

American Home Mtge. Servicing, Inc. v Kanwal

2011 NY Slip Op 33135(U)

November 21, 2011

Supreme Court, Suffolk County

Docket Number: 41654-09

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
IAS PART 37 - SUFFOLK COUNTY

PRESENT: Hon. JOSEPH FARNETI
Acting Justice of the Supreme Court

MOTION DATE 9-2-11
ADJ. DATE 11-17-11
Mot. Seq. # 002-MotD

American Home Mortgage Servicing, Inc.,

Plaintiff,

-against-

Saba Kanwal; Mortgage Electronic Registration Systems, Inc., as nominee for America Home Mortgage and "JOHN DOE #1" through "JOHN DOE #10", the last ten names being fictitious and unknown to the Plaintiff, the person or parties intended being the person or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the complaint,

Defendants,

X

SHAPIRO, DICARO & BARAK, LLC
Attorneys for Plaintiff
250 Mile Crossing Boulevard
Suite One
Rochester, N. Y. 14624

SABA KANWAL
Defendant Pro Se
50 Gillette Avenue
Patchogue, N. Y. 11772

Mortgage Electronic Registration Systems, Inc., as nominee for American Home Mortgage
111 Eighth Avenue
New York, N. Y. 10011

Lynn Poster-Zimmerman, Esq.
141 East Main Street
Huntington, N. Y. 11743

Upon the following papers numbered 1 to 11 read on this ex-parte application for an order of reference; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers _____; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this *ex-parte* application by plaintiff for, inter alia, an order granting the plaintiff an order of reference and for leave pursuant to CPLR 306-b ratifying and extending the time to file, nunc pro tunc, a purported affidavit of service upon the defendant Saba Kanwal, is granted solely to the extent that proper service upon the defendant Saba Kanwal is hereinafter made and filed nunc pro tunc with the Suffolk County Clerk's Office within Sixty (60) Days from the date of this Order, otherwise denied. If the renewal motion is not submitted within that time period it shall be deemed denied and the action dismissed due to the plaintiff's failure to obey a direct Order of this Court and the dismissal shall be without a further Order of this Court, and the notice of pendency shall be dismissed and vacated; and it is

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ORDERED that any renewed application for an order of reference shall be clearly identified as such (*see*, CPLR 2221 [e][1]) and shall include as exhibits a copy of all the papers submitted with this application, a copy of this order, all affidavits of service previously submitted, and the evidentiary proof specified herein; and it is further

ORDERED that the branch of the motion which seeks an order relieving Lynn Poster Zimmerman, Esq. of her duties as Guardian Ad Litem and Military Attorney for the defendant Saba Kanwal is denied as academic as set forth below.

On May 3, 2006, defendant Saba Kanwal (“Kanwal”) borrowed the sum of \$248,745 from American Home Mortgage (“the plaintiff”), executing an “InterestFirst” fixed-rate note which provided for 6.875% yearly interest and initial monthly installments of approximately \$1,425.10 due on the first day of each month beginning June 1, 2006 for the first 120 months, and thereafter monthly payments of approximately \$1,909.90 through to the maturity date of May 1, 2036. The note is secured by a mortgage on the property known as 99 Waverly Avenue, 2J, Patchogue, NY 11772 (“the subject property”). In the complaint, the plaintiff alleges that Kanwal defaulted in her obligation by failing to make the October 1, 2008 payment pursuant to the note.

On October 16, 2009, the plaintiff commenced this mortgage foreclosure action against Kanwal, and now seeks an order (1) appointing a referee to determine the amount due, (2) amending the caption by deleting the fictitious defendants named “John Doe #1 through “John Doe #10,” (3) deeming all non-appearing and non-answering defendants in default, (4) extending the time for service upon Kanwal pursuant to CPLR 306-b and ratifying the same nunc pro tunc, and, (5) relieving Lynn Poster-Zimmerman, Esq. of her duties as Guardian Ad Litem and Military Attorney.

