

US Bank N.A. v Masone
2017 NY Slip Op 31027(U)
April 12, 2017
Supreme Court, Suffolk County
Docket Number: 1734/2009
Judge: Howard H. Heckman, Jr.
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

COPY

PRESENT:
HON. HOWARD H. HECKMAN JR., J.S.C.

INDEX NO.: 1734/2009
MOTION DATE: 12/07/2015
MOTION SEQ. NO.: 003 MG
004 MD

-----X
US BANK NATIONAL ASSOCIATION,

Plaintiffs,

-against-

LIZA MASONE,

Defendants.
-----X

PLAINTIFFS' ATTORNEY:
KOZENY, MCCUBBIN & KATZ, LLP
40 MARCUS DR., STE. 200
MELVILLE, NY 11747

DEFENDANTS' ATTORNEYS:
LESTER & ASSOCIATES, PC
600 OLD COUNTRY RD., STE. 229
GARDEN CITY, NY 11530

Upon the following papers numbered 1 to 21 read on this motion _____; Notice of Motion/ Order to Show Cause and supporting papers 1- 10 (#003) ; Notice of Cross Motion and supporting papers 11-17(#004) ; Answering Affidavits and supporting papers 18-19 ; Replying Affidavits and supporting papers 20-21 ; Other _____ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff U.S. Bank, N.A., seeking an order: 1) confirming the referee's report dated October 2, 2014; 2) granting a judgment of foreclosure and sale, 3) substituting the affidavit of merit and amount due executed by Cassie M. Smith dated April 26, 2011 nunc pro tunc in place and stead of the affidavit of merit executed by Heather C. Carrico dated January 28, 2009; 4) amending the caption of the action nunc pro tunc to designate the plaintiff as a "banking corporation duly organized and existing under and by virtue of the laws of Cincinnati, OH" in place and stead of a "banking corporation duly organized and existing under and by virtue of the laws of the State of Delaware"; 5) invalidating and extinguishing the lien filed by defendant People of the State of New York under Index # 02SU01742S dated August 14, 2002 pursuant to RPAPL Article 15; 6) invalidating and extinguishing the lien filed by defendant John T. Mather Memorial Hospital of Port Jefferson, Inc. under Index # 23179 03 dated March 30, 2004 pursuant to RPAPL Article 15 is granted; and it is further

ORDERED that the cross motion by defendant Liza Masone seeking an order pursuant to CPLR 3211(a)(2), (7) & (8) denying plaintiff's motion and dismissing plaintiff's complaint for failure to name a necessary party and for failure to obtain personal jurisdiction over defendant Masone is denied; and it is further

ORDERED that plaintiff is directed to serve a copy of this order amending the caption upon the Calendar Clerk of the Court; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared and not waived further notice pursuant to CPLR 2103(b)(1),(2) or (3)

within thirty days of the date of this order and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff's action seeks to foreclose a mortgage in the sum of \$752,500.00 executed by defendants Liza Masone and Mark Masone on July 28, 2006 in favor of Mortgageit, Inc. On the same date defendant Liza Masone executed a promissory note promising to re-pay the entire amount of the indebtedness, evidencing the mortgage indebtedness. The mortgage was assigned to the plaintiff on January 9, 2009. Defendants have defaulted in making timely monthly mortgage payments since October 1, 2008. By short form Order (Blydenburgh, J.) dated April 27, 2010 plaintiff's unopposed motion seeking a default judgment and for the appointment of a referee was granted. Plaintiff's motion seeks an order confirming the referee's report and for a judgment of foreclosure and sale together with additional requests for relief related to amending the caption of the action, substituting the affidavit of merit nunc pro tunc and expunging two lien judgments. Defendant's cross motion seeks an order denying plaintiff's motion and dismissing the complaint.

In opposition to plaintiff's motion and in support of the cross motion, defendants Liza Masone and Mark Masone each submit affidavits together with two attorney affirmations. Defendants claim that by deed dated September 12, 2006 title to the mortgaged premises was conveyed by them to 26 Shorewood Drive, LLC. Defendants claim that they each own a 50% share of 26 Shorewood Drive, LLC. Defendant Liza Masone states that she "never personally received a copy of the Summons and Complaint apparently filed by Plaintiff." Plaintiff also denies that her mother or grandmother lived with her at her residential premises located at 92 Harris Drive, Oceanside, New York during the period that plaintiff's process server claims that he served the summons and complaint. Defendant Liza Masone states that she "had no knowledge of these foreclosure proceedings until ... (receiving) Plaintiff's most recent motion seeking a judgment and foreclosure and sale." Defendant Mark Masone makes the identical assertions. Both defendants claim that the title owner, 26 Shorewood Drive, LLC, was never served with a copy of the summons and complaint. Defendants argue that under these circumstances the plaintiff never obtained personal jurisdiction over the Masone defendants or 26 Shorewood Drive, LLC and the complaint must be dismissed. Defendants also argue that as the title owner of the premises, 26 Shorewood Drive, LLC, is an indispensable party to this foreclosure action and the complaint must be dismissed in its entirety based upon the plaintiff's failure to properly serve the LLC with copies of the summons and complaint.

