

DLJ Mtge. Capital, Inc. v Sinigaglia

2015 NY Slip Op 31673(U)

August 27, 2015

Supreme Court, New York County

Docket Number: 850075/2012

Judge: Robert D. Kalish

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - PART 29**

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DLJ Mortgage Capital, Inc.

Petitioner

DECISION AND ORDER

-against-

INDEX NO.: 850075/2012

**Paolo Sinigaglia
Simod S.P.A.
The Board of Managers of the 55 Wall
Condominium Now Cipriani Club Residences
at 55 Wall Condominium et al**

Respondent
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Upon the foregoing papers, the Plaintiff's motion to extend the time to serve the summons and complaint upon the Defendant Simod S.P.A. and file proof of service is denied with leave to renew to the extent as follows:

Procedural Background

The underlying action was brought to foreclose on a mortgage held by the Plaintiff covering premises known as 55 Wall Street, Unit #700, New York, NY. Said mortgage was executed by the Defendant Paolo Sinigaglia and given to Mortgage Electronic Registration Systems, Inc., as nominee of For Wall Street Mortgage Bankers LTD DBA Power Express. Said mortgage was thereafter assigned to the Plaintiff by assignment of mortgage dated July 11, 2012. The mortgage secures a debt (a promissory note) owed by the Defendant Paolo Sinigaglia and held by the Plaintiff. Mr. Sinigaglia defaulted on his obligation under the note and mortgage by failing to make monthly payments on October 1, 2011, and the Plaintiff commenced the underlying action by filing a summons and complaint on August 6, 2012.

Prior to the instant motion, the Plaintiff moved before the Honorable Justice Milton A. Tingling pursuant to CPLR §306-b to extend the time to serve the summons and complaint upon the Defendant Simod S.P.A. and file proof of service. The Plaintiff attaches the affirmation that it submitted to Justice Tingling in support of the prior motion to extend. In said affirmation, the Plaintiff argues in sum and substance that the Defendant Simod S.P.A. has its offices at 35020 S. Angelo Di Piove, Via Verdi, 14 in Padova Italy, and that service can only be effected upon Simod S.P.A. pursuant to the provisions of the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of the Hague Conference on Private International Law (the "Hague Convention").

By order dated December 3, 2014 (two and a half years after the Plaintiff filed the summons and complaint), Justice Tingling granted the Plaintiff's motion and extended the time for the Plaintiff to serve the summons and complaint upon the Defendant Simod S.P.A. and file proof of service, 180 days from the date of entry of said order.

Instant motion

The Plaintiff now moves again before this Court for a second extension of the time to serve the summons and complaint upon the Defendant Simod S.P.A. and file proof of service.

The Plaintiff argues in its affirmation in support of the instant motion that notwithstanding the prior extension of time, service has not yet been effectuated upon the Defendant Simod S.P.A. Plaintiff indicates that pursuant to the Hague Convention, the pleadings must be translated into Italian by a member of the Italian Consulate prior to being served upon Simod S.P.A. in accordance with Italian law. The Plaintiff further indicates that it provided its process server with copies of the pleadings to submit to the Italian Consulate on April 7, 2015, after conducting extensive research into the requirements of the Hague Convention in the time immediately after Justice Tingling's prior Order was filed. Plaintiff states in its affirmation that it has been advised by its process server that service via the Hague Convention typically takes between six and eight months to complete.

Analysis

"Good Cause" and "Interest of Justice" standards for extending time for service pursuant to CPLR 306-b

"The 120-day service provision of CPLR 306-b can be extended by a court, upon motion, 'upon good cause shown or in the interest of justice'. 'Good cause' and 'interest of justice' are two separate and independent statutory standards. To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service. Good cause will not exist where a plaintiff fails to make any effort at service, or fails to make at least a reasonably diligent effort at service. By contrast, good cause may be found to exist where the plaintiff's failure to timely serve process is a result of circumstances beyond the plaintiff's control" (Bumpus v. New York City Tr. Auth., 66 A.D.3d 26, 31-32 (NY App Div 2d Dept 2009) citing CPLR 306-b; Leader v. Maroney, 97 N.Y.2d 95 (N.Y. 2001); Valentin v. Zaltsman, 39 AD3d 852 (NY App Div 2d Dept 2007); Lipschitz v. McCann, 13 AD3d 417 (NY App Div 2d Dept 2004); Kazimierski v. New York Univ., 18 AD3d 820 (NY App Div 2d Dept 2005); Baione v. Central Suffolk Hosp., 14 AD3d 635 (NY App Div 2d Dept 2005); Busler v. Corbett, 259 AD2d 13 (NY App Div 4th Dept 1999); U.S. 1 Brookville Real Estate Corp. v. Spallone, 13 Misc 3d 1236(A) (NY Sup Ct 2006); Greco v. Renegades, Inc., 307 AD2d 711 (NY App Div 4th Dept 2003); Kulpa v. Jackson, 3 Misc. 3d 227 (NY Sup Ct Oneida Cnty 2004).

Further, “[i]f good cause for an extension is not established, courts must consider the “interest of justice” standard of CPLR 306-b. The interest of justice standard does not require reasonably diligent efforts at service, but courts, in making their determinations, may consider the presence or absence of diligence, along with other factors. The interest of justice standard is broader than the good cause standard, as its factors also include the expiration of the statute of limitations, the meritorious nature of the action, the length of delay in service, the promptness of a request by the plaintiff for an extension, and prejudice to the defendant” (Bumpus v. New York City Tr. Auth., 66 A.D.3d 26, 32 (NY App Div 2d Dept 2009) citing Leader v. Maroney, 97 NY2d 95 (NY 2001); Mead v. Singleman, 24 AD3d 1142 (NY App Div. 3d Dept 2005); Matter of Jordan v. City of New York, 38 AD3d 336 (NY App Div 1st Dept 2007); Estey-Dorsa v. Chavez, 27 AD3d 277 (NY App Div 1st Dept 2006); de Vries v. Metro. Transit Auth., 11 AD3d 312 (NY App Div 1st Dept 2004); Hafkin v. North Shore Univ. Hosp., 279 A.D.2d 86 (NY App Div 2d Dept 2000) affd 97 NY2d 95 (NY 2001); Slate v. Schiavone Constr. Co., 4 NY3d 816 (NY 2005)).

Upon the submitted papers, the Plaintiff has failed to establish “good cause” for a second extension of time to effect service upon Simod S.P.A.

The difficulty associated with effecting service upon a party located outside fo the United States pursuant to the Hague Convention has been treated as “good cause” for extending the 120 day service provision of CPLR §306-b (See Kulpa v. Jackson, 3 Misc. 3d 227 (NY Sup Ct Oneida Cnty 2004)). However, the Court recognizes that the instant motion is the second time that the Plaintiff has asked for an extension to effect service, and that the instant motion is made more than three years after the Plaintiff filed the summons and complaint. Further, although the Plaintiff indicates in the affirmation that it conducted extensive research into the requirements of the Hague Convention following Justice Tingling’s prior decision, it is unclear why said “research” required over four months to complete (the time between Judge Tingling’s December 3, 2014 order and April 7, 2015, the date that the Plaintiff indicates it provided its process server with copies of the pleadings to submit to the Italian Consulate).

The Court further notes that the Plaintiff made its prior motion before Justice Tingling on or around October 29, 2014 (the date of the Plaintiff’s affirmation in support of the prior motion to extend), more than two years after filing the summons and complaint in the underlying action. The Plaintiff states in the affirmation in support of the prior motion that it made “certain efforts to ascertain the whereabouts of the defendant Simod S.P.A.” prior to determining that service must be effected through the Hague Convention. Further, the Plaintiff’s affirmation in support of the prior motion indicates that the Plaintiff was aware that the pleadings must be translated into Italian by a member of the Italian Consulate as of the prior motion, and specifically requested 180 days from the date of said order to serve the summons as complaint upon Simod S.P.A. pursuant to the Hague Convention. As such, there is nothing to indicate that the “research” that the Plaintiff conducted between the time of Justice Tingling’s December 3, 2014 decision and April 7, 2015 (the date that the Plaintiff indicates it provided its process server with copies of the pleadings to submit to the Italian Consulate) yielded any information as to service under the Hague Convention that the Plaintiff did not already know as of making the prior motion. Further, the Plaintiff specifically argued in its affirmation in support of the prior motion that it had been “advised” that the “process beginning with delivering the Summons and Complaint as filed and translated into Italian through return of proof of service from Italy could take up to six months”. This prior argument is virtually identical to the argument that Plaintiff now presents to this Court in support of its motion for a second extension, without a single new update as to its efforts in effecting service

upon Simod S.P.A. under the Hague Convention.

Apart from Plaintiff's indication that it provided its process server with copies of the pleadings on April 7, 2015, the Plaintiff's current affirmation in support of this second motion to again extend the time to serve the summons and complaint upon Simod S.P.A. is entirely devoid of any new information as to the efforts the Plaintiff took following the prior decision to effect service upon Simod S.P.A. pursuant to the Hague Convention. The Plaintiff is for the second time requesting a 180 day extension. However, the instant motion is based upon the identical arguments that were previously considered on the prior motion and lacks any substantive information as to the Plaintiff's current efforts to effect service pursuant to the Hague Convention or the nature of the current delays.

As previously stated, good cause will not exist where a plaintiff fails to make any effort at service, or fails to make at least a reasonably diligent effort at service. However, good cause may be found to exist where the plaintiff's failure to timely serve process is a result of circumstances beyond the plaintiff's control, which can include delays caused by service pursuant to the Hague Convention has been treated as "good cause" for extending the time period for service (Bumpus v. New York City Tr. Auth., 66 A.D.3d 26, 31-32 (NY App Div 2d Dept 2009)). This Court recognizes that service pursuant to the Hague Convention does create delays that are outside of the Plaintiff's control. However, in the instant motion the Plaintiff has not presented any new arguments or updates as to its efforts in effecting service pursuant to the Hague Convention that were not already included in its prior motion for an extension of time pursuant to CPLR §306-b.

In the absence of some update by the Plaintiff as to its continuing efforts to effect service and/or the nature of the current delays in effecting service, simply claiming continuing delays due to service pursuant to the Hague Convention is insufficient to create good cause for a second extension of time. As such, this Court finds that the Plaintiff has failed to establish good cause for extending the time to effect service upon Simod S.P.A. pursuant to CPLR §306-b.

Upon the submitted papers, the Plaintiff also has failed to establish that it would be "in the interests of justice" to grant the Plaintiff a second extension of time to effect service upon Simod S.P.A.

As previously stated, the interest of justice standard for extending the time to effect service is broader than the good cause standard and is not determined solely by the Plaintiff's reasonably diligent efforts to effect service. The Court may consider multiple factors in determining whether or not it would be in the interests of justice to extend the time to effect service. Said factors include the Plaintiff's efforts in effecting service, the expiration of the statute of limitations, the meritorious nature of the action, the length of delay in service, the promptness of a request by the plaintiff for an extension, and prejudice to the defendant (Bumpus v. New York City Tr. Auth., 66 A.D.3d 26, 32 (NY App Div 2d Dept 2009)).

Upon review of the submitted papers, this Court finds that the Plaintiff has also failed to establish that it would be in the interests of justice for the Court to grant the Plaintiff a second extension of time to effect service upon Simod S.P.A. In making said determination, this Court has considered the fact that the previous extension ran on June 1, 2015 (180 days measured from Justice Tingling's December 3, 2014 decision). However, the Plaintiff did not make the instant motion until on or about July 24, 2015, almost two months after the extension had run. The Court further recognizes that the underlying action was commenced over three years ago.

Taken together with the Plaintiff's failure to present this Court with any information as to its efforts to effect service upon Simod S.P.A. (or any delays the Plaintiff faces in doing so) following Justice Tingling's prior decision, this Court finds that there is insufficient basis for the Court to give the Plaintiff a second extension to effect service upon Simod S.P.A. in the interests of justice.

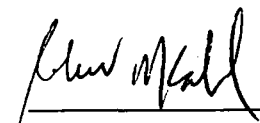
Accordingly, the Plaintiff's motion for a second extension of time to effect service upon Simod S.P.A. is hereby denied with leave to renew upon papers indicating the efforts that the Plaintiff took to effect service upon Simod S.P.A. pursuant to the Hague Convention during the prior extension period and/or the nature of any delays that the Plaintiff faced in doing so.

It is further

ORDERED that the Plaintiff shall appear before this Court for a status conference to be held on September 28, 2015.

The foregoing constitutes the Order and Decision of the Court.

Dated: August 27, 2015


_____, JSC
HON. ROBERT D. KALISH
J.S.C.