

NYCTL 2011-A Trust v 1916 Ocean Ave. LLC

2014 NY Slip Op 32080(U)

July 7, 2014

Sup Ct, Kings County

Docket Number: 502050/12

Judge: Bernadette Bayne

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At an IAS Term, Part 18 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, Brooklyn, New York, on the 7th day of July 2014.

P R E S E N T:

HON. BERNADETTE BAYNE

Justice.

NYCTL 2011-A TRUST and the BANK OF NEW YORK MELLON as Collateral Agent and Custodian for the NYCTL 2011-A Trust,

Plaintiffs,

DECISION AND ORDER

- against -

Index No. 502050/12

1916 OCEAN AVENUE LLC, NEW YORK COMMUNITY BANK, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, UNITED STATES OF AMERICA - INTERNAL REVENUE SERVICE, CONTRACT PLUS ELECTRICAL CORP., NEW YORK CITY TRANSIT ADJUDICATION BUREAU, CRIMINAL COURT OF THE CITY OF NEW YORK, CMCA, LLC, and "JOHN DOE #1" through "JOHN DOE #100" inclusive, the names of the last 100 defendants being fictitious, the true names of said defendants being unknown to the plaintiff, it being intended to designate fee owners, tenants or occupants of the liened premises and/or persons or parties having or claiming an interest in or lien upon the liened premises, if the aforesaid individual defendants are living, and if any or all of said individual defendants be dead, their heirs at law, next of kin, distributees, executors, administrators, trustees, committees, devisees, legatees, and the assignees, lienors, creditors and successors in interest of them, and generally all persons having or claiming under, by, through, or against the said defendants named as a class, of any right, title, or interest in or lien upon the premises described in the complaint herein,

Defendants.

<u>The following papers numbered 1 to 4 read on this motion:</u>	<u>Papers Numbered</u>
Notice of Motion/ Affidavit (Affirmation) Annexed_____	<u>1</u>
Notice of Cross-Motion/ Affidavit (Affirmation) Annexed_____	<u>2</u>
Affidavit (Affirmation) in Opposition/Reply to Cross Motion/ Further Support of Motion Annexed_____	<u>3</u>
Affidavit (Affirmation) in Reply/Further Support of Motion Annexed_____	<u>4</u>

In this action to foreclose a tax lien, the plaintiff moves this Court for an Order, “[p]ursuant to RPAPL §1321, appointing a referee and directing the referee to ascertain and compute the amounts due Plaintiffs upon the tax lien being foreclosed in this action, and to examine and report whether the lien property can be sold in one or more parcels”; “[e]xcising from the caption defendants John Doe No. 1 through John Doe No. 100, and discontinuing the action as against them”; and “[d]eeming service upon defendant CMCA, LLC timely *nunc pro tunc*”.

In support of their motion, the plaintiffs contend that they hold a tax lien on the subject property, which is located at 1916 Ocean Avenue, in Brooklyn, New York. The plaintiffs argue that “[t]he tax lien has not been paid and is superior to all other liens”, and, as such, they “[n]ow seek to foreclose upon the property”. The plaintiff claims that although all of the parties were served, “[n]one of the said defendants answered, moved or appeared with respect thereto, although the time for them to do so has expired and has not been extended by court order or otherwise”. The plaintiffs do note that one defendant, CMCA, LLC, “[w]as served after the expiration of time limits set forth in CPLR §306”. As such, the plaintiffs request “[t]hat the

Court deem service upon defendant CMCA, LLC, timely, nunc pro tunc”. The plaintiffs argue that “[t]he delay resulted in no prejudice to any defendant herein”, but contends that they “[w]ill be severely prejudiced if service is not deemed timely because they will not be able to foreclose the subject tax lien upon the property and the underlying charges will go unpaid”. Finally, the plaintiffs request that the caption be amended to remove JOHN DOE No. 1 through JOHN DOE No. 100, as they are not necessary parties.

Defendant 1916 OCEAN AVENUE LLC (hereinafter referred to as defendant 1916) opposes the plaintiffs’ motion by filing a motion with this Court, labeled a “cross motion”, wherein it seeks an Order, pursuant to “[C]PLR §306-b and §3211(a)(10), dismissing the complaint in its entirety as a necessary party was not served with process within the 120 days provided by CPLR §306-b”, and for a further Order “[v]acating the Notice of Pendency”. In the alternative, Defendant 1916 seeks leave to file a late Answer to the complaint filed in this case, pursuant to CPLR §2004.

