

U.S. Bank Natl. Assoc. v Murillo

2011 NY Slip Op 33517(U)

December 15, 2011

Supreme Court, Nassau County

Docket Number: 6056/08

Judge: F. Dana Winslow

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

**U.S. BANK NATIONAL ASSOCIATION, AS
TRUSTEE THE STRUCTURED ASSET INVESTMENT
LOAN 2005-10,**

Plaintiff,

-against-

**SOLEDAD MURILLO, LUIS DUQUE, BANK
UNITED, FSB,**

Defendants.

**TRIAL/IAS, PART 4
NASSAU COUNTY**

**TRAVERSE HEARING HELD
OCTOBER 11, 2011
SUBMISSION DATE: 11/10/11**

INDEX NO.: 6056/08

The instant foreclosure action was referred to this part on September 14, 2011 for a traverse hearing and disposition, following a motion to vacate a Judgment of Foreclosure and Sale. The Court notes that, according to plaintiff's counsel, the mortgagor's property had been transferred, following a referee's sale, to an entity related to plaintiff. No information was submitted showing that such entity was a bona fide purchaser. Accordingly, no issues regarding the standing or rights of said purchaser were considered.

The traverse hearing was conducted in three segments on October 5, 2011, October 6, 2011 and October 11, 2011, based upon the availability of the Court and witnesses. The hearing had a submission date of November 10, 2011.

The process server, Gary Cardi, testified that he was a six-year "self employed" former Police Officer, and that he received service assignments from A&J Process Service, which was located on the same floor, at the same address, as the local business office of plaintiff's counsel, Steven J. Baum, PC. Mr. Cardi stated that on April 5, 2008, at approximately 11:30 a.m., he served the Summons and Complaint upon Soledad Murillo personally pursuant to CPLR §308(1) and upon the co-mortgagor Luis Duque by substituted service pursuant to CPLR §308(2). According to Mr. Cardi, service was made at defendants' home, 934 Southern Drive, Franklin Square, New York, with additional mailings to the same address.

Mr. Cardi described Ms. Soledad Murillo, the person he served on April 5, 2008, as "female, white 50 to 59 years old about 5' 4", weighed about 130lbs, brown hair." That testimony was given after Mr. Cardi's recollection was refreshed by his affidavit of service submitted in this case. On cross-examination, defense counsel introduced into evidence another affidavit signed by Mr. Cardi, which pertained to service on April 5, 2008, at 11:25 a.m., upon Frances Faster, at an address in Valley Stream. Mr. Cardi admitted that there was "no difference" between the description of Ms. Murillo and the description of Ms. Faster on the two affidavits of service. The Court notes that the distance between the

two locations was not stated, except by plaintiff's counsel, Mr. Victor Spinelli. In closing argument, Mr. Spinelli stated that the Valley Stream address was only one mile from that of defendants' residence and that Mr. Cardi could easily have served Ms. Murillo at her residence twenty-three minutes later, as indicated on the respective affidavits of service. (The Court notes, that, according to "Mapquest", the distance between the two addresses is four to five miles.)

Following Mr. Cardi's testimony, the defendant Ms. Murillo testified that she was at work from 9:00 a.m. to 5:00 p.m. on April 5, 2008, the day of purported service. She stated that after her arrival she may have walked or driven a few miles to visit one or more of the fifteen sales people who worked for her, but that she would not have returned home during the day, based on her "custom and habit." In support of her testimony, she submitted a print out denominated a "milage log" for the month of April 2008, purportedly created in the regular course of her business, which showed an entry for April 5, 2008 of forty miles traveled. The Court notes that, according to "Mapquest" the distance between Ms. Murillo's residence and her place of business in Queens, NY, was approximately 15-20 miles, depending on the route taken. If the mileage log is accepted, the forty miles reflects one trip to her office and one trip home, which supports the argument that she could not have taken an additional trip home and returned to her office in the middle of the day on April 5, 2008.

Based upon the testimony and exhibits alone, the Court is left with reservations regarding the credibility of both witnesses, due to inconsistencies in their respective submissions. Mr. Cardi's demeanor further weakened his testimony.

The Court's ultimate determination, however, is governed by a matter raised in the traverse hearing by defense counsel, R. David Marquez, appearing *pro bono* in conjunction with the Nassau County Bar Association, Mortgage Foreclosure Legal Consultation Project. Mr. Marquez called upon Mr. Cardi to produce his records regarding the services of process that he performed on April 5, 2008. Mr. Cardi admitted that not only did he fail to keep records regarding the services he made on April 5, 2008, but also, that he was not aware of any duty to do so, and hadn't done so in the thousands of services that he performed. Mr. Marquez argued that, insofar as Mr. Cardi failed to maintain records in accordance with the statutory mandate, the service is void and the matter should be dismissed. (The Court notes that Mr. Marquez cited **GBL §89-cc**, which, as discussed below, does not apply in the case at bar, but which prompted the Court's examination of the applicable provisions of **GBL §89 et seq.**)

In response, Mr. Spinelli argued, essentially, that the failure to keep or produce records is of no consequence. "Since Nassau County, as I am aware of, does not require a process server to be licensed, the process server cannot be mandated or penalized for failing to maintain records required of licensed process servers. As a matter of law, failure to keep records shall not automatically void purported service and this can be found in the

Appellate Division case *Feierstein versus Mullan* under 120 Misc2d 574, 467 NYS2d 478, Appellate Term 1983.”

Mr. Spinelli is wrong. **Article 8** and **Article 8-A** of the **General Business Law** govern the duties of process servers. **GBL Article 8** applies to all process servers (who meet the statutory definition), and **GBL Article 8-A** (not applicable here) applies to all process servers in cities having a population of one million or more. Under **GBL Article 8**, a process server is defined as a person, other than an attorney or a party to an action acting on his own behalf, who (a) derives income from the service of papers in an action; or (b) has effected service in five or more actions or proceedings in the twelve month period immediately preceding the service in question. **GBL §89-t**. The definition does not distinguish between licensed or unlicensed process servers. Thus, even if Nassau County does not presently require a process server to be licensed, all process servers are subject to the State’s record keeping mandate, and may be penalized for non-compliance. **GBL § 89-u** requires each process server to maintain a legible record of all service made by him as prescribed by that section, and specifies the information required in the log. Compliance with **GBL §89-u** is subject to enforcement by the attorney general, and civil penalties may be imposed. **GBL §89-v**. (The licensing requirement, imposed upon process servers by local ordinance, may or may not coincide with the more stringent statutory requirements applicable to process servers in cities having a population of one million or more. *See GBL Article 8-A; GBL §89-cc.*)

Mr. Spinelli’s legal argument – that the failure to maintain records does not void purported service -- is invalid. The case cited by Mr. Spinelli, a 1983 decision of the Supreme Court, Appellate Term, First Department, is neither controlling nor relevant. That case held that non-compliance with the licensing provisions of the New York City Administrative Code was not grounds for dismissal. *See Feierstein v. Mullan*, 120 Misc.2d 574. The *Feierstein* case did not deal with the record-keeping requirements of **GBL Article 8** or **Article 8-A**. Mr. Spinelli has not cited, and the Court’s own research has not revealed, any authority for the proposition proffered by Mr. Spinelli, nor any controlling authority on the issue at bar.

This Court holds – seemingly for the first time – that the failure, at a traverse hearing, to produce records kept in accordance with the requirements of **GBL §89-u** may result in dismissal of the action. The Court adopts the reasoning articulated by its companion court in *First Commercial Bank of Memphis v. Ndiaye*, 189 Misc.2d 523 (Sup. Ct., Queens Co., 2001). *See also Inter-Ocean Realty Assoc. v. JSA Realty Corp.*, 152 Misc.2d 901 (Civ. Ct., NY County, 1991). In *First Commercial Bank*, a foreclosure action, the licensed process server produced a computer-generated log book at a traverse hearing. The Court found that this method of record-keeping failed to comply with the precise requirements of **GBL §89-cc** and local regulations applicable to licensed process servers in New York City. The Court noted that the purpose of these record-keeping requirements was to combat the continuing problem of process serving abuse, known as

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“sewer service,” and to ensure the reliability of the records presented in support of jurisdiction. Accordingly, the Court held that the testimony of the process server who failed to keep records in accordance with the statutory requirements could not be credited. This failure to keep appropriate records was considered a failure to comply with the rules of the court regarding the production of records at a traverse hearing. *See* 22 NYCRR § 208.29. The Court held that, absent a showing of good cause for non-compliance, the underlying cause of action should be dismissed for lack of jurisdiction.

The justification for dismissal is even more compelling where, as here, the process server does not produce any records at the traverse hearing. Ignorance of the law does not constitute good cause for non-compliance. *Cf. Inter-Ocean Realty Assoc.*, 152 Misc.2d 901 (Unverified statement by process server that his record book was stolen from his car did not constitute good cause for non-compliance with 22 NYCRR § 208.29).

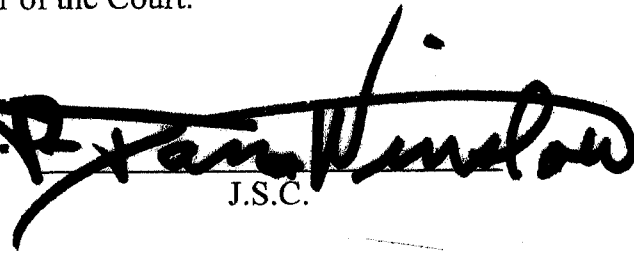
With respect to the case at bar, the Court notes the production of contemporaneous records might have enhanced Mr. Cardi’s credibility and aided in the reconstruction of the events that occurred on April 5, 2008. His own counsel, Mr. Spinelli, on objection to cross-examination, asked “[h]ow is he going to remember 2008?” The law provides specific direction regarding how such events are to be memorialized, which is set forth in Article 8 and Article 8-A of the **General Business Law**.

This Court, recognizing the sound policy of preventing questionable service practices, finds that the process server, Mr. Cardi, was required to keep records in accordance with **GBL §89-u**, and that his failure to produce such records at the traverse hearing, as required by 22 NYCRR § 208.29, is unlawful and constitutes grounds for dismissal for lack of jurisdiction.

In the past, prevailing practices may have permitted reliance upon affidavits of service and process servers’ credibility. The duty to keep comprehensive records may have been unnoticed, or underestimated by litigants and the Courts. Past practice, however, cannot be the motivating force for future conduct and determinations. The need, particularly in this economic environment and under these telling circumstances, for valid and reliable proof of service, mandates the rejection of “trust me,” and the adoption of “show me.”

ORDERED, that the application of defendant Soledad Murillo, to vacate the Judgment in this action pursuant to CPLR §5015(a) (4) is **granted**. The court determines that the purported service upon defendants is null and void, and the matter is dismissed for lack of jurisdiction. This constitutes the Order of the Court.

Dated: December 15, 2011

ENTERED 
DEC 22 2011 J.S.C.

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