff and against defendant TNT in the amount of \$76,126.01 (unpaid principal plus late charges), plus interest, costs and disbursements (including reasonable attorneys' fees) as set forth below.

With regard to plaintiff's claim against defendant Bennette, Bennette has sufficiently raised questions of fact as to personal jurisdiction and whether he was properly served with process. Plaintiff contends that Bennette was properly served and submits its process server's affidavit to show that, after

due diligence, Bennette was served pursuant to the CPLR's substituted service provisions, i.e., nail-and-mail service. See CPLR 308(4). The process server's affidavit states that, after 3 attempts at personal service or service on a person of suitable age and discretion, he affixed the service papers at Bennette's "dwelling house/usual place of abode within the state." Tae Hyun Whang Affirmation, Exh E.

Defendant Bennette's address is listed in the Affidavit of Service as "20 North Broadway #C-111, White Plains, NY 10601." *Id.* However, although defendant admits to receiving a mailing of the service papers, he disputes that they were properly affixed to his door, and instead argues they "were left in the vestibule of a common entrance to my apartment and others." Bennette Aff ¶¶ 15-16.

When affidavits of process servers are in conflict with the sworn statements by a defendant, a hearing is required to determine if service was properly made. See *Green Point Savings Bank v Taylor*, 92 AD2d 910, 910-11 (2d Dep't 1983). Due to conflicting affidavits, a traverse hearing is required. The validity of service pursuant to CPLR 308(4) is to be established through a hearing when, as here, there are conflicting affidavits and the truth of the matter is not clearly evident. See *First Union Mortgage Corp. v Silverman*, 242 AD2d 258, 258 (2d Dep't 1997). Although the court's decision to hold a hearing is discretionary (see *De Vore v Osborne*, 78 AD2d 915, 915 [3d Dep't 1980]), failing to hold a jurisdictional hearing is an improvident exercise of that discretion where, as here, "[t]here are numerous issues of fact regarding service of process upon the [defendant]" (*Fabrizio, Radmin, Buskbaum & Co. v Hendler & Murray, P.C.*, 216 AD2d 520, 520 [2d Dep't 1995]), particularly when one of the issues is whether the place of service was defendant's actual dwelling place (*Thomas v Maloney*, 289 AD2d 222 [2d Dep't 2001]).<sup>1</sup>

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<sup>1</sup> Should defendant Bennette decide to waive his personal jurisdictional objection, a time-consuming and costly hearing would not be required, especially given that if this action is ultimately dismissed based upon improper service, plaintiff can simply commence another action shortly thereafter. If defendant waives such hearing, he shall promptly notify opposing counsel and the court within 30 days. Conversely, should plaintiff seek to discontinue this proceeding and re-serve, plaintiff

Accordingly, it is

ORDERED that the motion for summary judgment is granted solely against defendant TNT Wholesalers, Inc. and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant TNT Wholesalers, Inc. in the amount of \$76,126.01, together with interest accrued from January 14, 2009 to the date of entry of judgment at the contract rate, as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements (including attorneys' fees as determined by the Special Referee, provided that plaintiff complies with the below) to be taxed by the Clerk upon submission of an appropriate bill of costs, and the motion is otherwise denied; and it is further

ORDERED that the issue of reasonable attorneys' fees is hereby referred to a Special Referee to hear and determine, as provided in CPLR 4317, except that, in the event of and upon the filing of a stipulation of the parties, another person designated by the parties to serve as referee may determine such issue; and it is further

**ORDERED that failure to serve the order on the Special Referee Clerk as set forth below will be deemed a waiver of plaintiff's claim for attorneys' fees; and it is further**

ORDERED that the cross motion is decided to the extent that this matter is referred to a Special Referee for a traverse hearing to hear and report with recommendation on the issue of service of process with respect to defendant Bennette, 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 such issue; and it is further

ORDERED that **such granting of a traverse hearing and/or referral is conditioned on defendant Bennette/plaintiff serving a copy of this order, within 30 days of entry of this order,**

\_\_\_\_\_ shall promptly so notify within 30 days.

with notice of entry, upon opposing counsel and upon the Special Referee Clerk (60 Centre Street, Room 119M), for the placement of this matter on the Special Referee's calendar; and it is further

**ORDERED** that failure to serve the order on the Special Referee Clerk shall be deemed an abandonment of Bennette's jurisdictional claim, and a denial of defendant Bennette's cross motion to dismiss; and it is further

**ORDERED** that this matter is scheduled for a preliminary conference on June 11, 2010 at 10:00 AM, in Room 428, 60 Centre Street, New York, NY, which may be adjourned by joint letter or letter with copy to the other side, if the Special Referee Clerk has been served and the parties are awaiting a traverse hearing.

This is the decision and order of the court.

Dated: 4/9/10

  
DORIS LING-COHAN, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if Appropriate:  DO NOT POST

J:\TRAVERSE\Banco Popular, aj in lieu compl - denied & traverse hearing.wpd

**FILED**  
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NEW YORK  
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