

**Community Preserv. Corp. v Sahara Realty Dev.,  
LLC**

2011 NY Slip Op 30437(U)

February 8, 2011

Sup Ct, Queens County

Docket Number: 3238/10

Judge: Augustus C. Agate

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## MEMORANDUM

SUPREME COURT : QUEENS COUNTY  
IA PART: 24

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THE COMMUNITY PRESERVATION  
CORPORATION,

x

INDEX NO. 3238/10

MOTION SEQ. NO. 1

- against -

BY: AGATE, J.

SAHARA REALTY DEVELOPMENT, LLC,  
et al.

Motion Date: 09/28/10

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 x

Cal No. : 6

Plaintiff, as Lender, and defendant Sahara Realty Development, LLC (Sahara) as Borrower, entered into a building loan agreement (loan agreement) dated March 28, 2007, pursuant to which plaintiff loaned Sahara the principal amount of \$3,100,000.00, and Sahara executed and delivered to plaintiff, a building loan note (note) as of the same date to evidence the loan. As security for the payment of the indebtedness under the Note and Loan Agreement, defendant Sahara executed and delivered a “BUILDING LOAN MORTGAGE, ASSIGNMENT OF LEASES AND RENTS AND SECURITY AGREEMENT” (subject mortgage) dated March 28, 2007 on the real property known as 26-20 and 26-22 21<sup>st</sup> Street, Astoria New York (Block 885, Lot 40 f/k/a Lots 40 and 41) (subject premises). As further security, defendants Shelley A. Mubdi, Farooque B. Chaudhury and Eal Wha Park (guarantors), executed and delivered to plaintiff, a “GUARANTY OF PAYMENT” (guaranty) also dated March 28, 2007.

Plaintiff commenced this action by filing a copy of the summons and complaint in the Office of the Clerk of Queens County on February 8, 2010, along with the notice of pendency in this action. It seeks to foreclose the mortgage and to recover a money judgment against defendants Sahara, Mubdi, Chaudhury and Park, in the event a deficiency remains after sale of the subject premises. In its complaint, plaintiff alleges that defendant Sahara defaulted under the terms of the note, subject mortgage and loan agreement by failing to pay the balance of the principal of the mortgage debt which matured and became due on December 31, 2008, despite due demand. Plaintiff also alleges that it has elected to declare the entire balance of principal with interest due and payable.

Defendants Sahara, Mubdi, Chaudhury and Park served a single, combined answer, admitting certain allegations of the complaint, and denying others, and asserting various affirmative defenses.

Defendants Decorama Building & Plumbing Supply, Inc. d/b/a Decorama Building & Plumbing Supply, New York City Environmental Control Board and Indymac Bank are in default in appearing or answering the complaint. Plaintiff did not serve defendants “John Doe #1” through “John Doe #12” with process.

Plaintiff moves to strike the answer of defendants Sahara, Mubdi, Chaudhury and Park, and for summary judgment in its favor against defendants Sahara, Mubdi, Chaudhury and Park, for leave to appoint a referee to ascertain and compute the amount due and owing plaintiff, for leave to amend the caption deleting the names “John Doe

#1” through “John Doe #12” inclusive. Defendants Sahara, Mubdi, Chaudhury and Park oppose the motion.

Plaintiff determined defendants “John Doe #1” through “John Doe #12” inclusive are unnecessary parties to this action. As a consequence, such defendants shall be deleted from the caption. That branch of the motion for leave to amend the caption to delete reference to defendants “John Doe #1” through “John Doe #12” is granted.

With respect to that branch of the motion by plaintiff pursuant to CPLR 3212 for summary judgment against defendants Sahara, Mubdi, Chaudhury and Park and to strike those defendants’ answer, 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” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). On a motion for summary judgment in an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default (*see Wells Fargo Bank, N.A. v Webster*, 61 AD3d 856 [2009]; *Republic Natl. Bank of N.Y. v O’Kane*, 308 AD2d 482, 482 [2003]; *see Aames Funding Corp. v Houston*, 44 AD3d 692, 693 [2007]).

In support of its motion, plaintiff offers, among other things, a copy of the pleadings, the note, subject mortgage, loan agreement and guaranty, a copy of a notice

of default, an affirmation of regularity of its counsel, and the affidavit of Helene S. Rudolph, a vice president and deputy general counsel of plaintiff.

These submissions establish plaintiff's prima facie case to summary judgment as against defendants Sahara, Mubdi, Chaudhury and Park (*see East New York Savings Bank v Carlinde Realty Corp.*, 54 AD2d 574 [1976], *affd* 42 NY2d 905 [1977]). The burden shifts to defendants Sahara, Mubdi, Chaudhury and Park to raise a triable issue of fact regarding their defenses (*see Cochran Inv. Co., Inc. v Jackson*, 38 AD3d 704 [2007]; *First Nationwide Bank, FSB v Goodman*, 272 AD2d 433 [2000]).

The first affirmative defense asserted by defendants Sahara, Mubdi, Chaudhury and Park is based upon lack of proper service of process.

