

**North Fork Bank v McClain**

2010 NY Slip Op 31112(U)

April 15, 2010

Supreme Court, Nassau County

Docket Number: 18866/00

Judge: F. Dana Winslow

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice  
TRIAL/IAS, PART 5  
NASSAU COUNTY**

**NORTH FORK BANK,**

**Plaintiff,**

**MOTION DATE: 2/2/10**

**- against -**

**MOTION SEQ. NO. 005  
INDEX NO.: 18866/00**

**SHERMAN McCLAIN, a/k/a SHERMAN  
CARL BOLLING, JR.,**

**Defendant.**

**The following papers read on this motion (numbered 1- 3):**

**Order to Show Cause.....1**  
**Affirmation in Opposition.....2**  
**Reply Affirmation.....3**

SHERMAN CARL BOLLING, JR. ("BOLLING") brings this Order to Show Cause seeking to reargue and renew the prior order of this Court, dated January 31, 2008 and entered on February 4, 2008 (the "Prior Order"), and upon renewal or reargument, to vacate the Prior Order. This is an action to recover the balance due on a Retail Installment Contract dated January 13, 1998 (the "Retail Installment Contract"), which was reduced to a Judgment in the amount of \$20,815.16, entered on February 16, 2005 (the "Judgment"). For a complete recitation of the facts and procedural history in this action, the Court refers to the above-referenced papers and all prior determinations in this action, including: the Prior Order; the Judgment; the Order entered December 27, 2006; and the Order entered May 24, 2004 [attached as Motion Exhibits F-I].

The Prior Order granted plaintiff's application to amend the caption and the Judgment to provide that the defendant SHERMAN McCLAIN is also known as SHERMAN C. BOLLING, JR. BOLLING claims that he is not a proper defendant in this action, because the action was commenced against, and defended by, a different

individual, and BOLLING was never served with process. Alternatively, BOLLING seeks to vacate or modify the income execution on his salary pursuant to **CPLR §5231(c)** or **CPLR §5231(i)**, on the ground that the amount being garnished (\$43,240.14), as indicated on his direct deposit pay statement, exceeds the total amount of the Judgment.

BOLLING's application is rife with incongruities and contradictions that cast doubt upon his veracity. BOLLING attempts to persuade the Court that the entire matter is the result of mistaken identity. He succeeds only in raising the specter of fraud.

BOLLING claims that he is not the SHERMAN McCLAIN who is the named defendant in this action. He asserts that, from birth and at the time the action was commenced and served, his name was Sherman McClaine with an "e." The SHERMAN McCLAIN in the caption and on the Retail Installment Contract is spelled without the final "e." In February of 2001, BOLLING states, he adopted his present name: "Sherman Carl Bolling, Jr." BOLLING submits copies of his birth certificate (the "Birth Certificate"), which refers to Sherman Carol McClaine born on July 8, 1965, and the order granting the petition to change his name, entered on February 15, 2001 (the "Name Change Order") [Motion Exh. A].

The above argument attempts to turn a spelling irregularity into a matter of substance. If BOLLING was the intended defendant -- that is, the individual who incurred the debt -- the spelling of the last name may be considered a ministerial error that may be corrected in the absence of prejudice. *See CPLR §2001*. The real question is whether or not BOLLING was the proper defendant and had notice of the action.

BOLLING is less than forthcoming on this issue. In his original Affidavit in Support, BOLLING implies that he is not the proper defendant: ("I was never the defendant in this action." [Affidavit In Support, ¶3]) He implies that his father, Sherman Bolling, Sr. ("Bolling Senior"), was the intended defendant. ("That Sherman McClain is my father. . . This action was commenced against my father, and not myself." [Affidavit in Support, ¶3]) This is not only incredible and devoid of evidentiary support, but also inconsistent with the evidence on file. There is no evidence that Bolling Senior ever used the name McClain. There is no evidence that Bolling Senior entered into the Retail Installment Contract using the name McClain (or had identification in the name of McClain that would have been acceptable to plaintiff).

