

**Campbell v Simon**

2012 NY Slip Op 32510(U)

September 29, 2012

Sup Ct, Suffolk County

Docket Number: 10245/2008

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**

Michael Campbell,  
  
Plaintiff,

Motion Sequence No.: 004; MD  
Motion Date: 6/28/11  
Submitted: 5/16/12

-against-

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Maryann Simon, William Simon, Workers  
Compensation Board of The State of New York,  
Supervisor of the Town of Islip, People of the State  
of New York, Bank of New York as Trustees for  
the Certificate Holders of CWABS 2004-11,

Defendants.

Upon the following papers numbered 1 to 16 read upon this motion to vacate a judgment:  
Notice of Motion and supporting papers, 1 - 8; Answering Affidavits and supporting papers, 9 - 12;  
Replying Affidavits and supporting papers, 13 - 16; it is

**ORDERED** that this motion commenced by order to show cause by defendant Bank of New  
York as Trustees for the Certificate Holders of CWABS 2004-11 for an order pursuant to CPLR  
3211(a)(8) dismissing the action against it, vacating the Judgment of Foreclosure and Sale entered  
on July 7, 2010 and the subsequent sale held on August 24, 2010, or pursuant to CPLR 5015 or  
CPLR 317 permitting the service of an answer and opportunity to defend, is denied.

On December 24, 2003, defendant Mary Ann Simon ("Simon") gave plaintiff Michael  
Campbell ("Campbell") a collateral mortgage on the premises known as 432 Auburn Avenue in  
Shirley, New York (the "Shirley Property"), to further secure the purchase money note and mortgage  
of the same date in the amount of \$245,000 on the premises known as 71 Park Drive in Mastic  
Beach, New York (the "Mastic Beach Property"). The purchase money mortgage on the Mastic  
Beach Property was recorded in the Suffolk County Clerk's office on January 9, 2004; the collateral  
mortgage on the Shirley Property was not recorded until November 1, 2007.

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On August 31, 2004, Sterling National Mortgage Co., Inc. (not a party herein) loaned Simon \$297,500 in connection with a refinance of the Shirley Property, secured by a mortgage thereon (the "Sterling Mortgage"). According to the HUD-1 Settlement Statement, the proceeds of the refinance were used to pay off a CitiFinancial mortgage loan in the amount of \$186,680.79 and satisfy other creditors in the amount of \$10,111.00; plaintiff received \$83,775.15 in cash. The Sterling Mortgage was recorded with the Suffolk County Clerk's office on December 14, 2004, and thereafter assigned to defendant Bank of New York by an Assignment of Mortgage dated September 5, 2006, which was recorded on September 26, 2006.

On March 3, 2008, Campbell commenced the instant action to foreclose on the purchase money mortgage he held on the Mastic Beach Property and the collateral mortgage he held on the Shirley Property. On May 7, 2008, Bank of New York commenced an action (Index No. 17625/08) against Simon to foreclose on the Sterling Mortgage it holds on the Shirley Property (the "BNY Action"). Campbell, named as a defendant in the BNY Action, interposed an answer in June 2008 denying that his mortgage was subordinate to the Sterling Mortgage held by the Bank of New York. According to the Bank of New York, Campbell's former attorney withdrew the answer pursuant to a stipulation; the stipulation has not been proffered.

The BNY Action is still pending. In the instant action, the default of all the non-answering defendants (including the Bank of New York), was fixed and determined and a referee was appointed by Order of Reference dated January 19, 2009. The judgment of foreclosure and sale was entered on July 7, 2010, and the judicial sale was held on August 24, 2010 whereat the Mastic Beach Property and the Shirley Property were sold. Campbell was the successful bidder on each property, and assigned the \$35,000 bid on the Shirley Property to Frank Garafola. The referee's deed conveying the Shirley Property to Garafola is dated August 24, 2010.

Defendant Bank of New York now argues that it was not properly served with the summons and complaint and that this Court does not have jurisdiction over it. Therefore, the Bank of New York maintains that the Order of Reference, the Judgment of Foreclosure, the Referee's Sale and the Referee's deed should be vacated, and the complaint dismissed. Alternatively, the Bank of New York argues if it is determined that this Court has jurisdiction, the default judgment should be vacated pursuant to CPLR § 5015 and/or CPLR § 317. The Bank of New York maintains that it would be equitable for this Court to find the default excusable as it was unintended, of a short duration, and promptly addressed. Additionally, the Bank of New York maintains it has a meritorious defense in that the Sterling Mortgage on the Shirley Property was recorded prior to the collateral mortgage held by Campbell.

"It is axiomatic that the failure to serve process in an action leaves the court without personal jurisdiction over the defendant, and all subsequent proceedings are thereby rendered null and void" (*Krisilas v Mount Sinai Hosp.*, 63 AD3d 887, 889, 882 NYS2d 186 [2d Dept 2009]; *Hossain v Fab Cab Corp.*, 57 AD3d 484, 486, 868 NYS2d 746 [2d Dept 2008]). Such a defect is not cured by a defendant's subsequent receipt of actual notice of the action, "since notice received by means other than those authorized by statute cannot serve to bring a defendant within the jurisdiction of the court" (*Feinstein v Bergner*, 48 NY2d 234, 241, 422 NYS2d 356 [1979]).

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To obtain personal jurisdiction over a corporation, service of process must be made pursuant to CPLR 311 (*see Lakeside Concrete Corp. v Pine Hollow Building Corp.*, 104 AD2d 551, 479 NYS2d 256 [2d Dept 1984]). Service of process may be effected on a corporation by personal service on the Secretary of State as provided for in Business Corporation Law § 306, or by personal service on “an officer, director, managing or general agent, cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service” (CPLR 311[a][1]).

