

<b>US Bank N.A. v Sylvester</b>
2015 NY Slip Op 31101(U)
June 19, 2015
Supreme Court, Suffolk County
Docket Number: 17641/2009
Judge: Joseph Farneti
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

**HON. JOSEPH FARNETI**  
Acting Justice Supreme Court

US BANK NATIONAL ASSOCIATION, AS  
TRUSTEE FOR CREDIT SUISSE FIRST  
BOSTON MBS HEAT 2004-4  
3476 Stateview Boulevard  
Ft. Mill, SC 29715,

Plaintiff,

-against-

REGINALD SYLVESTER, AARON SAMUEL,  
BENEFICIAL HOMEOWNER SERVICE  
CORPORATION, MORTGAGE  
ELECTRONIC REGISTRATION SYSTEMS,  
INC. AS NOMINEE FOR LEND AMERICA,  
PEOPLE OF THE STATE OF NEW YORK,  
PETRO, INC., UNITED STATES OF  
AMERICA ACTING THROUGH THE IRS,

JOHN DOE (said name being fictitious, it being  
the intention of Plaintiff to designate any and all  
occupants of premises being foreclosed herein,  
and any parties, corporations or entities, if any,  
having or claiming an interest or lien upon the  
mortgaged premises.)

Defendants.

ORIG. RETURN DATE: OCTOBER 23, 2014  
FINAL SUBMISSION DATE: OCTOBER 23, 2014  
MTN. SEQ. #: 003  
MOTION: MOT RRH

**PLTF'S/PET'S ATTORNEY:**  
GROSS POLOWY, LLC  
25 NORTHPOINTE PARKWAY - SUITE 25  
AMHERST, NEW YORK 14228  
716-204-1700

**ATTORNEY FOR DEFENDANTS**  
**REGINALD SYLVESTER**  
**AND AARON SAMUEL:**  
DAVID B. CALENDER, ESQ.  
108 SOUTH FRANKLIN AVENUE - SUITE 5  
VALLEY STREAM, NEW YORK 11580  
516-837-3758

**REFEREE:**  
CHRISTOPHER S. COMO, ESQ.  
563 FRENCH AVENUE  
NORTH BABYLON, NEW YORK 11703  
631-834-0834

Upon the following papers numbered 1 to 7 read on this motion \_\_\_\_\_  
TO VACATE JUDGMENT OF FORECLOSURE

Order to Show Cause and supporting papers 1-3; Affirmation of Emergency and supporting  
papers 4, 5; Affirmation in Opposition and supporting papers 6, 7; it is,

**ORDERED** that this motion by defendants REGINALD SYLVESTER and AARON SAMUEL (collectively “defendants”) for an Order:

(1) pursuant to CPLR 5015 (a) (4), vacating the Judgment of Foreclosure and Sale and relieving defendants therefrom upon the ground that defendants were never served with the summons and complaint herein and this Court was therefore without jurisdiction to render said Judgment; and

(2) pursuant to CPLR 3211 (a) (8), dismissing the foreclosure complaint upon the ground that the Court has no jurisdiction of the persons of defendants; or, in the alternative

(3) pursuant to CPLR 5015 (a) (1), relieving defendants from the Judgment of Foreclosure and Sale and allowing defendants to appear and serve an answer herein; and allowing defendants to proceed upon the merits to trial so that they may defend their interest in the property known as and located at 10 Schleigel Boulevard, Amityville, County of Suffolk, New York,

is hereby **GRANTED** solely to the extent set forth hereinafter. The Court has received opposition hereto from plaintiff US BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR CREDIT SUISSE FIRST BOSTON MBS HEAT 2004-4.

This is a foreclosure action relating to the premises known as 10 Schleigel Boulevard, Amityville, New York (“Premises”). The action was commenced by the filing of a summons and complaint on or about May 5, 2009. On May 11, 2009, defendant REGINALD SYLVESTER was served with a copy of the summons and complaint at the Premises by service upon “Michelle Samuel (co-occupant),” a person of suitable age and discretion pursuant to CPLR 308 (2). Also on May 11, 2009, defendant AARON SAMUEL was served with a copy of the summons and complaint at the Premises by service upon “Michelle Samuel (family member),” a person of suitable age and discretion pursuant to CPLR 308 (2). Defendants defaulted in appearing herein. After defendants failed to appear for a settlement conference of this matter on September 10, 2009, this Court granted an Order of Reference on January 27, 2010 without opposition, and a Judgment of Foreclosure and Sale on March 18, 2014 (“Judgment”), also without opposition.

The Premises was scheduled for public sale on October 9, 2014. However, on October 8, 2014, the Court (Emerson, J.), issued the following temporary restraining Order:

ORDERED, that the plaintiff, the plaintiff's attorney, and all other persons acting through them or on their behalf, including but not limited to referee Christopher S. Como, Esq. and any other referee, be and hereby are stayed pending the return date of this motion from executing any public sale of the [Premises] and from taking any other or further action regarding the [Premises].

