

Fidelity Natl. Title Ins. Co. v Smith
2015 NY Slip Op 32497(U)
December 22, 2015
Supreme Court, New York County
Docket Number: 155343/15
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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FIDELITY NATIONAL TITLE INSURANCE CO.,

Plaintiff,

-against-

JONATHAN SMITH,

Defendant.

----- X
SHERRY KLEIN HEITLER, J.:

Index No. 155343/15
Motion Seq. 001

DECISION & ORDER

Plaintiff Fidelity National Title Insurance Co. ("Plaintiff") moves pursuant to CPLR 315¹ for leave to serve the summons and verified complaint in this action upon defendant Jonathan Smith ("Defendant") by publication. Plaintiff further moves pursuant to CPLR 306-b² to extend the time within which to file proof of such service by 120 days.

The summons and verified complaint were filed in the New York County Clerk's office on May 28, 2015. According to the moving papers, Plaintiff's counsel hired Reginald Hunter from LegalEase to serve the Defendant at the Brooklyn, New York address that he provided to the Kings County District Attorney's Office after allegedly admitting to his role in the fraudulent mortgage scheme complained of by Plaintiff herein. Mr. Hunter attempted to serve the summons and verified complaint upon the Defendant at such address on June 8, 2015 but was informed by

¹ CPLR 315 provides that "[t]he court, upon motion without notice, shall order service of a summons by publication in an action described in section 314 if service cannot be made by another prescribed method with due diligence." CPLR 314, in turn, provides that service may be made without the state in the same manner as service is made within the state in a matrimonial actions and in certain cases involving real property or levies thereon.

² CPLR 306-b provides, in part, that "[s]ervice of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause shall be made within one hundred twenty days after the commencement of the action or proceeding."

the then tenant that the Defendant did not live there. Mr. Hunter then attempted to serve the Defendant at another Brooklyn, New York address but determined that he did not reside there either.³ On June 9, 2015 Plaintiff hired Stanley Foreman, a private investigator licensed in the State of New York, to locate the Defendant. Mr. Foreman's affidavit, sworn to September 22, 2015, describes in detail the numerous and significant but ultimately unsuccessful steps he took to locate the Defendant.⁴

Plaintiff does not seek permission to serve a defendant outside of New York State, which is what CPLR 314 authorizes. Nor is this a matrimonial action or one involving real property. This is an action for fraud and negligent misrepresentation resulting in money damages, and thus CPLR 315 does not authorize the relief Plaintiff seeks either. Nevertheless, service by publication is permitted by CPLR 308(5), which allows courts to direct an alternative method for service of process where the methods set forth in CPLR 308(1) (personal service), CPLR 308(2) (substituted service), and CPLR 308(4) (nail and mail service) are impracticable. "Significantly, a showing of impracticability does not require plaintiff to establish actual prior attempts by each and every statutory method of service, or require proof of due diligence." *Miller v Friedman*, 2013 NY Misc. LEXIS 554 (Sup. Ct. NY. Co Jan. 29, 2013, Madden, J.) (citing *Contimortgage Corp v Isler*, 48 AD3d 732, 734 [2nd Dept 2008]). However, the method devised by the court must be one that is reasonably calculated, under all the circumstances, to apprise the defendant of the pendency of the action. *Mullane v Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950);

³ A copy of Mr. Hunter's affidavit detailing his attempts to serve Mr. Smith is submitted as Plaintiff's exhibit B.

⁴ A copy of Mr. Foreman's affidavit is submitted as Plaintiff's exhibit C.

see also *Baidoo v Blood-Dzraku*, 48 Misc. 3d 309 (Sup. Ct. NY Co. 2015, Cooper, J).

While it has been held that publication is “the method of notice least calculated to bring to a potential defendant’s attention the pendency of judicial proceedings” (*Contimortgage Corp.* 48 AD3d at 734 (quoting *Boddie v Connecticut*, 401 US 371 [1971])), the efforts undertaken by Plaintiff in this case clearly show that serving the Defendant with process using the means authorized by CPLR 308(1), (2), and (4), or any other means, would be impracticable, if not impossible. Therefore, the court hereby authorizes service of process upon the Defendant by the Plaintiff by publication in accordance with CPLR 316.⁵ In order to afford Plaintiff sufficient time to complete such service and file affidavits thereof, Plaintiff’s CPLR 306-b motion to extend the time within which to effectuate such service is also granted, as set forth below.

Accordingly, it is hereby

ORDERED that Plaintiff’s motion is granted; and it is further

ORDERED that, in accordance with CPLR 316, the summons with notice in this action shall be served upon the Defendant, Mr. Jonathan Smith, by publishing same, together with notice to the Defendant, a brief statement of the nature of the action and the relief sought, and the sum of money Plaintiff would seek in case of a default, in the Brooklyn Daily Eagle, 16 Court Street, Suite 1208, Brooklyn, NY 11241, and the Daily News, 4 New York Plaza, 7th Floor, New

⁵ CPLR 316(a) provides in relevant part that “[a]n order for service of a summons by publication shall direct that the summons be published together with the notice to the defendant, a brief statement of the nature of the action and the relief sought, and, except in an action for medical malpractice, the sum of money for which judgment may be taken in case of default . . . in two newspapers, at least one in the English language, designated in the order as most likely to give notice to the person to be served, for a specified time, at least once in each of four successive weeks”

CPLR 316(c) provides in relevant part that “[t]he first publication of the summons shall be made within thirty days after the order is granted. Service by publication is complete on the twenty-eighth day after the day of first publication. . . .”

York, NY 10004; and it is further

ORDERED that, in accordance with CPLR 316, such service shall be made in each publication once each week for four consecutive weeks; and it is further

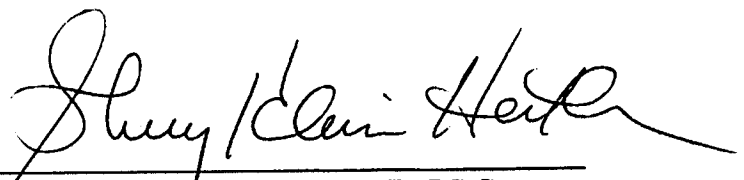
ORDERED that Plaintiff shall make all efforts to effectuate the first publication within 20 days from the date of this decision and order; and it is further

ORDERED that Plaintiff is directed to file proof of such service with the court no later than February 26, 2016; and it is further

ORDERED that Plaintiff appear for a compliance conference on February 29, 2016 in Part 30 at 60 Centre Street, Room 412, New York, NY 10007.

This constitutes the decision and order of the court.

DATED: 12-22-15



SHERRY KLEIN HEITLER, J.S.C.