As the opposition states, the evidence points to BOLLING as the intended and proper defendant. The Credit Application underlying the Retail Installment Contract (the "Credit Application") identifies the applicant as Sherman McClaine (with the "e"), whose birthday is July 8, 1965 (the same birthday as indicated on the Birth Certificate). Bolling

Senior was born in 1947. [Computer print-out of New York State Unified Court System criminal case record, attached as Motion Exh. C] Further, the Court notes that the signature on the Credit Application is BOLLING's. No expertise is required to discern that the handwriting on the Credit Application, the Retail Installment Contract and the Name Change Order all contain the same distinctive feature – namely, two dots under the lower case “c” in McClain(e). Insofar as BOLLING admits to having filled out the Name Change Order, he can hardly deny that he also filled out the Credit Application and signed the Retail Installment Contract. Although he makes much of his father's “long criminal history that includes forgery,” BOLLING cannot maintain that the Credit Application and Retail Installment Contract were forged based solely upon evidence of a 1980 forgery conviction, the context and circumstances of which are unknown.

In his Reply, BOLLING abandons the insinuation that he was not the intended defendant. Instead, he states that he takes “no position” with respect to whether or not he was the party who entered into the Retail Installment Contract. [Reply Affidavit, ¶ 3] The Court considers this disingenuous, at best. The Court finds that BOLLING was the individual who incurred the debt under the Retail Installment Contract, and therefore, was the intended and proper defendant in this action.

The question then becomes one of due process: (1) was BOLLING properly served with the Summons and Complaint; and (2) was such service (notwithstanding the misspelled name) sufficient to confer notice upon BOLLING that he was the intended defendant and to provide him an opportunity to defend the claims against him.

BOLLING asserts that he was never served with process and therefore the Court lacked jurisdiction to render a judgment against him. The Affidavit of Service, sworn to on December 13, 2000 (the “Affidavit of Service”), attests to service of the Summons and Verified Complaint upon Sherman McClain, at 821 Broadway, Westbury, N.Y. (“821 Broadway”), pursuant to CPLR §308(2) by delivery to James McClain, a relative, who is specifically described therein. BOLLING asserts that 821 Broadway was his father's address and that he (BOLLING) did not live there. He claims that he has no relative by the name of James McClain and that, to his knowledge, no one by that name was living at the premises at the time of service.

In his Affidavit in Support, BOLLING claims that at the time this action was commenced and service of process was attempted, BOLLING resided at 175-18 139<sup>th</sup> Road in Jamaica Queens (the “Jamaica Address”). Prior to that, he states, he was “in the military.” For the past five years (since 2005), he has lived at 124 Brown Avenue, Westbury, NY. [Affirmation in Support, ¶3.] (The Court notes that 124 Brown Avenue is actually in Hempstead, NY, as BOLLING acknowledges in his Reply Affidavit, ¶6.)

The evidence is sparse and contradictory. BOLLING submits what purports to be a Westlaw "Motor Vehicle Record," which indicates that a vehicle was registered to Sherman C. Bolling Jr., that the registration was renewed on January 3, 2001, and that the registrant's mailing address was the Jamaica Address. He also submits a purported National Grid "Tenants for Service Account List," which shows an account for Sherman Bolling, Jr. at the Jamaica Address from June 2000 until February 2005. Although these submissions have potential evidentiary value, neither document is authenticated, except by BOLLING, and neither proves that BOLLING did not maintain a dwelling or usual place of abode at 821 Broadway in December of 2000.

BOLLING's present assertion that he did not live at 821 Broadway at the time of commencement is contradicted by his own prior sworn statement. The Name Change Order entered February 15, 2001 (after commencement of this action) contained a statement that BOLLING's "present address is 821 Broadway, Westbury NY, 11580." The Name Change Order directed BOLLING to publish a legal notice of the name change, including the statement of his present address. In order for that address to appear on the Name Change Order, BOLLING would have had to sign a sworn petition listing 821 Broadway as his present address. Does BOLLING now admit that he committed perjury on the petition?

BOLLING did not address this contradiction until it was highlighted in plaintiff's opposition. In his Reply Affidavit, BOLLING asserts that he "used" the 821 Broadway address because 821 Broadway was still the address on his driver's license. If true, that would tend to confirm that he still maintained a residence at 821 Broadway, particularly since a person is required to notify the Department of Motor Vehicles ("DMV") within ten days of any change of address. **Vehicle and Traffic Law §505(5)**. BOLLING claims that he had moved to Jamaica in June of 2000 but had not yet changed that information with the DMV (even though he did change the address on his vehicle registration in January 2001, prior to filing the name change petition). If his driver's license did not reflect his true address, BOLLING fails to explain why he did not use a utility bill or other form of address verification for purposes of his name change petition. Nor does he explain why, in his Affirmation in Support, he avoided mention of ever residing at 821 Broadway, stating that he was "in the military" prior to moving to the Jamaica Address. Nor does he explain why the 1998 Credit Application and Retail Installment Contract list 86 Cross Street, Locust Valley, NY as his address. BOLLING's obfuscation and inadequate substantiation of his address history undermine his position.

