

Cadles of Grassy Meadows II, L.L.C. v Hossain
2017 NY Slip Op 30958(U)
May 4, 2017
Supreme Court, New York County
Docket Number: 158665/16
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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CADLES OF GRASSY MEADOWS II, L.L.C.,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 158665/16

Seq. No.: 001

SAIJAD HOSSAIN,

Defendant.

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HON. KATHRYN E. FREED:

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motions:

PAPERS

NUMBERED

SUMMONS, NOT. OF MOT. AND AFF. ANNEXED

1-3 (Exs. A-D)

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Plaintiff, Cadles of Grassy Meadows II, LLC, as assignee and successor in interest to HSBC Bank USA, National Association, moves, pursuant to CPLR 3213, for summary judgment in lieu of complaint on a judgment entered against defendant Saijad Hossain by plaintiff's assignor in 2007. Plaintiff also moves, pursuant to CPLR 5014, to renew the judgment entered against defendant in 2007. Defendant does not oppose the motion. After a review of the papers, and after a review of the relevant statutes and case law, the motion is **denied with leave to renew upon proper papers**.

FACTUAL AND PROCEDURAL BACKGROUND:

On February 14, 2007, the Supreme Court of the State of New York, New York County

entered a judgment in an action entitled *HSBC Bank USA, National Association, successor by merger to HSBC Bank USA formerly known as Marine Midland Bank, successor by conversion to Marine Midland Bank, N.A. v Hao Te International Trading Corp. and Saijad Hossain*, New York County Index No. 117722/06. The judgment was in favor of plaintiff HSBC Bank USA, National Association, successor by merger to HSBC Bank USA formerly known as Marine Midland Bank, Successor by conversion to Marine Midland Bank, N.A. against defendants Hao Te International Trading Corp. and Saijad Hossain ("Hossain") in the amount of \$61,279.80. Ex. A. A certified copy of the amended assignment of the judgment, entered in the office of the New York County Clerk on March 8, 2016, establishes that the judgment was assigned by HSBC Bank USA, National Association to the plaintiff in the captioned action, Cadles of Grassy Meadows II, L.L.C., a West Virginia limited liability company located at 100 North Center Street, Newton Falls, Ohio 44444. Ex. A.

On or about December 9, 2016, plaintiff moved, pursuant to CPLR 3213, for summary judgment in lieu of complaint. NYSCEF Doc. No. 2. In support of the motion, plaintiff submits an affidavit of service of the summons and the motion, a copy of the judgment, the assignment and amended assignment of the judgment, and the affirmation of Steven Vlock, Esq., attorney for plaintiff, dated October 14, 2016. In his affirmation, Vlock sets forth the history of the entry of the judgment set forth above, represents that the judgment has not been satisfied, and states that the ten year anniversary of the docketing of the judgment was to occur on February 14, 2017:

PLAINTIFF'S CONTENTIONS:

Plaintiff argues that it is entitled to summary judgment in lieu of complaint pursuant to CPLR 3213 in the amount of \$61,279.80 and that the judgment be renewed for an additional ten years

pursuant to CPLR 5014, *nunc pro tunc* to February 14, 2017, since 10 years have elapsed since the initial docketing of the judgment and it has gone uncollected.

CONCLUSIONS OF LAW:

Motion to Renew Judgment

A New York money judgment is enforceable for 20 years. See CPLR 211(b). A judgment creditor is permitted to commence an action to renew the judgment pursuant to CPLR 5014 “where [10] years have elapsed since the judgment was originally docketed.” *Pangburn v Klug*, 244 AD2d 394, 395 (2d Dept 1997). Such action must be commenced “during the year prior to the expiration of ten years since the first docketing of the judgment.” CPLR 5014. An assignee of a judgment is an “original party” to a judgment for the purpose of renewal of a judgment. *Id.*, citing *Saxe v Peck*, 139 A.D. 419 (3d Dept 1910). Plaintiff seeks to establish its entitlement to a renewal judgment pursuant to CPLR 5014(1) by submitting the prior judgment entered February 14, 2007; proof that the judgment was first docketed at least nine years ago; the assignment of the judgment by HSBC Bank USA, National Association to the plaintiff in the captioned action, Cadles of Grassy Meadows II, L.L.C., effective March 8, 2016; and proof that the judgment remains unsatisfied.

Although proof such as that submitted by plaintiff herein is ordinarily sufficient to entitle a party to renew a judgment (*see Rose v Gulizia*, 104 AD3d 757, 758 [2d Dept 2013]), there is a critical omission in plaintiff’s motion. Specifically, although the February 14, 2007 judgment was entered against Hossain and Hao Te International Trading Corp., plaintiff only seeks renewal of the judgment against Hossain and sets forth no explanation why the renewal judgment should not be identical to the initial judgment. Indeed, Hao Te International Trading Corp. is not even named as a party herein. Thus, this Court denies that branch of plaintiff’s motion seeking to renew the

judgment with leave to renew upon proper papers.

