JFKYYZ Series 4 L.P. v 176 Rockaway Ave Corp.
2014 NY Slip Op 31283(U)
May 5, 2014
Sup Ct, Kings County
Docket Number: 500307/14
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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JFKYYZ SERIES 4 L.P.,

Plaintiff, Decision and order

- against - Index No. 500307/14

176 ROCKAWAY AVE CORP., GEORGE WILSON, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY DEPARTMENT OF FINANCE, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, AND "JOHN DOE #1" THROUGH "JOHN DOE #99",

Defendants, May 5, 2014

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved seeking the appointment of a receiver pursuant to Real Property Law §254. The defendants oppose the motion and have moved by order to show cause seeking dismissal of the action on the grounds they have not been served with process. Papers have been submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

This lawsuit commenced on January 14, 2014 when plaintiff filed a summons and complaint seeking to foreclose a mortgage alleging the defendant had failed to make timely mortgage payments. The plaintiff now moves seeking a receiver to collect rents, make repairs to the property and apply the rental income to reduce the unpaid charges against the property. The defendants argue that they were never served with process and thus the court does not have jurisdiction over them and in any

event the motion seeking a receiver is improper because the plaintiff failed to satisfy a condition precedent before commencing the action. The defendants further argue the plaintiff has failed to demonstrate that a receiver is necessary.

Conclusions of Law

Turning to the issue of service, the Civil Practice Law and Rules provide that a summons and complaint may be served upon the defendant at the usual place of abode of the person to be served (CPLR §308(1)). It is true that generally a process server's affidavit provides prima facie evidence of proper service (Kaywood v. Cigpak Inc., 258 AD2d 623, 685 NYS2d 770 [2d Dept., 1999]). To contend that service was improper and that defendant is entitled to a hearing on the matter, the defendant must allege facts to support the contention (Genway Corp. v. Elgut, 177 AD2d 467, 575 NYS2d 899 [2d Dept., 1991], Rox River 83 Partners v. Ettinger, 276 AD2d 782, 715 NYS2d 424 [2d Dept., 2000]). Minor discrepancies in the appearance of the person served is insufficient to raise an issue of fact (Simmons First National bank v. Mandracchia, 248 AD2d 375, 669 NYS2d 646 [2d Dept., 1998]). Likewise, conclusory denials are insufficient to entitle a defendant to a hearing concerning service (Remington Investments Inc. v. Seiden, 240 Ad2d 647, 658 NYS2d 696 [2d Dept., 1997]).

A defendant is generally required to issue a sworn denial concerning service (Long Island savings Bank v. Meliso, 229 AD2d 478, 645 NYS2d 519 [2d Dept., 1996]). Thus a sworn denial by defendant that the location of the service was no longer his usual place of abode raises an issue whether service was proper (Johnson v. Motyl, 202 Ad2d 477, 609 NYS2d 34 [2d Dept., 1994]). In this case, there was service upon defendant George Wilson personally pursuant to CPLR §308(1). However, the defendant has raised specific objections concerning service of process specifically by pointing out discrepancies between his physical appearance and the physical appearance as recorded by the process server. Thus, a hearing will be held to determine whether those discrepancies are minor and insignificant or raise questions concerning the proper service of defendant George Wilson.

Concerning the defendant 176 Rockaway Avenue Corp., even if the above analysis would raise similar questions regarding service upon a corporate officer, service has been effectuated via the Secretary of State of which no objection has been presented. Thus, while the parties will be notified concerning a hearing regarding service upon Mr. Wilson, the motion seeking to dismiss the complaint based upon improper service of defendant 176 Rockaway Ave Corp., is denied.

Turning to other issues, the Consolidation and Modification Agreement in Section 18(a) provides that the debt will become due

"if any installment is not paid within ten days" after it is due. Section 18(k) does provide that, alternatively, the debt will become due "if for fifteen days after notice from the Mortgagee the Mortgagor shall continue to be in default under any other covenant of the Mortgagor" (id). Thus, clearly, the debt is due upon the defendants failure to make a payment within ten days it is due. The plaintiff may extend that time and provide a notice and fifteen days in which to expect payment. No condition precedent is created thereby which the plaintiff has failed to fulfill.

Concerning the appointment of a receiver, it is well settled that where a mortgage provides that a receiver may be appointed then such appointment may take place without notice RPAPL §1325(1). In addition, where a default of the mortgage payments has occurred and the mortgagee has the right to accelerate the debt and full payment has not been tendered then there is no proof of necessity for the appointment of the receiver (F.D.I.C. v. Vernon Real Estate Investments, Ltd., 798 F.Supp 1009 [Southern District of New York, 1992]). The defendants do not dispute the mortgage default at all, thus cannot seriously dispute the authority and permissibility of the appointment of the receiver. Moreover, the plaintiff has adequately presented evidence of a default permitting the appointment of a receiver. Moreover, any fears or concerns regarding the excessive cost of a

receiver are unfounded since as a fiduciary arm of the court pursuant to CPLR §8004 a receiver is only entitled to five percent "of the sums received and disbursed" as the maximum fee and that proof of such entitlement must be presented (De Nunez v. Bartles, 264 AD2d 565, 695 NYS2d 31 [1st Dept., 1999]). Thus, the examination of the receiver's duties and performances insures that the interest of the property remains paramount.

Therefore, based on the foregoing, the motion seeking the appointment of a receiver is granted. A separate order will enumerate the specific duties and details of the receiver.

So ordered.

ENTER:

DATED: May 5, 2014
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC