

Citimortgage, Inc. v Crossley
2016 NY Slip Op 30598(U)
March 30, 2016
Supreme Court, Queens County
Docket Number: 6967/12
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IA Part 6
Justice

CITIMORTGAGE, INC., Plaintiff,	Index Number <u>6967/12</u>
-against-	Motion Date <u>December 10, 2015</u>
MYRTLE CROSSLEY a/k/a MYRTLE CROSLEY, et al., Defendants.	Motion Seq. No. <u>4</u> Motion Cal. No. <u>35</u>

Pursuant to an order of the Court dated January 29, 2016, this Court ordered a traverse hearing to determine whether service was properly made pursuant to CPLR 308 and to determine whether jurisdiction was properly obtained over moving defendant. The traverse hearing on the issue of service was held on March 22, 2016.

In this case, plaintiff asserts that service upon defendant, Myrtle Crossley a/k/a Myrtle Crosley, was made upon the person of defendant pursuant to CPLR 308(2). Defendant denies delivery and compliance with CPLR 308(2).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In *Bankers Trust Company of California, N.A. v Steve Tsoukas*, 303 AD2d 343 (2d Dept 2003) the Appellate Division held:

"CPLR 308 (2) authorizes service, inter alia, by delivery of the summons and complaint within the state to a person of suitable age and discretion at the defendant's dwelling place and mailing the summons to the defendant's dwelling place and mailing the summons to the defendant's last known residence. The plaintiff bears the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process (see *Frankel v Schilling*, 149 AD2d 657, 659 [1989]). A process

server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to CPLR 308 (2) (see *Kaywood v Cigpak, Inc.*, 258 AD2d 623 [1999]; *Manhattan Sav. Bank v Kohen*, 231 AD2d 499, 500 [1996]). Where, however, as in this case, there is a sworn denial that delivery to the defendant was accomplished, the affidavit of service is rebutted and the plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing (see *Bank of Am. Natl. Trust & Sav. Assn. v Herrick*, 233 AD2d 351, 352 [1996]; *Frankel v Schilling, supra*). Even if a defendant eventually acquires actual notice of the lawsuit, actual notice alone will not sustain the service or subject a person to the court's jurisdiction when there has not been compliance with prescribed conditions of service (see *McDonald v Ames Supply Co.*, 22 NY2d 111 [1968]; *Bank of Am. Natl. Trust & Sav. Assn. v Herrick, supra*; *Frankel v Schilling, supra*).

At the hearing, plaintiff offered the testimony of Joseph Leggio, a licensed process server who testified that he served the summons and complaint, which service occurred on April 4, 2012, when he delivered at defendant's dwelling place, a copy of the papers to a person named "Mavis Hanson", a person he alleged to be the sister of defendant, Myrtle Crossley a/k/a Myrtle Crosley. He testified that he had no personal recollection of the service, however, according to his affidavit of service, logbook entries and contemporaneous notes, he personally served the Summons and Complaint and 1303 Notice on "Myrtle Crossley a/k/a Myrtle Crosley", on April 4, 2012 at 2:19 p.m. at 2964 Falcon Avenue, Far Rockaway, New York 11691 and he subsequently deposited a copy of the Summons and Verified Complaint and 1303 Notice in a postpaid, properly addressed plain envelope marked "Personal and Confidential" in an official depository under the exclusive care and custody of the United States Post Office in the State of New York, on April 6, 2012 addressed to 2964 Falcon Avenue, Far Rockaway, New York 11691. He further testified that at the time of service, he requested the recipient give her name and the recipient gave him the name of Mavis Hanson and said to him that she is the sister of defendant Myrtle Crossley a/k/a Myrtle Crosley. Moreover, he requested that she acknowledge receipt of the papers by signing her name at the bottom of the process server's work order prepared contemporaneously with the service (Plaintiff's Exhibit 4). He testified that the name she signed was "Crosley". Plaintiff submitted into evidence a photograph of the premises located 2964 Falcon Avenue, Far Rockaway, New York 11691 with GPS notation and date of April 4, 2012 and time of 14:15:36 (Plaintiff's Exhibit 3). Plaintiff

also submitted into evidence, the process server's logbook (Plaintiff's Exhibit 2), the process server's work order (Plaintiff's Exhibit 4) and the affidavit of service (Plaintiff's Exhibit 1). "Mavis Hanson" is described in the affidavit as a black female, black hair, approximately 73 years of age, 5'4"-5'7" and 125-149 lbs. Plaintiff also introduced evidence the Affidavit of defendant Myrtle Crosley which bears her signature on the second page (Plaintiff's Exhibit 5). The court determines that the plaintiff has established prima facie proof of service of process on the defendant pursuant to CPLR 308(2).

