

**Citibank NA as Trustee for the LXS 2006-13 Trust
Fund v Dyett**

2014 NY Slip Op 31589(U)

June 19, 2014

Sup Ct, Kings County

Docket Number: 501824-2012

Judge: Loren Baily-Schiffman

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This opinion is uncorrected and not selected for official publication.

EP

At an IAS Civil Term Part 65, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6 day of June, 2014.

Present: HON. LOREN BAILY SCHIFFMAN

CITIBANK NA AS TRUSTEE FOR THE LXS 2006-13 TRUST FUND, Plaintiff, - against - JOEL DYETT, ET AL, Defendant.
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Index No.: 501824-2012

Decision and Order

As required by CPLR 2219(a), the following papers were considered in the review of this motion.

The following papers numbered 1 to 2 read on this motion

	<u>PAPERS NUMBERED</u>
Notice of Motion - Notice of Cross-Motion - Affidavit(s) 1 - 2
Affirmation(s), Petition, and Exhibits Annexed
Answering Affidavit(s) and Affirmation(s)
Reply Affidavit(s) and Affirmation(s)
Other Papers

Upon the foregoing papers Plaintiff, Citibank, NA (hereinafter referred to as "Citibank") moves this court for an Order pursuant to CPLR § 306 (b) for an extension of time to effectuate service upon defendant Joel Dyett (hereinafter referred to as "Dyett") and upon the court's order granting same, for permission to serve defendant by publication pursuant to CPLR § 308 (5). Defendant, Dyett entered into a mortgage agreement secured by the property located at: 467 Monroe Street, Brooklyn, NY 11203 (Block 1634, Lot 79, a multi-family dwelling) with New York Mortgage Company, LLC (hereinafter referred to as "NY Mortgage") on March 31, 2006. Plaintiff alleges in the unverified Complaint dated July 5, 2012 that defendant did not make the requisite payments as per the note and the mortgage. Said complaint was filed with the summons on July 9, 2012 in the office of the Clerk of Kings County.

CPLR § 306 (b) requires that service of the summons and complaint be made within one

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hundred and twenty (120) days after commencement of the action. Pursuant to CPLR § 304, an action is commenced on the date it is filed with the Clerk of the Court. Since this action was commenced on July 9, 2012, CPLR § 306 (b) required that service upon defendant be effectuated by November 7, 2012. Plaintiff attempted to serve defendant at the following locations: 467 Monroe Street, 181 Van Buren Street, 494 Hancock Street, all in Brooklyn on Tuesday, July 24, 2012 at 8:15 am, Monday, August 13, 2012 at 8:15 am and Saturday, August 25, 2012 at 3:20 pm, respectively. Additionally, plaintiff attempted service upon defendant at 119-18 203rd Street, St. Albans, Queens on Tuesday, September 4, 2012 (the affidavit of attempted service does not refer to the time for the latter location). Thereafter, plaintiff obtained records from New York State Department of Motor Vehicles, New York State Board of Elections, "White Pages" "Tracers" and "IRB Search" on August 27, 2012 and September 5, 2012.

On or about September 28, 2012, plaintiff received notification from the United States Postal Service indicating that defendant was receiving mail at the 494 Hancock Street address. The affidavit of attempted service upon defendant at 494 Hancock Street states that tenants, "John Doe" and "Susie Doe" confirmed that "the defendant is the owner of said address" but did not reside there¹. Ken Harper, a tenant at 181 Van Buren Street, advised the process server that defendant was no longer the owner of said address as of four months ago, but comes around every two-three weeks to pick up mail².

Good Cause

CPLR § 306 (b) provides in relevant part that a court may grant an extension of time to serve defendant(s) after the prescribed period "upon good cause shown." Citibank asserts that

¹ Exhibit "C" annexed to the affirmation in support by Mark Golab, Esq.

² Exhibit "C" annexed to the affirmation in support by Mark Golab, Esq.

plaintiff is entitled to an extension of time to serve defendant(s) herein because a diligent effort was made to serve Dyett, without success³. In order to establish “good cause” pursuant to CPLR § 306 (b) a plaintiff must demonstrate reasonable diligence in attempting service upon defendant(s). *Bahadur v New York State Department of Correctional Services*, 88 Add 629, 631 (2nd Dept 2011); *Calloway v Wells*, 79 AD3d 786 (2nd Dept 2010). Reasonable diligence requires more than one attempt at service *Hafkin v North shore University Hospital* 279 AD2d 86 (2nd Dept 200); *Mitchell v Mitchell* 107 AD2d 737 (2nd Dept 1985); *Reed v Domenech*, 90 AD2d 844 (2nd Dept 1982); cf. *Barnes v City of New York*, 70 AD2d 580 (2nd Dept 1979); *app dismissed at 48 NY2d 630 and at 48 NY2d 654 and affd 51 NY2d 906 (1980)*. The process server herein made only one attempt to serve defendant at different locations.

