M&T Bank v Farrell
2016 NY Slip Op 31010(U)
June 2, 2016
Supreme Court, Broome County
Docket Number: 2014-1913
Judge: Eugene D. Faughnan
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[* 1]

At a Special Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, Binghamton, New York, on the 2ND day of JUNE, 2016.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : BROOME COUNTY

M&T BANK

Plaintiff,

DECISION AND ORDER

-vs-

Index No. 2014-1913
RJI No. 2014-1391-C

COLLEEN FARRELL a/k/a COLLEEN C. FARRELL; JEROME FARRELL II a/k/a DR. JEROME FARRELL II a/k/a JEROME T. FARRELL II a/k/a JEROME FARRELL; HORIZONS FEDERAL CREDIT UNION; ADMINISTRATOR OF THE SMALL BUSINESS ADMINISTRATION; FRANCINE MURRAY, AS EXECUTRIX OF THE ESTATE OF JONDALD J. MURRAY; UNITED HEALTH SERVICES HOSPITALS, INC.; "JOHN DOE #1" to "JOHN DOE #10", the last 10 names being fictitious and unknown to the plaintiff, the persons or parties intended being the persons or parties, if any, having or claiming an interest in or lien upon the mortgaged premises described in the verified complaint

Defendants.

COUNSEL FOR PLAINTIFF:

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EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court on the Motion of M&T Bank ("Plaintiff" or "M&T") to: 1) strike the Answer of Defendant Colleen Farrell and direct summary judgment in Plaintiff's favor; 2) grant default judgment against the non-answering defendants, and 3) appoint a Referee to compute the amounts due. Defendant, Dr. Jerome Farrell II ("Dr. Farrell") filed papers in opposition to the Motion for default judgment and filed a Cross-Motion to dismiss the complaint for failure to properly serve Dr. Farrell with the summons and complaint, and/or for failure to comply with CPLR §3408 and RPAPL §1304.

Plaintiff filed its Motion on October 26, 2015 consisting of a Notice of Motion dated October 1, 2015, an Affidavit of Rachel M. Nowicki, a Banking Officer at M&T, sworn to on September 3, 2015 with Exhibits A through F, and an Affirmation of Donyelle E. Crapsi, Esq. dated October 1, 2015 with Exhibits A through Q, and a second Affirmation from Attorney Crapsi dated October 1, 2015 with regard to compliance with CPLR Rule 3408. Defendant Dr. Farrell filed his Cross-Motion on December 18, 2015 consisting of an Affirmation of Ronald R. Benjamin, Esq. affirmed on December 18, 2015, and an Affidavit of Dr. Farrell dated December 18, 2015 with Exhibits 1 through 3. Plaintiff submitted an Affirmation of Gregory Sanda, Esq. in opposition to the Cross Motion and in further support of the original Motion, dated January 26, 2016, with Exhibits. The matter was reassigned to the undersigned and scheduled for a return date on the Motion and Cross Motion.

At the oral argument on February 2, 2016, Plaintiff appeared by local counsel, and Dr. Farrell was represented by Attorney Benjamin. There were no appearances at the motion by any other defendants. At the conclusion of the oral arguments, the Court afforded Defendant Dr. Farrell 30 days for an opportunity to submit a Memorandum of Law, and the Plaintiff's to reply 15 days after that. Defendant Dr. Farrell submitted a Memorandum dated March 3, 2016. Following that, Plaintiff requested, and obtained from the Court, an extension of time to file a reply. Plaintiff submitted a Reply Affirmation from Attorney Sanda dated April 4, 2016.

In the interim, John Kotchick III, Esq.,counsel for Defendant Colleen Farrell, submitted an Affirmation, dated March 2, 2016 in support of denial of Summary Judgment. Mr. Kotchick stated that he had changed offices, and did not receive the notice of the return date. Therefore, he requested that Colleen Farrell's defenses not be deemed abandoned.

