 FILED Sep 22 2014 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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CELESTE WENEGIEME,

Plaintiff,

- against -

U.S. BANK NATIONAL ASSOCIATION, as trustee, MARIE NICHOLSON ESQ, LEOPOLD & ASSOCIATES, PLLC, PHILIP WAYNE COLEMAN ESQ, OCWEN LOAN SERVICING,

Defendants.

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DECISION AND ORDER

Index No. 303957/2014

PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated August 14, 2014 of defendant Leopold & Associates, PLLC and the affirmations (2) and exhibits submitted in support thereof (Motion Sequence #2); plaintiff's affidavit in response dated August 22, 2014 and the exhibits submitted therewith; the affirmation in support of defendant Philip Wayne Coleman, Esq. dated September 2, 2014; plaintiff's notice of discontinuance filed with the Bronx County Clerk on August 22, 2014; the notice of motion dated August 26, 2014 of defendants U.S. Bank National Association and Ocwen Loan Servicing and the affirmation and exhibits submitted in support thereof (Motion Sequence #3); the responsive papers enumerated above being deemed submitted in response to Motion Sequence #3; the notice of motion dated September 9, 2014 of non-party MERS and the affirmation submitted in support thereof (Motion Sequence #4); and due deliberation; the court finds:

The motions of defendants Leopold & Associates, PLLC ("Leopold"), U.S. Bank National Association ("U.S. Bank") and Ocwen Loan Servicing ("Ocwen") and non-party MERS for dismissal of the complaint are consolidated for decision herein, as they involve common questions of fact and law.

Judgment of foreclosure and sale was granted in the underlying mortgage foreclosure action, *Bank of America, N.A. v. Alleyne*, Index No. 382417/2009 (Supreme Court, Bronx County). Plaintiff

Celeste Wenegieme ("Wenegieme") was named as a defendant in the underlying action because the mortgagor had transferred her interest in the property to Wenegieme, who answered the foreclosure complaint. Wenegieme did not assume the mortgage. Wenegieme commenced this action against defendants - the bank, loan servicer, attorneys and Referee in the underlying action - for trespass, having received a notice of the foreclosure sale.

Leopold moves to dismiss the complaint on the grounds of a lack of personal jurisdiction and that the complaint fails to state a cause of action. U.S. Bank and Ocwen also move to dismiss on the ground that the complaint fails to state a cause of action, and additionally move on the grounds of collateral estoppel and a defense founded on documentary evidence. According to the affidavit of service, plaintiff served the summons and complaint upon defendants by regular mail.

Service must be made in a manner permitted by law. The only provision permitting service by mailing alone is CPLR 312-a; however, such service requires mailing "by first class mail, postage prepaid, a copy of the summons and complaint, or summons and notice or notice of petition and petition, together with two copies of a statement of service by mail and acknowledgement [*sic*] of receipt in the form set forth in subdivision (d) of this section, with a return envelope, postage prepaid, addressed to the sender," CPLR 312-a(a), and plaintiff's affidavit of service does not demonstrate compliance with such procedures. Furthermore, there is no proof that plaintiff fulfilled any other facet of the statute. *See Klein v. Educational Loan Servicing, LLC*, 71 A.D.3d 957, 897 N.Y.S.2d 220 (2d Dep't 2010). As plaintiff cannot produce a signed acknowledgment of receipt, service was not effectuated. *See St. Dominick Med. Servs., P.C. v. Progressive Ins. Co.*, 31 Misc.3d 132(A), 2011 NY Slip Op 50609(U) (App Term 2d Dep't 2011).

