

HSBC Bank USA, N.A. v Oqlah
2016 NY Slip Op 32656(U)
September 15, 2016
Supreme Court, Kings County
Docket Number: 503099/2015
Judge: Noach Dear
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At an IAS Term, Part FRP-1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 15th day of September 2016

P R E S E N T:

HON. NOACH DEAR,

_____ x

Index No.: 503099/2015

HSBC BANK USA, N.A.,

Plaintiffs,

DECISION AND ORDER

-against-

TAREK OQLAH, et al,

Defendants,

_____ x

Papers	Numbered
Moving Papers and Affidavits Annexed	<u>1-2</u>
Answering Papers and Supplement	<u>3</u>
Reply Papers	<u>4</u>

Upon the foregoing papers, the Decision/Order on this Motion is as follows:

Defendant moves for an order dismissing the action pursuant to CPLR §3211(a)(8) based on the Court’s lack of personal jurisdiction over the Defendant Tarek Oqlah. Plaintiff opposes the motion and cross-moves for an order pursuant to CPLR §306-b and CPLR §2001 deeming service of the Summons and Complaint upon the defendant effective and timely, nunc pro tunc.

Plaintiff commenced this foreclosure action by filing the Summons and Complaint and Notice of Pendency on or about March 18, 2015. Plaintiff served every other defendant, but it does not appear that defendant Tarek Oqlah was served. On or about September 2, 2015, Plaintiff moved for an Order to extend the time to serve the defendant pursuant to CPLR§306-b. Plaintiff affirmed that loss mitigation had been unsuccessful and the foreclosure action was going to continue. On or about September 4, 2015, defendant moved for an order dismissing the plaintiff’s complaint due to lack of personal jurisdiction.

On February 24, 2016, the court issued a decision granting plaintiff's motion to extend time to serve and denied the defendant's motion to dismiss. Plaintiff was given a sixty (60) day extension to serve the summons and complaint until April 25, 2016. On March 29, 2016, plaintiff attempted to serve defendant at the property address located at 367 79th Street, Brooklyn, New York 11209 via suitable age and discretion on "Zobdia Ali - Co-tenant". However, defendant resides at 4077 N. O'Connor Road, Irving, Texas 75062. Defendant was eventually served on April 30, 2016 at 2:12pm at the Texas address by personal service. The affidavit of service was filed on May 5, 2016. Defendant does not deny that he was personally served on April 30, 2016. However, the instant motion to dismiss was filed by defendant on April 26, 2016.

Defendant argues that plaintiff was aware of his Texas residence prior to attempting to effectuate service on the Brooklyn address. Defendant states that plaintiff has mailed correspondence to the Texas address relating to the mortgage. Defendant contends that plaintiff's time to serve expired on April 25, 2016. As such, defendant asserts that this action should be dismissed for lack of personal jurisdiction.

Plaintiff contends that when they attempted to serve the defendant in Brooklyn they were made aware of his Texas residency. Plaintiff states that service was in fact attempted on two separate occasion at defendant's Texas address on March 19, 2016 and April 6, 2016¹. Plaintiff avers that a person named "Victoria Zamora" stated that defendant did not reside at that address.

Pursuant to CPLR§306-b:

Service 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 and twenty days after the commencement of the action or proceeding, provided that in an action or proceeding, except a proceeding commenced under the election law, where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days

¹ Both attempts were made prior to the April 25, 2016 deadline in the court order.

after the date on which the applicable statute of limitations expires. If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to the defendant, or upon good cause shown or in the interest of justice, extend the time for service.

Plaintiff commenced this action on March 18, 2015. It is undisputed that Plaintiff failed to timely serve defendant under CPLR§306-b. Plaintiff's ex parte motion to extend time to serve at that time was granted by the court in the interest of justice. Whether to grant an extension of time to serve process rests with the trial court's discretion. See *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95 (2001). To establish good cause, a plaintiff must demonstrate diligence in attempting service. *Id* at 105-106. Plaintiff attempted on several occasions to serve defendant at both the Brooklyn property address and the defendant's Texas residence. Based on the supporting affidavits, Plaintiff attempted twice to effectuate service on the Texas residence and was allegedly informed that defendant did not reside at the premises.

The Court does find that Plaintiff has established good cause shown in its effort to serve defendant timely. The Court need not address the interest of justice standard in elaborate detail. However, the Court will briefly state that in determining "interest of justice" the Court may consider factors such as the expiration of the statute of limitations, the meritorious nature of the action, the length of delay in service, the promptness of a request by the plaintiff for an extension, and prejudice to the defendant. See *Bumpus v. New York City Trans. Auth.*, 66 A.D.3d 26, 883 N.Y.S.2d 99 (2nd Dep't 2009). In the present case, plaintiff served defendant in a reasonable time after the sixty (60) day extension had expired². Moreover, there is a statute of limitation issue in this matter that would be highly prejudicial as against the plaintiff if this action were to be dismissed.

Therefore, for good cause shown and in the interest of justice it is hereby;

² Service on April 30, 2016 and the affidavit of service was filed on May 5, 2016.

ORDERED that the Defendant's motion to dismiss is DENIED without prejudice and Plaintiff's motion to deem service of the Summons and Complaint upon the Defendant effective and timely, nunc pro tunc is GRANTED. Defendant has thirty (30) days from the date of this order to file an answer with the Court.

The foregoing constitutes the decision and order of the Court.

ENTER:



Hon. Noach Dear, J.S.C.

HON. NOACH DEAR

KINGS COUNTY CLERK
FILED
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