BACKGROUND FACTS

Plaintiff filed this action for foreclosure on July 30, 2014 with respect to a Mortgage and Note dated March 25, 1994 between Plaintiff's predecessor in interest, and Defendants Colleen Farrell and Dr. Farrell, for a certain parcel of property on Riverside Drive, in Binghamton, New York. The parcel is identified in the mortgage and note as 207 a/k/a 219 Riverside Drive. Plaintiff alleges a default in payments in February, 2013. As stated by Dr. Farrell in his affidavit, Defendants Dr. Farrell and Colleen Farrell had been in divorce proceedings and he was no longer living at the Riverside Drive residence at the time of the commencement of the action. However, the Farrell's four children were all still living there.

After commencement of the action, Plaintiff filed affidavits of service regarding all the Defendants in the action. Defendant Colleen Farrell submitted an Answer dated September 8, 2014, with eight affirmative defenses. The remaining Defendants, including Dr. Farrell, did not submit an Answer. As will be discussed below, Defendant Dr. Farrell contends that he was not served with the summons and complaint, was unaware of the action, and therefore, could not have served an Answer. The lack of Answer, however, led to him being treated as in default for further proceedings.

Foreclosure settlement conferences were held on this matter, and the case was eventually released from the Settlement Conference Part in March, 2015. Plaintiff subsequently filed a Motion to obtain an Oder of Reference, which was served only on the Answering Defendant, Colleen Farrell. Her attorney asserts that he never received the notice of the adjourned date, due to his change of offices. Dr. Farrell's attorney did learn of the motion, and even though he had not Answered the Summons and Complaint, he did file papers in opposition to the Plaintiff's Motion, and made his own Cross Motion to dismiss the Complaint.

THE CURRENT MOTION AND OPPOSITION

Dr. Farrell contends, through his affidavit, that he was not served with the complaint, and that service on his receptionist was invalid, as the receptionist was not authorized to accept service. Dr. Farrell was not aware of the pendency of the action until his attorney was provided with a copy of the motion papers from Colleen Farrell's attorney, in December, 2015. Dr. Farrell also contends that he did not receive the required 90 day prior notice under RPAPL §1304. He points to numerous defects in the mailing and content of the notice. These includes contentions that the Plaintiff failed to make diligent inquiry as to Dr. Farrell's residence and therefore, failed to mail the notice by certified mail and regular mail to his last known address and the subject premises; that the notice was not in the fourteen point type; and that the notice sent to the subject premises was incorrectly addressed. Plaintiff argues that Dr. Farrell was properly served by substitute service under CPLR §308(2) in that the receptionist in his office was served, and it is irrelevant if the receptionist was authorized to accept service, or if Dr. Farrell acquired knowledge of the suit. Plaintiff also argues that Dr. Farrell was not entitled to service of a 90 day pre-foreclosure notice under RPAPL §1304 because he does not occupy the residence as his principal dwelling.

Service of the summons and complaint

Plaintiff has previously filed, and submitted with this motion, an affidavit of service evidencing that the Summons and Complaint and RPAPL §1303 notice were served upon Dr.

Farrell's receptionist at Dr. Farrell's place of business on August 19, 2014, and service was completed by the mailing of the Summons and Complaint to the office of Dr. Farrell on September 2, 2014. Affidavits of service were filed in the Clerk's office on September 11, 2014. Dr. Farrell steadfastly denies receiving the Summons and Complaint.

"CPLR § 308 (2) contains a two-part requirement for effective service with the first being delivery to a person of suitable age and discretion at certain premises and the second component being a mailing either to the last known residence or actual place of business (hence the phrase "deliver and mail"). The additional mailing is also required to be in an envelope bearing the legend of "personal and confidential" and not indicating on the outside that the communication is from an attorney or concerns litigation. Both of the deliver and mail steps must be achieved within 20 days of each other with proof of service filed with the clerk within 20 days thereafter. Failure to perform both steps is a jurisdictional defect. Actual receipt is not dispositive (*Ruffin v. Lion Corp.*, 15 NY3d 578, 583, 940 N.E.2d 909, 915 N.Y.S.2d 204 [2010])." *Komanicky v. Contractor,* 49 Misc3d 1203(A), 5-6 (Sup Ct. Broome County 2015); *see also Raschel v. Rish,* 69 NY2d 694, 697 (1986).