As to the question of whether or not BOLLING had notice of the action, BOLLING is silent. Coincidentally, his name change occurred within two months of the purported service of process.

BOLLING states that he never appeared in this action. He claims that it was his father, Bolling Senior, who retained attorney James Flanagan, Esq., filed an answer, appeared in conference, and opposed summary judgment. With respect to the motion to amend the caption and Judgment to add BOLLING's name, BOLLING claims that he never received any of the "paperwork" regarding the motion, nor the Prior Order which granted it. He claims not to know if there was any opposition to the motion. [Affidavit in Support, ¶11.] BOLLING states that he first learned of the Judgment when his salary was garnished.

BOLLING's denial of knowledge of the proceedings or participation in this action is dubious, at best. First, the Court has reviewed the entire file in this matter, and notes that the signatures on the Verified Answer and the Affirmation in Opposition to the original summary judgment motion appear to be identical to the signature on the Credit Application, and bear the same distinctive handwriting gesture referred to above. Second, the record contains evidence of service of the Prior Order and the underlying motion upon BOLLING by certified mail at 124 Brown Avenue, Hempstead, NY 11550. BOLLING admits that this was his address at the time in question. His nonspecific and unsubstantiated denial of receipt raises no question of fact. *See Rosario v. Beverly Rd. Realty Co.*, 38 AD3d 875. Third, although no formal opposition was submitted to the motion to amend the Judgment, the Court received a letter from Sherman C. Bolling, 124 Brown Avenue, Hempstead, NY 11550 dated September 6, 2006. The letter makes the same argument as made here (that Sherman McClain is not Sherman Carl Bolling, Jr.) based upon the same proof (the spelling of the name "McClaine" with an "e" on the Birth Certificate). Did BOLLING send the letter? Did he know about it? The file maintained by the County Clerk contained this letter and was apparently examined by BOLLING's attorney on June 18, 2009. Why is there no mention of this letter in the present application?

The record in this case is cloudy. The Court suspects that it is intentionally so. BOLLING cannot plausibly deny his own involvement in the underlying credit transaction. BOLLING never explains why he changed his name shortly after the commencement of an action against SHERMAN McCLAIN. BOLLING also does not explain why Bolling Senior would litigate an action in which he was neither the named nor intended defendant. Was there some undisclosed agreement or understanding between BOLLING and his father? Did BOLLING enter into the Retail Installment Contract to obtain financing for his father (disqualified by credit or criminal history)? Did the father and son understand that Bolling Senior was the true obligor and would deal with any problems arising from a default? Did BOLLING intentionally avoid participation in this litigation, by changing his name and ignoring notice of proceedings? Did

BOLLING and Bolling Sr. conspire to render the Judgment unenforceable against either one of them?

The Court cannot answer these questions. The Court can only determine, in view of the totality of the record before it, whether due process requires it to vacate the Prior Order and Judgment, and to hold a hearing on the question of personal jurisdiction over BOLLING. There is substantial evidence that BOLLING was the intended and proper defendant, that service of process was validly effected, that BOLLING was aware of the action and his own potential liability, and that his non-participation was knowing and intentional. BOLLING's application rests on nothing more than his own bare denials and the inconclusive and inadmissible documentary evidence that he did not reside at the address where process was served. BOLLING's general lack of candor in the present application casts a shadow upon the reliability of his statements. The application lacks sufficient substance to disturb the Prior Order amending a five-year-old Judgment.

With respect to the alternative relief sought, to vacate or modify the income execution, the Court notes that the Income Execution [Motion Exh. E] reflects the correct amount of the Judgment. It is unclear why BOLLING's direct deposit pay statement reflects garnishments in excess of \$43,240.14. The Court cannot ascertain whether this is error, or whether the amount indicated includes any other outstanding obligations. On the record presented, the Court cannot grant the alternative relief sought, but will reconsider this issue upon presentation of evidence as to the derivation of the amount garnished.

Based upon the foregoing, it is

ORDERED, that BOLLING's motion is **denied** in its entirety. This constitutes the decision and Order of the Court.

Dated: 4/15/10

  
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J.S.C.

**ENTERED**  
APR 29 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE