

Landco Mtge. Bankers, Inc. v Shinnecock Realty Corp.

2012 NY Slip Op 30919(U)

March 29, 2012

Supreme Court, Suffolk County

Docket Number: 08989/2009

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Landco Mortgage Bankers, Inc.,

Plaintiffs,

-against-

Shinnecock Realty Corp. and Joanna Levenslick,

Defendants.

Motion Sequence No.: 004; MD

Motion Date: 10/31/11

Submitted: 11/30/11

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Attorney for Plaintiff:

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6800 Jericho Turnpike, Suite 207W
Syosset, NY 11791

Attorney for Defendant

Joanna Levenslick:

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Massapequa, NY 11758

Clerk of the Court

Upon the following papers numbered 1 to 38 read upon this motion to vacate the judgment of foreclosure and sale: Order to Show Cause and supporting papers, 1 - 28; Answering Affidavits and supporting papers, 29 - 31; Replying Affidavits and supporting papers, 32 - 35; Other, Sur-reply, 36 - 38.

In March 2009, the plaintiff commenced this action to foreclose a mortgage on real property known as 14 Petrel Road in Southampton, New York (the "Property"). Defendant Levenslick defaulted in submitting an answer or otherwise appearing in the action.

In April 2009 and again in April 2010, plaintiff offered Levenslick a forbearance agreement; both resulted in a default for failure to make the required payments. Pursuant to CPLR §3408, settlement conferences were held on December 2, 2010, January 31, 2011 and March 30, 2011. Such proceedings did not result in a modification of the loan.

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The plaintiff submitted an *ex-parte* application for an order establishing Levenglick's default in answering the summons and complaint and for the appointment of a referee to compute the amount due under the note and mortgage. The application was granted in the order of reference dated April 27, 2011. Thereafter, upon the *ex-parte* application of plaintiff, the Court issued the judgment of foreclosure and sale which is the subject of the instant motion. The affidavit of service indicates that the judgment of foreclosure and sale with notice of entry was mailed on July 19, 2011 to Levenglick at the aforementioned addresses. The referee's notice of sale was mailed to Levenglick on August 3, 2011.

By order to show cause returnable August 1, 2011, Levenglick, proceeding pro se, moved to vacate the judgment of foreclosure; the noticed sale was temporarily stayed. On September 14, 2011, due to defective service, the motion to vacate was denied and the stay lifted. The foreclosure sale occurred on September 15, 2011, and on October 12, 2011, Levenglick was served with the deed and the 10-day notice to quit. On October 24, 2011, Levenglick, pro se, interposed the instant motion seeking the vacatur of the judgment of foreclosure and sale. The order to show cause by which this motion was interposed contained a temporary restraining order enjoining the transfer of the title and all further foreclosure proceedings, and stayed Levenglick's eviction from the Property.

By her submissions, Levenglick states that her motion should be granted because she never had a settlement conference, mail was sent to the wrong address, that she is retaining counsel, that she is in the process of getting the funds to pay plaintiff and that she never received notice of the sale. In a separate notarized submission entitled, "Response to Order to Show Cause," Levenglick alleges, among other things, that she was defrauded by plaintiff in July 2008 when she obtained the loan, that she invested over \$300,000 to purchase the property, that the loan balance was \$850,000, that the interest rate increased after one year, thereby increasing her monthly payments by \$1400, and that she had medical and personal problems which prevented her from making the loan payments. Plaintiff, however, concedes that "[t]here is no doubt that I owe Landco the balance of the loan...."

Plaintiff opposes the motion arguing that Levenglick has not raised an issue or provided any reason for failing to make payments on the loan since 2008. Moreover, plaintiff argues that Levenglick has not provided a basis upon which the judgment of foreclosure and sale should be vacated.

In reply, Levenglick, now with benefit of counsel, asks the Court to set aside the sale and consider the motion as one to vacate the judgment and dismiss the action or, in the alternative, to vacate the default and permit her to interpose an answer with counterclaims in the form annexed. Levenglick, by her attorney, provides a list of grounds to justify granting the request, including an assertion made for the first time that the Court lacks personal jurisdiction over Levenglick due to improper service.

In her affidavit in support of the reply dated November 21, 2011, Levenglick denies that she received service of the summons and complaint personally or in any other manner. Levenglick also asserts that she is 5'1" tall and weighs 170 pounds, not 5'8" and 120 pounds as indicated in the

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process server's affidavit of service. Levenslick also denies that she lives at the New York City address where substituted service was purportedly effected upon her. According to Levenslick, she never received any of the additional notices or the notice of sale purportedly mailed to the property or to the New York City address.

In the sur-reply, plaintiff maintains that Levenslick's new allegations and claims violate the provisions of CPLR §3012 (a), that she is attempting to frustrate and forestall the inevitable as she does not have the ability to pay what she owes on the Property and that her claims of non-service raised for the first time three years after the commencement of this action, are blatantly false. Plaintiff also argues that Levenslick does not have a meritorious defense and that her allegations of fraud and violations of the banking laws are baseless.

