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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY

Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

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DEUTSCHE BANK TRUST COMPANY AMERICAS AS TRUSTEE,
9350 Waxie Way
San Diego, CA 92123

Index No: 1070/08
Motion Date: 2/9/11
Motion Cal. No.: 4
Motion Seq. No.: 4

Plaintiff,

-against-

DANILO PICON, MAGALYS T. PICON, MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR FIRST NATIONAL BANK OF ARIZONA, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, JOHN DANIELS, YVETTE "DOE"

Defendants.

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The following papers numbered 1 to 16 read on this motion by defendant for an order (1) to vacate the default judgment issued in the above captioned action and to have the above captioned action dismissed for lack of jurisdiction over the defendant due to a lack of standing; (2) to vacate the default judgment issued in the above captioned action and to have the above captioned dismissed for lack of jurisdiction over the defendant due to improper service of process; (3) to vacate the default judgment issued in the above action and to allow Danilo E. Picon, to appear and file an answer in connection with the above captioned action; and to allow him to proceed upon the merits to trial so that he may defend his interest in the property located at 4908 99th Street, Corona, N.Y. 11368; (4) to dismiss the above captioned action pursuant to CPLR 3211 for failure to state a cause of action upon which relief can be granted; (5) to dismissed the action with prejudice for fraud; (6) to dismiss with prejudice against the plaintiff, Deutsche Bank Trust Company Americas as Trustee, as well as their successors and assigns forever.

	PAPERS NUMBERED
Notice of Order to Show Cause- Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition - Affidavits-Exhibits.....	5 - 9
Reply Affirmation	10 - 12
Affirmation of Rule 202.7.....	13 - 14

Emergency Affidavit..... 15 - 16

Upon the foregoing papers, it is hereby ordered that the motion to vacate his default is granted and upon vacatur, the complaint is dismissed as more fully set forth below:

PROCEDURAL HISTORY

Plaintiff Deutsche Bank Trust Company Americas as Trustee ("Plaintiff") commenced the present action by filing a Lis Pendens and a Summons and Complaint and contends that on January 28, 2008 it effectuated service on Defendant Danilo E. Picon (hereinafter "Defendant") by "nail and mail" service pursuant to CPLR §308 (4). Defendant now moves to vacate his default in answering the complaint and dismiss the foreclosure action on the grounds that Plaintiff lacks standing to commence the action. Defendant claims that service was directed to what was previously his marital home, a home in which he did not reside at the time of the purported service as a result of his then pending divorce and the issuance of an associated order of protection; that he never received the summons and complaint either in person or by mail and that he did not receive a copy of the judgment of foreclosure with notice of entry and only learned about the foreclosure after he returned to the subject property after he returned in January 2010. Defendant thus claims he did not receive notice of the lawsuit and the court lacks personal jurisdiction. As a result of Defendant's failure to interpose an answer, an Order of Reference was granted on December 1, 2008 and a default Judgment of Foreclosure and Sale was granted on July 1, 2009.

RULING

Defendant was not properly served under CPLR §308 (4) because Plaintiff failed to fulfill the "due diligence" requirements necessary to provide Defendant with sufficient notice of

the action for foreclosure. Consequently, the default judgment of foreclosure against the Defendant is vacated pursuant to CPLR §5015 (a) (4) and the case is dismissed for lack of personal jurisdiction.

Furthermore, Defendant's motion to dismiss is granted on the ground that Plaintiff's acquisition of the Mortgage without the underlying Note is insufficient to sustain a foreclosure action because the Plaintiff lacks standing.

However, Defendant fails to substantiate a case under either Judiciary Law § 489, General Business Law § 349 or common law fraud. Consequently, Defendant's motion to dismiss the present action *with prejudice* is denied.

MOTION TO VACATE THE DEFAULT JUDGMENT

Defendant contends that the action should be dismissed because he did not reside or live at the address upon which purported service took place and thus never received notice of the action.

Under CPLR §5015 (a) (4), a default judgment can be vacated due to the court's "lack of jurisdiction" in rendering an order or judgment (CPLR §5015 [a] [4]). A judgment or order granted in the absence of personal jurisdiction over a party is a nullity that must be set aside unconditionally (*Ismailov v Cohen*, 26 AD3d 412, 413, 414 [2d Dept 2006]) ("[defendant] demonstrated that he was not served with process (see CPLR §5015 [a] [4]). Thus, his "default" was a nullity … and vacatur of the judgment was required as a matter of law and due process even in the absence of a demonstration of a meritorious defense").

Plaintiff's Affidavit of Service attests to the fact that service was effectuated pursuant to CPLR §308 (4), commonly referred to as "nail and mail" service. Service under CPLR §308 (4)

is effectuated "by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served" along with additional, statutorily-mandated mailing requirements (CPLR §308 [4]). However, such service is only permitted in cases where personal service under CPLR §308 (1), or substituted service under CPLR §308 (2) ("to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode") cannot be achieved after "due diligence" (*Estate of Waterman v Jones,* 46 AD3d 63, 65 [2d Dept 2007]).

The due diligence requirement as set forth in CPLR §308 (4) must be "strictly observed" due to the reduced likelihood that a summons served by "nail and mail" will be properly received (*O'Connell v Post*, 27 AD3d 630, 631 [2d Dept 2006]).

Although "due diligence" is not statutorily defined, it has been interpreted by the courts as referring to "the quality of the efforts made to effect personal service" (*Barnes v City of New York*, 70 AD2d 580, 580 [1979]) and thus merely demonstrating that a few attempts were made at the Defendant's residence may not satisfy the prerequisite "due diligence" requirements necessary to use "nail and mail" service (*Estate of Waterman v Jones,* 46 AD3d 63, 66 [2d Dept 2007]).

The party effectuating service, in order to satisfy the "due diligence" requirement of CPLR §308 (4), must demonstrate that the server of process made genuine efforts and/or inquiries to adduce the location of the party to be served (*see e.g., Kurlander v A Big Stam Corp.*, 267 AD2d 209, 210 [2d Dept 1999]).

The "due diligence" requirement of CPLR §308 (4) is not satisfied when the affidavit of service failed to describe the efforts of the process server made to ascertain the defendant's current dwelling place and provided no evidence that the process server made inquiries to the

defendant's neighbors, checked telephone listings, or conducted a search with the Department of Motor Vehicles (*Estate of Waterman v Jones,* 46 AD3d at 67]) or attempts to locate a business address (*Sanders -v- Elie*, 29 AD3d 773 (2nd Dept 2006]).

If the court determines that the "due diligence" requirement of CPLR §308 (4) was not satisfied, service by "nail and mail" will be deemed jurisdictionally defective, and it is irrelevant if the defendant may later come into physical possession of the pleadings (*Raschel v Rish*, 69 NY2d 694, 697 [1986]).

In the instant matter, Plaintiff's process server asserts that service occurred on January 28, 2008 at 49 - 08 99th Street, Corona, NY 11368, which was the marital address of the Defendant and his wife and co-defendant. However, as a result of a divorce action filed in May, 2007, Defendant moved out from the 49 - 08 address on June 6, 2007,(relocating to a residence for which he filed a change of address and the Postal Service issued a forwarding order), and did not return until December, 2009. In fact, Defendant's wife was issued a one-year order of protection against the Defendant effective September 21, 2007. Therefore, Defendant as established that the purported "nail and mail service" took place during the period when the order of protection was still in place.

Furthermore, the Affidavit of Service indicates that only minimal efforts were made to locate the Defendant before resorting to nail and mail service under CPLR §308(4). The Plaintiff made only two attempts, both during work or commuting hours, to serve the Defendant before initiating nail and mail service. Significantly, the Plaintiff provides no evidence that it checked Defendant's place of employment, spoke to neighbors, returned during morning hours (or on a Saturday), performed a skip trace or conducted a public records search.

Service by "nail and mail" is designed to be a last ditch effort to provide service when all

else fails. In a situation as sensitive and important as the foreclosure upon a party's primary residence, the "due diligence" requirement represents an essential safeguard to protect homeowners from being dispossessed without proper notice and an opportunity to be heard. The Plaintiff's failure to undertake even minimal efforts to locate the Defendant is a breach of both the substance and spirit of the law and renders the purported service defective.

Plaintiff further argues that both CPLR §§ 5015(a)(1) and 317 contain periods of limitation if exceeded, a court may not grant the relief requested. However, pursuant to CPLR § 317, the one year time limitation is calculated from when the aggrieved party has knowledge of the judgment, so long as it does not exceed five years from the date the judgment was entered. Significantly, CPLR § 5015 provides that a motion to vacate judgment must be made within one year from when defendant is served with a copy of the judgment with notice of entry. Plaintiff avers that it mailed a copy of the judgment to Defendant at the original residence. However, despite Defendant filing a change of address with the United States Postal Service, Defendant claims he never received a copy of the judgment because the forwarding order had expired. The evidence adduced by Defendant is sufficient to conclude that the motion to vacate the default is timely. Accordingly, Defendant's motion withstands the limitation.

Since the Defendant was not properly served with process and never received a copy of the judgment, the Defendant's motion to vacate the judgment of foreclosure under CPLR 5015 (a) (4) is granted and the complaint is dismissed for lack of personal jurisdiction over the Defendant.

MOTION TO DISMISS DUE TO LACK OF STANDING

The Defendant seeks, if vacatur is granted without finding a failure of personal jurisdiction, to have the case dismissed on the ground that the Plaintiff does not own the

underlying Note and therefore lacks standing to prosecute the present foreclosure action.

Standing to sue requires an interest in the claim at issue "that the law will recognize as a sufficient predicate for determining the issue at the litigant's request" (*Caprer v Nussbaum*, 36 AD3d 176, 182 [2d Dept 2006]). In general, the right to contest the issue of standing is waived if it is not raised in the Defendant's answer or pre-answer motion to dismiss (*Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624, 625 [2d Dept 2009]). However, such waiver does not apply if the Defendant has not appeared or filed an answer (*Deutsche Bank Nat'l Trust Co. v McRae*, 27 Misc 3d 247, 252 (Sup Ct, Allegany County 2010]).

Once the issue of standing is raised by the Defendant, the burden is placed on the Plaintiff to prove, as in the instant matter, that it owns the Note underlying the action and the validity of any associated assignment (*TPZ Corp. v Dabbs*, 25 AD3d 787, 789 [2d Dep't 2006]). A demonstration by the Plaintiff that it owns the Mortgage, without a showing that it also owns the Note is a nullity and any action for foreclosure based on the ownership of the mortgage alone must fail (*Kluge v Fugazy*, 145 AD2d 537, 538 [2d Dept 1988]). This result is mandated because the mortgage is "but an incident to the debt which it is intended to secure," and without more, it provides the holder with no actionable interest on which to commence a foreclosure action (*Merritt v Bartholick*, 36 NY 44, 45 [1867].

While a written assignment or physical transfer of the Note is sufficient to result in an implicit transfer of an associated Mortgage, an assignment of the Mortgage, without an explicit assignment of the Note, will not result in an assignment of that Note (*U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 754 [2d Dept 2009]).

In the case before us, Plaintiff only proffers evidence that the *mortgage* was transferred to the Plaintiff (through MERS, as nominee for Firs National Bank of Arizona ["Arizona"]) via

an Assignment of Mortgage dated January 7, 2008. It does not, critically, provide evidence that the *Note itself* was transferred to the Plaintiff.