Section 311-a(a) of the Limited Liability Company Law provides that service of process upon a limited liability company may be made pursuant to Article 3 of the Limited Liability Company Law. Under Article 3 of the Limited Liability Company Law, service may be made on the Secretary of State (*see e.g.* Limited Liability Company Law §§ 303, 304). The affidavit of service of the licensed process server dated February 12, 2010 with respect to defendant Sahara indicates service of the summons and complaint, by personally delivering to and leaving with Donna Christie, a person authorized by the Secretary of State to receive such service, at the Office of the Secretary of State in Albany, duplicate copies of such process together with the statutory fee. Such affidavit of service constitutes prima facie evidence of proper service of process upon defendant Sahara pursuant

to CPLR 311-a(a) (*see Trini Realty Corp. v Fulton Center LLC*, 53 AD3d 479 [2008]). Defendant Sahara has raised no issue of fact rebutting this affidavit of service (*see id.*; *126 Spruce Street, LLC v Club Cent., LLC*, 15 Misc 3d 538 [2007]). Under such circumstances, a hearing to determine whether process was properly served upon defendant Sahara is unnecessary (*see generally Manhattan Sav. Bank v Kohen*, 231 AD2d 499 [1996]; *Sando Realty Corp. v Aris*, 209 AD2d 682 [1994]).

The affidavit of service dated February 11, 2010 by a licensed process server indicates service upon defendant Mubdi by in-hand delivery of a copy of the summons and complaint to Mubdi on February 9, 2010 at 150-24 86<sup>th</sup> Avenue, Briarwood, New York. This affidavit constitutes prima facie proof of proper service upon defendant Mubdi pursuant to CPLR 308(1) (*see Skyline Agency, Inc. v Ambrose Coppotelli, Inc.*, 117 AD2d 135, 139 [1986]). Defendant Mubdi's bare unsworn denial of service in the unverified answer is insufficient to dispute the veracity and contents of the affidavit (*see Chemical Bank v Darnley*, 300 AD2d 613 [2002]). In addition, to the extent defendant Mubdi asserts in the affirmative defense that plaintiff failed to serve him with a copy of the summons and complaint by mail, CPLR 308(1) does not require an additional mailing of the summons. Minimum standards of due process require that the court's exercise of personal jurisdiction over an individual be predicated upon a proper jurisdictional basis, adequate notice and an opportunity to be heard (*see World-Wide Volkswagen Corp. v Woodson*, 444 US 286 [1980]; *Mullane v Central Hanover Trust Co.*, 339 US 306 [1950]). Personal delivery of written

notice within the State constitutes adequate notice in a civil lawsuit (*see Mullane v Central Hanover Trust Co.*, 339 US 306 [1950], *supra*). Under such circumstances, where defendant Mubdi has failed to substantiate the conclusory allegation that he never was served with any court papers, a hearing on the issue of proper service of process is not necessary (*see Wieck v Halpern*, 255 AD2d 438; *Green Point Savs. Bank v Clark*, 253 AD2d 514 [1998]).

The affidavit of service dated February 11, 2010 by a licensed process server indicates defendant Chaudhury was served by service of a copy of the summons and complaint upon one “AZVAA CHAUDHURY DAUGHTER” at 83-39 168<sup>TH</sup> Place, Jamaica Hills, New York, the actual dwelling place of defendant Chaudhury, and a subsequent mailing of a copy of process to defendant Chaudhury at the same address. The affidavit of service dated February 11, 2010 by a licensed process server indicates defendant Park was served by service of a copy of the summons and complaint upon one “YUN HEE PARK WIFE” at 10 Holiday Park Dr., Williston Park, New York, the actual dwelling place of defendant Park, and a subsequent mailing of a copy of process to defendant Park at the same address. These affidavits constitute prima facie evidence of proper service pursuant to CPLR 308(2) (*see Beneficial Homeowner Service Corp. v Girault*, 60 AD3d 984 [2009]).

To the extent defendants Chaudhury and Park assert plaintiff failed to serve them in hand, personal service of a copy of the summons and complaint pursuant to CPLR 308(2), does not require in-hand delivery or additional attempts to deliver a copy of the summons in hand (*cf.* CPLR 308[4]).

“It is hornbook law that a constitutionally proper method of effecting substituted service need not guarantee that in all cases the defendant will in fact receive actual notice (*Dobkin v Chapman*, 21 NY2d 490, 502)” (*Bossuk v Steinberg*, 58 NY2d 916, 918 [1983]). The method of service prescribed in CPLR 308(2) is one “reasonably calculated, under all the circumstances, to apprise [the] interested part[y] of the pendency of the action” (*Mullane v Central Hanover Trust Co.*, 339 U.S. 306, 314, [1950], *supra*) (*Bossuk v Steinberg*, 58 NY2d 916, 918-919 [1983]). The bare unsworn denial of mailing in the unverified answer of defendants Chaudhury and Park is insufficient to dispute the veracity of the affidavits of service relative to the subsequent mailing (*see Indymac Bank, F.S.B. v Kamen*, 68 AD3d 931 [2009]; *Cavalry Portfolio Servs., LLC v Reisman*, 55 AD3d 524, 525 [2008]; *Remington Invs. v Seiden*, 240 AD2d 647 [1997]).

