

Wells Fargo Bank, N.A. v McCray

2013 NY Slip Op 31143(U)

May 21, 2013

Sup Ct, Queens County

Docket Number: 15441/2012

Judge: Robert J. McDonald

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

WELLS FARGO BANK, N.A.

Plaintiff,

- against -

Index No.: 15441/2012

Motion Date: 03/26/2013

Motion No.: 133

Motion Seq.: 1

YVETTE MCCRAY, ANTONIO S. CHAMBERS,
SAN JAY O. CASSANOVA, EMPIRE OF
AMERICA FSB, NEW YORK CITY PARKING
VIOLATIONS BUREAU, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK
CITY TRANSIT ADJUDICATION BOARD,
CRIMINAL COURT OF THE CITY OF NEW
YORK, NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE, KEYSpan ENERGY
DELIVERY, "JOHN DOE 1 TO JOHN DOE 25,"
said names being fictitious, the
persons or parties intended being the
persons, parties, corporations or
entities, if any, having or claiming
an interest in or lien upon the
mortgaged premises described in the
complaint,

Defendants.

- - - - - x

The following papers numbered 1 to 15 were read on this motion by
the defendants Yvette Mccray, Antonio S. Chambers and Sanjay O.
Casanova for an order pursuant to CPLR 3211(a)(8), CPLR 3212(d)
and CPLR 6514 dismissing the complaint on the grounds of improper
service of process upon Antonio Chambers and Sanjay Casanova and
for an order vacating the default of defendant Yvette McCray and
compelling the acceptance of her answer:

Papers
Numbered

Notice of Motion-Affirmation-Affidavits-Exhibits	1 - 6
Affirmation in Opposition-Affidavits-Exhibits.....	7 - 11
Reply Affirmation.....	12 - 15_____

Upon the foregoing papers it is ordered that this motion is determined as follows:

This is a motion pertaining to the foreclosure of the property located at 194-53 115th Road, St. Albans, Queens County, New York. On February 29, 2008, defendants McCray, Chambers and Casanova jointly executed a note and mortgage in the principal sum of \$368,150.00 which was delivered to Professional Mortgage Bankers, Corp. The parties entered into a loan modification agreement on September 17, 2009. The mortgage was assigned to the plaintiff on July 1, 2011. The defendants allegedly defaulted in their monthly mortgage payments beginning on November 1, 2010. Plaintiff subsequently accelerated the defendant's mortgage and brought an action to foreclose its mortgage by filing a summons and complaint and lis pendens on July 25, 2012. Plaintiff alleges that prior to commencing its action, it served a notice of default and ninety day notice pursuant to the requirements of RPAPL § 1304.

According to the affidavits of service filed with the court, defendants Chambers and Casanova were served at the mortgaged premises on July 30, 2012 pursuant to CPLR 308(2) by serving a person of suitable age and discretion, to wit, co-defendant Yvette McCray. Ms. McCray herself was served personally at the subject premises on July 30, 2012. None of the defendants filed a timely answer and as such are in default.

Defendant McCray does not dispute that she was properly served, however, she moves to vacate her default and for an order compelling the plaintiff to accept a late answer stating that she has a reasonable excuse for the default and a potentially meritorious defense. Defendants Chambers and Casanova assert that the complaint must be dismissed against them for lack of personal jurisdiction as neither of them reside at 194-53 115th Road, St. Albans, Queens, the location where service was purportedly made.

In support of the motion, Yvette McCray submits an affidavit dated January 22, 2013 in which she states that she did not answer the summons and complaint because her son is seriously ill. She also contends that she has a potentially meritorious

defense which she has set forth in her proposed answer. She also states that although she lives at the subject property, co-defendants Antonio Chambers and Sanjay Casanova do not reside at said premises and the subject premises is not their actual place of business, dwelling place or usual place of abode. She states that Chambers lives at 83 Bushwick Avenue in Central Islip and Casanova lives at 194-56 114th Road in St. Albans, New York.

Antonio Chambers submits an affidavit in which he states that the affidavit of process server Samuel Berg dated August 1, 2012 is false because he does not reside at the mortgaged premises where substituted service on him was made. He states that although he is a co-owner of the subject property he no longer lives there. He states that at the time service was purportedly made he resided at 83 Bushwick Avenue in Central Islip. He submits several documents including his driver's license, title to his vehicle, his personal checks, payroll checks and bills in his name which were sent to him indicating that his address is in Central Islip New York.

Sanjay Casanova who is also a co-owner of the subject property states that he did not live at the premises at the time substituted service was purportedly made upon him. He submits a driver's license showing that his dwelling place is 194-56 114th Road, St. Albans and not the subject premises which is located at 194-53 115th Road, St. Albans. Therefore, he states that the affidavit of the process server was incorrect in that he place of service is not his dwelling place or usual place of abode.

In opposition, plaintiff's counsel, Alyssa H. Solarsh, Esq., states that in order to vacate the default judgment pursuant to CPLR 5015 the defendant must demonstrate a legally sufficient excuse for her default and a meritorious defense to the plaintiff's cause of action. Counsel contends that with respect to the motion to dismiss by Casanova and Chambers, the affidavit of service is prima facie evidence of proper service and the defendant's denial of receipt of the summons and complaint is insufficient to raise a question of fact as to the sufficiency of service as it fails to contain specific facts to rebut the statements in the process server's affidavit (citing Countrywide Home Loans Servicing, LP v Albert, 78 AD3d 983 [2d Dept. 2009]; Scarano v Scarano, 63 AD3d 716 [2d Dept. 2009]). Further plaintiff contends that if the defendants moved from the subject premises they did so without notifying the plaintiff of a change in occupancy pursuant to the terms of the mortgage. Plaintiff also argues that defendant McCray has not presented a reasonable excuse for her default or a meritorious defense.

Upon review and consideration of the defendants' motion, the plaintiff's affirmation in opposition, and the defendants' reply thereto, this court finds with respect to McCray's application to vacate her default, a party seeking to vacate a default judgment pursuant to CPLR 5015(a)(1) must demonstrate both a reasonable excuse for the default and the existence of a meritorious defense (see Velasquez v Gallelli, 44 AD3d 934 [2d Dept. 2007]; Choudhry v Edward, 300 AD2d 529 [2d Dept. 2002]). Here this Court finds that McCray has proffered a reasonable excuse and that the verified answer contains a potentially meritorious defense. Furthermore, strong public policy favors the resolution of cases on the merits and plaintiff has not shown any prejudice if an answer is served late the plaintiff did not demonstrate prejudice from the defendants' relatively short delay in appearing and answering (see Dimitriadis v Visiting Nurse Serv. of N.Y., 84 AD3d 1150 [2d Dept. 2011]; U.S. Bank, N.A. v Dick, 67 A.D.3d 900 [2d Dept. 2009]; Westchester Med. Ctr. v Hartford Cas. Ins. Co., 58 AD3d 832 [2d Dept. 2009]; Jaskiel v. Tsatskis, 57 AD3d 619 [2d Dept. 2008]; City Line Auto Mall, Inc v Citicorp Leasing Inc, 45 AD3d 716 [2d Dept. 2007]).

With respect to Chamber's and Casanova's application to dismiss the plaintiff's complaint, CPLR 308 (2) permits personal service on a natural person "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business" of the person to be served and, within 20 days thereafter, mailing a copy of the summons to the actual place of business in a specified manner (CPLR 308 [2]). CPLR 308 (2) requires strict compliance and the plaintiff has the burden of proving, by a preponderance of the credible evidence, that service was properly made (see Kearney v Neurosurgeons of N.Y., 31 AD3d 390 [2006]; U.S. Bank Natl. Assn. v Vanvliet, 24 AD3d 906 [3rd Dept. 2005]).

Here based upon the evidence submitted the plaintiff failed to establish by a preponderance of the evidence that service was properly effected at Chambers and Casanova's usual place of abode (see Samuel v Brooklyn Hosp. Ctr., 88 AD3d 979 [2d Dept. 2011]; Kearney v Neurosurgeons of N.Y., 31 AD3d at 391 [2d dept. 2006]). The evidence submitted was sufficient to rebut the statement made by the process server.

A process server's affidavit stating proper service in accordance with CPLR 308, constitutes prima facie evidence of proper service (see Bank, Natl. Assn. v Arias, 85 AD3d 1014 [2d Dept. 2011]; Scarano v Scarano, 63 AD3d 716 [2d Dept. 2009]). However, a defendant's sworn denial of receipt of service, containing specific facts to rebut the statements in the process

server's affidavit, "generally rebuts the presumption of proper service established by a process server's affidavit and necessitates an evidentiary hearing" (City of New York v Miller, 72 AD3d 726 [2d Dept. 2010]; also see Associates First Capital Corp. v Wiggins, 75 AD3d 614 [2d Dept. 2010]; Washington Mut. Bank v Holt, 71 AD3d 670[2d Dept. 2010]). The plaintiff, then, must establish personal jurisdiction over the defendant by a preponderance of the evidence adduced at a hearing (see DeStaso v Bottiglieri, 52 AD3d 453 [2d Dept 2008]).

Here, defendants Chambers and Casanova have submitted evidence which contains sufficient facts regarding their actual residence at the time of service to warrant a traverse hearing to determine whether the defendant was properly served pursuant CPLR 308(2) by delivery of a copy of the summons and complaint to a person of suitable age and discretion at each defendant's dwelling place or usual place of abode (see U.S. Bank, Natl. Assn. v Arias, 85 AD3d 1014 [2d Dept. 2011]).

Accordingly, for all of the above stated reasons it is hereby

ORDERED, that the motion by defendant McCray to vacate her default is granted and the plaintiff is directed to accept her answer in the form annexed to her motion, and it is further,

ORDERED that the motion of Chambers and Casanova is granted to the extent that all parties are directed to appear for a traverse hearing to be held in Room 304 of the Queens County Supreme Court, located at 25-10 Court Square, Long Island City, New York 11101, at **10:00 a.m** on **July 2, 2013**.

Dated: Long Island City, NY
May 21, 2013

ROBERT J. McDONALD
J.S.C.