

Wells Fargo Bank, N.A. v Ziropiannis

2017 NY Slip Op 30904(U)

April 18, 2017

Supreme Court, Nassau County

Docket Number: 2376/2011

Judge: Julianne T. Capetola

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At a Term of the Supreme Court of the State of New York held in and for the County of Nassau, 100 Supreme Court Drive, Mineola, New York, on the 18th day of April 2017

P R E S E N T:

HON. JULIANNE T. CAPETOLA
Justice of the Supreme Court

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WELLS FARGO BANK, N.A.,

Plaintiff,

- against -

**DECISION AND
ORDER ON MOTION**
Index No: 2376/2011

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DEMETRIOS ZIROGIANNIS, JOANN
ZIROGIANNIS a/k/a JO ANN ZIROGIANNIS,
PNC NATIONAL ASSOCIATION successor by
merger to NATIONAL CITY BANK,
JOHN DOE, etc.,

Defendant.

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The following papers were read on this Motion:
Defendants Demetrios Ziropgiannis and Joann Ziropgiannis' Notice of Motion and
Supporting Documents
Plaintiff's Affirmation in Opposition

Defendants Demetrios Ziropgiannis and Joann Ziropgiannis (hereinafter "Defendants") in this action has moved by notice of motion for an order pursuant to CPLR §2221 to reargue this Court's Decision and Order After Hearing dated February 10, 2017 (hereinafter the "Decision"). Plaintiff opposed the motion, oral argument was held on April 12, 2017 and the motion was deemed submitted.

At the outset, Plaintiff has argued that the instant motion is procedurally improper inasmuch as the decision Defendants seek to reargue was a decision after hearing and not a motion decision. Accordingly, Plaintiff argues that the motion should be governed by CPLR §4405 which states that "A motion under this article shall be made before the judge who presided at the trial within fifteen days after decision" and therefore renders the instant motion untimely in addition to procedurally defective.

In the instant matter, the Decision, although rendered post-hearing, was actually a decision on the underlying motion for an order of reference which was held in abeyance pending the Traverse hearing. The determination of whether service was proper, which was the subject of the Decision, was an inquiry conducted in conjunction with the underlying motion and, accordingly, for that reason and in the interest of justice, the Court deems the instant motion which was brought pursuant to CPLR §2221 to have been properly made.

With regard to the application to reargue, CPLR §2221 states, in relevant part:

“(d) A motion for leave to reargue: . . . shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion”.

Defendants first argue that this Court “overlooked” their reply papers submitted with respect to their post-trial memorandum of law. Defendants argue that, pursuant to a conference call discussion between this Court and counsel for both parties, it had been agreed that Defendants would be permitted to submit brief reply papers pertaining specifically to Plaintiff’s inclusion of papers not properly admitted into evidence in their post-trial memorandum and that said reply was to be delivered to chambers on the morning of February 10, 2017 due to the time constraint related to the expiring statute of limitations. Defendants argue that their reply papers were clocked in at 12:35 p.m. however this Court’s Decision was rendered and faxed to all counsel at 11:46 a.m. without consideration of the reply papers. This argument is of no moment inasmuch as the Court specifically noted in the Decision that “any exhibits annexed to post trial memoranda of law that were not properly entered into evidence at trial have not been considered as evidence” and, accordingly, the consideration of Defendants’ reply papers was essentially irrelevant.

Defendants further argue that the Court, in its Decision, improperly held that the burden of proof had shifted to the Defendants as the Plaintiff failed to meet its burden in the first instance as, Defendants argue, the Court improperly considered testimony related to a document not entered into evidence, to wit, the affidavit of service completed by process server Steven Cardi.

“It is well established that it is the plaintiff who bears the ultimate burden of proving by preponderating evidence that jurisdiction over the defendant was obtained (see, *Saratoga Harness Racing Assn. v Moss*, 26 A.D.2d 486, affd 20 N.Y.2d 733;

Brooklyn Union Gas Co. v Arrao, 100 A.D.2d 949; *Jacobs v Zurich Ins. Co.*, 53 A.D.2d 524). *Powell v. Powell*, 114 A.D.2d 443 (2d. Dept. 1985).

Upon reconsideration and further review of the transcripts of the hearing, all papers submitted as post-trial memoranda, as well as the Court's file, the Court is constrained to reverse its prior Decision and it is determined that Plaintiff failed to meet its burden of establishing that proper service was made upon Defendants.

CPLR §318 states that,

"A person may be designated by a natural person, corporation or partnership as an agent for service in a writing, executed and acknowledged in the same manner as a deed, with the consent of the agent endorsed thereon. The writing shall be filed in the office of the clerk of the county in which the principal to be served resides or has its principal office. The designation shall remain in effect for three years from such filing unless it has been revoked by the filing of a revocation, or by the death, judicial declaration of incompetency or legal termination of the agent or principal".

In the instant matter, as a threshold issue Plaintiff bore the burden of establishing that attorney Joseph Rocco, Esq. was in fact a designated agent for service of process such that service by Mr. Cardi upon his office could be deemed proper service. Plaintiff bore the burden of establishing the existence of an attorney-client relationship between the Defendants and Mr. Rocco. In order to do so, the best evidence of same, absent an original Notice of Appearance being placed into evidence, or a copy thereof with an explanation regarding what happened to the original, would have been the testimony of one or both of the Defendants, or Mr. Rocco himself, none of whom were called as witnesses by Plaintiff. Plaintiff also failed to properly admit into evidence the affidavit of service completed by Mr. Cardi, and/or a Notice of Appearance and Waiver signed by Joseph Rocco. All that Plaintiff offered during the hearing was the testimony of Mr. Cardi who was unable to state that he had an independent recollection of his receipt of the notice of appearance from Mr. Rocco and, in fact, testified that he had left the notice of appearance at Mr. Rocco's office because he was not available at the time and, had same been executed and returned at all, it would have, in any event, been returned to Plaintiff's counsel's office. The return address on the envelope provided by Mr. Cardi to Mr. Rocco's office for the return of the executed notice of appearance, according to Mr. Cardi's testimony, was not that of Mr. Cardi or Mr. Cardi's office so he would never have had any personal knowledge regarding its execution or lack thereof. It should be

noted that, upon review of the County Clerk's file, no Notice of Appearance executed by Mr. Rocco was ever filed in this case, despite Plaintiff's counsel's representation during the hearing.

In light of the insufficiency of Mr. Cardi's testimony, this Court placed undue weight upon his statements with regard to the affidavit of service and notice of appearance and, accordingly, erred in its prior Decision and now reverses its determination. While it may be unreasonable to state that a homeowner who has not paid their mortgage over a period of years is wholly ignorant of the possible consequences of their actions, or inactions as the case may be, a plaintiff is still not absolved of their obligation to properly obtain jurisdiction over such individuals for the purposes of a foreclosure proceeding.

Accordingly, it is hereby:

ORDERED, Defendants Demetrios Ziropiannis and Joann Ziropiannis' motion is hereby granted to the extent that reargument is permitted and, upon reargument, this Court's Decision and Order on Motion dated February 10, 2017 is hereby vacated; and it is further

ORDERED, that it is hereby determined that proper service was never effectuated upon Defendants Demetrios Ziropiannis and Joann Ziropiannis and, accordingly, personal jurisdiction was never obtained and therefore the complaint filed under Index #2376/2011 is hereby dismissed.

This constitutes the decision and order of the Court.

ENTER

Dated: 4/18/17



HON. JULIANNE T. CAPETOLA
J.S.C.

ENTERED

APR 19 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE