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| <b>BAC Home Loan Servicing, LP v Berardi</b>                                                                                                                                                                                                                     |
| 2015 NY Slip Op 32682(U)                                                                                                                                                                                                                                         |
| December 22, 2015                                                                                                                                                                                                                                                |
| Supreme Court, Suffolk County                                                                                                                                                                                                                                    |
| Docket Number: 44619/2009                                                                                                                                                                                                                                        |
| Judge: Thomas F. Whelan                                                                                                                                                                                                                                          |
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**ORIGINAL**

SHORT FORM ORDER

INDEX No. 44619/2009

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 33 - SUFFOLK COUNTY

***P R E S E N T :***

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 07/27/15  
SUBMIT DATE: 10/30/15  
Mot. Seq. # 004 - MD  
CDISP: No

-----X  
BAC HOME LOAN SERVICING, LP f/k/a/  
COUNTRY WIDE HOME LOAN SERVICING,  
LP,

Plaintiff,

-against-

LAWRENCE L. BERARDI, if living, and if be  
dead, any and all other persons who may claim  
as devisees, distributees, legal representatives and  
successors in interest of said defendant, all of whom  
and whose places of residence are unknown to the  
plaintiff and cannot after diligent inquiry be  
ascertained, and to PEOPLE OF THE STATE OF  
NEW YORK, THE UNITED STATES OF  
AMERICA, and to JOHN DOE #1- JOHN DOE  
#12, these last twelve names being fictitious and  
intended to be persons and entities having some  
claim or interest in the mortgaged premises

Defendants.

-----X

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Attys. For Plaintiff  
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Garden City, NY 11530

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Guardian Ad Litem. Military Atty. for  
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Upon the following papers numbered 1 to 14 read on this motion by defendant Berardi for dismissal of the complaint and/or leave to file a late answer; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers           ; Opposing papers: 5-6; Reply papers 7-8; Other: 9-10 (Affirmation of GAL); 11-12 (Proof of publication); 13-14 (Affirmation of GAL services rendered); (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED**, that those portions of this motion (#004) by defendant, Berardi, for dismissal of the plaintiff's complaint pursuant to CPLR 3211(a)(8) are considered thereunder and under CPLR 308(5), 305 and 316 and are denied; and it is further

**ORDERED** that the remaining portions of this motion wherein defendant Berardi seeks dismissal of the complaint on non-jurisdictional grounds or leave to serve and file a late answer are considered under CPLR 3215(c), 3012 and are denied.

This mortgage foreclosure action was commenced in November of 2009 against, among others, Lawrence L. Berardi, the obligor/mortgagor under the March 27, 2007 note and mortgage for which the remedy of foreclosure and sale is sought by the plaintiff. In November of 2009, the plaintiff's process server served two occupants found at the mortgaged premises as unknown defendants. In December of 2010, the plaintiff served the summons, complaint and RPAPL 1303 notice upon defendant Berardi at the mortgaged premises pursuant to CPLR 308(4).

In March of 2010, the plaintiff moved for an order (#001) adding the municipal defendants listed in the caption as party defendants. In addition, the plaintiff sought to describe the defendant mortgagor, Lawrence L. Berardi, as an unknown defendant and to add his successors as party defendants in the event that Berardi was deceased. The plaintiff's motion thus included a request for leave to serve a supplemental summons and amended complaint in which the municipal defendants were added, the mortgagor was described as a defendant whose existence and/or whereabouts were unknown and, if deceased, his heirs, personal representatives and successors were joined as party defendants. The request for a deficiency judgment that was contained in the original complaint was deleted in the amended complaint and claims for foreclosure and sale were alone asserted against the mortgagor defendant, Berardi, and the newly added defendants. The plaintiff further sought an order directing publication of the supplemental summons with notice pursuant to CPLR 308(5) and 316 and the appointment of a guardian ad litem/military attorney for the mortgagor defendant and his unknown successors, if any.

The motion was granted by the Acting Justice then assigned to this case by order dated March 22, 2010 [Spinner, J.]. The court therein directed that the summons with notice be published in two newspapers and it appointed Lynn Poster-Zimmerman, Esq., as guardian ad litem. After qualifying according to law for her fiduciary office, the guardian ad litem appeared herein for her wards, including Mr. Berardi, by consent, qualifying affidavit and an answer, in which she neither admitted nor denied the allegations in the complaint and a qualified waiver of notice of certain proceedings.

By the instant motion (#004), defendant Berardi, who became known to the court after appearing before it in connection with prior motions made by a purported transferee of the mortgaged premises, moves for an order dismissing the complaint on the grounds that the court is without personal jurisdiction over him. Alternatively, defendant Berardi seeks dismissal of the complaint as abandoned pursuant to CPLR 3215(c) and/or by reason of a purported lack of standing on the part of the plaintiff or a failure to join a necessary party. Alternatively, defendant Berardi seeks an order granting him leave to appear herein by a late answer. In his moving papers, defendant Berardi asserts that on October 23, 2010, he transferred all of his right, title and interest in the mortgaged premises to a trust known as the "33 Yava St. Trust". The Trust bears the same name as the street address of the mortgaged premises which is situated in Brookhaven, New York. A copy of the deed of October 23, 2010 as recorded by the Suffolk County Clerk on October 29, 2010 is attached to the moving papers. The recording page issued affixed to the deed by the Suffolk County Clerk recites that no transfer taxes were paid upon recording.

The plaintiff opposes the instant motion, which was duly served upon the guardian ad litem appointed for defendant Berardi. The guardian ad litem appeared in response to such service by an affirmation in which she details her undertakings on behalf of her ward which included a review of the pleadings and the affidavits of due diligence and service of process upon her ward, and the details of a meeting she had with Mr. Berardi to confirm his identity after he became known to her and the court. In light of the change in Mr. Berardi's status from an unknown defendant to a known defendant and his appearance on this motion by counsel of his own choosing, the guardian ad litem, seeks in effect, the termination of her fiduciary office and the fixation of her compensation pursuant to CPLR 1204.

For the reasons stated below, the instant motion (#004) by defendant Berardi for the relief outlined above is denied and the guardian ad litem's request for termination of her office and the fixation of her compensation is granted.

The moving defendant's claim that the court lacks jurisdiction over him is rejected as lacking in merit. A review of the file maintained in this action by the Clerk of the Court reveals that on November 9, 2009, the plaintiff's process server attempted service of the summons, complaint and other initiatory papers on defendant Berardi at the mortgaged premises and was advised by an occupant, Fernando Lopez, who was served as such, that defendant Berardi did not reside there. On December 2<sup>nd</sup> and 10<sup>th</sup> of 2009, the plaintiff's process server twice attempted to personally serve defendant Berardi at the mortgaged premises. On December 14, 2009, the same process server affixed the summons, complaint and initiatory papers to the door of the mortgaged premises and mailed copies thereof to said premises the following day pursuant to CPLR 308(4) following two prior unsuccessful attempts to effect service pursuant to CPLR 308(1) or 308(2) on December 2<sup>nd</sup> and 18<sup>th</sup> of 2009 (*see* December 17, 2009 Affidavit of Doreen Napolitano, attached to the moving papers).

On March 17, 2010, the plaintiff obtained an order granting it leave to serve a supplemental summons and amended complaint in which defendant Berardi was identified as an unknown defendant and the two governmental defendants listed in the caption were added as party defendants. The order further directed that the supplemental summons with notice be published in two newspapers. The March 17, 2010 order contained the appointment of attorney, Lynn Poster-Zimmerman, Esq., as guardian ad litem for defendant Berardi, if living and if deceased, his devisees, distributees, personal representatives and others claiming an interest under him in the premises. Due proof of the publication of the supplemental summons with notice by way of affidavits of service by principal employees of the Long Island Business News and the Port Times Record were submitted by the guardian ad litem to the court on this motion.

On the instant motion, defendant Berardi challenges the order of publication as being unsupported by sufficient due diligence, which purportedly leaves the court without jurisdiction over him. In his supporting affidavit, Berardi claims that he was not served with a summons and complaint even though he has always been a resident of the State of New York. He does not detail where he resided during the course of this action. However, in a reply affirmation, the moving defendant's counsel attaches a notice issued in a Chapter 7 bankruptcy proceeding filed by said defendant in July 8, 2011, wherein defendant Berardi listed the mortgaged premises as his address.

The court rejects defendant Berardi's claim that the court lacks jurisdiction over his person. Defendant Berardi failed to rebut the presumption of service arising from the affidavit of the plaintiff's process server dated, December 17, 2009, who therein attested to service of the summons, complaint and RPAPL § 1303 notice upon defendant Berardi at the mortgaged premises pursuant to the CPLR 308(4). Defendant Berardi is estopped from denying that the mortgaged premises were neither his dwelling place nor his usual place of abode by his use thereof in the bankruptcy filing and the statements of his counsel set forth in paragraphs 2 and 3 of his reply affirmation. Nor did defendant Berardi rebut the proficiency of the service of the supplemental summons with notice that was effected upon him, and if he were deceased, to his devisees, distributees, legal representatives and other successors by publication pursuant to CPLR 316 in accordance with the order of March 10, 2010. This additional service not only joined as party defendants, Berardi's distributees, representatives and other successors, in the event Berardi was deceased, but it further secured in personam jurisdiction pursuant to CPLR 308(5) over him in the event that the prior service was inadequate.

Under the circumstances of this case, which include the November 9, 2009 statements of non-residency that were uttered to the process server by the occupant, Fernando Lopez, and the process server's inability to locate anyone at the mortgaged premises in December of 2009 when service pursuant to CPLR 308(4) was effected upon defendant Berardi, the court finds that the dictates of due process were satisfied by the services of process effected upon defendant Berardi, and that the court has jurisdiction over the person of defendant Berardi (*see* Siegel, N.Y. Prac. § 107, at 195 [4th ed.]; *see also State Street Bank & Trust Co. v Coakley*, 16 AD3d 403, 790 NYS2d 412, 413 [2d Dept 2005]; *Home Fed. Sav. Bank v Versace*, 252 AD2d 480, 481, 675 NYS2d 131 [2d Dept 1998]). The court thus denies those portions of the instant motion wherein the defendant seeks dismissal of the plaintiff's complaint or a traverse hearing on the issue of service.

The remaining portions of the instant motion are also denied. It is well settled that a mortgagor who has made an absolute conveyance of all his interest in the mortgaged premises, including his equity of redemption, is not a necessary party to foreclosure, unless a deficiency judgment is sought (*see Federal Natl. Mtge. Assn. v Connelly*, 84 AD2d 805, 444 NYS2d 147 [2d Dept 1981]; *see also DLJ Mtge. Capital, Inc. v 44 Brushy Neck*, 51 AD3d 857, 859 NYS2d 221 [2d Dept 2008]).

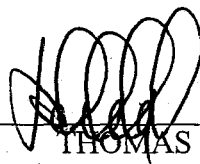
Here, defendant Berardi has averred that he transferred all of his right, title and interests in the subject premises to a Trust by deed dated October 23, 2010 and no deficiency judgment is sought against him by the plaintiff in its amended complaint. Defendant Berardi is no longer a party with a right of redemption or other interest that may be subject to extinguishment by any judgment to be entered herein. He is thus not a necessary party and has no right to appear herein and contest the relief requested by the plaintiff.

Finally, the court discharges attorney Lynn Poster-Zimmerman, Esq. (Fiduciary Id. No. 136820), from her duties as guardian ad litem and military attorney since her fiduciary office terminated upon the ascertainment of defendant Berardi's whereabouts and his appearance herein by counsel of his own choosing on this motion. The court hereby awards the guardian ad litem compensation in the amount of \$2,730.00, inclusive of costs and expenses, which amount is hereby found by the court to be the reasonable value of the services rendered to her wards in her dual capacity as guardian ad litem and

military attorney. Said amount shall be paid by the plaintiff to the guardian ad litem within 45 days of the date of this order. In the event that such sum is not so paid, the guardian ad litem may docket this order as a judgment against the plaintiff as contemplated by CPLR 2222 upon the tender of this order to the Clerk by the guardian ad litem.

In view of the foregoing, the instant motion (#004) by defendant Berardi for dismissal of the complaint and the other relief outlined above is denied.

Dated: December 22, 2015



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THOMAS F. WHELAN, J.S.C.