Motion for Summary Judgment In Lieu of Complaint

This Court also denies the branch of plaintiff's motion seeking summary judgment in lieu of complaint. A party may move for summary judgment in lieu of complaint where an action is based upon a judgment. *See Lawrence v Kennedy*, 95 AD3d 955, 957 (2d Dept 2012). A motion for summary judgment in lieu of complaint is governed by the same standards as a motion for summary judgment brought pursuant to CPLR 3212. *See Gateway State Bank v Shangri-La Private Club for Women, Inc.*, 113 AD2d 791 (2d Dept 1985). It is well settled that the burden is on the moving party to make a prima facie showing that it is entitled to summary judgment as a matter of law. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

A motion for summary judgment in lieu of complaint is governed by the same standards as a motion for summary judgment brought pursuant to CPLR 3212. *See Gateway State Bank v Shangri-La Private Club for Women, Inc.*, 113 AD2d 791 (2d Dept 1985). As movant, plaintiff has the burden of establishing that it properly served defendant with process. *See CPLR 3213; Cadle Co. v Ayala*, 47 AD2d 919, 920 (2d Dept 2008). If service cannot be made with due diligence pursuant to the personal delivery method set forth in CPLR 308(1) or by the "deliver and mail" method set forth in CPLR 308(2), plaintiff may use the "affix and mail" method set forth in CPLR 308(4).

Section 308(4) allows plaintiff to affix the summons "to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business . . ."

“The due diligence requirement of CPLR 308(4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received.” *McSorley v Spear*, 50 AD3d 652, 653 (2d Dept 2008), quoting *Gurevitch v Goodman*, 269 AD2d 355 (2d Dept 2000). A failed attempt to serve a defendant at his or her dwelling place or usual place of abode may not qualify as due diligence unless the process server has also attempted to ascertain defendant’s place of employment for service at that location. *See O’Connell v Post*, 27 AD3d 630 (2d Dept 2006).

Here, the process server failed to show due diligence in attempting to serve Hossain personally pursuant to CPLR 308(1) or by “delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served . . .” pursuant to CPLR 308(2). The affidavit of service reflects that Hossain was served by affix and mail at his “actual place of abode”, 116-21 148th Street, Jamaica, New York, on October 27, 2016 at 4:35 p.m. Ex. A. The process server initially attempted to serve Hossain at 153-25 Hillside Avenue, Jamaica, New York on October 20, 2016 but learned that he no longer lived at that address. Ex. A. He then made attempts to serve Hossain at 116-21 148th Street, Jamaica, New York on three consecutive days: October 25, 2016 at 11:46 p.m.; October 26, 2016 at 6:59 p.m.; and, finally, on October 27, 2016 at 4:35, at which time he affixed the papers to the door at that location. The process server then mailed the summons and motion papers to Hossain at his “last known address”, which the process server said was 116-21 148th Street, Jamaica, New York.

Initially, the attempt to serve Hossain on three consecutive weekdays, even if one was during working hours and two were not, does not constitute reasonable diligence. *See generally Wood v Balick*, 197 AD2d 438 (1st Dept 1993); *Solomon Holding Corp. v Stephenson*, 2015 NY Slip Op 30943 (U) (Sup Ct New York County 2014). It is clearly conceivable that Hossain was away during the week that service was attempted and that is why he was not at home.

Additionally, despite noting in the affidavit of service that Hossain had moved out of his previous address at 153-25 Hillside Avenue, Jamaica, New York, there is no indication of how the process server attempted to learn Hossain's new address, including, but not limited to, checking with the Department of Motor Vehicles to determine where he could be properly served. *See Spath v Zack*, 36 AD3d 410 (1st Dept 2007). Additionally, since there is no indication that the process server performed an investigation into Hossain's actual place of employment, it was improper for him to have resorted to affix and mail service. *See Riverwalk Holding, Ltd. v Fiallo*, 40 Misc3d 1211(A) (Sup Ct Queens County 2013). Since service of the summons and the instant motion was improper, the branch of plaintiff's motion seeking summary judgment in lieu of complaint is denied with leave to renew upon proper papers.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of the motion by plaintiff Cadles of Grassy Meadows II, L.L.C. seeking to enter a renewal judgment against defendant, Saijad Hossain, in the amount of \$61,279.80, together with costs and disbursements, as taxed by the Clerk, is denied with leave to renew upon proper papers; and it is further,

ORDERED that the branch of the motion by plaintiff Cadles of Grassy Meadows II, L.L.C. seeking summary judgment in lieu of complaint is denied with leave to renew upon proper papers; and it is further,

ORDERED that this constitutes the decision and order of the court.

DATED: May 4, 2017

ENTER:

A handwritten signature in black ink, appearing to read 'Kathryn E. Freed', written over a horizontal line.

Hon. Kathryn E. Freed, J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**