

Suntrust Mtge., Inc. v LeMay

2011 NY Slip Op 32624(U)

October 5, 2011

Supreme Court, Suffolk County

Docket Number: 42026/2008

Judge: William B. Rebolini

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Short Form Order

COPY**SUPREME COURT - STATE OF NEW YORK****I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**
Justice

Suntrust Mortgage, Inc.,

Plaintiff,

-against-

Addison LeMay, if living, and if he be dead, any and all other persons, who may claim as devisees, distributees, legal representatives and successors in interest of said defendants, all of whom whose places of residence are unknown to the plaintiff and cannot after diligent inquiry be ascertained, Ketcham Ave. LP, Robert Toussie, People of the State of New York, The United States of America, "John Doe #1" through "John Doe #12", the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having a claiming an interest in or lien upon the premises, described in the complaint,

Defendants.

Motion Sequence No.: 002; MOT.DMotion Date: 6/8/11Submitted: 6/15/11Index No.: 42026/2008Attorney for Plaintiff:

Berkman, Henoeh,
Peterson & Peddy, P.C.
100 Garden City Plaza
Garden City, N. Y. 11530

Guardian Ad Litem and Military
Attorney for Defendant Addison Lemay:

Neil J. Abelson, Esq.
24 Crooked Oak Road
Belle Terre, NY 11777

Attorney for Defendant Robert Toussie:

Certilman, Balin, Adler & Hyman, LLP
90 Merrick Avenue
East Meadow, NY 11554

Clerk of the Court

Upon the following papers numbered 1 to 13 read upon this *ex parte* application by movnt for an order dismissing the complaint as follows: Application and supporting papers, 1 - 5; Answering Affidavits and supporting papers, 6 - 9; Replying Affidavits and supporting papers, 10 - 13.

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This is an action to foreclose a mortgage dated August 14, 2006 ("the Mortgage") made by the defendant Addison Lemay ("Lemay"), as mortgagor, in favor of Suntrust Mortgage, Inc. ("Suntrust") with respect to the property located at 94 Margaret Drive, Coram, New York, 11727 ("the Subject Property"). In connection with the Mortgage, Lemay executed a note dated August 14, 2006 ("the Note") in favor of Suntrust promising to repay the sum of \$273,000 in monthly installments of \$1,932.28 commencing on October 1, 2006 until paid in full on the maturity date of September 1, 2036.

Familiarity with this matter is presumed and the Court need not recite the history of this foreclosure matter and only relevant facts will be restated where necessary. By Order of this Court dated March 16, 2009 (Rebolini, J.) ("the Publication Order"), Neil J. Abelson, Esq. ("the Guardian"), was appointed as guardian ad litem and military attorney on behalf of the defendants who may be absentees, infants, or incompetents or unknown successors in interest of defendants who may be deceased, or defendants who may be in the military service, and to protect and defend the interest of said defendants in the action.

The Guardian now moves for, *inter alia*, an order: (a) amending the caption of the action; (b) vacating that part of the Publication Order which authorized service of process on the defendant Addison Lemay pursuant to CPLR §308 (5); (c) dismissing Suntrust's amended verified complaint for lack of jurisdiction over the person of Lemay and lack of jurisdiction over the subject matter of this action, *nunc pro tunc*; and (d) awarding the Guardian a legal fee of \$4,000 for his services rendered herein. In support of the motion, the Guardian has submitted, among other things, the Order of Publication, his own affirmation, and a purported resume/internet posting of Lemay. The Guardian contends, among other things, that Suntrust failed to submit *prima facie* proof that Lemay could not be served with the supplemental summons by another prescribed method with "due diligence" as defined by CPLR §308 (4). The Guardian asserts that since Lemay chose 34 East Main Street, U.P.S. Box #232, Smithtown, NY 11787 ("Box # 232") as his business address, service by mail upon Lemay pursuant to CPLR §308 (2) at Box # 232 could have been effected rather than service by publication. According to the Guardian, service by mail rather than by publication would have been better calculated to provide Lemay with notice of this action. The Guardian also asserts that the Publication Order which was submitted by Suntrust and that provided, *inter alia*, for publication of the Supplemental Summons with Notice in two newspapers (instead of one newspaper) once in each of four successive weeks (instead of once a week for two successive weeks), did not meet the requirements of CPLR §316. The Guardian further argues that the Publication Order failed to provide for mailing of a copy of the Supplemental Summons with Notice for mailing to Lemay's mailing address, Box # 232; instead, it provided for service by mail at the Subject Property. The Guardian alleges, among other things, that he found Lemay through his own efforts which included an internet search. Lemay and LeMay's former bankruptcy attorney allegedly informed the Guardian via a telephone conversation that Lemay's business mailing address was, during all relevant times herein, Box # 232. The Guardian further alleges that Lemay's resume, which he found posted on the internet, lists "34 East Main Street, Smithtown, NY 11787" as Lemay's address.

