

U.S. Bank, N.A. v Petrez
2010 NY Slip Op 32472(U)
April 22, 2010
Supreme Court, Queens County
Docket Number: 17313/08
Judge: Patricia P. Satterfield
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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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 U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, Index No.: 17313/08
 FOR CSAB MORTGAGE-BACKED PASS-THROUGH
 CERTIFICATES, SERIES 2006-2 Date of Traverse: 1/15/10
 3476 Stateview Boulevard Final Submission Date: 2/22/10
 Ft. Mill, SC 29715

Plaintiff,

Decision and Order After Traverse

-against-

WILLIAM PETREZ, et. al.,

Defendants.

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 This is an action commenced by plaintiff U.S. Bank National Association, as Trustee for CSAB Mortgage-Backed Pass-Through Certificates, Series 2006 (“plaintiff”) on July 11, 2008, to foreclose upon a note and mortgage given by defendant William Petrez (“defendant”), in the amount of \$642,750.00 to Wall Street Mortgage Bankers Ltd. d/b/a Power Express (“Wall Street Mortgage Bankers”) on May 17, 2006, on property located at 86-06 102nd Avenue, Ozone Park, New York. Upon his default in making the required payment on April 1, 2008, and each subsequent payment thereafter, plaintiff, as purported assignee of the note and mortgage, from Mortgage Electronic Registration Systems, Inc. (“MERS”), as nominee of Wall Street Mortgage Bankers, by instrument dated July 9, 2008, commenced the instant action. Upon defendant’s default in answering the complaint, this Court by order dated October 15, 2008, appointed a referee to ascertain and compute the amount due to plaintiff and signed thereafter, on February 3, 2009, a judgment of foreclosure and sale, which was entered on February 19, 2009. By decision and order dated August 19, 2009, defendant’s motion to vacate the Notice of Sale and Judgment of Foreclosure dated June 11, 2008, was granted to the extent that the matter was set down for a traverse hearing to determine whether this Court has jurisdiction over defendant. The traverse was held January 15, 2010; plaintiff was granted leave to address the issue of what constitutes a person of suitable age and discretion under CPLR 308(2), in instances in which the person served does not speak English as a first language. Final submission was February 22, 2010.

CPLR 308(2) authorizes service, inter alia, by delivery of the summons and complaint within the State to “a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served.” Where the validity of service of the summons and complaint is challenged, the plaintiff has the burden of proving proper service by a preponderance of the evidence. Munoz v. Reyes, 40 A.D.3d 1059 (2nd Dept. 2007); Bankers Trust Co. of California,

N.A. v. Tsoukas, 303 A.D.2d 343 (2003); Spangenberg v. Chaloupka, 229 A.D.2d 482 (1996); Kanner v. Gerber, 197 A.D.2d 673 (1993). It is beyond dispute that “[s]ervice is only effective... when it is made pursuant to the appropriate method authorized by the CPLR.” Markoff v. South Nassau Community Hosp., 61 N.Y.2d 283, 288 (1984); Feinstein v. Bergner, 48 N.Y.2d 234, 241 (1979); Foy v. 1120 Ave. of Americas Associates, 223 A.D.2d 232 (1996). Plaintiff, at traverse, thus has the burden of establishing by a preponderance of the credible evidence that jurisdiction over a defendant was obtained. Long Island Sav. Bank, FSB v. Meliso, 229 A.D.2d 478 (1966); Matter of Griffin v. Griffin, 215 A.D.2d 386 (1995); Kanner v. Gerber, 197 A.D.2d 673 (1993). Plaintiff met its burden. Here, plaintiff contends that service was effected properly by service upon a person of suitable age and discretion.

At the traverse hearing, Constantinos Philippou (“Philippou”), plaintiff’s process server, testified that on July 21, 2008, he picked up copies of the summons, complaint and statutory notice from his employer, A&J Process Service Company, and, according to his work ticket, he went to 40 Durhamoc Lane, North Babylon, New York, defendant’s residence, to effect service. He further testified that in response to his knocking on the door, a “lady answered the door,” told him “she was cleaning the house,” told him her name “was Leonore,” and he added: “The last name I think was B-A-L-A-B-A R-C-A and she received the papers and I walked away.” He also testified that she spoke to him in English, provided him with her first name and last name, and denied living at the residence, but stated that “she was there housecleaning.” Philippou also testified that upon completion of service, he entered a description of the person served on the work ticket and the service in his service log, and thereafter, on March 20, 2007, mailed a copy of the summons and complaint to defendant on July 22, 2009. The affidavit of service stated that a “Leonore Balacra-House Cleaner” was served, as a person of suitable age and discretion, to effectuate service upon defendant at his residence at 40 Durhamoc Lane, North Babylon, New York, and that the person served reported that defendant was not in the military.

Defendant called two witnesses: Leonore Balabarca, defendant’s mother-in-law, and defendant. Mrs. Balabarca testified that she lives in Lima, Peru, and that for the last ten years, she comes to the United States “once a year to renew [her] residency and to see [her] family,” including her daughter, defendant’s wife. In response to questions asked on direct examination, Ms. Balabarca testified:

- Q. Do you remember a gentleman coming to the door to deliver mail or an envelope?
- A. Yeah, possibly. I think I remember. There is so much mail.
- Q. Do you remember someone ringing the doorbell and asking if Mr. Petrez was at home?
- A. If they had asked about him, I would have answered and recognized he is the owner of the house.