Here, the process server’s affidavit indicates that the Bank of New York was personally served on July 10, 2009, at “2595 W Chandler Blvd., Chandler, AZ 85224” with the “Summons, Verified Complaint and Consent to Change Attorney” by delivering a copy of each to “Danielle Stewart-Operations Manager” who “stated that he/she was authorized to accept service on behalf of the corporation.” The process server’s affidavit of service also includes a description of Danielle Stewart. Thus, the affidavit of Campbell’s process server constitutes *prima facie* evidence of proper service pursuant to CPLR 311(a)(1) (*see McIntyre v Emanuel Church of God in Christ, Inc.*, 37 AD3d 562, 830 NYS2d 261 [2d Dept 2007]). “While a proper affidavit of a process server attesting to personal delivery upon a defendant constitutes *prima facie* evidence of proper service, a sworn non-conclusory denial of service by a defendant is sufficient to dispute the veracity or content of the affidavit, requiring a traverse hearing” (*NYCTL 1998-1 Trust v Rabinowitz*, 7 AD3d 459, 460, 777 NYS2d 483 [1st Dept 2004]; *see Wells Fargo Bank, N.A. v Chaplin*, 65 AD3d 588, 884 NYS2d 254 [2d Dept 2009]; *Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d 343, 756 NYS2d 92 [2d Dept 2003]). However, a hearing is not required where the defendant or party allegedly served does not personally contest the service (*see Walkes v Benoit*, 257 AD2d 508, 684 NYS2d 533 [1st Dept 1999]; *see also Rox Riv 83 Partners v Ettinger*, 276 AD2d 782, 715 NYS2d 424 [2d Dept 2000]; *Skyline Agency, Inc. v Ambrose Coppotelli, Inc.*, 117 AD2d 135, 502 NYS2d 479 [2d Dept 1989]).

The affidavit submitted in support of the motion by the Bank of New York motion is insufficient to warrant a traverse hearing. Counsel for the Bank of New York has submitted the affidavit of Sharon Mason, vice president of BAC Home Loans Servicing, LP (“BAC”), who asserts that BAC is the authorized agent of the defendant Bank of New York. Mason states that she “reviewed [the Bank of New York’s] records, including employment records, and there is no record of a Danielle Stewart being employed by [the Bank of New York].” Mason also states that the Bank of New York “has no record of ever being served with the summons and complaint in this action.” However, the Bank of New York has not proffered an affidavit from one of its human resources/personnel employees, or other employee, principal, officer or director with personal knowledge (*see Lynch v New York City Tr. Auth.*, 12 AD3d 644, 784 NYS2d 900 [2d Dept 2004]; *Olesniewicz v Khan*, 8 AD3d 354, 777 NYS2d 705 [2d Dept 2004]; *Simonds v Grobman*, 277 AD2d 369, 716 NYS2d 692 [2d Dept 2000]); *cf Miterko v Peaslee*, 80 AD3d 736, 915 NYS2d 314 [2d Dept 2011] [affidavit of corporation’s president that person allegedly served not employed by corporation or authorized to accept service on corporation’s behalf sufficient to warrant hearing]; *McIntyre v Emanuel Church of God in Christ, Inc.*, *supra*; [affidavit of corporation’s pastor sufficient]; *Dunn v Pallett*, 42 AD3d 807, 840 NYS2d 453 [3d Dept 2007] [affidavit of chief operating officer of corporation and affidavit of defendant’s employee sufficient]). Thus, the Bank of New York has failed to rebut the presumption of valid service, no traverse hearing is required, and

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the court will not dismiss the plaintiff's complaint for lack of personal jurisdiction pursuant to CPLR 3211(a)(8) (*see Pezolano v Incorporated City of Glen Cove*, 71 AD3d 970, 896 NYS2d 685 [2d Dept 2010]).

The Bank of New York's alternative claim for vacatur of the order of reference is also unavailing. To be entitled to such relief pursuant to CPLR 5015, the defendant is required to set forth a justifiable excuse for the default and a meritorious defense (*see Development Strategies Co., LLC v Astoria Equities, Inc.*, 71 AD3d 628, 896 NYS2d 396 [2d Dept 2010]; *Mora v Scarpitta*, 52 AD3d 663, 861 NYS2d 110 [2d Dept 2007]; *Yellow Book of New York, Inc. v Weiss*, 44 AD3d 755, 843 NYS2d 190 [2d Dept 2007]). The only excuse offered by the Bank of New York is improper service which has been found to be without merit. Since the Bank of New York has offered no other excuse for its default, it is not entitled to the relief demanded pursuant to CPLR 5015(a)(1) (*see Tadco Constr. Corp. v Allstate Ins. Co.*, 73 AD3d 1022, 900 NYS2d 687 [2d Dept 2010]; *Pezolano v Incorporated City of Glen Cove, supra*). The Bank of New York's claims to one or more meritorious defenses are thus inconsequential as the Court need not determine whether it demonstrated a meritorious defense (*see Development Strategies Co., LLC v Astoria Equities, Inc., supra*).

Finally, the Bank of New York has failed to demonstrate it did not personally receive notice of the summons in time to defend the action, as required to obtain relief from a default judgment pursuant to CPLR 317 (*see SRF Funding, Inc. v Studio Fifty Corp.*, 36 AD3d 604, 829 NYS2d 137 [2d Dept 2007]). The record reveals that the Notice of Motion for the appointment of a referee with supporting papers and a proposed order was mailed to the Bank of New York at the aforementioned Arizona address on October 1, 2009 and on December 9, 2009.

In view of the foregoing, the instant motion by defendant the Bank of New York is denied. All stays previously imposed by the court are hereby vacated.

Dated:

9/27/2012



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

  X   FINAL DISPOSITION            NON-FINAL DISPOSITION

RIDER

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