

Bank Bldg. v Mehling
2015 NY Slip Op 31520(U)
August 13, 2015
Supreme Court, New York County
Docket Number: 159971/14
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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THE BANK BUILDING, BY ITS BOARD OF
MANAGERS,

Index No. 159971/14

Motion seq. no. 001

Plaintiff,

DECISION AND ORDER

-against-

BRIAN MEHLING, *et al.*,

Defendants.

-----X
BARBARA JAFFE, J.:

For plaintiff:

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Wolf Haldenstein et al.
270 Madison Ave.
New York, NY 10016
212-545-4600

For defendant Mehling:

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By notice of motion, plaintiff moves pursuant to CPLR 3215 for an order granting it a default judgment against all of the defendants and appointing a referee to compute the amount due to plaintiff. Defendant Mehling opposes and, by notice of cross motion, moves for an order dismissing plaintiff's complaint pursuant to CPLR 3211(8) for improper service or, alternatively, granting him leave to serve and file a late answer pursuant to CPLR 3012(d).

I. BACKGROUND

Plaintiff, a condominium association located at 300 West 13th Street a/k/a 77 Eighth Avenue in Manhattan, seeks to foreclose upon a lien for common charges allegedly unpaid by defendant Mehling, owner of unit 304. Plaintiff's affairs are handled by its Board of Managers. (NYSCEF 36).

According to plaintiff, Mehling has failed to pay common charges and special

assessments since August 1, 2013 and as of February 28, 2015, he owes \$75,040.15. On June 27, 2014, plaintiff filed a notice of lien for unpaid common charges. (NYSCEF 37).

Plaintiff thereafter commenced the instant action, and asserted three claims against Mehling and the other defendants seeking: (1) a judgment of foreclosure; (2) a judgment for the overdue amounts; and (3) attorney fees. (NYSCEF 29).

Plaintiff attempted to serve its summons and complaint on Mehling at his condominium unit on November 18, 2014 at 4:33 pm, on November 19, 2014 at 7:02 pm, and on November 21, 2014 at 7:42 pm. Having failed to find someone of suitable age and discretion to receive the pleadings, plaintiff's process server affixed the summons and complaint to Mehling's door on November 24, 2014 at 2:52 pm. On November 26, 2014, a process server mailed a copy of the pleadings to Mehling at the condominium. (NYSCEF 31).

On February 9, 2015, an additional copy of the pleadings was mailed to the defendants pursuant to CPLR 3215, and on March 9, 2015, plaintiff conducted a non-military investigation of Mehling. (NYSCEF 32, 33).

On March 10, 2015, Mehling e-filed his answer, in which he denies plaintiff's allegations, and counterclaims on the ground that plaintiff has refused to make keys available to his condominium unit and roof or to repair his gutters, and has thus caused him damages in excess of \$100,000. (NYSCEF 22).

By letter that day, plaintiff rejected Mehling's answer as untimely. (NYSCEF 34). After receiving a copy of the answer in the mail, plaintiff again rejected it as untimely. (NYSCEF 35).

II. MOTION FOR A DEFAULT JUDGMENT

A. Contentions

Plaintiff relies on its affidavit of merit, proof of service, and proof of defendants' default to establish its entitlement to a default judgment. (NYSCEF 24, 37).

Mehling asserts that he has not resided at his condominium unit since December 2013 when he moved to Hackensack, New Jersey, which he asserts is his principal address. In support, he submits a copy of his New Jersey driver's license which was issued on December 10, 2013. Mehling claims he discovered the pleadings when he checked his mail at the condominium and found plaintiff's February 2015 mailing; he denies receiving any other copy of the pleadings. (NYSCEF 43).

Mehling thus asserts that the process server did not attempt to serve him with due diligence as he attempted to serve him at an address at which he no longer resides and did not try to serve him at his place of business, that as he does not live at the condominium unit, the pleadings were not affixed to his "dwelling place" or "usual place of abode," and that as he was not properly served, plaintiff did not complete service within 120 days of commencement of the action. (NYSCEF 51).