...

Q. But specifically, do you remember a delivery on or about July 31st?

A. Exactly the day, I don't know. I know that something was brought to the house. I know that I signed for it. It was an envelope, a package. I don't remember exactly.

Mrs. Balabarca also testified that the house was a mess because they were painting and that she put deliveries on the table a few feet from the door, that she did not tell defendant or her daughter about the delivery, adding: "The truth is I had forgotten because I was very much into my soap opera and all the things about the house. I had completely forgotten about it." On cross examination, Mrs. Balabarca testified that she has been a resident alien of the United States since 1989. At one point during questioning, counsel for plaintiff requested that "the record [] reflect that the witness started answering that last question before it was interpreted in the Spanish language. The questions and answers related to the location of Mrs. Balabarca's identification, and were as follows:

Q. Do you have it with you now? Did you bring it?

A. No. I left it at home.

Q. In Peru or in Babylon?

A. No, in my daughter's house.

Defendant testified that Mrs. Balabarca speaks "a couple of words" in English, that he does not speak Spanish and communicates with Mrs. Balabarca through his wife. He further testified that she did not tell him that on July 21, 2008, she received a delivery for him. He conceded that Mrs. Balabarca was staying with them and helping his pregnant wife out with housework, and "could have been helping cleaning out the house or cleaning the house."

The threshold issue is whether Mrs. Balabarca, whose first language is Spanish, was a person of suitable age and discretion. In Roldan v. Thorpe, 117 A.D.2d 790 (2nd Dept. 1986), the Appellate Division, adopted the standard for determining whether a person served is a person of "suitable age and discretion," articulated by a nisi prisi court, stating [117 A.D.2d at 791-792]:

As the court stated in City of New York v. Chemical Bank (122 Misc.2d 104, 108-109, 470 N.Y.S.2d 280):

“The person to whom delivery is made must objectively be of sufficient maturity, understanding and responsibility under the circumstances so as to be reasonably likely to convey the summons to the defendant. Thus, delivery to adult relatives, employees, co-workers and apartment-house doormen as persons of suitable age and discretion, has been sustained. (Citations omitted).

Here, counsel for plaintiff submitted several cases addressing the language issue, including Ralph C. Sutro Co. v. Valenzuela, 113 A.D.2d 793 (2nd Dept. 1985), an analogous case in which the Appellate Division, Second Department, in upholding service, stated:

. . . the evidence establishes the adequacy of substituted service pursuant to CPLR 308(2). We find no merit to Carlos' contention that his mother-in-law, Mrs. Rico, was not a person of suitable age and discretion for the purpose of receiving process (see, e.g., Nuez v. Diaz, 101 Misc.2d 399, 421 N.Y.S.2d 770). By her own testimony, Mrs. Rico (through an interpreter) acknowledged that she knew the served papers were intended for Carlos, and she delivered them to him when he returned from work that same day. (Mrs. Rico made no similar acknowledgment as to Sonia, and in any event, the plaintiff did not seek to establish that substituted service had been made upon Sonia.)

Resolution of the question of the sufficiency of Mrs. Balacrara's English language skills turns on the issue of credibility. It is well-recognized that issues of credibility are primarily to be determined by the trier of fact who had the opportunity to view the witness, hear the testimony, and observe the demeanor. See, Cirami v. Taromina, 243 A.D.2d 437 (1997) [stating that issues of credibility are primarily to be determined by the trier of fact who had the opportunity to view the witness, hear the testimony, and observe the demeanor]; Darmetta v. Ginsburg, 256 A.D.2d 498 (1998)[stating that determinations regarding the credibility of witnesses are for the fact-finders, who had the opportunity to see and hear the witnesses]; Vega v. City of New York, 194 A.D.2d 537 (1993)[stating that issues of credibility are properly determined by the hearing court]. Here, this Court finds credible the testimony of the process server who spoke to Mrs. Balacrara in English, whose testimony, when coupled with Mrs. Balacrara's own admissions during her testimony of her status as a resident alien since 1989, her acknowledged receipt of the documents from a man asking for her son-in-law, her forgetting to give him the documents because of the house being in disarray and her focus on the soap opera, is sufficient to establish by a preponderance of the credible evidence that service was made upon defendant by service upon “Leonore Balacrca-House Cleaner.” See, Holtzer v. Stepper, 268 A.D.2d 372 (2000); Avakian v. De Los Santos, 183 A.D.2d 687 (1992); Frankel v. Schilling, 149 A.D.2d 657 (1989).

Based upon the foregoing, this Court determines that personal jurisdiction over defendant Petrez was obtained, and that this Court thus has jurisdiction over this defendant. Accordingly, the motion to vacate the judgment of foreclosure sale dated February 3, 2009, and entered February 19, 2009, is denied. The stay heretofore imposed pending a determination of the jurisdictional question hereby is lifted, and plaintiff is granted leave to proceed with this foreclosure action.

Dated: April 22, 2010

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J.S.C.