

**Cooper v Pullar**

2014 NY Slip Op 33951(U)

January 16, 2014

Supreme Court, Rensselaer County

Docket Number: 241182

Judge: III, Raymond J. Elliott

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At a Term of the Supreme Court, held in and  
for the County of Rensselaer, in the City of  
Troy, New York, on the 16<sup>th</sup> day of January,  
2014.

PRESENT: HON. RAYMOND J. ELLIOTT, III  
Justice

SUPREME COURT  
COUNTY OF RENSSELAER STATE OF NEW YORK

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RUSSELL E. COOPER,

Plaintiff,

-against-

DECISION AND ORDER  
INDEX NO.241182

JAMES E. PULLAR, DORIS E. PULLAR,  
SAMUEL J. BARR, BANK OF AMERICA, N.A.,  
FIRST NIAGARA BANK, N.A. f/k/a FIRST  
NIAGARA BANK s/b/m HUDSON RIVER BANK  
AND TRUST, NEW YORK STATE DEPARTMENT  
OF TAXATION AND FINANCE AND UNITED  
STATES OF AMERICA AND DISCOVER BANK,

Defendants.

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APPEARANCES: Gregory E. Schaaf, Esq.  
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224 State Street  
Schenectady, New York 12301-1092  
For the Plaintiff

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950 New Loudon Road, Suite 109  
Latham, New York 12110-2100  
For the Defendant: First Niagara Bank, N.A.

RAYMOND J. ELLIOTT, III J.S.C.

Plaintiff, Russell E. Cooper, moves for a default judgment pursuant to CPLR §3215(a) against Defendant, Samuel J. Barr, based on his failure to answer or to appear in the action. Defendant has not appeared in opposition to the motion. Defendant, First Niagara Bank, N.A. opposes the motion and seeks an order denying Plaintiff's motion to the extent that it may impair First Niagara Bank, N.A.'s senior first recorded lien on the real property or its right to foreclose on its interest.

Plaintiff commenced the underlying action against the Defendants by way of a Summons and Complaint dated September 20, 2012. The gist of Plaintiff's claim is as follows: that in October 1995, he entered into a 15 year Lease with Option to Buy ("Lease") for the property known as 26 Fonda Avenue, City of Troy, ("premises") with the Defendants Pullar; that Pullar sold the premises to Defendant, Samuel J. Barr, ("Barr"), in December 2003; that Barr mortgaged the premises with Defendant First Niagara in December 2003 and with Defendant Bank of America in February 2008; that Plaintiff has fully complied with the terms of the Lease and made all the required payments; that since Plaintiff has fully complied with the Lease, Defendant Barr should be ordered to deed the premises to the Plaintiff; that since Barr's interest in the premises was subject to defeasance, the mortgages of Defendants First Niagara and Bank of America are null and void, and that since Barr's interest in the premises was subject to defeasance, the liens of the Defendants, New York State Department of Taxation and Finance, United States of America, and Discover Bank against the premises should be declared to be invalid.

Plaintiff filed a motion seeking a default judgment against Defendant dated July 19, 2013. In support of the motion, was an Attorney's Affirmation of Gregory E. Schaaf, Esq., with

attached Exhibits, which included copies of the Summons and Verified Complaint, the Affidavit of Service, and proof of mailings

Plaintiff states that the action was commenced on September 21, 2012, when the Summons and Verified Complaint were filed with the Rensselaer County Clerk's Office. The Affidavit of Service indicates that service was attempted on several occasions at 511 Glenhaven Square, Troy, New York 12180, which Plaintiff indicates is Defendant's residence. The Process Server went to the premises on Saturday, October 13, 2012, at 8:30 a.m. and at 12:00 p.m., Monday, October 15, 2012, at 7:00 p.m. and at 7:30 p.m., and on Tuesday, October 16, 2012, at 8:00 a.m., 12:00 p.m. and at 2:47 p.m. On October 15, 2012, at 7:00 p.m., "a white automobile was observed swiftly entering the garage of the residence after being opened by remote control and immediately closed upon entry. No answered the door despite repeated knocks and doorbells rings between 7:00 p.m. and 7:30 p.m.". On Tuesday, October 16, 2012, at 2:47 p.m. the Summons and Complaint with Exhibits and Notice of Pendency were affixed to the door of the premises. A female resident at 521 Glenhaven Square, informed the Process Server that she was familiar with Samuel J. Barr and confirmed that he resides at 511 Glenhaven Square.

The Affidavit of Service further indicates that two sets of the papers were mailed by both Certified Mail and First Class Mail to Defendant's residence at 511 Glenhaven Square, Troy, New York 12180. The First Class Mail was labeled "Personal and Confidential". Plaintiff further included the return envelope and Certified Mail Receipt which indicates that it was mailed on October 16, 2012. The Affidavit of Service was filed in the Rensselaer County Clerk's Office on October 29, 2012.

The motion return date was August 16, 2013, and the Court has received no response

from Defendant, Samuel J. Barr.

Defendant, First Niagara Bank, N.A., has appeared in opposition to the motion to protect its rights regarding the proceeding entitled “First Niagara Bank, N. A. f/k/a First Niagara Bank s/b/m Hudson River Bank & Trust, Plaintiff, against Samuel Barr; Bank of America, N.A.; New York State Department of Taxation and Finance, United States of America; Pamela Cooper; Russ Cooper, Defendants” under Index No. 237620. The Honorable George B. Ceresia executed a Judgment of Foreclosure and Sale on October 10, 2012, for real property located at 26 Fonda Avenue, Troy, New York 12180. The mortgage foreclosure proceeding was scheduled for Referee’s sale of the premises on January 9, 2013. On January 9, 2013, and by an Order signed on February 4, 2013, the Court stayed the said Referee’s Sale until further Order of the Court. The Court’s Order also denied the request of Plaintiff Russell Cooper to consolidate this mortgage foreclosure action with the above captioned action. Defendant, First Niagara Bank, N.A., asserts that pursuant to the operation of recording statutes in Article 9 of the Real Property Law, Plaintiff’s unrecorded interests are void against the properly first recorded lien held by First Niagara Bank.

Pursuant to CPLR §3215, upon any application for a judgment by default, the applicant must submit proof of service of the summons and complaint, an affidavit from a party of the proof of the facts constituting the claim, the default, and the amount due (*Mercury Casualty Co. v. Surgical Center at Milburn. LLC*, 65 A.D.3d 1102 [2d Dept. 2009]). CPLR §3215(a) states “When a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial... the plaintiff may seek a default judgment against him. If the plaintiff’s claim is for a sum certain or for a sum which can by computation be made certain, application may be made to

the clerk within one year after the default. ...”. A Plaintiff seeking a default judgment has the burden of proving he properly served the Defendant with the Summons and Complaint. (see *Wilson v. Tompkins Ave. Grocery, Inc.*, 26 Misc.3d 1212A [Sup. Ct. Kings Co. 2010]).

CPLR §308 address personal service upon a natural person. The affix and mail method of service requirements are contained in subdivision 4. “Where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend ‘personal and confidential’ and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such affixing and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such affixing or mailing, whichever is effected later; service shall be complete ten days after such filing...” (CPLR §308(4)).

In order to use the “Affix and Mail” method of service, it must be shown that service under paragraphs one and two of CPLR §308 cannot be made with due diligence. In *State of N.Y. Higher Educ. Servs. Corp. v. Sparozic*, 35 A.D.3d 1069 (3d Dept. 2006), the Appellate Division, Third Department stated: “ ‘[T]he requirements of ‘due diligence’ in attempting to make personal service are not rigidly prescribed’ and we have never established a precise, minimum number of attempts at service which are necessary (*Matter of Jacoby v. New York State*

*Bd. for Professional Med. Conduct*, 295 A.D.2d 655, 656, [3d Dept. 2002]). Nevertheless, a careful review of our case law indicates that, whereas ‘two attempts to serve a person during working hours does not satisfy the due diligence requirements of CPLR 308(4)’ (*State of N.Y. Higher Educ. Servs. Corp. v. Cacia*, 235 A.D.2d 986, 987 [3d Dept. 1997]), ‘efforts ... made at personal service on two different weekdays and on a Saturday, at three different times of day, i.e., 6:30 P.M., 3:00 P.M. and 8:55 A.M.,’ were found sufficient” (*State of N.Y. Higher Educ. Servs. Corp. v. Upshur*, 252 A.D.2d 333, 373 [3d Dept. 1999]).

“As to what constitutes ‘due diligence,’ it is a *sui generis* test. The courts don’t like to count service attempts, but a single visit to the premises, when no one is home, will not suffice. A few visits on different occasions and at different times to both residence and place of business, if known, will. A mere showing of many visits will not automatically do. He should vary the time of his visits.” (*see Siegel NY Prac.* §74 at 122 [5<sup>th</sup> ed]).

The Court finds that the Affidavit of Service submitted does satisfy the due diligence requirement of CPLR §308(4).