In opposition to the cross motion, plaintiff contends that defendants' denial of service of the summons and complaint made six and one-half years after service is incredible and provides insufficient evidence to defeat plaintiff's motion or to require a traverse hearing. Plaintiff contends that defendants' conclusory denials couched in language prefaced with "to my knowledge" do not provide an adequate evidentiary foundation to create a genuine issue of fact surrounding service of process. Plaintiff also claims that defendant Liza Masone does not have standing to assert defenses on behalf of the title owner, 26 Sherwood Drive, LLC, and that, even were the court to determine that the LLC is a "necessary" party, the remedy would not be to dismiss the complaint since the LLC is not an indispensable party. Plaintiff claims that the mortgage lender is still entitled to foreclose the mortgage and need only commence a strict foreclosure action against 26 Sherwood Drive, LLC, to obtain plenary relief against the title owner.

Absent proper service of the summons and complaint upon a defendant, a court lacks

jurisdiction and the complaint must be dismissed (*Prudence v. Wright*, 94 AD3d 1073, 943 NYS2d 185 (2nd Dept., 2012); *Deutsche Bank National Trust Co. v. Pestano*, 71 AD3d 1074, 899 NYS2d 269 (2nd Dept., 2010)). Service of process must be made in strict compliance with statutory methods for effecting personal service upon a natural person pursuant to CPLR 308 (*Macchia v. Russo*, 67 NY2d 592, 505 NYS2d 591 (1986); *Estate of Waterman v. Jones*, 46 AD3d 63, 843 NYS2d 462 (2nd Dept., 2007); *Emigrant Mortgage Company, Inc. v. Westervelt*, 105 AD3d 896, 964 NYS2d 543 (2nd Dept., 2013)). The failure to serve process in an action leaves the court without personal jurisdiction over the defendants, and all subsequent proceedings are thereby rendered null and void (*Krisilas v. Mount Sinai Hospital*, 63 AD3d 887, 882 NYS2d 186 (2nd Dept., 2009); *Emigrant Mortgage Company, Inc. v. Westervelt, supra.*)).

CPLR 308 (2) provides:

Personal service upon a natural person.

Personal service upon a natural person shall be made by any of the following methods:

2. 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 and by either mailing the summons to the person to be served 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 in an envelope bearing the legend "personal and confidential" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such delivery and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such delivery or mailing; whichever is effected later; service shall be complete ten days after such filing; proof of service shall identify such person of suitable age and discretion and state the date, time and place of service.....

Ordinarily a process server's affidavit of service constitutes prima facie evidence of proper service (*U.S. Bank, N.A. v. Tauber*, 140 AD3d 1154, 36 NYS3d 144 (2nd Dept., 2016); *NYCTL v. Tsafatinos*, 101 AD3d 1092, 956 NYS2d 571 (2nd Dept., 2012)). A defendant may rebut the process server's affidavit by submitting an affidavit containing specific and detailed contradictions of the claims in the process server's affidavit, but bare, conclusory and unsubstantiated denials of service are insufficient to rebut the presumption of proper service (*U.S. Bank, N.A. v. Tate*, 102 AD3d 859, 958 NYS2d 722 (2nd Dept., 2013); *Beneficial Homeowner Serv. Corp. v. Girault*, 60 AD3d 984, 875 NYS2d 815 (2nd Dept., 2009)).

