

Bank of Am., N.A. v Fachlaev

2014 NY Slip Op 33138(U)

March 11, 2014

Supreme Court, Queens County

Docket Number: 15859/09

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

BANK OF AMERICA, N.A.
3415 Vision Drive
Columbus, OH 43219
Plaintiff,
-against-

SOLOMON FACHLAEV, et al.,
Defendants.

Index No. 15859/09

Motion
Date April 17, 2012

Motion
Cal. No. 3

Motion
Sequence No. 2

The following numbered papers read on the branch of the motion by order to show cause by defendant, Solomon Fachlaev, for an order pursuant to CPLR 5015(a)(1) vacating a prior order of reference of the court dated April 8, 2010, as well as the accompanying referee's report, which is in essence, a motion to vacate the default judgment of foreclosure on the ground that the court does not have jurisdiction of the person of the defendant because of improper service.

	<u>PAPERS NUMBERED</u>
Order to Show Cause-Affidavits-Exhibits...	1-5
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Upon the foregoing papers it is ordered that this motion is determined as follows:

Defendant Solomon Fachlaev's motion to vacate the default judgment entered on the ground that the court does not have jurisdiction of the person of defendant because of improper service is granted. Defendant Solomon Fachlaev asserts that he was not properly served pursuant to CPLR 308. Pursuant to an order of the court dated April 30, 2012, this court ordered a traverse hearing to determine whether service was properly made pursuant to CPLR 308. The traverse hearing on the issue of service was held on March 11, 2013 and continued on October 8, 2013.

At the hearing, plaintiff presented credible evidence in the form of testimony by Christopher Klein, who at the time of the alleged service was a licensed process server. Mr. Klein testified that he had no personal knowledge of the service of the Summons and Verified Complaint, but offered his affidavit of service into evidence.¹ Mr. Klein attempted service at the address of 14422 68th Dr., Flushing, NY 11367-1735 on three(3) occasions: on 7/17/09 at 7:16 PM, on 7/18/09 at 6:56 AM and on 7/20/09. He testified that when he attempted service on one date, he spoke to "defendants neighbor" who confirmed to him that defendant resides at the address. In his affidavit of service he avers that he spoke to a female neighbor named Dora Irving who he describes as white, blonde hair, 5'5", 150 lbs. and 38 years at 144-28 68th Drive. The affidavit of service indicates (and Mr. Klein testified) that after he was unable with due diligence to serve the defendant in person, on July 20, 2009, he affixed to the door at 14422 68th Dr., Flushing, NY 11367-1735, a copy of the Summons and Verified Complaint. Plaintiff submitted an affidavit sworn by Edward C. White that avers that he subsequently deposited a copy of the Summons and Verified Complaint in a postpaid, properly addressed plain envelope marked "Personal and Confidential" in an official depository under the exclusive care and custody of the United States Post Office in the State of New York, on July 22, 2009 to 14422 68th Dr., Flushing, NY 11367-1735 by first class mail. Mr. Klein's testimony and the affidavits of Mr. Klein and Mr. White clearly demonstrate that plaintiff complied with the service requirements of CPLR 308(4), also referred to as "nail and mail", in that after exercising due diligence to serve the defendant in person, he "nailed and mailed" the documents to the defendant's last known address.

Notwithstanding the testimony of the process server, the Court finds that defendant presented sufficient evidence to refute plaintiff's prima facie case. Defendant Fachlaev avers in his affidavit that he never received a Summons and Complaint by

¹The Court notes that in support of plaintiff's claim that plaintiff made a "good faith" effort to obtain defendant's address prior to the subject service herein, plaintiff's attorney describes the efforts of Michael Ballato, a process server, to obtain defendant's address for service of process. However, such representations were not considered by the court as they are not in admissible form by a person with personal knowledge of the facts, and unsupported by admissible sworn evidence, as Mr. Ballato was not called by plaintiff as a sworn witness. See ¶¶ 13-18 of Plaintiff's Affirmation in Opposition.

mail or at the subject premises located at 147-24 68th Rd.² He denied knowledge of any person named as "Dora Irving" or a neighbor who matches the physical description provided on the affidavit of service. He denied that any process server ever came to the entrance door of his home. He denied ever receiving any legal papers in the mail.

The process server had no specific recollection of the service. He presented no process server logbook, as he testified that the relevant log book and entries were destroyed by him in the regular course of business. The court does not credit the testimony of the process server and does credit the testimony of the defendant. The court does not have personal jurisdiction over the defendant.

Furthermore, CPLR 308(4) requires plaintiff to demonstrate that he exercised due diligence in attempting to serve defendant pursuant to CPLR 308(1) or (2), prior to resorting to nail and mail service pursuant to CPLR 308(4). The court notes that two (2) of the three(3) attempts that the process server made to serve defendant pursuant to CPLR 308(1) or (2) occurred on a weekday and/or at a time when defendant might reasonably be expected to be at work or en route. As Professor Siegel noted in discussing the due diligence requirement:

A mere showing of many visits will not automatically do. If the server deposes that for five straight business days he went to the defendant's residence at 10 a.m. and found no one home, he is more likely to be credited with obtuseness than with diligence. He should vary the time of his visits. At least for purposes of satisfying the diligence requirement of CPLR 308(4), it should be shown that the process server made genuine inquiries about the defendant's whereabouts and places of employment.

(David D. Siegel, § 74 New York Practice [5th ed 2010] at 122).

Moreover, even with three attempts at various times on

²The Court notes that plaintiff claims that service was made at 144-22 68th Drive and not at 147-24 68th Road. (Emphasis added)

separate days, the "due diligence" standard under CPLR 308(4) is still not satisfied in the case of an affixing at a defendant's dwelling place, regardless of how many attempts are made to serve a person pursuant to 308(1) or (2) unless the process server also attempts to ascertain the defendant's place of business in order to attempt service upon defendant at that location (Gurevitch v Goodman, 269 AD2d 355 [2d Dept 2000]; Moran v Harting, 212 AD2d 517 [2d Dept 1995]; Claerbaut v East Long Island Hospital, 117 AD2d 772 [2d Dept 1986]). The "due diligence" component of CPLR 308(4) will not be satisfied in the case of an affixing at a defendant's dwelling place, unless the plaintiff also made genuine inquiry as to defendant's whereabouts and place of employment (Serraro v Staropoli, 94 AD3d 1083 [2d Dept 2012]). In Serraro, the process server's failure to inquire about the defendant's place of employment or work schedule was exacerbated by the fact that the attempts at service at defendant's residential address were all made on weekdays at times when it reasonably could have expected that the defendant was either at work or in transit to work. Here, plaintiff presented no admissible evidence that the process server made any inquiry to determine defendant's whereabouts or place of work or employment. Accordingly, the court holds that the "due diligence" requirement was not met, and the service was not properly completed pursuant to CPLR 308(4).

Pursuant to CPLR 306-b, the court, sua sponte, grants plaintiff leave to re-serve defendant within 120 days in light of the fact that the action was timely commenced by filing of summons and complaint (Murphy v Hoppenstein, 279 AD2d 410 [1st Dept 2001][extension of time granted where initial service was improper]; Gurevitch v Goodman, 269 AD2d 355 [2d Dept 2000] [instead of dismissing action for improper service, the court, sua sponte, granted leave to plaintiff to re-serve defendant within 120 days]).

Accordingly, defendant's motion to vacate the default judgment is granted to the following extent:

It is hereby

ADJUDGED, that plaintiff failed to use "due diligence" before attempting to effect service pursuant to CPLR 308(4); and it is further

ORDERED, that plaintiff is granted leave to re-serve defendant within 120 days from the date of this order with notice of entry; and it is further;

ORDERED, that the default judgment is vacated;

ORDERED, that in the event that the plaintiff fails to re-serve defendant Solomon Fachlaev within 120 days from the date of this order with notice of entry, without further order of this court, the complaint shall be dismissed.

This constitutes the decision and order of the court.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: March 11, 2014

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Howard G. Lane, J.S.C.