

Hamilton Equity Group, LLC v Kourbage
2017 NY Slip Op 30002(U)
January 3, 2017
Supreme Court, New York County
Docket Number: 151049/2015
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

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Hamilton Equity Group, LLC, as Assignee of HSBC
Bank USA, National Association, successor by
merger to HSBC Bank USA f/k/a Marine Midland Bank
successor by conversion to Marine Midland Bank, N.A.,

Plaintiff/Petitioner,

-against-

William Kourbage, Jack Pearlman (not liable), and
Nassau Land Improvement Co., Inc.,

Defendants/Respondents.
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KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to dismiss.

Papers

Notice of Motion, Affirmation, and Exhibits
Opposition Affirmation, and Exhibits
Reply Affirmation

Numbered

1-9
10-12
13

In this renewal judgment action, defendant William Kourbage (Kourbage) moves, pursuant to CPLR 3211(a)(8), to dismiss the complaint insofar as asserted against him on the ground of improper service.

Factual Background

This action arises from defendant's breach of certain loan obligations to plaintiff Hamilton Equity Group, LLC, as Assignee of HSBC Bank USA, National Association, successor by merger to HSBC Bank USA f/k/a Marine Midland Bank, successor by conversion to Marine Midland Bank, N.A. (Hamilton), and a subsequent judgment resulting from said breach.

Hamilton commenced this renewal judgment action with the filing of a renewal summons and verified complaint on or about February 12, 2015. On or about July 13, 2015, Kourbage

served an answer, raising the affirmative defense that the Court lacked personal jurisdiction over defendant.

Plaintiff alleges that after due diligence in attempting to serve Kourbage personally, personal service of the Summons and Complaint was made pursuant to CPLR 308(2). Plaintiff has submitted an Affidavit of Service sworn to on June 17, 2015, by James D. Cozens, stating that on June 11, 2015, at 1:04 p.m., he served "Jane" Kourbage as a person of suitable age at 5 Gnarled Hollow Circle, Huntington, New York 11743 (the premises) and delivered a copy of the Renewal Summons and Verified Complaint and Notice of Commencement of Action Subject to Mandatory Filing on a "Female-White Skin-Brown Hair-Approx. 45 years of age-Approx. 5'5" tall-Approx. 150lbs." The Affidavit of Service was filed with the New York County Clerk on June 22, 2015. The Affidavit also states that a copy of the summons and verified complaint was mailed to the same address on June 12, 2015.

Defendant alleges that the owner and sole female occupant of the premises, Barbara Loew, was never served with a copy of the summons and complaint, and was in Merrick, New York, at Salon Due Mila on June 11, 2015, at 1:04 p.m. In her Affidavit, sworn to on September 9, 2015, Ms. Loew states that no one was at the premises on June 11, 2015, at 1:04 p.m., and that she found the summons and complaint on a bench outside her home when she returned home from work on June 11, 2015. Defendant also submits the affidavit of Adele Santoro, Ms. Loew's hair stylist, stating that Ms. Loew arrived at Salon Due Mila on June 11, 2015, at 1 p.m. for her hair appointment and left approximately 3:45 p.m.

In its reply papers, defendant also submits the affidavit of Mr. Kourbage stating that there was no one at the premises on June 11, 2015, at 1:04 p.m.. After a review of Mr. Cozens' Affidavit of Service claiming that he served a relative of William Kourbage named "Jane"

Kourbage, defendant states that none of his living female relatives fit the description contained in the Affidavit of Service, nor did any of his relatives, or any other person, have access to the premises on June 11, 2015. In his affidavit, Mr. Kourbage provides a description of each of his five living female relatives: 1) his mother, 92 years old and living in Brooklyn, New York; 2) his ex-wife, 63 years old and living in a different residence in Huntington; 3) his sister, 69 years old and living in Brooklyn, New York; 4) his daughter, 38 years old and living in Northport, New York; and 5) his daughter-in-law, 31 years old. In order for any of the aforementioned relatives to gain access to the premises, they would have to gain access through Ms. Loew or Mr. Kourbage. Mr. Kourbage attests that he did not provide access to any person.

Additionally, both Mr. Kourbage and Ms. Loew state in their affidavits that neither received any mail for William Kourbage at the premises marked "Personal & Confidential" other than an envelope postmarked July 1, 2015 (a copy of which was provided with Ms. Loew's Affidavit).

Arguments

Defendant moves to dismiss the action as against him on the grounds that the Court lacks in personam jurisdiction over Kourbage due to defective service.

Plaintiff contends that the motion should be denied because defendant was properly served with the summons and complaint.

Discussion

CPLR 308(2) authorizes service, inter alia, by service 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 and complaint 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. A process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to CPLR 308(2). (*see, C&H Import & Export, Inc. v MNA Global, Inc.*, 79 AD3d 784, 785, 912 NYS2d 428 [2nd Dept 2010]). Where, however, there is a specific sworn denial that a defendant was served with process, the affidavit of service is rebutted, and the plaintiff must establish jurisdiction at a hearing by a preponderance of the evidence (*see, National Union Fire Insurance Company of Pittsburg, PA v. Montgomery*, 245 AD2d 150, 665 NYS2d 665 [1st Dept. 1997]).

A prima facie case of due service was made by the affidavit of service upon William Kourbage which states that a copy of the renewal summons and verified complaint was served on June 11, 2015, at 1:04p.m., at 5 Gnarled Hollow Circle, Huntington, New York 11743 by personal delivery of the same upon "Jane" Kourbage, relative of said defendant, who refused to divulge her true first name. The plaintiff's agent further alleges that said address is the defendant's actual place of residence within New York State. Plaintiff's agent also alleges that he enclosed copies of the aforesaid documents in a postpaid sealed wrapper properly addressed to the defendant at 5 Gnarled Hollow Circle, Huntington, New York 11743, and deposited said wrapper in a post office of the United States Postal Service within this State on June 12, 2015.

Nevertheless, specific assertions from both Mr. Kourbage and Ms. Loew that no relative, nor anyone else, was at or had access to the premises at or around 1:04 p.m. on June 11, 2015, and that no female relative of Mr. Kourbage fits the description of the person who claims to have been "Jane" Kourbage, and that Ms. Loew found the summons and complaint on a bench outside her home upon her return to the premises, are sufficient to rebut the process server's affidavit that he personally delivered the summons and complaint to defendant and raises issues of fact as to jurisdiction that must be resolved at a traverse hearing.

Accordingly, it is hereby

ORDERED that the application to dismiss, is denied at this juncture; and it is further

ORDERED that as to whether or not service was properly effectuate, is referred to a Special Referee to hear and determine; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date. Copies of the Information Sheet are available in Rm. 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh under the "References" section of the "Courthouse Procedures" link).


JOAN M. KENNEY
J.S.C. 1/3/17

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