Under such circumstances, a hearing to determine whether process was properly served upon defendants Chaudhury and Park is unnecessary (*see Beneficial Homeowner Service Corp. v Girault*, 60 AD3d 984 [2009], *supra*).

That branch of the motion to dismiss the affirmative defense raised by defendants Sahara, Mubdi, Chaudhury and Park based upon improper service of process is granted.

To the extent defendants Sahara, Mubdi, Chaudhury and Park assert plaintiff violated and failed to comply with RPAPL 1302 and 1304, and Banking Law § 595-a, they have failed to demonstrate the subject mortgage was a subprime mortgage,

or a high-cost home loan or otherwise was subject to the requirements of RPAPL 1302 and 1304 and Real Property Law § 595-a (*see e.g. Irwin Mtge. Corp. v Davis*, 72 AD3d 743 [2010]). In addition, to the extent defendants Sahara, Mubdi, Chaudhury and Park assert plaintiff violated Banking Law § 6-1, they have failed to demonstrate that the mortgage loan was a “high-cost home loan,” as that term was defined in that section, as of the date of the making of the subject loan (*see* Banking Law § 6-1[1][d]; former Banking Law § 6-1[e][i] [L 2002, c 626, § 1, eff. April 1, 2003]). Prior to the amendment (effective October 14, 2007 [L 2007, c 552, § 2]) to former Banking Law § 6-1(e)(i) (L 2007, c 552, § 1), mortgage loans in principal amounts exceeding \$300,000.00 were not covered by the statute. To the extent defendants Sahara, Mubdi, Chaudhury and Park assert plaintiff violated Banking Law § 6-m, that statute was enacted and made effective on August 5, 2008 (*see* L 2008, c 472, § 5), prior to the origination of the subject mortgage. That branch of the motion by plaintiff to dismiss the first, third and fourth affirmative defenses asserted by defendants Sahara, Mubdi, Chaudhury and Park is granted.

The second and fifth affirmative defenses asserted by the answer of defendants Sahara, Mubdi, Chaudhury and Park are based on their claim that plaintiff failed to provide them with a notice of default under the note and mortgage. The mortgage matured, and was due and payable on April 1, 2009, and plaintiff was not required to provide defendants Sahara, Mubdi, Chaudhury and Park with a notice of default under the mortgage or note prior to commencement of this foreclosure action (*see Gerrity Co. Inc. v Riscica*,

214 AD2d 866 [1995]; *Syracuse Trust Co. v First Trust & Deposit Co.*, 239 App Div 586 [1933]). In any event, plaintiff provided notice of default to defendant Sahara. Furthermore, defendants Mubdi, Chaudhury and Park waived notice of any default in the guaranty. That branch of the motion by plaintiff to strike the second and fifth affirmative defenses in the answer of defendants Sahara, Mubdi, Chaudhury and Park is granted.

To the extent defendants Sahara, Mubdi, Chaudhury and Park dispute the exact amount owed to plaintiff, such dispute does not preclude the granting of summary judgment as to liability (*see Layden v Boccio*, 253 AD2d 540 [1998]). The dispute may be resolved after a reference pursuant to RPAPL 1321 (*see Crest/Good Mfg. Co. v Baumann*, 160 AD2d 831 [1990]).

To the extent defendants Sahara, Mubdi, Chaudhury and Park assert Daniel J. Wheeler, the vice-president of plaintiff has indicated a willingness to forbear from continuing prosecution of this action, they have failed to demonstrate that the parties or their counsel entered into any agreement in open court, a written stipulation subscribed by plaintiff or its attorney, or in the form of an order and entered (*see CPLR 2104*). Defendants Sahara, Mubdi, Chaudhury and Park also have failed to produce any evidence that under the terms of the subject mortgage, plaintiff is obligated, at this post-maturity juncture, to enter into a forbearance agreement. Moreover, they executed a letter dated February 23, 2010, wherein they acknowledged any negotiations undertaken by plaintiff would not constitute a waiver by plaintiff of any of its rights under the mortgage.

Defendants Sahara, Mubdi, Chaudhury and Park have failed to come forward with any evidence showing the existence of a triable issue of fact with respect to any defense. Plaintiff, therefore, is entitled to summary judgment in its favor against them (*see Fed. Home Loan Mtge. Corp. v Karastathis*, 237 AD2d 558 [1997]; *DiNardo v Patcam Serv. Station*, 228 AD2d 543 [1996]). That branch of the motion by plaintiff for summary judgment in its favor against defendants Sahara, Mubdi, Chaudhury and Park is granted.

That branch of the motion for leave to appoint a referee is granted.

Settle order.

Dated: February 8, 2011

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AUGUSTUS C. AGATE, J.S.C.