Only an affidavit of service which on its face depicts appropriate service constitutes *prima facie* evidence of proper service. *See New Century Fin. Servs., Inc. v. Baines*, 12 Misc.3d 1182(A), 2006 NY Slip Op 51382(U) (App Term 1st Dep't 2006). Accordingly, given the insufficiency of the method employed by plaintiff, the complaint must be dismissed. *See Matter of Bokhour v. New York City School*

Constr. Auth., 70 A.D.3d 684, 892 N.Y.S.2d 877 (2d Dep't 2010); *Bennett v. Acosta*, 68 A.D.3d 910, 890 N.Y.S.2d 330 (2d Dep't 2009). The fact that plaintiff has chosen to proceed *pro se* does not require a different result. *See Brown v. Midrox Ins. Co.*, 108 A.D.3d 921, 970 N.Y.S.2d 108 (3d Dep't 2013); *Matter of Maddox v. State Univ. of N.Y. at Albany*, 32 A.D.3d 599, 819 N.Y.S.2d 605 (3d Dep't 2006), *appeal dism*, 8 N.Y.3d 978, 868 N.E.2d 230, 836 N.Y.S.2d 547 (2007). "Notice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court." *Macchia v. Russo*, 67 N.Y.2d 592, 595, 496 N.E.2d 680, 682, 505 N.Y.S.2d 591, 593 (1986). Accordingly, prejudice (or the lack thereof) or a defendant's actual notice of the action are immaterial. *See 72A Realty Assocs. v. New York City Envtl. Control Bd.*, 275 A.D.2d 284, 713 N.Y.S.2d 26 (1st Dep't 2000).

While defendant Marie Nicholson, Esq. submitted an affirmation in support of Leopold's motion suggesting that she, too, should be granted relief, the notice of motion and primary affirmation sought relief only with respect to Leopold. Defendant Philip W. Coleman, Esq. likewise submitted an affirmation requesting relief without serving a notice of motion or cross-motion.

It is generally error to grant relief not sought in a motion. *See SAF LaSala Corp. v. S&H 88th St. Assocs.*, 138 A.D.2d 241, 525 N.Y.S.2d 206 (1st Dep't 1988). However, if plaintiff does not acquire personal jurisdiction over a defendant, all subsequent proceedings are a nullity. *See e.g. Beltre v. Babu*, 32 A.D.3d 722, 821 N.Y.S.2d 69, *rearg denied*, 2006 N.Y. App. Div. LEXIS 14226 (1st Dep't Nov. 16, 2006). Therefore, even in the absence of a motion explicitly seeking such relief, where it has been determined that plaintiff has not acquired jurisdiction over the person of the defendant, dismissal must follow. *See Haberman v. Simon*, 303 A.D.2d 181, 755 N.Y.S.2d 596 (1st Dep't 2003); *see also NYCTL 2004-A Trust v. Faysal*, 62 A.D.3d 409, 877 N.Y.S.2d 686 (1st Dep't 2009); *Resolution Trust Corp. v. Beck*, 243 A.D.2d 307, 664 N.Y.S.2d 522 (1st Dep't 1997); *Long Is. Minimally Invasive Surgery, P.C. v. Lester*, 12 Misc.3d 1183A, 824 N.Y.S.2d 763 (App Term 1st Dep't 2006). Accordingly, the action against all defendants must be dismissed.

With regard to the failure to state a cause of action and documentary evidence defense, trespass requires the physical entry upon land, *see Bly v. Edison Electric Illuminating Co.*, 172 N.Y. 1, 64 N.E. 745 (1902), and the complaint makes no such allegation. In addition, such entry must be unauthorized or unjustified, *see Seril v. Bureau of Highway Operations*, 245 A.D.2d 233, 667 N.Y.S.2d 42 (1st Dep't 1997), *lv denied*, 91 N.Y.2d 813, 697 N.E.2d 180, 674 N.Y.S.2d 279 (1998), and here entitlement to foreclosure and sale exists pursuant to undisturbed orders of the court.

For collateral estoppel to apply, "[i]t is required that an issue in the present proceeding be identical to that necessarily decided in a prior proceeding, and that in the prior proceeding the party against whom preclusion is sought was accorded a full and fair opportunity to contest the issue." *Allied Chemical v. Niagara Mohawk Power Corp.*, 72 N.Y.2d 271, 276, 528 N.E.2d 153, 155, 532 N.Y.S.2d 230, 232 (1988), *cert. denied*, 488 U.S. 1005, 109 S. Ct. 785 (1989). Indeed, this court has already denied plaintiff's two applications to stay the foreclosure sale, in part because plaintiff appeared in the underlying foreclosure action by counsel and appeared to have had a full and fair opportunity to contest plaintiff's entitlement to relief therein. The mortgagee sought summary judgment on notice to Wenegieme who could have and should have interposed her arguments at the time of and in the context of the summary judgment motion or the subsequent motion practice. *See Binghamton Plaza v. Fashion Bug # 2470 of Binghamton, Inc.*, 252 A.D.2d 870, 675 N.Y.S.2d 710 (3d Dep't 1998); *Money Store of New York, Inc. v. Doner Holding Corp.*, 112 A.D.2d 284, 491 N.Y.S.2d 730 (2d Dep't 1985); *Lehman Bros. Holding, Inc. v. Wall St. Mtge. Bankers, Ltd.*, 2013 NY Slip Op 33116(U), at *2 n 1 (Sup Ct N.Y. County Dec. 10, 2013); *Matter of RBC Capital Mkts. Corp. v. Bittner*, 2011 NY Slip Op 31231(U) (Sup Ct N.Y. County May 9, 2011).

MERS's motion for dismissal is denied. The motion, returnable September 12, 2014, was not served until September 9, 2014, plainly untimely under CPLR 2214. Furthermore, MERS is not a named defendant and the complaint contains no allegations involving MERS.

Leopold's application for sanctions against Wenegieme for frivolous conduct is denied. The

course of this litigation has demonstrated that plaintiff, proceeding *pro se*, either does not or refuses to understand the consequences of the underlying litigation, but plaintiff's understandable frustration has not risen to such a level as to be sanctionable.

The court notes that plaintiff filed a notice of discontinuance with the Bronx County Clerk on August 22, 2014. However, the notice was untimely, Leopold having made its motion to dismiss on August 15, 2014 and having filed same on August 18, 2014. *See* CPLR 3217(a)(1); *BDO USA, LLP v. Phoenix Four, Inc.*, 113 A.D.3d 507, 979 N.Y.S.2d 45 (1st Dep't 2014).

Accordingly, it is

ORDERED, that the motion of defendant Leopold & Associates, PLLC for the imposition of sanctions against plaintiff Celeste Wenegieme for frivolous conduct is denied (Motion Sequence #2); and it is further

ORDERED, that the motion of defendant Leopold & Associates, PLLC to dismiss the complaint is granted (Motion Sequence #2); and it is further

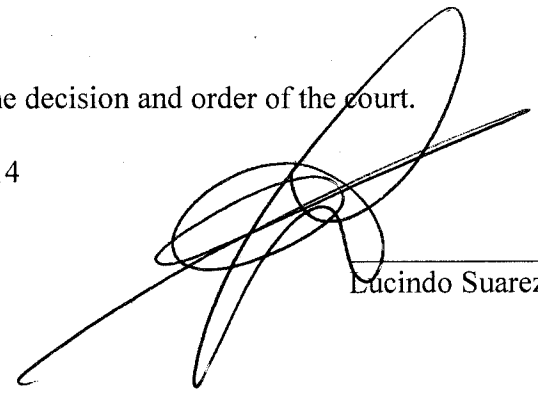
ORDERED, that the motion of defendants U.S. Bank National Association and Ocwen Loan Servicing to dismiss the complaint is granted (Motion Sequence #3); and it is further

ORDERED, that the motion of non-party MERS to dismiss the complaint is denied (Motion Sequence #4); and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of all defendants dismissing the complaint.

This constitutes the decision and order of the court.

Dated: September 17, 2014



Lucindo Suarez, J.S.C.