In support of its “cross motion”, defendant 1916 generally argues that “[t]he underlying service of process is defective and the plaintiffs failed to join an indispensable party”. Defendant 1916 also contends that “[t]he underlying tax owed is in error and the Court (if it is not inclined to dismiss the action for failure to serve a necessary party) respectfully should properly wait to have the appropriate tax amounts determined”. Finally, defendant 1916 argues that “[s]hould the Court decide not to dismiss the action, the Court should, pursuant to CPLR §2004, permit defendant to file an answer” because “[i]n the instant matter, defendant did not interpose an answer within the time prescribed by the CPLR”. In support of its contention that it should be permitted to “[f]ile an answer”, defendant 1916 argues that the “[p]laintiffs cannot claim to be prejudiced by any delay in the proceedings as plaintiffs themselves have shown a clear pattern of sitting on their

rights and delay [*sic*]", and that "[d]efendant is not currently in default, further showing the lack of prejudice to occur [*sic*] by permitting defendant to interpose an answer in the instant action".

Discussion

CPLR §306-b allows 120 days, after the filing of the summons and complaint, in which to effect service on the defendant. As long as service is made within that period, or within the period as extended by the court, the service relates back to the filing, and as long as the filing was within the applicable statute of limitations, the action is timely. CPLR §306-b. If service can't be made within the 120 days despite the plaintiff's diligent efforts, the plaintiff can move for an extension of time, just as under Federal Rule 4(m), and there is no arbitrary limit on how long an extension the court can grant. The plaintiff should show "good cause" for the extension, but CPLR §306-b also allows the court to grant it without good cause if the court finds it "in the interest of justice."

Unlike a request for extension of time within which service of process may be effected that is premised on good cause, a plaintiff who makes such a request under interest of justice standard need not establish reasonably diligent efforts at service as a threshold matter; however, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the statute of limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant. Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95, 761 N.E.2d 1018, 736 N.Y.S.2d 291 (Ct. Of Appeals, 2001); CPLR 306-b.

If the plaintiff serves the complaint beyond the temporal deadline, defendant's counsel has the option of refusing to acquiesce in this informal attempt to cure its default. However, any decision to reject the plaintiff's proposed pleading must be promptly made, for there is always the

risk that delay will constitute a waiver. *See, e.g.,* Lai Har Chin v. Yard, 40 A.D.3d 590, 833 N.Y.S.2d 405 (2nd Dept., 2007); Rebh v. Rotterdam Ventures Inc., 252 A.D.2d 609, 675 N.Y.S.2d 234 (3rd Dept., 1998); Haygood v. Rochester General Hosp., 249 A.D.2d 943, 672 N.Y.S.2d 182 (4th Dept., 1998). If the untimely service of the complaint follows the making of the defendant's motion to dismiss, the defendant's retention of that pleading will not serve as a waiver, since its objection was preserved by the motion to dismiss. Brenner v. Cross County Shopping Center, 308 A.D.2d 469, 764 N.Y.S.2d 638 (2nd Dept., 2003).

After hearing the oral arguments of the parties, and upon review of the papers submitted, this Court is of the opinion that the plaintiff's motion should be granted in its entirety. Aside from the portion of the motion seeking to amend the caption, to which there is no objection, the plaintiff requests that the Court deem the summons and complaint, timely served, *nunc pro tunc*, upon defendant CMCA, LLC. The Court notes that defendant CMCA, LLC, was actually served, albeit after the expiration of the time permitted by the CPLR, and that the plaintiff made diligent efforts to serve defendant CMCA, LLC, which is located outside of New York State. The Court further notes that, regardless of whether the service upon defendant CMCA, LLC, was timely or not, the record reflects that, to date, they have not interposed an answer or otherwise appeared in this action.

Remarkably, it is defendant 1916 that challenges the validity of service of the summons and complaint upon co-defendant CMCA, LLC, not defendant CMCA, LLC, itself. Although the argument is novel, this Court finds no basis for defendant 1916 to challenge service on another defendant. Moreover, as defendant 1916 has yet to interpose an answer to the summons and complaint, and its motion was the first time that it appeared in this action, this Court is of the opinion that defendant 1916 has no standing to challenge service on another defendant, and based

upon the amount of time that has elapsed since it was served with the summons and complaint, it has also waived any objections or challenges to the method, manner or timeliness of the way that it was served with the summons and complaint.