The only documents the Plaintiff submits in connection with the issue of the ownership and assignment of the Note are a copy of the original Adjustable Rate Note Agreement between Arizona and the Defendant dated March 8, 2006, and a copy of an undated allonge between Arizona and the First National Bank of Nevada ["Nevada"], seemingly transferring Arizona's interest in the Note to Nevada. Although not dated, it is only logical for the court to assume that the allonge was executed prior to any purported assignment of the Note to the Plaintiff. If we were to assume otherwise, it would imply that Arizona was assigning to Nevada a Note that it did not own (since such Note had already been purportedly assigned to the Plaintiff).

Critically, Plaintiff does not provide documents demonstrating that the *Note* itself was assigned to Plaintiff, such as from MERS (as nominee for Arizona), from Arizona itself, or from a third-party such as Nevada.

The only interpretation the court can adduce from such evidence is that although it is possible that Nevada may own both the Mortgage and the Note since a valid transfer of a Note (in this case through the undated allonge), effectively transfers an associated Mortgage, the assignment of the Mortgage from MERS (as nominee for Arizona) to Plaintiff, under New York law, definitively did *not* transfer ownership of the Note to Plaintiff.

Since the allonge indicates that the Note is the property of Nevada and not Arizona, Arizona was never in a position to assign the Note to Plaintiff. Therefore, even if Plaintiff holds the Mortgage, without evidence that it also owns the Note, it lacks standing to pursue the foreclosure action at bar. Consequently, Plaintiff's acquisition of the Mortgage without the underlying Note is insufficient to sustain a foreclosure action and Defendant's motion to dismiss

based on the Plaintiff's lack of standing is granted.

MOTION TO DISMISS WITH PREJUDICE DUE TO FRAUD

The Defendant seeks to have the default judgment dismissed with prejudice on the ground of fraud. To this end, the Defendant asserts three primary causes of action: 1) Champerty, under Judiciary Law § 489, in which the Plaintiff is accused of buying the debt primarily for the purpose of bringing a lawsuit; 2) violation of General Business Law § 349); and 3) common law fraud.

Defendant first argues that Plaintiff's purported purchase of the Mortgage violated Judiciary Law § 489 which prohibits a corporation or collection agency from purchasing a debt with the primary purpose of bringing a lawsuit (*see Limpar Realty Corp. v Uswiss Realty Holding, Inc.*, 112 AD2d 834, 835 - 836 [1st Dept 1985]). Although Defendant offers some convincing evidence to this end, including the fact that the debt was purportedly purchased when the property was already "well into default" and was subject to foreclosure within days of its purchase, the Defendant fails to provide the degree of evidence necessary to overcome Plaintiff's assertion that the purchase represented a "prudent mortgage investment." Since Defendant failed to make the requisite showing that the purported purchase of the note was made "primarily" for the purposes of bringing a lawsuit, Defendant's request to dismiss the case with prejudice under Judiciary Law § 489 is denied.

The Defendant also contends that the Plaintiff violated both General Business Law § 349, and that the Plaintiff is liable for common law fraud. Defendant, however, fails to flesh out his argument or provide any substantial evidence backing his claim. Consequently, the Defendant's motion to dismiss the present foreclosure action with prejudice due a violation of GBL 349 or under the theory of common law fraud is denied.

REMAINING ISSUES

The other issues raised in Defendant's Order to Show Cause including the 1) motion to dismiss due to a failure to state a cause of action under CPLR 3211, and 2) a motion to vacate the default judgment and allow an answer under CPLR 317 are deemed moot as they are subsumed or deemed irrelevant in light of this court's decision above.

Based on the forgoing, it is

ORDERED that Defendant's motion to vacate the default judgment and dismiss the action is granted; it is further

ORDERED that Defendant's motion to have the case dismissed with prejudice due to fraud is denied.

The foregoing constitutes the decision and order of the court.

Dated: June 22, 2011

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Bernice D. Siegal, J. S. C.