As for the threshold issue regarding personal jurisdiction, it appears from the submitted affidavit of service that Dr. Farrell was served in accordance with CPLR 308(2) since the summons and notice were delivered to his actual place of business to a receptionist, who qualifies as a person of suitable age and discretion (*Edan v. Johnson,* 117 AD3d 528 [1st Dept. 2014]; *Glasser v. Keller,* 149 Misc2d 875 [Sup. Ct. Queens County 2000]) and that follow-up mailing was made to him at his actual place of business in an envelope marked "personal and confidential" within 20 days thereafter, as well as proof of service filed within 20 days after that. Dr. Farrell's opposition papers do not challenge that the person served was his employee, nor is there any evidence that the receptionist denies receiving the service of process. Although Dr. Farrell argues that the receptionist was not authorized to accept service, "authority is not a relevant criterion with respect to service on individuals." *City of New York v. VJHC Dev. Corp.,* 125 AD3d 425, 425 (1st Dept. 2015) *citing Charnin v. Cogan,* 250 AD2d 513, 517-518 (1st Dept 1998), *Public Adm'r of County of New York. v. Markowitz,* 163 AD2d 100 (1st Dept 1990).

The Court finds that Plaintiff accomplished service of the Summons and Complaint on Dr. Farrell under CPLR §308(2).

90 day notice under RPAPL §1304

"RPAPL 1304 requires a lender to notify a borrower of an impending legal action at least 90 days before a foreclosure action is commenced, using specific statutory language printed in 14-point type (see RPAPL 1304 [1]). The notice must be sent to the borrower by first-class mail as well as registered or certified mail (see RPAPL 1304 [2]). '[P]roper service of the RPAPL 1304 notice containing the statutorily-mandated content is a condition precedent to the commencement of [a] foreclosure action [and] [t]he plaintiff's failure to show strict compliance requires dismissal.'" *TD Bank, N.A. v. Leroy*, 121 AD3d 1256, 1257 (3rd Dept. 2014) *quoting Aurora Loan Servs., LLC v. Weisblum*, 85 AD3d 95, 103 (2nd Dept. 2011) (other citations omitted); *Deutsche Bank Natl. Trust Co. v. Spanos,* 102 AD3d 909 (2nd Dept. 2013).

Plaintiff alleged in the complaint that it complied with RPAPL 1304. "Thus, in support of its motion for summary judgment on the complaint, [the lender] was required to prove its allegations by tendering sufficient evidence demonstrating the absence of material issues as to its strict compliance with RPAPL 1304, and failure to make this showing requires denial of the motion, regardless of the opposing papers" *TD Bank*, 121 AD3d at 1257 *quoting Aurora Loan Servs., LLC v Weisblum, supra; see e.g. Bank of New York Mellon v. Aquino,* 131 AD3d 1186 (2nd Dept. 2015).

Attorney Crapsi's affirmation in support of this motion states that the RPAPL §1304 notice was sent to the borrowers by first class and certified mail on March 10, 2014. (Crapsi affirmation at ¶12). The affirmation attached a copy of the notice. Attorney Crapsi had no first hand knowledge of the mailing, and therefore this is insufficient to establish compliance with RPAPL §1304. *Chase Home Finance LLC v. Silver,* 47 Misc3d 1203(A) (Sup Ct. Kings County 2015); *First Natl. Bank of Chicago v. Silver*, 73 AD3d 165 (2nd Dept. 2010).

Plaintiff's motion also includes an affidavit from a Banking Officer, Ms. Nowicki, alleging compliance with RPAPL §1304. (Nowicki affidavit at ¶10). Specifically, the affidavit states that a "review of the records maintained by plaintiff in the regular course of business, pertaining to this action shows that a 90-Day Pre-Foreclosure Notice was mailed to each borrower by way of United States Postal Service Certified Mail and First Class Mail on March 10, 2014, to the last known address of the borrowers, which is the address for the real property

that is the subject of this foreclosure action." (Id.) The Nowicki affidavit also attached copies of the notices.