While the purpose for submitting reply papers is to give the movant an opportunity to address arguments made in opposition, and not to advance new arguments or different grounds as to why the relief requested should be granted, this rule is not inflexible (see, Kennelly v. Mobius Realty Holdings, LLC, 33 AD3d 380 [1st Dept., 2006]). A court, in the exercise of its discretion, may consider a claim or evidence offered for the first time in a reply where the offering party's adversary responded to the newly presented argument or claim in a sur-reply (see, id.; Basile v. Grand Union Co., 196 AD2d 836, [2nd Dept., 1993]; Fiore v. Oakwood Plaza Shopping Ctr., Inc., 164 AD2d 737 [1st Dept., 1991], *aff'd*, 78 NY2d 572 [1991], *cert. denied* 506 US 823, 113 SCt 75 [1992]). Therefore, under the circumstances, the Court will exercise its discretion and consider Levenslick's argument of lack of personal jurisdiction due to improper service.

When a defendant seeking to vacate a judgment entered on default raises a jurisdictional objection which falls under CPLR §5015(a)(4), the Court is required to resolve the jurisdiction question before determining whether it is appropriate to grant a discretionary vacatur under CPLR §5015(a)(1) (see, Roberts v. Anka, 45 AD3d 752 [2nd Dept., 2007]). Pursuant to CPLR §5015(a)(1), a moving party seeking to vacate a default judgment must demonstrate both an excuse for the default and a meritorious defense. However, where a defendant asserts lack of personal jurisdiction as the ground for vacatur, such claim is governed by CPLR §5015(a)(4) and no additional showing of merit or of excusable default is required (see, Mayers v. Cadman Towers, Inc., 89 AD2d 844 [2nd Dept., 1982]). A successful motion pursuant to this rule renders the subject judgment void and results in a dismissal of the action (see, Cartier v. County of Nassau, 281 AD2d 477 [2nd Dept., 2001]). Under CPLR §317, a defendant is not required to offer a reasonable excuse for his or her default, but must demonstrate that he or she did not personally receive notice of the summons in time to defend the action (see, Eugene Di Lorenzo, Inc. v. A.C. Dutton Lbr. Co., 67 NY2d 138 [1986]; Bank of New York v. Espejo, 92 AD3d 707 [2nd Dept., 2012]; Tribeca Lending Corp. v. Crawford, 79 AD3d 1018 [2nd Dept., 2010]).

It is well established that a process server's sworn affidavit of service constitutes *prima facie* evidence of proper service (see, Wells Fargo Bank, NA v. McGloster, 48 AD3d 457 [2nd Dept., 2008]; Household Fin. Realty Corp. of NY v. Brown, 13 AD3d 340 [2nd Dept., 2004]). A defendant can rebut the *prima facie* showing with a sworn denial of service in an affidavit containing specific

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and detailed contradictions of the allegations in the process server's affidavit (see, Bankers Trust Co. of California, NA v. Tsoukas, 303 AD2d 343 [2nd Dept., 2003]; Skyline Agency v. Coppotelli, Inc., 117 AD2d 135 [2nd Dept., 1986]). Bare conclusory and unsubstantiated denials of receipt of process are thus insufficient to rebut the presumption of proper service created by the affidavit of the plaintiff's process server and to require a traverse hearing (see, Irwin Mtge. Corp v. Davis, 72 AD3d 743 [2nd Dept., 2009]; Mortgage Elec. Registration Sys., Inc. v Schotter, 50 AD3d 983 [2nd Dept., 2008]).

Here, the process server's sworn affidavit of service indicates that on March 16, 2009, Levenglick was personally served at the Property with the summons and complaint and the requisite RPAPL §§1303 and 1320 notices. The process server indicates that the individual he personally served at the Property, identified herself as Joanna Levenglick, whom he describes as a white female, with brown hair and glasses, approximately 55 years old, approximately 5'8" and approximately 120 pounds. This evidence constitutes *prima facie* evidence of proper service pursuant to CPLR §308(1) (see, Skyline Agency, Inc. v. Coppotelli, 117 AD2d 135 [2nd Dept., 1986]; CPLR §306[b]). The discrepancy in Levenglick's actual height and weight which she asserts without evidentiary support, is 5'1" and 170 pounds, is insufficient to rebut the *prima facie* showing of proper service in view of the undisputed accuracy of the process server's description as to her age, hair color and glasses (see, Black v. Pappalardo, 132 AD2d 640 [2nd Dept., 1987] [finding that the discrepancy in the physical description as to height and weight are not significant in view of the undisputed accuracy of the stated age and hair color; see, also, Dominican Sister of Ontario, Inc. v. Dunn, 272 AD2d 367 [2nd Dept., 2000]; Simmons First Nat'l Bank v. Mandracchia, 248 AD2d 375 [2nd Dept., 1998], but see, Frankel v. Schilling, 149 AD2d 657 [2nd Dept., 1989]).

Moreover, a second affidavit of service indicates that Levenglick was served by substituted service (CPLR §308[2]) on March 21, 2009, by delivery of the papers to the doorman, a person of suitable age and discretion, at 339 East 58th Street, Apt 3H, New York, NY 10022 (the "New York City" address"), and mailing to Levenglick at that location on March 24, 2009. Levenglick's bare denial of receipt by substituted service is insufficient to rebut the veracity or content of the process server's affidavit of service pursuant to CPLR §308(2) that she had been effectively served. Service that is left with a doorman, followed by a mailing, is valid where, as here, access to the building is prohibited (see, Rosenberg v. Haddad, 208 AD2d 468 [1st Dept., 1994]). Notably, Levenglick has failed to submit an affidavit by the person upon whom process was allegedly served pursuant to CPLR §308(2), or her daughter who purportedly lives at the New York City apartment, denying receipt of the summons and complaint (see, Roberts v. Anka, 45 AD3d 752 [2nd Dept., 2007]). Additionally, Levenglick's unsubstantiated assertion that the New York City address is not her "actual dwelling" or "usual place of abode" is belied by the documentation before the court. Levenglick is a television producer in New York City and plaintiff has submitted, *inter alia*, documentation showing that the New York City address is for a cooperative apartment for which the proprietary lease is in her name and showing that the New York City Register lists the apartment in her name. Plaintiff has also submitted letters sent to Levenglick at the New York City address from her insurance carrier regarding insurance on the subject Property in foreclosure and from the Town of Southampton Tax Receiver's office which sent a 2010 tax notice for the subject Property being

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foreclosed. Thus, Levenglick is estopped from claiming that the New York City address was not an actual abode or dwelling place under CPLR §308(2) (see generally, U.S. Bank Nat'l. Assoc. v. Vanvliet, 24 AD3d 906 [3rd Dept., 2005]; Poet v. Kolenda, 142 AD2d 633 [2nd Dept., 1988]; Cuomo v. Cuomo, 144 AD2d 331 [2nd Dept., 1988]).

Furthermore, plaintiff complied with all of the proof and notice requirements of CPLR §3215(f) and 3215(g)(3) for entering a default. In the sworn affidavits of service as to the mailing of such notices, it is asserted that the notices were sent to the Property address and to the New York City address and were not returned as undeliverable. Levenglick's mere denial of receipt of these additional notices and the multiple other notices regarding this foreclosure action, is insufficient to rebut delivery (see, 333 Cherry LLC v. Northern Resorts, Inc., 66 AD3d 1176 [3rd Dept., 2009]; see generally, Engel v. Lichterman, 95 AD2d 536 [2nd Dept., 1983], *aff'd* 62 NY2d 943 [1984]). Therefore, that portion of the instant application which seeks a vacatur of the judgment and dismissal of the action for lack of personal jurisdiction is denied (see, Pezolano v. Incorporated City of Glen Cove, 71 AD3d 970 [2nd Dept., 2010]; Roberts v. Anka, 45 AD3d 752 [2nd Dept., 2007]).

Levenglick's request to vacate her default in answering and for leave to serve and file a late answer are equally unavailing. To be entitled to such relief, Levenglick must set forth a justifiable excuse for her default and a meritorious defense (see, CPLR §5015; CPLR §3012; Development Strategies Co., LLC, Profit Sharing Plan v. Astoria Equities, Inc., 71 AD3d 628 [2d Dept., 2010]). The only excuse offered by Levenglick is improper service which has been found to be without merit. Since Levenglick offered no other excuse for her default, she is not entitled to the relief pursuant to CPLR §5015[a][1] (see, Pezolano v. Incorporated City of Glen Cove, 71 AD3d 970 [2nd Dept., 2010]; Roberts v. Anka, 45 AD3d 752 [2nd Dept., 2007]). Levenglick's claims to one or more meritorious defenses are thus inconsequential and the court need not determine whether she demonstrated a meritorious defense (see, Development Strategies Co., LLC, Profit Sharing Plan v. Astoria Equities, Inc., 71 AD3d 628 [2d Dept., 2010]). For the same reasons, Levenglick is not entitled to enlargement of her time to submit an answer (see, Bank of NY v. Espejo, 92 AD3d 707 [2nd Dept., 2012]).

Finally, Levenglick is not entitled to vacatur pursuant to CPLR §317 as she has failed to demonstrate that she did not receive notice of this action in time to defend (see, Bank of NY v. Espejo, 92 AD3d 707 [2nd Dept., 2012]; Tribeca Lending Corp. v. Crawford, 79 AD3d 1018 [2nd Dept., 2010]; Irwin Mtge. Corp v. Davis, 72 AD3d 743 [2nd Dept., 2009]).

In view of the foregoing, the instant motion by defendant Levenglick to vacate the judgment of foreclosure and sale previously entered herein is denied in its entirety. All stays previously imposed by the court are hereby lifted.

Based on the foregoing, it is

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ORDERED that this motion by defendant Johanna Levenglick for an order vacating the judgment of foreclosure and sale dated July 6, 2011, entered upon her default in appearing in the action or answering the complaint, is denied.

Dated: 3/29/2012


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

FINAL DISPOSITION _____ NON-FINAL DISPOSITION