While a process server’s affidavit is considered prima facie evidence of service; the statements made by the tenants at 494 Hancock Street and set forth in the affidavit are heresy. In the case at bar, merely because “John Doe” and “Susie Doe” alleged that Dyett did not reside at 494 Hancock Street did not relieve the process server of the duty to make more than one attempt at service at 494 Hancock Street. A reference to a conversation in the process server’s affidavit is insufficient proof, as a matter of law, that plaintiff exercised reasonable diligence in the attempted service upon defendant. *Schwarz v Margie*, 62 AD3d 780 (2nd Dept 2009); *Leviton v Unger* 56 AD3d 731 (2nd Dept 2008). Said tenants confirmed that Dyett was the owner and the United States Postal Service reported that defendant did in fact receive mail at 494 Hancock Street, before the time to serve defendant had expired.

Plaintiff has offered no explanation why the process server did not speak to any neighbors in an attempt to ascertain Dyett’s whereabouts. Moreover, Citibank has offered no explanation

³ ¶9 of the affirmation in support by Mark Golab, Esq.

why the process server did not return to the 494 Hancock address after receipt of notification by the United States Postal Service that Dyett was receiving his mail there. Accordingly, plaintiff knew or should have known that defendant received mail at 494 Hancock Street and 181 Van Buren Street five weeks and approximately eight weeks, respectively, prior to the expiration date for service upon defendant. However, Citibank made only one single attempt to serve defendant at each location on July 24, 2012, August 13, 2012, August 25, 2012 and September 4, 2012. Accordingly, plaintiff has failed to demonstrate good cause to support an extension of time to serve defendant herein.

Interests of Justice

CPLR § 306 (b) also permits the court to grant an extension of time to effectuate service in the interests of justice. The interests of justice standard is more flexible than the good cause standard, and requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests of the parties. *Leader v Maroney, Id at 105*. The Court of Appeals set forth the following factors to consider when determining whether or not the interests of justice would be served by granting an extension of time: 1) diligence in attempted service, 2) expiration of the Statute of Limitations, 3) meritorious nature of the cause of action, 4) the length of delay in service, 5) the promptness of plaintiff's request for the extension of time to serve and 6) prejudice to defendant. *Id. at 105-106*. As previously set forth, plaintiff did not exercise diligence in the attempted service made herein. Also noteworthy is the fact that the Statute of Limitations will not run until January 1, 2018. Plaintiff did not make the motion to extend the time to serve defendant herein until nearly five months after the time prescribed by statute had expired.

In order to demonstrate meritorious claim in a foreclosure action the plaintiff must submit the unpaid note, mortgage and evidence of the default. *Washington Mutual Bank v Schenk, 112*

AD3d 615, 616 (2nd Dept 2013), citing, Wells Fargo Bank v Webster, 61 AD3d 856; Capstone Bus Credit, LLC v Imperia Family Realty, LLC, 70 AD3d 882, 883 (2nd Dept 2010); GRP Loan v Taylor, 95 AD3d 1172, 1173-1174 (2nd Dept 2012). Citibank has failed entirely to demonstrate that plaintiff has a meritorious cause of action. While plaintiff alleges in the complaint⁴ herein that Citibank is the holder of the note and mortgage; no note whatsoever has been submitted herein. Moreover, the mortgage herein was made between Dyett and NY Mortgage. Citibank has annexed a document indicating that a mortgage agreement between Dyett and MERS, dated March 31, 2006 was recorded in the Office of the City Register of the City of New York on April 21, 2006. Citibank has failed entirely to submit any evidence whatsoever that indicates that plaintiff is the holder and owner of the note and mortgage herein. The allegation contained in the complaint that Citibank is the owner and holder of the note and mortgage is insufficient to demonstrate a meritorious cause of action. *Aames Funding Corp v Houston 44 AD3d 692; 693 (2nd Dept 2007).*

Plaintiff has failed to demonstrate diligence in the attempted service, did not make more further attempts to effectuate service within the 120 days, waited nearly five months to make the instant motion for an extension of time to serve defendant and failed entirely to demonstrate the existence of a meritorious cause of action herein. Accordingly, the interests of justice will not be served in granting an extension of time for Citibank to serve defendant, Dyett. Plaintiff's motion of an extension of time to serve defendant, Dyett, herein is denied in its entirety.

This is the Decision and Order of the Court.

ENTER,



LOREN BAILY-SCHIFFMAN
J.S.C.

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⁴ Exhibit "A" ¶ 7, annexed to the affirmation in support by Mark Golab, Esq.