CPLR §308(4) further requires that the affixing and subsequent mailing of the Summons and Complaint be effected within twenty days of each other. The Affidavit of Service indicates that the Summons and Complaint were affixed to Defendant’s residence on October 16, 2012, and further states that “Deponent also mailed two sets of copies to Samuel J. Barr at 511 Glenhaven Square, Troy, NY 12180, by Certified U.S. Mail and also by First Class U.S. Mail labeled ‘Personal and Confidential’ and not indicating by return address or otherwise, that the communication was from an attorney...”. The Certified Mail envelope provided by Plaintiff indicates that the envelope was sent to the residence on October 16, 2012.

To successfully complete service pursuant to CPLR §308(4), the Plaintiff is required to file the Affidavit of Service by no later than twenty days of either the delivery or mailing, whichever was effected later. (*see Wilson* 26 Misc.3d at 4-5). This is a necessary step in order to complete service pursuant to CPLR §308(4). Service is completed ten (10) days after the filing of the Affidavit with the Court Clerk and Defendant's time to Answer begins running at that time. (*see* CPLR §320[a]). The Affidavit of Service is date stamped by the Rensselaer County Clerk's Office on October 29, 2012.

In addition, CPLR §3215(g)(3)(i) requires that when a default judgment based on nonappearance is sought against a natural person in an action based upon nonpayment of a contractual obligation, an affidavit shall be submitted that additional notice has been given by or on behalf of the plaintiff at least twenty days before the entry of such judgment by mailing a copy of the summons by first-class mail to the defendant at his place of residence in an envelope bearing the legend "personal and confidential" and not indicating on the outside of the envelope that the communication is from an attorney or concerns an alleged debt. CPLR §3215(g)(3)(iii) states that "This requirement shall not apply to cases in the small claims part or commercial claims part of any court, or to any summary proceeding to recover possession of real property, or to actions affecting title to real property." The Court finds that Plaintiff had no obligation to provide an additional Affidavit of Service attesting to the timely additional mailing of the Summons as required by CPLR §3215(g)(3)(i) to the Defendant based on the subject matter of this action.

The Court finds that Defendant was served with the Summons and Verified Complaint and that service was completed on November 8, 2012, ten (10) days after the filing of the

Affidavit with the Rensselaer County Clerk. The Court finds that Defendant is in default for failing to timely answer or appear, as more than thirty days have passed since service of process was completed. The Court further finds that Plaintiff has provided a Verified Complaint and the proper Affidavits as required by CPLR §3215.

“Under CPLR 3215(d), when an action involves defaulting and non-defaulting defendants and plaintiff timely moves pursuant to CPLR 3215(c) for a default judgment, the court may order that any further proceedings relating to the default judgment be deferred until disposal of the claims against the non-defaulting defendants, whether by trial or other means” (*Norowzian v. Jones*, 2011 N.Y. Slip Op 31547U [Sup. Ct. New York Co. 2011] *citing* Weinstein, Korn and Miller, *New York Civil Practice* ¶ 3215.18).

The Court will order that any further proceedings relating to entry of a default judgment against Defendant, Samuel Barr, are deferred until disposal or trial of the claims against the non-defaulting Defendants.

Accordingly, based on the foregoing, it is hereby


**ORDERED**, that Plaintiff’s Motion for a default judgment against Defendant, Samuel Barr, is granted, and it is further

**ORDERED**, that any further proceedings relating to entry of a default judgment against Defendant, Samuel Barr, are deferred until disposal or trial of the claims against the non-defaulting Defendants.

This shall constitute the Decision, Order and Judgment of the Court. This Decision and Order is being returned to the attorney for the Plaintiff. The Court will retain the original supporting documentation until conclusion of the action. The signing of this Decision and Order

shall not constitute entry or filing under CPLR 2220. Plaintiff is not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

Dated: January 16, 2014  
Troy, New York

  
RAYMOND J. ELLIOTT, III  
Supreme Court Justice

FILED  
JAN 29 2014  
CLERK OF COURT  
ALBANY COUNTY  
ALBANY, NY

**Papers Considered:**

1. Notice of Motion Pursuant to CPLR §3215(a) dated July 19, 2013; Attorney's Affirmation of Gregory E. Schaaf, Esq., dated July 19, 2013, with annexed Exhibits A-B; Affidavit of Service Mailing Additional Summons Pursuant to CPLR §3215(g)(3)(i) sworn to June 28, 2013; Affidavit of Service sworn to July 25, 2013.
2. Affidavit in Opposition of Gary A. Lefkowitz, Esq., sworn to August 7, 2013, with annexed exhibits A-I; Affidavit of Service by Mail sworn to August 7, 2013.
3. Reply Affirmation of Peter V. Coffey, Esq., dated August 16, 2013.