Although plaintiff submitted copies of letters dated March 10, 2014 along with a certified mail receipt containing borrowers names, the notices do not contain a postmark or date of mailing, or an affidavit from anyone with personal knowledge of the mailing, and are therefore insufficient to show compliance with RPAPL §1304. *See TD Bank, NA, supra.* The Affidavit from Ms. Nowicki does not establish "strict compliance" with the statute. Her statement is not based upon her personal knowledge and the allegation that she reviewed the records does not equate to an affidavit of service, and fails to state the standard mailing procedures and whether those procedures were followed in this instance. *See e.g. Wells Fargo Bank, N.A. v. Banks,* 2015 NY Misc LEXIS 4029 (Sup Ct. Queens County 2015); *One West Bank, FSB v. Chapilliquen,* 2016 NY Misc LEXIS 1084 (Sup. Ct. Queens County 2016) (affidavit failed to establish the procedure used to ensure that mailed items were always properly addressed and mailed by registered or certified mail); *HSBC Bank USA, N.A. v. Garard,* 2015 NY Misc LEXIS 2607 (Sup Ct. Suffolk County 2015); *Nationstar Mortgage LLC v. Brown,* 2016 NY Misc LEXIS 1464 (Sup Ct. Kings County 2016); *Bank of America, N.A. v. Purita,* 2015 NY Misc LEXIS 4819 (Sup Ct Suffolk County 2015).

Additionally, the notices that Plaintiff relies upon do not actually contain the correct address for the subject premises. The notices were addressed to 216 Riverside Drive, even though the property address listed on the notice states that the property is 219 Riverside Drive. Even if the Court accepted the notices at face value, they do not establish strict compliance with RPAPL §1304 because they are not addressed properly.

Plaintiff takes the position that Dr. Farrell is not even entitled to notice under RPAPL §1304 because he was not occupying the residence as his principal dwelling. "Had the Legislature intended that plaintiffs need not comply with RPAPL § 1304 if the borrower did not currently reside at the subject premises, it would not have instructed, inter alia, that the notice be sent to the 'last known address of the borrower' (RPAPL § 1304 [2]), or that the 90-day waiting period before commencing a foreclosure action would not apply or would cease to apply if the borrower no longer occupied the premises as his or her principal dwelling (RPAPL § 1304 [3])." *Wells Fargo v. Bank, supra* at 4-5. Rather, it is the 90 day waiting period that can be shortened if

the borrower no longer occupies the premises. Thus, the Court concludes that the notice requirement still applied to Dr. Farrell even if he was not living at the subject premises at the time, and Plaintiff has failed to show strict compliance with RPAPL §1304. It is Plaintiff's burden to establish compliance as a condition precedent to the filing of the action, and the defense can be raised at any time. *U.S. Bank N.A. v. Carey,* 137 AD3d 894 (2nd Dept. 2016); *Chase Home Finance v. Silberstein, supra*; *see First Natl. Bank of Chicago v. Silver, supra.*

The Plaintiff has failed to establish its prima facie entitlement to summary judgment due to its failure to establish strict compliance with RPAPL §1304. Dr. Farrell also filed an affidavit attesting that he did not receive the notice under RPAPL §1304 by registered or certified mail. Plaintiff relied upon its initial motion papers, and an affirmation from attorney Sanda . This is insufficient to raise a triable issue of fact as to Dr. Farrell's cross motion. *See Aurora Loan, supra; Bank of America v. Purita, supra.*

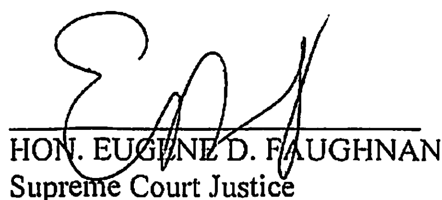
Accordingly, Plaintiff's Motion for Summary Judgment against Dr. Farrell is DENIED, and Dr. Farrell's Cross-Motion to dismiss is GRANTED.

For the reasons noted above with respect to the deficiencies in the RPAPL §1304 proof, Plaintiff's motion for summary judgment against Colleen Farrell is DENIED. For good cause shown, and in the interest of justice the Court also deems that she has not abandoned her affirmative defenses and it is appropriate to preserve her affirmative defenses.

IT IS SO ORDERED.

This constitutes the Decision and Order of the Court.

Dated: June 2, 2016
Binghamton, New York



HON. EUGENE D. FAUGHNAN
Supreme Court Justice