

Trustco Realty Corp. v Hayes
2014 NY Slip Op 33684(U)
December 15, 2014
Supreme Court, Westchester County
Docket Number: 64939-2013
Judge: Joan B. Lefkowitz
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SUPREME COURT : STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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TRUSTCO REALTY CORPORATION,

DECISION & ORDER

Plaintiff,

Index No: 64939-2013

-against-

EARL R. HAYES, JR., et al

Motion Return Date:

Defendants.

October 17, 2014

Motion Seq. #1

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The following papers were read on the **E-filed** motion by plaintiff for an order granting summary judgment and appointing a referee to compute.

- Notice of Motion, Affidavit (Exhibits A-F)
- Affidavit in Support (Exhibits A-C)
- Affirmations and Affidavit in Support
- Affirmation in Opposition (A-B)
- Reply Affirmation

Upon reading the foregoing papers it is

ORDERED the motion is denied without prejudice; and it is further

ORDERED the parties are directed to appear on January 26, 2015, at 9:30 a.m. in the Preliminary Conference Part, Courtroom 800, Westchester County Supreme Court, 111 Martin Luther King Boulevard, White Plains, New York, prepared to conduct a preliminary conference.

Plaintiff failed to establish its prima facie entitlement to summary judgment and the appointment of a referee to compute.

RPAPL 1304 requires the plaintiff to send the borrowers a 90-day notice of statutorily required information by both certified and regular mail before it can commence a foreclosure action. “[P]roper service of RPAPL 1304 notice on the borrower or borrowers is a condition precedent to the commencement of a foreclosure action, and the plaintiff has the burden of establishing satisfaction of this condition” (*Aurora Loan Services, LLC v Weisblum*, 85 AD3d 95, 106 [2d Dept 2011]).

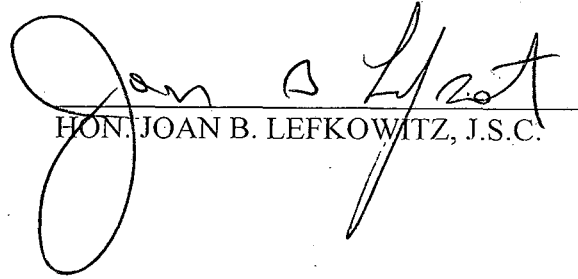
“[P]roof that an item was properly mailed gives rise to a rebuttable presumption that the item was received by the addressee. The presumption may be created by either proof of actual mailing or proof of a standard office practice or procedure designed to ensure that items are

properly addressed and mailed” (*Mid-City Constr. Co., Inc. v Sirius American Ins. Co.*, 70 AD3d 789, 790 [2d Dept 2010] [internal quotation marks and citations omitted]). A certified mail receipt, standing alone, does not establish that plaintiff mailed the notice (*Mid-City*, *supra* at 790). Here, in support of the motion plaintiff submitted only a certified mail receipt but no affidavit of service by a person who actually mailed the RPAPL 1304 notice or who described plaintiff’s standard office practice in mailing such notices. In any event, plaintiff submitted no proof that the notice was sent to the borrowers by first class mail as required by RPAPL 1304.

The motion must be denied because plaintiff failed to establish that it satisfied the condition precedent by properly mailing the RPAPL 1304 notice. Plaintiff cannot rely on the evidence it submitted for the first time in reply to sustain its prima facie burden of establishing that it complied with RPAPL 1304 (*Daguerre, S.A.R.I. v Rabizadeh*, 112 AD3d 875 [2d Dept 2013]).

ENTER,

Dated: White Plains, New York
December 15, 2014


HON. JOAN B. LEFKOWITZ, J.S.C.

To the attorneys of record by e-file