

<b>U.S. Bank N.A. v Nunez</b>
2017 NY Slip Op 32220(U)
October 10, 2017
Supreme Court, Queens County
Docket Number: 708847/16
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE  
Justice

IAS PART 6

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U.S. BANK NATIONAL ASSOCIATION AS  
TRUSTEE,  
Plaintiff,  
  
-against-  
  
PEDRO NUNEZ, et al.,  
  
Defendants.  
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Index No. 708847/16  
  
Motion  
Date February 2, 2017  
  
Motion  
Cal. No. 173  
  
Motion  
Seq. No. 1

This is an action to foreclose a mortgage on a premises known as 103-09 32<sup>nd</sup> Avenue, East Elmhurst, New York 11369 ("subject property").

After the commencement of this action by filing, defendants were allegedly served with the summons and complaint on August 19, 2016 pursuant to CPLR 308(2). On September 9, 2016, defendants e-filed an Answer and served plaintiff's attorney by regular mail. On September 26, 2016, plaintiff "erroneously" filed and mailed to defendants, a Notice of Rejection of the Answer.

Defendants' Answer, served on September 9, 2016 interposed, inter alia, an affirmative defense of lack of personal jurisdiction. On November 8, 2016, defendants filed the instant motion pursuant to CPLR 3211(a)(8) to dismiss the complaint for lack of personal jurisdiction because the plaintiff failed to

meet the service requirements of CPLR 308(2).

In an order dated March 21, 2017, this court, *inter alia*, held defendants' motion in abeyance pending a traverse hearing to determine the validity of service of process.

At the hearing, the plaintiff called the process server as its only witness. The process server testified that he served a copy of the summons and complaint upon the defendants at the subject property at 103-09 32<sup>nd</sup> Avenue, East Elmhurst, New York 11369.

He further testified that on the date and time of service that an unidentified female answered the door and confirmed that the defendants lived at the subject property. However, on cross-examination he admitted that in the affidavit of service there is no mention or description of any female informant, nor is there any mention of such female informant in the process server's log book. The court rejects such testimony as being uncorroborated and not credible.

Two (2) affidavits of service filed on August 24, 2016 state separately that on August 19, 2016 defendants Pedro Nunez and Milagros Nunez were served that day by delivery of a true copy of the summons and complaint with a person of suitable age and discretion, identified as "John Doe co-occupant" at "defendant's place of residence within the state" at 103-09 32<sup>nd</sup> Avenue, East Elmhurst, New York 11369. The separate affidavits of service

further state that a second copy was mailed to each defendant at the aforementioned address on August 23, 2016, and that the address was defendant's "Actual Place of Residence". The two (2) affidavits are virtually identical, except one is for defendant Pedro Nunez and one is for defendant Milagros Nunez, his wife.

Defendants Pedro and Milagros Nunez each testified on their own behalf at the hearing. Defendant Pedro Nunez testified that he is a resident of the Dominican Republic, having lived in that country and that being his primary residence since May 20, 2014. He further testified that shortly after permanently leaving the United States, he notified the plaintiff bank that he relocated to the Dominican Republic. In a prior foreclosure action filed by plaintiff bank (*U.S. Bank National Association v. Pedro Nunez, Milagros Nunez, et al.*, Index No. 707242/2014), defendants notified plaintiff bank that defendant had permanently moved to the Dominican Republic. (See Defendants' Exhibit K).

In *Washington Mutual Bank v. Luciano*, 127 AD3d 1167 (2d Dept 2015), the court held as follows:

The court does not have personal jurisdiction over a defendant when a plaintiff fails to properly effectuate service of process (see *Emigrant Mtge. Co., Inc. v. Westervelt*, 105 AD3d 896, 896-897, 964 NYS2d 543 [2013]; *Krisilas v Mount Sinai Hosp.*, 63 AD3d 887, 889, 882 NYS2d 186 [2009]).

"Service of process must be made in strict compliance with statutory methods for effecting personal service upon a

natural person' pursuant to CPLR 308"  
(*Estate of Waterman v Jones*, 46 AD3d 63, 65, 843 NYS2d 462 [2007], quoting *Macchia v Russo*, 67 NY2d 592, 594, 496 NE2d 680, 505 NYS2d 591 [1986]; see *Emigrant Mtge Co., Inc. v. Westervelt*, 105 AD3d at 896-897; *Gottesman v Friedman*, 90 AD3d 608, 609 934 NYS2d 436 [2011]). A defendant's eventual awareness of pending litigation will not affect the absence of jurisdiction over him or her where service of process is not effectuated in compliance with CPLR 308 (see *De Zego v Donald F. Bruhn, M.D., P.C.*, 67 NY2d 875, 877, 492 NE2d 1217, 501 NYS2d 801 [1986]; *Macchia v Russo*, 67 NY2d at 595; *Feinstein v Bergner*, 48 NY2d 234, 241, 397 NE2d 1161, 422 NYS2d 356 [1979]; *Krisilas v Mount Sinai Hosp.*, 63 AD3d at 889; *Bankers Trust Co. Of Cal. v Tsoukas*, 303 AD2d 343, 344, 756 NYS2d 92 [2003]). Where a court determines that a defendant rebutted the presumption of service, which is ordinarily established through a process server's affidavit of service, and sets the matter down for a hearing, the burden at the hearing is on the plaintiff to establish by a preponderance of the evidence that personal jurisdiction was acquired over the defendant (see *Aurora Loan Servs., LLC v Gaines*, 104 AD3d 885, 886, 962 NYS2d 316 [2013]; *Gray v Giannikios*, 90 AD3d 836, 837, 935 NYS2d 112 [2011]; *Engel v Boymelgreen*, 80 AD3d 653, 655, 915 NYS2d 596 [2011]; *Goralski v Nadzan*, 89 AD3d 801, 801, 932 NYS2d 376 [2011]).

CPLR 308 sets forth the different ways in which service of process upon an individual can be effected in order for the court to obtain jurisdiction over that person. CPLR 308(2) provides, in pertinent part, that personal service upon a natural person may be made "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 ... mailing the summons to the person to be served at *his or her last known residence*" (emphasis added).

"Jurisdiction is not acquired pursuant to CPLR 308(2) unless both the delivery and mailing requirements have been strictly complied with" (*Gray-Joseph v Shuhai Liu*, 90 AD3d 988, 989, 934 NYS2d 868 [2011]; see *Daguerre, S.A.R.L. v Rabizadeh*, 112 AD3d 876, 878, 978 NYS2d 80 [2013]; *Munoz v Reyes*, 40 AD3d 1059, 1059, 836 NYS2d 698 [2007]; *Ludmer v Hasan*, 33 AD3d 594, 594, 821 NYS2d 661 [2006]). It "is a two-step form of service in which a delivery and mailing are both essential" (Vincent C. McKinney, *Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C308:3*).

Plaintiff failed to satisfy both the delivery and mailing requirements of 308(2).

#### 1. Delivery

The court finds that plaintiff failed to establish by fair preponderance of the evidence that the premises located at 103-09 32<sup>nd</sup> Avenue, East Elmhurst, New York was either defendants' dwelling place or usual place of abode. The evidence presented by plaintiff shows that the defendants had limited contact with the subject property and that limited contact with the premises is insufficient to properly characterize the premises as defendants' dwelling place or usual place of abode.

#### 2. Mailing

The court also finds that plaintiff failed to meet its burden of proof that its mailing of copies of the summons and

complaint to the same address satisfied the second prong of CPLR 308(2). The undisputed evidence demonstrated that in or about November 10, 2014, the plaintiff's counsel was served with a sworn affidavit in the form of an Affidavit from defendants that stated they had each moved their residence outside of the United States and resided in the Dominican Republic. (Defendants' Exhibit K). Additionally, plaintiff's counsel acknowledged in an Affirmation of Regularity For Expedient Service, dated January 29, 2015 that both defendants claimed that they were "permanently retired and permanently moved" to the Country of the Dominican Republic and that their last known address was "Calle 5 Casa 31 La Cueva de Cevico Cotui Dominican Republic 934. (¶¶ 6, 8, 9 Defendants' Exhibit L).

Therefore, for the purposes of satisfying the requirements of CPLR 308(2), plaintiff knew or should have known that defendants' "last known residence" was not the subject property at 103-09 32<sup>nd</sup> Avenue, East Elmhurst, New York 11369 but at the address that defendants provided to plaintiff located in the Dominican Republic.

Additionally, there is further evidence that plaintiff was made aware and knew that the subject property address was not defendants' residence by plaintiff's own process server, Steven C. Kemp. He averred in separate "Affidavits of Attempted Service" that on August 2, 2016 he attempted service of Summons

and Complaint on Pedro Nunez and Milagros Nunez at the subject address of 103-09 32<sup>nd</sup> Avenue, East Elmhurst, New York 11369, but was unable to effect service for the reason "doesn't live at the property as per Jane Doe". (See Defendants' Exhibits A and B).<sup>1</sup>

Accordingly, the motion by defendants, Pedro Nunez and Milagros Nunez to dismiss the complaint is granted insofar as related against them pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction because the plaintiff failed to satisfy the service requirements of CPLR 308.

A courtesy copy of this order is being mailed to counsel for the respective parties. Plaintiff's Exhibits/Evidence and defendants' Exhibits/Evidence are being returned under same cover.

Dated: October 10, 2017

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**Howard G. Lane, J.S.C.**

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<sup>1</sup>The court notes that the process server averred in a subsequent Affidavit of Service sworn to on August 23, 2016 that he delivered a copy of the summons and complaint to "John Doe, co-occupant" and that "said premises is defendant's place of residence within the state". The affidavit fails to state what is the source for the plaintiff's statement that "premises is defendant's place of residence within the state" (Exhibit 3).