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Suntrust opposes all branches of the Guardian's motion including the Guardian's request for a \$4,000 fee, but otherwise consents to the Guardian being compensated at an amount determined reasonable by the Court. In support of this application, Suntrust has submitted, among other things, an affirmation from counsel, the affidavit dated December 19, 2008 from Jessica Damadeo ("Damadeo"), a legal assistant employed by counsel, two affidavits from counsel's process server, Robert Napolitano, a copy of the Mortgage and Note, the Order Modifying and Terminating Automatic Stay dated April 29, 2010 (Grossman, U.S.B.J.) in Lemay's personal federal bankruptcy case, and a docket report dated November 30, 2010 for Lemay's bankruptcy case filed in the Eastern District of New York under Case No.: 9-09-75017-reg. As to the branches of the motion which are opposed, counsel for Suntrust argues that it properly sought relief pursuant to CPLR §308 (5) which allows the Court, in its discretion, to determine the manner and method of service, and that Suntrust complied with the Publication Order. Counsel asserts that Lemay's purported address, U.P.S. Box #232, is a mail drop box which cannot be considered a place of business as defined by CPLR §308 (6), and that, in any event, Lemay misrepresented Box #232 as an apartment ("APT 232") at said location. Damadeo alleges that she attempted to locate a current or former employer to inquire about the current whereabouts of Lemay and that she was unsuccessful. Damadeo allegedly searched the records of the New York State Department of Motor Vehicles ("the DMV") and found a license record expansion for one "Addison P. Lemay, 2nd". Damadeo further alleges that box holder information maintained by the local Postmaster for the United States Postal Service ("US Post Office") indicates that the subject Smithtown location is a "UPS Store". As to process itself, in one of his affidavits, Napolitano alleges that he went to the Subject Property and that Daniel Orr, the current occupant, told him that Lemay does not reside at that address. In his other affidavit, Napolitano alleges that he went to Smithtown and that the subject location is a hair/nail salon and that Lemay does not reside therein. According to Napolitano, on the date of his attempted service, the apartments above the salon were unoccupied or used for storage.

In his reply, the Guardian has submitted, *inter alia*, an itemization of legal services allegedly rendered as Guardian herein. The Guardian alleges, among other things, that the original request for a fee in the sum of \$4,000 as set forth in his notice of motion was inadvertently based upon an incorrect computation. He alleges that he has expended a total of 65.84 hours of his time from May 14, 2009 through to June 5, 2011 performing professional services herein and that his customary billing rate for legal services is \$450 per hour. He acknowledges that compensation herein cannot be comparable to that of private practice. The Guardian now requests that the Court award him a legal fee for services rendered herein as the Court deems just and reasonable based upon his alleged services rather his original request for \$4,000. Parenthetically, while the notice of motion includes a request by the Guardian for a fee in the sum of \$4,000, at paragraph "57" of the Guardian's Affirmation in Support of the Motion dated April 22, 2011, he requested a fee in the sum of \$3,500.

Initially, the branch of the Guardian's motion seeking to dismiss the amended verified complaint on the basis that the Court lacks subject matter jurisdiction over this matter is denied as without merit. The general, original jurisdiction of the Supreme Court of the State of New York encompasses all actions at law and equity, except those expressly proscribed by the State and Federal Constitutions or other acts entitled to supremacy (see, N.Y. Const. Art. VI §7 [a]; Thrasher v. United

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States Liab. Ins. Co., 19 NY2d 159 [1967]). Further, the instant action foreclosure action, which was commenced as a result of the alleged breach of the various mortgage loan documents, is clearly a justiciable controversy (see, RPAPL §1301, *et seq.*). That an action to foreclose a mortgage is within the subject matter jurisdiction of this Court is clear. Appellate authorities have repeatedly held that “[a] plaintiff in an action to foreclose a mortgage establishes its case as a matter of law through production of the mortgage, the unpaid note and evidence of a default” (Wells Fargo Bank v. Cohen, 80 AD3d 753, 755 [2nd Dept., 2011]). Thus, this Court has exclusive jurisdiction to determine, according to governing statutes, the issues raised by the pleadings or by motion, including those for accelerated judgments, which are viewed as trial equivalents, and those raised at the trial of the action, including adjudication of the sufficiency of proof and the reception of evidence (see, Balogh v. H. R. B. Caterers, 88 AD2d 136 [2nd Dept., 1982]).

Turning to the issues of service and personal jurisdiction, “[i]t is well established that CPLR §308 (5) vests a court with the discretion to direct an alternative method of service of process when it has determined that the methods set forth in CPLR §308 (1), (2) and (4) are ‘impracticable’ ” (Home Fed. Sav. Bank v. Versace, 252 AD2d 480 [2nd Dept., 1998], quoting CPLR §308 [5]). “Although the impracticability standard ‘is not capable of easy definition’ (Markoff v. South Nassau Community Hosp., 91 AD2d 1064, 1065 *affd* 61 NY2d 283 [1984]), it does not require the applicant to satisfy the more stringent standard of ‘due diligence’ under CPLR §308 (4), or to make a showing that ‘actual prior attempts to serve a party under each and every method provided in the statute have been undertaken’ ” (Astrologo v. Serra, 240 AD2d 606 [2nd Dept., 1997], quoting Kelly v. Lewis, 220 AD2d 485 [2nd Dept., 1995]; see, Dobkin v. Chapman, 21 NY2d 490 [1968]).

Under the circumstances presented here, Suntrust’s alternate service by publication pursuant to CPLR §308 (5), was proper as service pursuant to the other relevant sections of CPLR §308 was clearly “impracticable” (see, Home Fed. Sav. Bank v. Versace, 252 AD2d 480 at 480 [2nd Dept., 1998]; Astrologo v. Serra, 240 AD2d 606 [2nd Dept., 1997], see also, OCI Mtge. Corp. v. Murphy, 258 AD2d 633 [2nd Dept., 1999]; cf., Caban v. Caban, 116 AD2d 783 [3rd Dept., 1986]). Contrary to the Guardian’s contentions, Suntrust previously moved for and was granted the Publication Order pursuant to CPLR §308 (5), not CPLR §308 (4), which requires “due diligence”; neither did the Publication Order require compliance with CPLR §315 or CPLR §316, that would have imposed additional publication requirements (see, Dime Sav. Bank of New York v. Mancini, 184 AD2d 989 [3rd Dept., 1992]; cf., Matter of Kaila B. v. Christopher M. B., 64 AD3d 647 [2nd Dept., 2009]; Serrano v. Serrano, 186 AD2d 912 [3rd Dept., 1992]). The proof submitted herein by Suntrust was sufficient to show that Lemay was attempting to evade service (see, OCI Mtge. Corp. v. Murphy, 258 AD2d 633, [2nd Dept., 1999]; O’Garro v. Brown, 288 AD2d 279 [2nd Dept., 2001]). Further, there is no evidence before the Court that the DMV, instead of Lemay, incorrectly listed U.P.S. Box #232 as an apartment number, and even if that were the case, Lemay never notified the DMV of his correct business mailing address; neither did he provide the DMV with an actual residence address (see, McCleaver v. VanFossen, 276 AD2d 603 [2nd Dept., 2000]; Hill v. Jones, 113 AD2d 874 [2nd Dept., 1985]; Vehicle and Traffic Law § 505 [5]). By failing to properly provide a correct address to DMV, Lemay affirmatively misrepresented his address and Suntrust had every right to rely upon that misrepresentation, first, by attempting service of process at that alternate location (after going to the

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Subject Property) and, secondly, by seeking an alternate method of service pursuant to CPLR §308 (5) (see, Home Fed. Sav. Bank v. Versace, 252 AD2d 480 [2nd Dept., 1998]; see generally, Burke v. Zorba Diner, Inc., 213 AD2d 577 [2nd Dept., 1995]; Hill v. Jones, 113 AD2d 874, [2nd Dept., 1985]). While Lemay purportedly advertises 34 East Main Street, Smithtown, NY 11787 as his business location, his resume does not include Box #232 or otherwise indicate that it is merely a mailbox and not an “actual place of business” (see, CPLR §308 [6]). Moreover, there is no evidence before the Court that Lemay provided Suntrust with a change of address as required by Section “7” of the Note and Section “15” of the Mortgage, which sections expressly provide for notification to Lemay at that the Subject Property unless otherwise notified. Surely, Lemay, who was purportedly trained in military counterintelligence (as indicated by his resume submitted by the Guardian), knew or had reason to know that Suntrust would have a difficult time attempting to effect service upon him in light of these facts. All of these factors combined show that service upon Lemay under pursuant to CPLR §308 (1), (2), (3) and (4) was clearly “impracticable.”

The Court has considered the Guardian’s remaining contentions and finds that they are without merit. Based upon all of the foregoing facts and circumstances the Court adheres to its original determination of March 16, 2009. The Guardian is awarded a fee for his services hereinafter rendered herein as indicated, and he is discharged as of the date of this Order. The Plaintiff may, if it be so advised, move to amend the caption of this action to include Lemay’s additional aliases as indicated in Lemay’s federal bankruptcy case.

Based on the foregoing, it is

ORDERED that this motion by movant, Neil J. Abelson, Esq., the guardian ad litem and military attorney herein, for an order: (a) amending the caption of the action; (b) vacating that part of the Order dated March 16, 2009 (Rebolini, J.) which authorized service of process on the defendant, Addison Lemay, pursuant to CPLR §308 (5); (c) dismissing the plaintiff’s amended verified complaint for lack of jurisdiction over the person of the defendant and lack of jurisdiction over the subject matter of this action, *nunc pro tunc*; and (d) awarding Neil J. Abelson, Esq., a legal fee of \$4,000 for services rendered herein as guardian ad litem and military attorney, is granted solely to the extent that the guardian ad litem and military attorney is awarded a fee for his services rendered herein as set forth immediately below; the remainder of the motion is denied; and it is further

ORDERED, that Neil J. Abelson, Esq, is discharged as guardian ad litem and military attorney herein, and he is awarded the sum of \$4,000.00 for his services rendered herein, after considering the facts and circumstances herein, including the affirmation and itemized statement of services rendered.

Dated: **OCT 05 2011**


HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___ **X** ___ NON-FINAL DISPOSITION