Plaintiff maintains that absent evidence that he notified it of his move to New Jersey, Mehling was served at his dwelling place, and it observes that Mehling stated that his residence in New Jersey was his "principal" residence rather than his only residence, that he continues to receive mail and packages at the building, and that he did not change his mailing address for his real estate tax bills. (NYSCEF 53).

B. Analysis

Pursuant to CPLR 308(4), the plaintiff must use due diligence in effectuating service by either personal delivery (308[1]), or the “deliver and mail” method (308[2]). If either method of service is not successful, the plaintiff may affix the summons to the door of the defendant’s actual place of business, dwelling place, or usual place of abode, and must also mail the summons to the defendant at his or her last known residence or actual place of business. (CPLR 308[4]). The affixing and mailing must be performed within 20 days of each other, and proof of service must be filed with the court within 20 days of whichever step occurs later. (*Id.*). Service is complete 10 days after the filing of proof of service. (*Id.*).

“The due diligence requirement of CPLR 308(4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received.” (*McSorley v Spear*, 50 AD3d 652 [2d Dept 2008], *lv denied* 10 NY3d 715, *rearg denied* 11 NY3d 751, *quoting Gurevitch v Goodman*, 269 AD2d 355 [2d Dept 2000]). What constitutes due diligence is determined on a case-by-case basis, focusing not on the quantity of the attempts at personal delivery, but on their quality. (*McSorley*, 50 AD3d at 652). One of the factors to be considered is the extent of inquiry by the process server concerning defendant’s whereabouts. (*Id.*).

“Dwelling place” as defined in the CPLR 308 is a location at which the defendant is actually residing at the time of delivery. (*Feinstein v Bergner*, 48 NY2d 234 [1979]). A defendant may “actually” reside at more than one location for purposes of the statute. (*Litton Loan Servicing, LP v Vasilatos*, 7 AD3d 580 [2d Dept 2004]). The Court of Appeals has defined “usual place of abode” as a place at which the defendant lives with a degree of permanence and stability, even if not in actual residence at the time of delivery, but with the intention to return.

(*Feinstein*, 48 NY2d at 234). Neither term has been defined as “last known residence.” (*Id.* at 239).

While it is undisputed that Mehling has not changed his address with the post office and continues to receive mail at the building, it is also undisputed that he changed his address with the Department of Motor Vehicles and obtained a New Jersey license in 2013, before he was allegedly served there. As the parties’ submissions are insufficient to establish whether Mehling was properly served pursuant to CPLR 308(4), a hearing is needed. (*See Austin v Tri-County Mem. Hosp.*, 39 AD3d 1223 [4th Dept 2007] [while defendant stated that service address was not her residence, plaintiff submitted evidence that she had changed address with neither post office nor Department of Motor Vehicles, and thus issues of fact warranted hearing]; *see also Cent. Mortgage Co. v Ward*, 127 AD3d 803 [2d Dept 2015] [as evidence submitted by parties was not dispositive on issue of whether service was proper, hearing should have been held]; *Kasowitz, Benson, Torres & Friedman v Cao*, 105 AD3d 521 [1st Dept 2013] [as defendant’s sworn, nonconclusory claim that place where she was served was not her dwelling place or usual place of abode raised factual issue as to proper service, traverse hearing necessary]).

III. CONCLUSION

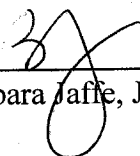
Accordingly, it is hereby

ORDERED, that plaintiff’s motion for default judgment and defendant Mehling’s cross motion to dismiss are held in abeyance pending a traverse hearing; and it is further

ORDERED, that the traverse hearing is referred to a special referee to hear and determine, and counsel for plaintiff shall, within 30 days from the date of this order, serve a copy

of this order with notice of entry, together with a completed Information Sheet,¹ upon the Special Referee Clerk in the Motion Support Office in Room 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date.

ENTER:



Barbara Jaffe, JSC

DATED: August 13, 2015
New York, New York

¹ Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.