

HSBC Bank USA v Pryce
2011 NY Slip Op 33244(U)
October 14, 2011
Supreme Court, Queens County
Docket Number: 1553/08
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE**
Justice

IAS PART 6

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HSBC BANK USA, NATIONAL ASSOCIATION	Motion
AS TRUSTEE FOR NOMURA HOME EQUITY	Date January 25, 2011
LOAN, INC., ASSET-BACKED CERTIFICATES,	Motion
SERIES 2006-FM1,	Cal. No. 14
Plaintiff,	
-against-	Motion
JANET PRYCE, et al.,	Sequence No. 4
Defendants.	

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1-4
Cross Motion.....	5-8
Reply and Opposition to Cross Motion.....	9-10

Upon the foregoing papers it is ordered that the application by defendant Pryce for the court to stay the eviction proceedings of all occupants from her home located at 135-19 234th Street, Laurelton, New York 11422, to vacate the sale of the subject real property, to vacate the default judgment for foreclosure and sale pursuant to CPLR 5015(a)(2) and (a)(3), and to dismiss the case in its entirety pursuant to CPLR 317 on the grounds that plaintiff lacked standing and failed to comply with the requirements of 3215(f), was previously granted in a decision and order of this Court dated March 4, 2011 solely to the extent that a traverse hearing was to be held on April 26, 2011, to determine the propriety of service pursuant to CPLR 308 and to determine whether jurisdiction was properly obtained over moving defendant.

A traverse hearing on the issue of service was held on August 2, 2011. Defendant asserted that she was not served with a copy of the summons and complaint.

As an initial matter, in her Notice of Motion, defendant seeks an order granting defendant's application for renewal of the previous motion by defendant by Order to Show Cause dated March 30, 2010 which motion was marked off calendar for defendant's non-appearance on the call of the calendar on

July 13, 2010. In support of this motion, counsel for defendant submitted an affirmation in which she represents that in defendant's prior Order to Show Cause, defendant sought various relief from the court based upon, among other things, the meritorious defense that "our client was not served in the underlying action" (§ 8 Affirmation of Beverly Benjamin-George dated August 23, 2010). Indeed, even with the instant motion, defendant failed to submit any affidavit of merit in which a claim is made for improper service or lack of service. The court notes that this assertion by counsel is wholly unsupported in the motion papers as defendant Janet Pryce failed to submit any sworn affidavit in which she asserts such a defense.

Moreover, upon the court's review of the defendant's papers submitted in support of the underlying Order to Show Cause, the court discovered that defendant failed to raise any issue concerning lack of service or improper service. The court can only wonder if defendant was truly asserting a claim of improper or lack of service, why such claim was not initially raised in the Order to Show Cause? Moreover, why is such claim wholly unsupported by an affidavit of merit from defendant?

DISCUSSION

At the hearing, plaintiff presented credible evidence in the form of testimony by Anthony Conti, who at the time of the alleged service was a licensed process server. Mr. Conti testified that he had no personal knowledge of the service of the Summons and Verified Complaint, but offered his affidavit of service into evidence. Mr. Conti testified that prior to his first attempt of service his office performed a "skip" search for defendant's address which search indicated that defendant Janet Pryce resided at 169-01 140th Avenue, Laurelton, New York 11434. Mr. Conti then attempted service at that address on three occasions: on 1/22/08 at 9:00PM, on 1/23/08 at 9:05AM, and on 1/24/08 at 7:00AM. He testified that when he attempted service on one date, he spoke to "defendants neighbor" who told him that defendant "still resides at the ...address". The affidavit of service indicates (and Mr. Conti testified) that after he was unable with due diligence to serve the defendant in person, on January 24, 2008, he affixed to the door at 169-01 140th Avenue, Laurelton, New York 11434, a copy of the Summons and Verified Complaint, and he subsequently deposited a copy of the Summons and Verified Complaint in a postpaid, properly addressed plain envelope marked "Personal and Confidential" in an official depository under the exclusive care and custody of the United States Post Office in the State of New York, on January 24, 2008 to 169-01 140th Avenue, Laurelton, New York 11434 by both first class and certified mail. Mr. Conti's testimony clearly demonstrated that plaintiff complied with the service

requirements of CPLR 308(4), also referred to as "nail and mail", in that after exercising due diligence to serve the defendant in person, he "nailed and mailed" the documents to the defendant's last known address.

Defendant Janet Pryce testified that she resides at 169-01 140th Avenue, Laurelton, New York 11434. She further testified that the first time she was aware of the instant action, was when a neighbor informed her that a Notice of Sale was attached to the door of the subject mortgage property located at 135-19 234th Street, Laurelton, New York 11422. Defendant disputes that the process server ever came to her residence at 169-01 140th Avenue on the dates and times stated on the affidavit of service because on all of the occasions he claims he came to her residence either her children, her husband or herself were present to respond to the door bell ringing. She testified that she happened to be home and not at work for the period on January 21, 2008 through January 27, 2008 because she did not attend work due to illness. To corroborate her testimony she submitted a completed "Application for leave of Absence Due to Illness" form and a copy of a physician referral dated January 23, 2008. She testified that she never received a copy of the Summons and Complaint by mail or at her residence. She denied that any process server ever rang the bell to her residence from the outside entrance door.

Defendant's mere denials of receipt of process are insufficient to rebut plaintiff's evidence (see, *Truscello v. Olympia Const., Inc.*, 294 AD2d 350 [2d Dept 2002]). Defendant's bald assertion that she never received the Summons and Complaint by mail was insufficient to dispute the veracity of the process server's affidavit (see, *Fairmont Funding Ltd. v. Stefansky*, 235 AD2d 213 [1st Dept 1997]). Such a properly executed affidavit of service created a presumption of mailing by plaintiff and of receipt by defendant (see, *Kihl v. Pfeffer*, 94 NY2d 118 [NY 1999] (stating that a mere denial of receipt is not enough to rebut the presumption)).

The court does not credit the testimony of defendant. The court concludes that plaintiff properly obtained personal jurisdiction over defendant when she was properly served pursuant to CPLR 308(4). As defendant failed to present sufficient evidence to rebut plaintiff's prima facie case, that branch of defendant Janet Pryce's motion to dismiss the complaint on the ground that the court lacks jurisdiction over the defendant is denied.

As it has been determined that moving defendant was indeed properly served, the court will now address the remainder of defendant Pryce's contentions in her Order to Show Cause, which

seeks an application for the court to stay the eviction proceedings of all occupants from her home located at 135-19 234th Street, Laurelton, New York 11422, to vacate the sale of the subject real property, to vacate the default judgment for foreclosure and sale pursuant to CPLR 5015(a)(2) and (a)(3), and to dismiss the case in its entirety pursuant to CPLR 317 on the grounds that plaintiff lacked standing and failed to comply with the requirements of 3215(f).

Pursuant to CPLR 5015(a):

a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of:

2. newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404;

3. fraud, misrepresentation, or other misconduct of an adverse party;

To the extent that defendant moves under CPLR 5015(a)(2), which grounds consist of "newly-discovered evidence which, if introduced at the trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial under section 4404", such branch of the motion is denied as untimely since the Judgment of Foreclosure and Sale was entered on June 2, 2009. Since a motion for a new trial under 4404 must be made within fifteen (15) days after the decision or verdict pursuant to CPLR 4405, the fifteen (15) day period has long since expired at the time of the making of defendant's application (Siegel, NY Prac § 428, at 696 [3d ed 1999]). As such, to the extent that defendant moves under CPLR 5015(a)(2), such branch of the motion is denied.

To the extent that defendant moves under CPLR 5015(a)(3), such branch of the motion is denied. Pursuant to CPLR 5015(a)(3), "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of: fraud, misrepresentation, or other misconduct of an adverse party". The defendant seeks to vacate the judgment on the grounds of extrinsic fraud, which "may be defined as fraud practiced in obtaining a judgment such that a

party may have been prevented from fully and fairly litigating the matter" (*Shaw v. Shaw*, 97 AD2d 403 [2d Dept 1983][internal citations omitted]). The defendant also seeks to vacate the judgment on the grounds of misrepresentation. The court finds that the moving defendant has not presented a prima facie case that she was prevented from fully and fairly litigating the matter, as the court determined upon a traverse hearing that she was indeed properly served with a copy of the summons and complaint and defendant has demonstrated no evidence of misconduct by the plaintiff which would have prevented moving defendant from having her day in court. Moving defendant lost her day in court due to defendant's own conduct of defaulting in answering the Complaint.

To the extent that defendant moves to dismiss the case in its entirety pursuant to CPLR 317 on the grounds that plaintiff lacked standing and failed to comply with the requirements of 3215(f), such arguments are unavailing since CPLR 317, which section permits vacatur of default judgment, requires that there be "a finding of the court that [defendant] did not personally receive notice of the summons in time to defend . . ." In the instant case, the court has made no such determination, and has in fact found that the defendant was indeed properly served with the summons and complaint. As such, to the extent that defendant moves to dismiss the case in its entirety pursuant to CPLR 317 is denied.

The court has considered defendant's remaining contentions, and find them without merit.

Accordingly, defendant's motion is denied in its entirety.

ALL STAYS ARE HEREBY LIFTED AND VACATED.

This constitutes the decision and the order of the court.

Exhibits are being mailed to the respective counsel along with a courtesy copy of this order.

Dated: October 14, 2011

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Howard G. Lane, J.S.C.