By Order dated October 23, 2014, this Court extended the aforementioned temporary restraining Order until a determination of the instant motion. The Court noted therein that plaintiff did not appear on October 23, 2014 to oppose defendants' application for an extension.

Defendants have filed this application to vacate the Judgment upon the ground that the Court has no jurisdiction over the persons of defendants. In the alternative, defendants seek to vacate their default in appearing in this matter pursuant to CPLR 5015 (a) (1), and to serve an answer to the complaint. Defendants allege that both defendants never resided at the Premises where service was effectuated. Defendant REGINALD SYLVESTER avers that for at least the last eight years he has resided at 67 Coit Street, First Floor, Irvington, New Jersey, having resided at 1054 DeKalb Avenue, Brooklyn, New York prior thereto. Defendant AARON SAMUEL avers that he resides at 178-10 Wexford Terrace, Apt. 2N, Jamaica, New York, and has resided at that location for over twenty-four (24) years. Therefore, as the Premises was allegedly not defendants' "dwelling place" or "usual place of abode," defendants argue that the service upon a person of suitable age and discretion at the Premises was defective and did not confer jurisdiction over either of them. In support thereof, defendants have submitted, among other things, affidavits made by both defendants.

In opposition hereto, plaintiff has submitted a loan application signed by defendant REGINALD SYLVESTER, prior to obtaining the subject loan, in which this defendant indicated that the Premises would be his primary residence. Further, plaintiff has submitted the last deed of record concerning the Premises which lists the Premises as defendants' residence. Moreover, plaintiff claims that defendants have not refuted Michelle Samuel's status as a relative of defendant

AARON SAMUEL or that Ms. Samuel allegedly represented herself as a co-occupant of the Premises with defendants.

With respect to personal jurisdiction over defendants, the burden of proving that personal jurisdiction has been acquired over a defendant in an action rests with the plaintiff (*see Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d 343 [2003]; *Bank of Am. Nat. Trust & Sav. Assn. v Herrick*, 233 AD2d 351 [1996]; *Frankel v Schilling*, 149 AD2d 657 [1989]). A process server's affidavit of service establishes a *prima facie* case as to the method of service and, therefore, gives rise to a presumption of proper service (*see Household Fin. Realty Corp. of N.Y. v Brown*, 13 AD3d 340 [2004]; *Bankers Trust Co. of Cal.*, 303 AD2d 343; *Frankel*, 149 AD2d 657). However, where there is a specific sworn denial that a defendant was served with process, the affidavit of service is rebutted, and the plaintiff must establish jurisdiction at a hearing by a preponderance of the evidence (*see Mortgage Access Corp. v Webb*, 11 AD3d 592 [2004]; *Bankers Trust Co. of Cal.*, 303 AD2d 343; *Kingsland Group v Pose*, 296 AD2d 440 [2002]).

In this case, the Court finds that defendants have specifically rebutted the process server's affidavits, which, as discussed, indicates that defendants were served by substitute service at the Premises, their alleged dwelling place, on May 11, 2009. CPLR 308 (2) permits personal service on a natural person by delivering the summons within the state to a person of suitable age and discretion at the *dwelling place* of the person to be served and, within 20 days thereafter, mailing the summons to the person to be served at his or her last known residence (*see* CPLR 308 [2]; *Washington Mut. Bank v Murphy*, 2015 NY Slip Op 03520 [2d Dept]). The Court finds that questions of fact exist as to whether the Premises was defendants' *dwelling place* on May 11, 2009.

In view of the foregoing, this motion to vacate the Judgment dated March 18, 2014, is **GRANTED** solely to the extent that the parties are directed to appear for a traverse hearing on **August 6, 2015, at 10:00 a.m., in Part 37, Hon. Alan D. Oshrin Supreme Court Building, 1 Court Street, Riverhead**, to determine the propriety of service of the within summons and complaint. CPLR 308 (2) requires strict compliance, and plaintiff has the burden of proving, by a preponderance of the credible evidence, that service was properly made. If service was not properly effected, then the Judgment shall be vacated unconditionally. Conversely, if defendants were properly served, then

defendants' motion to vacate the Judgment based upon improper service shall be denied (see *Washington Mut. Bank*, 2015 NY Slip Op 03520; *Central Mortg. Co. v Ward*, 2015 NY Slip Op 02926 [2d Dept]; *Kasowitz, Benson, Torres & Friedman, LLP v Cao*, 105 AD3d 521 [2015]; *Sileo v Victor*, 104 AD3d 669 [2013]).

The temporary restraining order heretofore granted on October 8, 2014 (Emerson, J.), and extended by this Court by Order dated October 23, 2014, is hereby extended pending further Order of the Court.

The foregoing constitutes the decision and Order of the Court.

Dated: June 19, 2015

  
HON. JOSEPH FARNETI  
Acting Justice Supreme Court

\_\_\_\_\_ FINAL DISPOSITION

  X   NON-FINAL DISPOSITION