

Countrywide Home Loans Inc. v Sarnelli

2014 NY Slip Op 33166(U)

November 21, 2014

Supreme Court, Richmond County

Docket Number: 101299/08

Judge: Thomas P. Aliotta

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
COUNTRYWIDE HOME LOANS INC.,

Plaintiff,

-against-

BARBARA BETH SARNELLI, MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC.,
as nominee for MORTGAGEIT INC.,
NEW YORK CITY ENVIRONMENTAL CONTROL BOARD,
NEW YORK CITY TRANSIT ADJUDICATION BUREAU,

Defendant(s).

-----X

TP 12

PRESENT:

HON. THOMAS P. ALIOTTA

DECISION AND ORDER

Index No: 101299/08

Motion No: 1742-003

The following papers numbered 1 to 4 were fully submitted on
the 1st day of October, 2014:

	Papers Numbered
Notice of Motion to Dismiss the Complaint (Affirmation in Support) (Dated: June 9, 2014).....	1
Affidavit of Defendant Barbara Beth Sarnelli (Dated: June 23, 2014).....	2
Affirmation in Opposition (Dated: June 23, 2014).....	3
Reply Affirmation (Dated: September 23, 2014).....	4

Upon the foregoing papers, the motion for dismissal of the
complaint by defendant Barbara Beth Sarnelli is held in abeyance as
set forth below.

This matter arises out of plaintiff's attempt to foreclose a
residential mortgage on property located at 135 Fine Boulevard, Staten
Island, New York. Plaintiff Countrywide Home Loans Inc. (hereinafter
"Countrywide") claims that on January 22, 2007, defendant Barbara Beth
Sarnelli (hereinafter "defendant") executed a note and mortgage in the
amount of \$417,000.00 in favor of its predecessor, MortgageIt, Inc.

(see copies of the Note and Mortgage appended to defendant's moving papers); that defendant defaulted by failing to make the required payment on November 1, 2007 and thereafter; and that as a result of said default and in compliance with the terms of the mortgage, Countrywide, the "servicer" of the loan, mailed defendant a default notification letter dated December 17, 2007 to the mortgaged premises (Plaintiff's Exhibit D). To the extent relevant, the letter advised defendant that in order to avoid acceleration of the mortgage, she would have to pay the sum of \$6,321.99 to Countrywide by January 21, 2008¹ (see Countrywide's Exhibit D). According to the complaint, Countrywide was assigned the mortgage on March 24, 2008, and commenced this action one day later, on March 25, 2008, when it filed the summons and complaint with the Richmond County Clerk (see Countrywide's Exhibit E).

Countrywide claims that it served defendant with a copy of the summons and complaint on March 28, 2008 in conformity with CPLR 308(2), and annexes in support thereof the affidavit of service of its process server, Jeffrey Conocchioli (see Plaintiff's Exhibit F). When defendant failed to appear, answer or otherwise move with respect to the complaint, this Court executed an order on July 22, 2008 (entered

¹In her June 23, 2014 affidavit in support of her motion to dismiss, Sarnelli denies ever receiving the December 17, 2007 default letter. She likewise denies being served with the purported March 24, 2008 Summons and Complaint upon her purported husband, Robert Sarnelli, and states unequivocally that she has "never been married to a Robert Sarnelli, nor [is she] related to a Robert Sarnelli...[and that] no one by that name has ever lived at 135 Fine Boulevard [on Staten Island]" (*cf.* Countrywide's Exhibit F).

on July 24, 2008) granting plaintiff a default judgment and appointing a referee to compute the amounts due (see Plaintiff's Exhibit G). Thereafter, on or about April 16, 2013, plaintiff filed another motion seeking, *inter alia*, the entry of an order vacating the July 22, 2008 Order of Reference, and executing a new Order of Reference in order to enable plaintiff to show compliance with Administrative Order 431/11. That directive requires plaintiff's counsel in a residential mortgage foreclosure action to file with the court an attorney's affirmation, *inter alia*, confirming the accuracy of plaintiff's pleadings. Plaintiff also sought to substitute the Bank of America as the party-plaintiff to reflect an assignment that was effectuated after the action was commenced (see Plaintiff's Exhibit C). Defendant did not oppose the motion, which was granted at oral argument on February 26, 2014.² In the present motion, defendant seeks, *inter alia*, the vacatur of her default and dismissal of the complaint based on the absence of personal jurisdiction, claiming that she was never served (see CPLR 5015[a][4]).

While conclusory and unsubstantiated denials of the receipt of process are insufficient to rebut the presumption of proper service created by a process server's affidavit (see Irwin Mtg. Corp. v. Devis, 72 AD3d 743; Beneficial Homeowner Serv. Corp. v. Girault, 60 AD3d 984), here, defendant's detailed and unequivocal denial of knowledge of any husband or other person by the name of "Robert

²No written copy of this Order appears in the Court's files.

Sarnelli" residing at 135 Fine Boulevard directly contradicts the facts asserted in the process server's affidavit of service. That affidavit provides, in relevant part, that service was affected on March 28, 2008 "by delivering 1 true copy(s) thereof to and leaving with Robert Sarnelli - Husband a person of suitable age and discretion at [135 Fine Boulevard, Staten Island, New York 10314], the said premises being [Ms. Sarnelli's] dwelling place within the State of New York" (Plaintiff's Exhibit E). Under these circumstances, defendant is entitled to a hearing on the issue of personal service. Where the service of process has been sufficiently controverted, "the affidavit of service is rendered inconclusive" (Anton v. Amato, 101 AD2d 819; *cf.* Empire Natl. Bank v. Judal Constr., 61 AD2d 789), and it is incumbent upon a party asserting jurisdiction to demonstrate that the moving party has been duly served by a fair preponderance of the evidence adduced at a hearing conducted for that purpose (see Matter of TNT Petroleum Inc. v. Sea Petroleum, Inc., 40 AD3d 771).

Accordingly, it is

ORDERED, that the issue of the proper service upon defendant Barbara Beth Sarnelli is referred to Special Referee Kenneth McGrail to hear and determine with recommendations following a traverse hearing; and it is further

ORDERED, that the Special Referee shall file his or her report and recommendations with all due diligence; and it is further

ORDERED, that if trial of the issue hereby referred is not begun within 60 days of the date of this order, or before such later date

as the Special Referee may fix upon good cause shown, this order shall be cancelled and revoked, shall be remitted by the Special Referee to the court from which it was issued, and the matter hereby referred shall immediately be returned to the court for trial of those issues (22 NYCRR §202.43[d]); and it is further

ORDERED, that this matter be held in abeyance pending receipt of

the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403.

E N T E R,

Dated: November 21, 2014

_____/s/_____
Hon. Thomas P. Aliotta
J.S.C.