At the hearing, defendant Myrtle Crosley testified that she resides at 2964 Falcon Avenue, Far Rockaway, New York 11691, that she never received a copy of the Summons and Verified Complaint from her sister whose name is Mavis Hanson. She further testified that at the time of the alleged service, her sister, Mavis Hanson, resided outside of the United States in London, England and could not have been in her residence at the time of the alleged service to receive any papers from the process server. She testified that she never received a copy of the Summons and Complaint in the mail at her residence. She swears in her affidavit submitted in support of her motion "[that] Mavis Morgan f/k/a Mavis Hanson lives in London, England" and that she "does not resemble the alleged description. She is taller, older and of fairer complexion than the description given," and she is "heavier than the description given."

In this case, plaintiff asserts that service upon defendant Myrtle Crosley was made upon a person of suitable age and discretion pursuant to CPLR 308(2). Defendant denies delivery and compliance with CPLR 308(2).¹

¹CPLR 308(2) permits service by delivery of process to a person of suitable age and discretion at a specified location where redelivery to the defendant is likely to occur together with a mailing to the defendant at a similar specified location" (McKinney's Commentaries, C308:3). "Assuming the plaintiff complies with the statutory requirements, service will be valid even in the rare case in which the defendant does not actually receive the papers" (C308:3; see, *Bossuk v. Steinberg*, 58 NY2d 916, 918 [1983]; *Granite Management and Disposition, Inc. v. Sun*, 221 AD2d 186 [1st Dept 1995]). However, notwithstanding, valid service pursuant to CPLR 308(2), a defendant who claims to have not actually received the papers may have a default judgment opened pursuant to CPLR 317. CPLR 317 gives the defendant an opportunity to open a default notice of the action in time to defend it and that she has a meritorious defense. In order to satisfy the requirements of CPLR 317, defendant must show

However, the court does not credit this testimony from defendant Myrtle Crosley concerning the failure or lack of personal service upon her at her residence address as it is totally inconsistent with the evidence presented at the hearing. First, although defendant admitted that she alone resides at the subject premises, she provided no explanation of how anyone, other than herself, could have been inside her residence at the time of service, other than herself. Second, although she claimed that the physical description on the affidavit of service did not match her sister, she did not deny that the physical description matched herself. Indeed, from the Court's own in court observation, the Court finds that the physical description on the affidavit of service closely matches the defendant. Third, the Court in comparing the signatures on defendant's affidavit (Plaintiff's Ex. 5) and the signature on the process server's work order (Plaintiff's Ex. 4) finds that the handwritings for the name "Crosley" closely match. Fourth, although the evidence presented by plaintiff is in support of service of process was being made on a person of suitable age and discretion, the Court finds that the evidence presented strongly supports a theory by a fair preponderance of the credible evidence that the person served was not defendant's sister, Myrtle Hanson, but actually the defendant herself who falsely identified herself to the process server by giving him her sister's name instead of her true name when she was asked by him to identify herself. Fifth, the defendant provided no plausible explanation of how the process server was able to secure the name of defendant's sister, who admittedly was not a citizen of and not in the United States at the time of service.

As the court does not credit the testimony of defendant Myrtle Crosley, the court concludes that plaintiff properly obtained personal jurisdiction over defendant when she was properly served pursuant to CPLR 308(2) or 308(1). As defendant Myrtle Crosley failed to present sufficient evidence to rebut plaintiff's prima facie case, that branch of defendant Myrtle Crosley's motion to dismiss the complaint on the ground that the Court lacks jurisdiction over the defendant Myrtle Crosley is denied.

(1) service was made in a manner other than personal delivery; (2) she did not receive actual notice of the process in time to defend the action; (3) a meritorious defense and (4) the motion under CPLR 317 being made within one year from receipt of knowledge of entry of the default judgment (see, *Caba v. Rai*, 63 AD3d 578, 581[2d Dept 2009]). The court notes that defendant has made no showing to satisfy the requirements of CPLR 317.

As defendant makes no arguments in her motion other than her contention that she was not properly served, the motion is denied in its entirety.

Plaintiff's exhibits are being mailed to counsel for plaintiff with a courtesy copy of this order.

A courtesy copy of this order is also being mailed to counsel for defendant, Myrtle Crossley.

This constitutes the decision and order of the Court.

Dated: March 30, 2016

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Howard G. Lane, J.S.C.