Turning to defendant 1916's motion, which it labeled as a cross motion, the Court initially notes that said motion was neither timely drafted, nor noticed, to be labeled a cross motion. It is well settled that a cross-motion is timely if it was made at least three days prior to the time at which the original motion is noticed to be heard. CPLR §2215. However, CPLR §2215 was amended in 2007 to provide that, to be timely, a cross-motion must be served at least seven days prior to the return date of the main motion if the original movant has properly availed him or herself of the opportunity to submit a reply pursuant to CPLR 2214(b). The original moving party may then serve "any reply or responding affidavits" at least one day before the return date. In this instance, the plaintiff made its motion on August 8, 2013. Defendant 1916 filed its motion on April 9, 2014, which is significantly longer than either the three (3) or seven (7) day time periods in which service of a cross motion must be effectuated in order for it to be timely and proper pursuant to the CPLR.

Regardless of whether defendant 1916 labels its application as a motion or a cross motion, aside from its request to file a late answer, this Court cannot find any basis for granting any of the relief that defendant 1916 requested therein. As previously mentioned, the portion of defendant 1916's motion seeking dismissal of the plaintiff's action, in its entirety, based upon defendant 1916's contention that co-defendant CMCA, LLC, was not properly served with the summons and complaint, is denied. The remainder of defendant 1916's motion requests leave of the Court to file a late answer to the summons and complaint.

CPLR §2004 permits the court to extend a defendant's time to appear or answer, upon

good cause shown, whether the motion is made before or after the expiration of the time fixed for that response. In resolving motions brought under CPLR §2004, courts will consider the length of the delay, whether the excuse for the delay was reasonable, whether there is evidence of material meritorious defenses to plaintiff's complaint allegations, whether the default was willful, whether the defendant intended to abandon its defense, whether the plaintiff was prejudiced by the delay, and the strong public policy in favor of resolving actions on their merits. The defendant's "reasonable excuse" explanation must be offered by a knowledgeable affiant and should detail the specific facts and circumstances that were responsible for the delay. Naked conclusions, speculation or argument will not suffice.

In this instance, although the Court is not particularly impressed with defendant 1916's excuse for its delay in interposing an answer to the summons and complaint, the Court does recognize that the defendant's principal is located in Singapore and that it had to obtain an affidavit from him in that country. Moreover, despite the plaintiff's claims to the contrary, the Court finds that permitting defendant 1916 will result in very little prejudice to the plaintiff, but would completely prevent defendant 1916 from defending the action on its merits. Although defendant 1916 concedes that it "[d]id not interpose an answer within the time prescribed by the CPLR", and acknowledges that "[t]he Court may properly consider factors such as the length of the delay, whether the opposing party has been prejudiced by the delay, the reason given for the delay", and "[w]hether the moving party was in default before seeking the extension", it correctly points out that "[p]laintiffs also waited until almost a full year had passed before making their instant motion to appoint a referee", and notes that it "[i]s not currently in default".

A strong public policy exists which favors the disposition of matters on their merits.

Ahmad v. Aniolowiski, 28 A.D.3d 692, 814 N.Y.S.2d 666 (2nd Dept., 2006); Bunch v. Dollar

Budget, Inc., 12 A.D.3d 391, 783 N.Y.S.2d 829 (2nd Dept., 2004). As such, and based upon the foregoing, this Court, in its discretion, grants the portion of defendant 1916's motion which sought an Order for leave to interpose an answer to the summons and complaint in this action, in the form annexed to its motion papers. Although the Court is permitting defendant 1916 to interpose an answer, the Court is also simultaneously granting the plaintiff's motion in its entirety, including the plaintiffs application for an Order of Reference.

Conclusion

Accordingly, it is

ORDERED, that the plaintiffs' motion is granted in its entirety; and it is further,

ORDERED, that the portion of defendant 1916's motion seeking dismissal of the plaintiffs' action, in its entirety, is denied; and it is further,

ORDERED, that the portion of defendant 1916's motion seeking permission to file a late answer in this action, in the form annexed to defendant 1916's motion papers is granted, and the answer is deemed timely.

This constitutes the Decision and Order of the Court.

E N T E R

Bernadette Bayne
HON. BERNADETTE BAYNE
J.S.C.
BERNADETTE BAYNE
Supreme Court Justice

FILED
KINGS COUNTY CLERK
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