The record shows that the process server served defendant Liza Masone by substituted service by delivery of the summons and complaint on Isabel Masone (family member), a person of suitable age and discretion at defendant's dwelling place located at 92 Harris Drive, Oceanside, New York 11572 on January 14, 2009 at approximately 5:05 p.m. The affidavit of service states that the required first class mailing was sent on January 16, 2009. The affidavit provides a description of the individual who was served as a grey haired, white skinned, 65 year old woman who wore glasses and

was between 5'4" and 5'7" tall and weighed approximately 125 to 149 pounds. Defendant Liza Masone submits an affidavit claiming that: 1) she never "personally" received the summons and complaint; 2) she never received any mail containing a summons and complaint; 3) she had no knowledge of the foreclosure proceedings until April, 2015; 4) her mother, Isabella Vitucci has never resided with her in her Oceanside home; and 5) her grandmother, Isabella Tuzzino, died approximately one month before service of process was allegedly made. Defense counsel claims that defendant Liza Masone's mother "weighs almost 230 pounds", a detail not mentioned in defendant Liza Masone's affidavit.

The affidavit of the process server provides prima facie evidence of proper service upon defendant Liza Masone pursuant to CPLR 308(2). In response the defendant has submitted self-serving, generalized and conclusory statements which fail to provide sufficient credible evidence to support her defense that she was never served with a summons and complaint in this action. Defendant Masone's qualified statement that she was never "personally" served with the pleadings together with her claimed "lack of knowledge" of these foreclosure proceedings are not credible statements given the more than six year default in making any payments under the terms of the parties' agreement. Moreover, although Masone concedes that her mother's name matches the name of the individual who was served with the pleadings on January 14, 2009, her claim that her mother could not possibly have been present in her home because she did not reside there and was undergoing cancer treatment, provides insufficient, detailed contradictions of the process server's sworn affidavit. Absent the submission of documentation concerning her mother's physical appearance in the form of a copy of her driver's license or other descriptive record to confirm details of her appearance, date of birth, etc. and/or written documentation concerning her medical treatment and place of residence at the time, defendant's affidavit fails to provide adequate contradictory evidence and merely makes bare, conclusory and unsubstantiated denials of service. In this respect defense counsel's unsubstantiated claim (not confirmed by either affidavit submitted by Liza Masone or Mark Masone) that defendant's mother weighed 230 pounds, despite undergoing chemotherapy "for the past decade", is also severely questionable, and fails to raise a credible issue of fact in opposition to plaintiff's affidavit of service.

Based upon this record the affidavit of the process server constituted prima facie evidence of proper service pursuant to CPLR 308(2) and the claimed discrepancies asserted by the defendant fail to raise a genuine issue of fact which would necessitate a traverse hearing. The defendant's application to dismiss plaintiff's complaint for failure to obtain personal jurisdiction over her must therefore be denied (*Wells Fargo Bank, N.A. v. Tricarico*, 139 AD3d 722, 2016 NY Slip Op 03502 (2nd Dept., 2016); *IndyMac Bank v. Hyman*, 74 AD3d 751, 901 NYS2d 545 (2nd Dept., 2010)).

With respect to the defendant's remaining claim to dismiss the complaint for failure to state a valid cause of action as a result of its failure to include a necessary party, while 26 Shorewood Drive, LLC, as the current title holder of the mortgaged premises is a "necessary" party to this proceeding (RPAPL 1311(1)), it is not an indispensable party since the LLC's rights as title owner of the premises will remain unaffected by the judgment of foreclosure and sale (*see Private Capital Group, LLC v. Hosseinpour*, 48 AD3d 746, 853 NYS2d 159 (2nd Dept., 2008); *6820 Ridge Realty LLC v. Goldman*, 263 AD2d 22, 701 NYS2d 69 (2nd Dept., 1999); *Polish National Alliance v. White Eagle Hall Co.*, 98 AD2d 400, 470 NYS2d 642 (2nd Dept., 1983)). The fact that a party may be "necessary" does not render it "indispensable" to the validity of a foreclosure judgment and sale (*see John Hancock Life Insurance Co. v. 491 John Hancock Mutual Life Insurance Co.*, 220 AD 2d 208,

632 NYS2d 10 (1st Dept., 1995); *Scharaga v. Schwartzberg*, 149 AD2d 578, 540 NYS2d 451 (2nd Dept., 1989)) and clearly defendant Masone lacks standing to assert any defense on behalf of 26 Shorewood Drive, LLC. Plaintiff retains the right to commence an action in strict foreclosure (RPAPL 1352 & 1503)).

Accordingly defendant's cross motion is denied and plaintiff's motion seeking an order confirming the referee's report of sale and granting a judgment of foreclosure and sale together with additional relief recited above is granted. Plaintiff is directed to submit a proposed judgment of foreclosure and sale in a form consistent with this short form order and including a provision for the appointment of a substitute referee to conduct the sale, within twenty days of this order.

Dated: April 12, 2017


J.S.C.