

Deutsche Bank v Acevedo

2016 NY Slip Op 30489(U)

February 25, 2016

Supreme Court, Kings County

Docket Number: 503781/2013

Judge: Robin S. Garson

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 75 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25th day of February, 2016

P R E S E N T:

HON. ROBIN S. GARSON,

Justice.

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DEUTSCHE BANK, NATIONAL TRUST COMPANY, AS TRUSTEE OF THE INDYMAC INDX MORTGAGE TRUST 2007-AR13, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-AR13 UNDER THE POOLING AND SERVICING AGREEMENT DATED MAY 01, 2007,

Plaintiffs,

- against -

Index No. 503781/13

JUAN ACEVEDO, et al.,

Defendants.

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The following papers numbered 1 to 5 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	1- 3_____
Opposing Affidavits (Affirmations)_____	4_____
Reply Affidavits (Affirmations)_____	5_____
_____ Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers, defendant Juan Acevedo moves for an order restoring its prior motion to dismiss and, upon restoration, dismissing the complaint pursuant to CPLR 3211 (a) (8) and cancelling the notice of pendency.

FILED
KINGS COUNTY CLERK
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Plaintiff Deutsche Bank National Trust Company commenced this mortgage foreclosure action by filing a summons and complaint on July 8, 2013. The subject mortgage, executed by defendant on April 5, 2007, encumbers the property at 272 Etna Street in Brooklyn. According to the affidavit of plaintiff's process server, defendant was served by delivery of the summons and complaint on July 26, 2013 to "ROSA PENAFIEL, RESIDENT/OCCUPANT of JUAN ACEVEDO" at 272 Etna Street, Brooklyn, NY. The affidavit states that "[s]aid address is [defendant's] last known address." A separate affidavit of mailing states that process was mailed to defendant at 272 Etna Street, Brooklyn, NY on July 30, 2013. On August 26, 2014, defendant served an answer which set forth an affirmative defense of lack of personal jurisdiction, among others, as well as counterclaims. By letter dated September 3, 2014, plaintiff notified defendant that his answer was being rejected as untimely. On September 24, 2014, plaintiff served a reply to defendant's counterclaims.

On December 18, 2014, defendant filed a motion to dismiss the complaint on grounds of lack of proper service. In his motion, defendant contends that service was not properly effectuated since delivery of the summons and complaint to a person of suitable age and discretion was not made at his dwelling place or usual place of abode. Defendant asserts that he moved from the subject property at 272 Etna Street in November 2009 and at the time service was purportedly effectuated in July 2013 he was residing at 26 St. Andrews Place in Brooklyn. In opposition, plaintiff contends that defendant waived the defense of lack of

personal jurisdiction under CPLR 3211 (e) by failing to bring a motion to dismiss within 60 days of the service of his answer.

CPLR 3211 (a) (8) provides that a party may move for judgment dismissing one or more causes of action asserted against him on the ground that “the court has not jurisdiction of the person of the defendant.” CPLR 3211 (e) provides, in relevant part,

“[A]n objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship.”

While defendant served an answer containing a defense of lack of personal jurisdiction on August 26, 2014, more than sixty days prior to bringing the instant motion to dismiss, the answer was rejected by plaintiff as untimely. The court notes that the letter of rejection appears facially valid and defendant does not dispute otherwise. Although plaintiff served a reply to defendant’s counterclaims three weeks following its letter of rejection, there is nothing in the record indicating that plaintiff communicated to defendant’s counsel that the answer was deemed accepted or that plaintiff would not take proceedings toward a default judgment. Under the circumstances, plaintiff may not hold defendant to the sixty-day limitation for seeking dismissal (*see TAZ Prods., Inc. v Rentacom, Inc.*, 19 Misc 3d 965, 968 [Civ Ct, NY County 2008]; *Chase Home Fin. LLC v Adetula*, 32 Misc 3d 1236[A], 2011 NY Slip Op 51593[U], *1 [Sup Ct, Kings County 2011] [Insofar as the plaintiff rejected the defendant’s

answer, the service of such answer cannot constitute an appearance]). As a result, the court finds that defendant's defense of improper service is not waived under CPLR 3211 (e).

In his motion to dismiss, defendant submits an affidavit wherein he avers that he did not reside at the subject property on the date service was attempted but rather was residing at his actual place of residence, 26 St. Andrews Place, Apt. #2, Brooklyn NY. Along with his affidavit, defendant submits certain documents, including a copy of his tax return for the year 2013, a copy of a Con Edison bill for March 2013 and an earnings statement for the period July 27, 2013 to August 2, 2013, each of which lists 26 St. Andrews Place as defendant's address. CPLR 3211 (e) requires that "[t]he papers in opposition to a motion based on improper service shall contain a copy of the proof of service, whether or not previously filed." Plaintiff's opposition papers are defective in that they do not include a copy of the affidavit of service. Furthermore, the affidavit of service filed in this action is ineffective to show proper substituted service upon defendant. CPLR 308 (2) provides that personal service upon a natural person shall be made "by delivering the summons within the state to a person of suitable age and discretion at the *actual place of business, dwelling place or usual place of abode* of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business" (emphasis added). The affidavit of service filed in this matter does not indicate that 272 Etna Street, where delivery of process was made to a person of suitable age and discretion, is the actual place of business, dwelling place or

usual place of abode of defendant. Rather, this address is identified only as defendant's "last known address." It is well settled that neither the term "dwelling place" nor "usual place of abode" may be equated with the "last known residence" of a defendant for purposes of substituted service pursuant to CPLR 308 (2) or CPLR 308 (4) (*see Feinstein v Bergner*, 48 NY2d 234, 239 [1979]; *Cuomo v Cuomo*, 144 AD2d 331, 332 [2d Dept 1988]; *Chiari v D'Angelo*, 123 AD2d 655, 655 [2d Dept 1986]). While plaintiff cites to a boilerplate paragraph in the mortgage whereby defendant agreed that all *notices* in connection with the mortgage were to be mailed to 272 Etna Street, such provision cannot reasonably be interpreted to include service of legal process. Because there is no evidence presented by plaintiff showing that defendant was properly served, it has not established that the court has personal jurisdiction over defendant.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is deemed restored to the calendar; and it is further

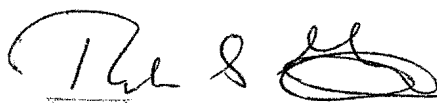
ORDERED that defendant's motion is granted in all respects; and it is further

ORDERED that the complaint is hereby dismissed pursuant to CPLR 3211 (a) (8) for improper service; and it is further

ORDERED that the Kings County Clerk is directed to cancel the notice of pending judgment filed in this action.

E N T E R,

2-25-16



HON. ROBIN S. CARSON
A.J.S.C.

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