

Citibank, N.A. v Jerome
2011 NY Slip Op 32469(U)
August 18, 2011
Sup Ct, Suffolk County
Docket Number: 11919-2007
Judge: Emily Pines
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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 23, SUFFOLK COUNTY

COPY

Present:
HON. EMILY PINES
J. S. C.

Original Motion Date: 05-31-2011
Motion Submit Date: 06-02-2011
Motion Sequence No.: 006 MOTD

[X] FINAL
[] NON FINAL

_____ X
CITIBANK N.A. AS TRUSTEE c/o EMC
MORTGAGE CORPORATION,

Plaintiff,

-against-

CA RLO JEROME, et al.,

Defendant.
_____ X

Attorney for Plaintiff
Rosicki, Rosicki & Associates
By: Lijue Philip, Esq.
51 East Bethpage Road
Plainview, New York 11803

Attorney for Defendant
Carlo Jerome, Pro se
347 Grand Central Avenue
Amityville, New York 11710

Court Appointed Referee
Diane C. Carroll, PC
175 Pinelawn Road
Suite 304
Melville, New York 11747

ORDERED, that the motion (motion sequence # 006) by defendant Carlo Jerome (“Jerome”) for an order staying the foreclosure sale of the subject property and vacating the Judgment of Foreclosure and Sale is determined as set forth herein.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff commenced this action to foreclose a mortgage on property located in Amityville, New York, owned by Jerome, by filing a summons and complaint on April 17, 2007. Jerome did not interpose an answer or timely move to dismiss the complaint. On April 14, 2008, Plaintiff obtained a Judgment of Foreclosure and Sale (“Judgment”) by default. By Order dated January 8, 2009, this Court (Pines, J.) denied Jerome’s motion to vacate the Judgment on the ground that

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Jerome failed to serve the Order to Show Cause upon Plaintiff. In its Decision, the Court noted that even if the Order to Show Cause had been properly served, Jerome failed to demonstrate a reasonable excuse for the default and a meritorious defense to the foreclosure action. Thereafter, by Order dated August 24, 2010, this Court (Pines, J.) denied Jerome's second motion to vacate the Judgment finding that Jerome failed to proffer a reasonable excuse for the default and a meritorious defense to the foreclosure action.

Jerome now moves, pursuant to CPLR 5015(4), to vacate the Judgment. In support of the motion, Jerome submits an affidavit wherein he alleges, among other things, that the court never acquired personal jurisdiction over him because he was not properly served with the summons and complaint. Jerome avers that he purchased the subject premises located at 347 Grand Avenue, Amityville, New York, on May 1, 2006, on behalf of his nephew, Michael Desiar, because Mr. Desiar had poor credit. Because Jerome and his wife had separated, Jerome lived in the subject premises with his nephew and his nephew's family from May 2006 until November 2006, when he and his wife reunited and moved to Wheatley Heights. Jerome states that he has lived at 270 Nicholls Road in Wheatley Heights since November 2006. Jerome provides a copy of the affidavit of the process server attesting to service of the summons and complaint upon him on April 21, 2007. The process server's affidavit indicates that Jerome was served, pursuant to CPLR 308(2), by delivery of a copy of the summons and complaint to Ashley Desiar, a family member and a person of suitable age and discretion, at 347 Grand Avenue, Amityville, New York on April 21, 2007, and mailing of an additional copy to that address on April 24, 2007. The affidavit of the process server describes Ms. Desiar as appearing 31 to 39 years of age, 5 feet 4 inches to 5 feet 7 inches in height, 125 to 149 pounds, with black skin and black hair. Jerome claims that he was not properly served with the summons and complaint because (1) 347 Grand Central Avenue in Amityville was not his actual dwelling place on April 21, 2007, as he had moved out of that dwelling approximately five months earlier and moved to 270 Nicholls Road in Wheatley Heights, and (2) Ashley Desiar, the daughter of Jerome's nephew, was only 13 years of age at that time and, therefore, was not of suitable age and discretion. Further, Jerome states that he did not receive notice of this action until well after the default Judgment had been entered against him. Jerome acknowledges that he made two prior motions to vacate the Judgment but states that he did not raise the issue of lack of jurisdiction. He argues that the present motion, made under CPLR 5015(a)(4), does not require a

showing of a reasonable excuse and a meritorious defense.

In opposition to the motion, the Plaintiff argues, among other things, that Jerome's motion should be denied because the copy of Jerome's affidavit submitted in support of the motion received by the Plaintiff is unsigned. Plaintiff also contends that Jerome's conclusory and self-serving allegations denying service cannot overcome Plaintiff's *prima facie* evidence that Jerome was properly served. Further, Plaintiff argues that Jerome has not shown a reasonable excuse for his default and a meritorious defense.

In reply, counsel for Jerome (retained after Jerome made the instant motion *pro se*) provides a copy of the Jerome's original signed affidavit as provided to the court but inadvertently not provided to Plaintiff's counsel. Additionally, counsel argues, for the first time, that Plaintiff did not have standing to commence this action.

In a sur-reply, Plaintiff argues, among other things, that the argument by Jerome's counsel that Plaintiff lacked standing should be disregarded because it is raised for the first time in reply papers. Alternatively, Plaintiff argues that Jerome waived the defense of lack of standing by failing to raise it in a pre-answer motion to dismiss or as affirmative defense in an answer to the complaint.

DISCUSSION

Pursuant to CPLR 5015(a), "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just . . . upon the ground of . . . (4) lack of jurisdiction to render the judgment or order." "Whether or not the defendant has a meritorious defense is irrelevant to the question of whether the judgment should be vacated for lack of jurisdiction" (*Shaw v. Shaw*, 97 AD2d 403, 404 [2d Dept 1983]).

CPLR 308(2) authorizes service by delivery of the summons and complaint within the State to a person of suitable age and discretion at the defendant's dwelling place and mailing the summons to the defendant's last known residence. A process server's sworn affidavit of service constitutes

prima facie evidence of proper service (*see Goldberger v. Gansburg*, 85 AD3d 914 [2d Dept 2011]; *Wells Fargo Bank, NA v. McGloster*, 48 AD3d 457 [2d Dept 2008]). “Where . . . there is a sworn denial that delivery to the defendant was accomplished, the affidavit of service has been rebutted and the plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing” (*Bankers Trust Co. of California, N.A. v. Tsoukas*, 303 AD2d 343, 344 [2d Dept 2003]).

Here, Jerome’s affidavit was sufficient to rebut the process server’s affidavit of service of the summons and complaint pursuant to CPLR 308(2). Contrary to the Plaintiff’s contention, Jerome’s denial of service is not bald, conclusory or unsubstantiated. Jerome specifically denies that he resided at the subject premises where service was effectuated and states that he moved to another residence some five months earlier upon reconciling with his estranged wife. Additionally, Jerome specifically refutes the physical description set forth in the process server’s affidavit of Ashley Desiar as appearing approximately 31 to 39 years of age by stating that Ms. Desiar, his nephew’s daughter, was only 13 years old at that time. Accordingly, pursuant to Administrative Order No. 12-08 dated December 4, 2008, issued by Hon. H. Patrick Leis, District Administrative Judge, 10th Judicial District, Suffolk County, a hearing will be held on September 26, 2011, at 11:00 a.m., before Principal Court Attorney Kathryn Coward as a Special Referee, to hear and determine whether personal jurisdiction was properly obtained over the defendant Carlo Jerome.

The Court notes that Jerome’s signed affidavit was provided to the Court with the original motion papers and that a copy of same was subsequently provided to Plaintiff’s counsel. Therefore, this is a non-issue.

With regard to the issue of standing, Jerome waived any argument that the plaintiff lacked standing to commence the foreclosure action by failing to interpose an answer or file a timely pre-answer motion asserting the defense of standing (*Deutsche Bank National Trust Co. v. Hussain*, 78 AD3d 989, 990 [2d Dept 2010]; *Countrywide Home Loans Servicing, LP v. Albert*, 78 AD3d 983, 985 [2d Dept 2010]; *HSBC Bank, USA v. Dammond*, 59 AD3d 679, 680 [2d Dept 2009]).

Contrary to Jerome’s contention, Plaintiff’s counsel timely filed a proper affirmation in accordance with the October 20, 2010 Administrative Order [# 548-10] issued by the Chief Administrative Judge requiring counsel for the plaintiff to verify the accuracy of documents filed in support of residential foreclosure actions.

In light of the foregoing, the sale of the Subject Premises pursuant to the Judgment is hereby stayed pending further order of the Court.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: August 18, 2011
Riverhead, New York


EMILY PINES
J. S. C.

☒ **FINAL**
☐ **NON FINAL**