

Heywood Condominium v Wozencraft

2014 NY Slip Op 32891(U)

November 12, 2014

Supreme Court, New York County

Docket Number: 152411/13

Judge: Donna M. Mills

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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THE HEYWOOD CONDOMINIUM, BY ITS BOARD
OF MANAGERS,

Plaintiff,

-against-

Index № 152411/13

STEVEN WOZENCRAFT, WELLS FARGO BANK, N.A.,
THE NEW YORK STATE DEPARTMENT OF TAXATION,

Defendants.

-----X
DONNA MILLS, J.:

In this action for foreclosure of a lien, plaintiff The Heywood Condominium, by its Board of Managers (Heywood Board) moves for an order, pursuant to CPLR 4403 and 22 NYCRR § 202.44, confirming the report of the JHO filed on January 14, 2014 (Report), finding that there was good and proper service of the summons and complaint, and recommending the appointment of a temporary receiver to collect rents. Defendant Steven Wozencraft (Wozencraft) opposes Heywood's motion and cross-moves for an order rejecting the entire Report.

Heywood Board, which represents the Heywood Condominium, a residential condominium apartment building (the Building, or Condo, as appropriate) located at 263 9th Avenue, New York, New York, commenced this action on March 15, 2013, against Wozencraft, the owner, by deed, of one of the condominium apartments (unit 9A) in the Building. The relief sought is a judgment of foreclosure on a duly recorded written lien in the amount of \$211,178.40 (the Lien), against Wozencraft, and the appointment of a temporary receiver for unit 9A, during the pendency of the proceeding. The Lien was recorded on February 21, 2013, in the Office of the City Register, and a notice of pendency was filed on the same day as the complaint, March 15, 2013. According to the complaint, Heywood Board is pursuing these actions because of

Wozencraft's failure to pay the required common charges, late fees, real estate taxes, repair charges and capital assessments (together, the Common Charges) for unit 9A (also referred to by the parties as the apartment), from April 2007 forward, creating an undue financial strain on the non-defaulting unit owners, which continues to increase each passing month.

Procedurally, under motion sequence number 001, plaintiff moved for the appointment of a temporary receiver. For reasons not relevant here, the motion was withdrawn without prejudice, after which plaintiff moved, once again, for the appointment of a temporary receiver for the subject premises. Wozencraft submitted opposition and a cross motion for an order, pursuant to CPLR 3211 (a), dismissing the action as against him due to, among other things, defective service of process. By order dated September 10, 2013, this court decided the motion and cross motion to the extent of directing that a traverse hearing be held before a special referee to hear and report on the issues of proper service, and whether a temporary receiver should be appointed. This court also directed that the motion and cross motion be held in abeyance pending receipt of the report and recommendations of the special referee and a motion pursuant to CPLR 4403, or receipt of the determination of the special referee.

The matter was assigned to a JHO, who conducted the traverse hearing on December 17, 2013 (Hearing). At its conclusion, the JHO issued his Report orally and on the record, recommending that service of process be sustained and that a temporary receiver be appointed. The instant motion to confirm and cross motion to reject the Report followed.

Addressing service of process first, it is Wozencraft's contention that the failure of the process server to use due diligence in his attempt to effect personal service, and a series of procedural irregularities which occurred during the course of the hearing, mandate rejection of

the Report. For its part, Heywood Board maintains that the hearing was thorough and proper in all respects, and that the conclusions drawn and recommendations made, should be upheld. A review of the Hearing transcript reveals the following.

Process server Cory Banks (Banks) was sworn in, and, by way of background, testified that he is licensed in the State of New York to serve process, that he has worked as a process server for "Save-On Process" since February 2004, and that he has completed approximately 1,000 service attempts, pursuant to the CPLR, during that period of time. After Banks's license was shown to defense counsel and offered into evidence, the JHO stated: "We don't need it. Let's move on. He has an honest face; all right? If he says he's licensed, I'm prepared to accept that testimony as true" (Hearing tr at 6).

Banks was then questioned about his efforts to serve Wozencraft prior to resorting to substituted service by "nail and mail" (CPLR 308 [1], [2] and [4]). In response, Banks testified that he attempted to deliver process to Wozencraft on three separate occasions, March 28, March 29 and April 1, 2013, but was unsuccessful on each of these attempts. With respect to his first attempt, Banks testified that, upon his arrival at the Building, he told the doorman why he was there and he went up and knocked on the door to apartment 9A. When no one answered, "I put my ear to the door to see if I heard any music or animals or something to indicate someone was home. I didn't hear that. Knocked again, and just made my attempt. Nobody was there" (Banks tr at 9). Banks testified that he keeps a record of his service attempts, and that, according to his record, his first attempt on March 28, 2013, was at 2:30 p.m.

According to Banks, his second attempt was the following day, March 29, at 6:15 in the evening (*id.* at 10). Again, he told the doorman why he was there, went up to the ninth floor,

knocked on the door to apartment 9A, and placed his ear to the door to listen for any indication that somebody was inside. He didn't hear anything, and he recorded this as his second attempt (*id.*).

Banks testified that he made his third attempt on April 1, at 11:48 a.m. This time, when he explained his presence in the Building, "they got on the phone with the super, and the super actually escorted me up this time, and I went to the -- he got off the elevator, I knocked, the same thing basically for my first attempt, nobody was there, and I nail-and-mailed the papers to the door" and mailed another set to Wozencraft (*id.* at 10-11). Banks stated that he attached the papers to the door using tape, and that he was able to confirm that it was the correct apartment with a lady he saw in the Building (*id.* at 11).

Plaintiff's counsel then offered into evidence proof of mailing, to which the JHO responded: "[h]e said he mailed it. I'll accept it. I don't need a proof of mailing. Let's move on." When defense counsel asked "did you want to see?" the JHO stated "[y]ou can show it to the attorney for the defendant if you want. It's proffered, but I don't need it. Let's move on" (*id.* at 11). Next, plaintiff's counsel offered into evidence Banks's affidavit of service, as well as an amended affidavit of service, explaining, on the record, that the amended affidavit was needed because Banks had erroneously recorded the time of the second attempt as 4:15, instead of 6:15, and he did not notice the mistake until later. Asked whether he thought that the amended affidavit (with the corrected time) needed to be filed, the JHO commented "I think it doesn't really make much difference" (*id.* at 12). The JHO's comment prompted the following, on the record, discussion:

"[defense counsel]: What happened, Judge . . . is we moved to dismiss the action

on the grounds that the service of process was inadequate because there was not attempt made during non business hours, which is a requirement for nail and mail, because the affidavits had three attempts during the business day. Then in response to that the, they - -

[JHO]: They said there was a mistake.

[defense counsel]: So these affidavits - -

[JHO]: Are already - - the affidavit is in evidence. That will be plaintiff's - - the erroneous affidavit is in evidence. That's fine. That's okay. Don't worry about it.

* * *

[plaintiff's counsel]: We have an amended affidavit.

[JHO]: We don't need an amended affidavit. Let's move on. We have the testimony now.

[plaintiff's counsel]: The logbooks are in?

[JHO]: The testimony is more important than the affidavit. Let's move on"

(*id.* at 12-13). Questioned by defense counsel, Banks acknowledged, on the record, that he made a mistake in the original affidavit and that he corrected it (*id.* at 13).

Banks provided his logbook for defense counsel's review, and when asked what he was using to refresh his recollection, Banks replied that he was looking at the "work ticket that is attached to all my services so I can write down exactly my attempt time and completion time so therefore I can transfer it over to the log" (*id.* at 14). When asked what he wrote in his logbook for the second attempt, Banks answered that the "[s]econd attempt is 3/29. So that would be 6:15," and that it had been written in military time as "18:15" (*id.* at 15). And when asked if he had changed 16:15 to 18:15, Banks answered no (*id.*). The logbook was then accepted into evidence (*id.*), and upon his own examination of the logbook, the JHO stated "let the record reflect that the time before is 15:28, the time after is 18:50," adding "it could be 16. All right" (*id.* at 16). The JHO then blocked questions intended to show that there were other instances when Banks affixed process to doors without attempting service at nonbusiness hours (*id.* at 18), but he did accept into evidence two documents/affidavits relating to that accusation, as well as

the original and corrected affidavits (*id.* at 19, 20).

Finally, it was revealed that Banks's logbook was blank where there should have been a description of the area outside the door to the apartment (*id.* at 16-17), and that he probably did not file any of the affidavits of service with the county clerk (*id.* at 21).

The next witness was Salvatore Marchese, the Building's superintendent, who recalled meeting Banks on April 1, 2013, when "he came in to serve papers. The doorman contacted me, I went into the lobby to meet with him, and I escorted him up to the apartment, the apartment 9A" (*id.* at 26). He also recalled Banks knocking on the door, checking to see if anyone was inside, finding no one home, and attaching the papers to the door with tape "somewhere around eye level," and leaving (*id.* at 27, 28). Marchese testified that he walked Banks back down to the lobby and Banks left. During cross examination, Marchese stated that he did not recall escorting Banks to the apartment on any of his prior service attempts, and he disagreed with the content of Banks's sworn affidavit in which he stated that Marchese had escorted him previously as well (*id.* at 28, 29).

Next, defense counsel called former Wozencraft employee Jonathan K. Lipton (Lipton) to testify. According to Lipton, he came to New York on April 1, 2013, for business purposes, and stayed in Wozencraft's apartment for one night. He testified that, upon his arrival in the city, he went over to the apartment around 9:00 a.m., to drop off his bags, and went out. He then returned around 3:00 or 4:00 in the afternoon, and left again around 5:30 p.m., to attend a "Jeffrey Fashion Cares" fund-raising event being held on the Intrepid. He returned for the night around 10:30 or 11:00 p.m.

When questioned about whether he had observed any legal papers in or about the

apartment, Lipton stated that nothing was taped or attached to the door when he returned to the apartment in the afternoon. He did, however, find papers shoved under the door by the time he left again, around 5:30 p.m. (*id.* at 32-33, 36). When he saw them, he contacted Wozencraft, who instructed him to call his (Wozencraft's) attorney right away. Lipton did so, and dropped off the documents at the attorney's office the following morning, April 2, 2013 (*id.* at 32, 37). Following that testimony, counsel placed the documents into evidence (*id.* at 33).

Wozencraft offers the following reasons for rejecting the JHO's recommendation to sustain service. Calling them procedural irregularities which require rejection, Wozencraft strenuously objects to the JHO's comments: "[h]e has an honest face; all right? If he says he's licensed, I'm prepared to accept that testimony a true" (*id.* at 6); "I don't need proof of mailing" (*id.* at 11); and, in reference to the filing of the amended affidavit, "I think it doesn't really make much of a difference" (*id.* at 12). Substantively, Wozencraft argues that Banks did not meet the due diligence requirement for substituted service, pursuant to CPLR 308 (4), in that none of his three service attempts occurred outside normal business hours when he might have been home, rather than at work. Wozencraft relies on Banks's logbook and original affidavit of service as evidence that the second service attempt took place at 4:15 p.m., which, like the other two service attempts, took place during normal business hours. He asserts that Banks's amended affidavit of service dated July 26, 2013, by which he seeks to change 4:15 to 6:15 p.m., is a belated and inadequate effort to justify resorting to substituted service and save an otherwise defective service, which does not meet due diligence requirements (*see* CPLR 308 [1], [2] and [4]; *County of Nassau v Letosky*, 34 AD3d 414, 415 [2d Dept 2006]).

Wozencraft also objects to confirmation of the Report on the ground that substituted

service was not properly effected because Lipton had found the papers shoved under the door, rather than affixed to its outside. He also points to, what he describes as discrepancies, regarding the number of papers Banks (purportedly) affixed to the door, and the time frame in which he made substituted service, and he points to Banks's failure to provide a description of the area outside his door in his logbook, and his failure to bring "GPS" records to the Hearing, as proof of faulty service. Wozencraft also argues that the JHO's failure to permit summation is indicative of a tainted and flawed hearing.

Wozencraft's argument in opposition to the appointment of a receiver rests on essentially, the premise that Heywood Board is unreasonably refusing to negotiate on the amount owed, and that, if Heywood Board would agree to resume providing him with all services attendant to condo ownership, he would begin making payments.

It is well settled that, as the trier of fact, the JHO is "in the best position to weigh the evidence and make credibility determinations" and that such determinations are accorded deference by the motion court (*Winopa Intl., Ltd. v Woori Am. Bank*, 59 AD3d 203; 204 [1st Dept 2009]). It is also "well settled that the report of a Special Referee shall be confirmed whenever the findings contained therein are supported by the record and the Special Referee has clearly defined the issues and resolved matters of credibility" (*Nager v Panadis*, 238 AD2d 135, 135-136 [1st Dept 1997]).

Here, the JHO repeatedly defined the issues and made pronouncements as to which evidence he found credible and persuasive. This court recognizes that, in an effort to reach substantive issues, the JHO may have been flippant with some of his remarks, including his comment about the process server having an honest face. These comments, however, do not

mandate rejection of the Report, especially, where, as here, defense counsel offered no objections to the evidence itself. A review of the context in which the remarks were made reveals that, in the first two instances, the JHO gave defense counsel an opportunity to examine the New York State process server's license and the proof of mailing, and in neither instance did defense counsel object, or otherwise question the veracity of the proffered document. And with respect to his third remark, the JHO explained that the amended affidavit was not needed because "we have the testimony now" (Hearing tr at 13). With respect to the issue of a receiver for the property (unit 9A), Wozencraft offered no evidence to refute Heywood Board's assertion that he has made no payments towards the Common from April 2007 to the present date.

A hearing was held during which the JHO evaluated the credibility and testimony of each witness, and weighed the evidence, both proffered and not, as he saw fit (*see Nager v Panadis*, 238 AD2d at 135-136; *Kaplan v Einy*, 209 AD2d 248, 251 [1st Dept 1994]). Despite the few contested comments, the record, taken as a whole, supports the JHO's findings of fact and recommendations as to service of process and the appointment of a temporary receiver. New York law dictates that "a court . . . not disturb the findings of a special referee where those findings are supported by the record" (*Atlantic Aviation Inv. LLC v Varig Logistica, S.A.*, 73 AD3d 467, 468 [1st Dept 2010]).

Accordingly, it is

ORDERED that the motion of plaintiff to confirm the Report is granted and the Report is hereby confirmed in its entirety; and it is further

ORDERED that the cross motion of defendant to reject the Report, is denied.

Dated: NOV 12 2014

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.