By way of background, the plaintiff’s motion (001) for, inter alia, an order for service by publication and an extension of service was granted by Order dated August 19, 2010 (Spinner, J.), and Lynn Poster Zimmerman, Esq. was purportedly appointed as Guardian Ad Litem and Military Attorney for Kanwal. Due to the automatic stay imposed under 11 U.S.C. § 362(d), however, that Order was a nullity as Kanwal had previously filed a petition for “Chapter 7” bankruptcy relief on August 13, 2010 under Case No.: 10-76377 in the United States Bankruptcy Court for the Eastern District of New York (*see, Valiotis v Psaroudis*, 69 AD3d 610, 899 NYS2d 55 [2d Dept 2010]; *Homeside Lending, Inc. v Watts*, 16 AD3d 551, 792 NYS2d 513 [2d Dept 2005]; *Chen v Dickerson*, 17 Misc3d 61, 847 NYS2d 334 [App. Term, 9th & 10th Jud. Dists., Sept. 28, 2007]). When plaintiff’s office discovered that Kanwal had filed her petition for bankruptcy relief, counsel attempted to withdraw its prior motion for publication by letter dated August 19, 2010, but the same had already been signed but not entered. Thereafter, by Order dated November 19, 2010 (Grossman, U.S.B.J.), the automatic stay in Kanwal’s federal bankruptcy case was vacated for cause pursuant to 11 U.S.C. § 362(d) as to the plaintiff and the subject property herein.

Parenthetically, according to the information maintained by the Court’s computerized records, a foreclosure settlement conference was held on September 22, 2011. At that time it was determined that Kanwal was not entitled to a subsequent conference as it was determined that the subject property

was not owner-occupied. Accordingly, there has been compliance with CPLR 3408 and no further foreclosure settlement conference is required.

Turning to the issues raised by this ex parte application, under CPLR 306-b a plaintiff must serve a defendant within 120 days after the filing of the action. The 120-day service provision of CPLR 306-b can be extended by a court, upon motion, "upon good cause shown or in the interest of justice" (CPLR 306-b). "Good cause" and "interest of justice" are two separate and independent standards (*see, Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104, 736 NYS2d 291 [2001]). To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service (*see, Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, *supra* at 105-106). Good cause will not exist where a plaintiff fails to make any effort at service (*see, Valentin v Zaltsman*, 39 AD3d 852, 835 NYS2d 298 [2d Dept 2007]; *Lipschitz v McCann*, 13 AD3d 417, 786 NYS2d 567 [2d Dept 2004]), or fails to make at least a reasonably diligent effort at service (*see e.g., Kazimierski v New York Univ.*, 18 AD3d 820, 796 NYS2d 638 [2d Dept 2005]; *Baione v Central Suffolk Hosp.*, 14 AD3d 635, 636-637, 789 NYS2d 315 [2d Dept 2005]; *Busler v Corbett*, 259 AD2d 13, 15, 696 NYS2d 615 [4th Dept 1999]). By contrast, good cause may be found to exist where the plaintiff's failure to timely serve process is a result of circumstances beyond the plaintiff's control (*Bumpus v New York City Tr. Auth.*, 66 AD3d 26, 32, 883 NYS2d 99 [2d Dept 2009]).

If good cause for an extension is not established, courts must consider the "interest of justice" standard of CPLR 306-b (*see e.g., Busler v Corbett*, 259 AD2d 13, *supra* at 17). The interest of justice standard does not require reasonably diligent efforts at service, but courts, in making their determinations, may consider the presence or absence of diligence, along with other factors (*see, Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, *supra* at 105). The interest of justice standard is broader than the good cause standard (*see, Mead v Singleman*, 24 AD3d 1142, 1144, 806 NYS2d 783 [3d Dept 2005]), as its factors also include the expiration of the statute of limitations, the meritorious nature of the action, the length of delay in service, the promptness of a request by the plaintiff for an extension, and prejudice to the defendant (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, *supra* at 105-106; *Bumpus v New York City Tr. Auth.*, 66 AD3d 26, *supra* at 32; *Matter of Jordan v City of New York*, 38 AD3d 336, 339, 833 NYS2d 8 [1st Dept 2007]; *Estey-Dorsa v Chavez*, 27 AD3d 277, 813 NYS2d 54 [1st Dept 2006]; *Mead v Singleman*, 24 AD3d 1142, *supra* at 1144; *de Vries v Metropolitan Tr. Auth.*, 11 AD3d 312, 313, 783 NYS2d 540 [1st Dept 2004]; *Hafkin v North Shore Univ. Hosp.*, 279 AD2d 86, 90-91, 718 NYS2d 379 [2000], *affd* 97 NY2d 95, 736 NYS2d 291 [2001]; *see also, Slate v Schiavone Constr. Co.*, 4 NY3d 816, 796 NYS2d 573 [2005]).

Under the facts and circumstances of this case, the Court finds that the plaintiff made a showing of due diligence, establishing good cause for its motion to extend the time for service as to Kanwal pursuant to CPLR 306-b, as well as a showing that the extension was warranted in the interest of justice (*see, Frank v Garcia*, 84 AD3d 654, 923 NYS2d 529 [1st Dept 2011]; *compare, Seldin v Smith*, 76 AD3d 623, 907 NYS2d 36 [2d Dept 2010]; *cf., Redman v South Island Orthopedic Group, P.C.*, 78 AD3d 1147, 911 NYS2d 674, *lv denied*, 16 NY3d 707, 920 NYS2d 781 [2011]). The plaintiff's papers outline the reasonable steps taken to locate Kanwal, including its reasonable attempts to serve Kanwal within the 120 days after the action was filed, and demonstrate that failure to timely serve process was the result of circumstances beyond the plaintiff's control, namely, the inability to

locate Kanwal (*see, Frank v Garcia*, 84 AD3d 654, *supra*). Although this motion was not filed until July 28, 2011, Kanwal's intervening bankruptcy, the additional requirements imposed by the Administrative Orders of the Chief Administrative Judge dated October 20 2010 and March 2, 2011 as well as the newly enacted Uniform Rules of Trial Courts (22 NYCRR) § 202.12-A (f), the subsequent foreclosure settlement conference recently held September 22, 2011 (*see, CPLR 3408*), the alleged default in payment occurring three years ago, and the lack of any potential prejudice to Kanwal, who ostensibly has been discharged in bankruptcy, warrant an extension of time for the plaintiff to serve Kanwal pursuant to CPLR 308 (*see, Bumpus v New York City Tr. Auth.*, 66 AD3d 26, *supra*; *Frank v Garcia*, 84 AD3d 654, *supra*; *de Vries v Metropolitan Tr. Auth.*, 11 AD3d 312, *supra*).

In determining this matter, the Court also notes the numerous attempts and searches allegedly performed by the plaintiff's agents and employees in attempting to locate the defendant which included, among other things, two visits to the subject property, personal visits to various addresses, requests to several post offices for "change of address" information relating to different addresses as well as an "on-line skip trace". In her affirmation of regularity dated July 26, 2011, counsel avers that she performed a search on July 25, 2011 with the Department of Defense Manpower Data Center which indicated that there was no information on file indicating that Kanwal was in the military of the United States or of any ally. In her affidavit sworn to on December 9, 2009, the plaintiff's process server, Victoria Vinceslio alleges that she visited the subject property on October 17, 2009 and found the same to be "vacant with the electric meter turned off." In her affidavit of due diligence and attempted service sworn to on December 4, 2009, Rosemary LaManna, alleges that on October 21, 2009 she sent a change of address information request to the Postmaster, United States Post Office, Patchogue, with respect to the subject property, which was returned with a marking of "OK". LaManna also alleges, inter alia, that her request dated November 17, 2009 for change of address information to the U.S. Postmaster, Patchogue, with respect to another address, 50 Gillette Avenue, Patchogue, New York, was returned with a marking of "No Change of Address Order on File". When Vinceslio visited the Gillette Avenue address, however, she was alleged informed by a resident that Kanwal was unknown to her. LaManna further alleges that on October 19, 2009 she received information from the New York State Department of Motor Vehicles ("DMV") which indicated that the subject property was Kanwal's current address and that Kanwal's license driver's license did not expire until October 6, 2011. In her affidavit sworn to on December 23, 2010, however, Vinceslio alleges that she purportedly served Kanwal on December 22, 2010 by substitute service upon a co-tenant, "Mohammed Ishtiaq," at the Gillette Avenue address pursuant to CPLR 308 (4), which affidavit was stamped filed by the Suffolk County Clerk on December 23, 2010. According to Vinceslio, Ishtiaq allegedly identified the Gillette address as Kanwal's "dwelling house." By failing to properly provide a correct address to DMV, Kanwal affirmatively misrepresented her current address as the subject property and the plaintiff had every right to rely upon that misrepresentation, first, by attempting service of process at the subject property, and, secondly, by seeking an alternate method of service (*see, McCleaver v VanFossen*, 276 AD2d 603, 714 NYS2d 138 [2d Dept 2000]; *Home Fed. Sav. Bank v Versace*, 252 AD2d 480, 675 NYS2d 131 [2d Dept 1998]; *see generally, Burke v Zorba Diner, Inc.*, 213 AD2d 577, 623 NYS2d 932 [2d Dept 1995]; *Hill v Jones*, 113 AD2d 874, 493 NYS2d 603 [2d Dept 1985]; Vehicle and Traffic Law § 505 [5]; CPLR 308 [5]; 316).

Accordingly, upon good cause show and in the interests of justice, this *ex-parte* application by

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plaintiff for, inter alia, an order granting the plaintiff an order of reference and for leave pursuant to CPLR 306-b extending the time to file, nunc pro tunc, a purported affidavit of service upon Kanwal is granted solely to the extent that proper service upon Kanwal is hereinafter made and filed with the Suffolk County Clerk's Office within Sixty (60) Days from the date of this Order, otherwise denied. This Court declines to grant that branch of the plaintiff's application which seeks to ratify and extend the time to file the purported affidavit of service sworn to on December 23, 2010 nunc pro tunc as of the time that purported service was allegedly made, as this ex parte application was not filed until July 28, 2011 (*cf.*, *Murphy v Hoppenstein*, 279 AD2d 410, 720 NYS2d 62 [1st Dept 2001]; *Griffin v Our Lady of Mercy Medical Center*, 276 AD2d 391, 715 NYS2d 633 [1st Dept 2000]; *Pandolfi v Langer*, 32 Misc3d 1213(A), 2011 NY Slip Op 51270(U) [Sup Ct, Nassau County, July 6, 2011, Asarch, J.]).

The branch of the motion which seeks an order relieving Lynn Poster Zimmerman, Esq. of her duties as Guardian Ad Litem and Military Attorney for Kanwal is denied as academic. Since the Order dated August 19, 2010 (Spinner, J.), was a nullity due to the automatic stay as indicated above, Lynn Poster Zimmerman, Esq. was never appointed as Guardian Ad Litem and Military Attorney for Kanwal (*see*, 11 U.S.C. § 362 [d]; *Valiotis v Psaroudis*, 69 AD3d 610, *supra*).

Lastly, the plaintiff is reminded that proper proof of compliance with CPLR 3215(g)(3), concerning the mailing of additional notice, is required upon application for a judgment of foreclosure against Kanwal. The signed "affidavit" document pursuant to CPLR 3215(g)(3), which was submitted by the plaintiff's office, is undated and unsworn.

Proposed order of reference marked "Not Signed."

Dated: November 21, 2011


HON. JOSEPH FARNETI, A.J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION