

Globe Trade Capital, LLC v Hoey
2017 NY Slip Op 33362(U)
December 21, 2017
Supreme Court, Suffolk County
Docket Number: Index No. 14/70272
Judge: Jerry Garguilo
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SHORT FORM ORDER

E-FILE

INDEX NO. 14/70272

**SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION IAS PART 48 - SUFFOLK COUNTY**

PRESENT:

**HON. JERRY GARGUILO
SUPREME COURT JUSTICE**

AMENDED ORDER

GLOBE TRADE CAPITAL, LLC,

Plaintiff,

-against-

THOMAS J. HOEY, JR., WENDY HOEY,
THOMAS J. HOEY, FR. AND WENDY HOEY
AS THE TRUSTEES OF THE THOMAS J.
HOEY, JR. AND WENDY HOEY LIVING
TRUST, THE COUNTY OF SUFFOLK, NEW
YORK, THE SUFFOLK COUNTY
TREASURER, THE TOWN OF
SOUTHAMPTON, NEW YORK, THE TOWN
OF SOUTHAMPTON, NEW YORK RECEIVER
OF TAXES,

Defendants.

**ORIG. RETURN DATE: 8/30/17
SUBMISSION DATE:
MOTION SEQ#007, 008
MOTION: 007-MD; 008-MG
CASEDISP**

**PLAINTIFF'S ATTORNEY
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**DEFENDANTS' ATTORNEY
JOSEPH ADRAGNA, ESQ.
58 E. Main St.
Huntington, NY 11743**

Upon the following e-filed papers numbered 197 to 259 read on the motions to vacate default judgment, set aside Sheriff Sale, dismiss action, motion to Confirm Referee Report of Sale; Notice of Motion/ Order to Show Cause and supporting papers 197 - 211, 252, 253; Notice of Cross Motion and supporting papers 212 - 222, 260, - 262; Answering Affidavits and supporting papers 226 - 246, 254 - 259; Replying Affidavits and supporting papers 248 - 253; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the prior order, dated November 13, 2017 (Garguilo, J.), which denied the Defendants' motion (007) to vacate the default and dismiss the complaint with prejudice, and granted the Plaintiff's motion (008) for an order confirming the Referee's Report of Sale and a deficiency judgment is amended as hereinafter set forth; and it is further

Globe Trade Capital LLC v Thomas J. Hoey, Jr.
Index No. 14/70272
Page No. 2

ORDERED that the motion (007) by Defendants Wendy Hoey and Thomas J. Hoey, Jr., both individually and as Trustees of the Thomas J. Hoey, Jr and Wendy Hoey Living Trust, to vacate the default judgment pursuant to CPLR 5015 and dismissing the action with prejudice is denied in its entirety; and it is further

ORDERED that the Plaintiff's motion (008) for an order confirming the Referee's Report of Sale and a deficiency judgment is granted.

The Court notes that, although Defendants' papers were considered in the determination of their motion, that the Court decided only that branch of the motion by Wendy Hoey, individually to vacate her default and to dismiss the complaint. Therefore, the Court now determines that branch of Defendants' motion by the remaining Defendants, Thomas J. Hoey, Jr., individually, and Thomas J. Hoey and Wendy Hoey, as Trustees of the Thomas J. Hoey, Jr. and Wendy Hoey Living Trust.

Turning to that branch of the motion by Defendant Thomas J. Hoey, Jr., individually, the Court notes that Defendant Hoey was properly served while he was incarcerated.

Exhibit B of Plaintiff's motion papers reveals David Chu's affidavit of service wherein he avers that he is a Deputy Sheriff of the City and State of New York and that he was

"authorized pursuant to [his] special duties to serve process, that on December 26, 2014 at approximately 1:00 p.m. at the New York City Department of Corrections, 75-20 Astoria Boulevard East Elmhurst, New York 11370 in the Borough of Queens, [he] served the Summons and Complaint, Notice of Pendency, Certificate of Merit, Notice of Commencement of Action Subject to Mandatory Electric Filing & Help for Homeowners in Foreclosure upon Thomas Hoey, in the following manner:

Personal Service

By delivering to and leaving with, NYC CORRECTION OFFICER BAYLEY #15424, a person of suitable age and discretion, who stated he/she was AUTHORIZED TO ACCEPT SERVICE FOR INMATES IN THE CUSTODY OF THE NYC DEPT OF CORRECTIONS to the defendant/respondent, a true copy thereof. Said address is the PLACE OF INCARCERATION of the defendant/respondent."

In opposition, Defendant Thomas J. Hoey, Jr. submits an affirmation (Defendant's Exhibit D) and a personal affidavit (Defendant's Exhibit E). The Court rejects the affirmation as improper

Globe Trade Capital LLC v Thomas J. Hoey, Jr.
Index No. 14/70272
Page No. 3

form, inasmuch as an affirmation may be made only by an attorney, physician, osteopath or dentist pursuant to CPLR 2106. The affidavit submitted in Defendant's Exhibit E is silent as to whether or not he received service of process.

As stated in the order dated June 1, 2017 (Garguilo, J.),

“In seeking to vacate a default, a Defendant is required to demonstrate a reasonable excuse of the delay in appearing and answering the complaint and a potentially meritorious defense to the action (see CPLR 5015 [a] [4]; *Sime v Ludhar*, 37 AD3d 817, 830 NYS2d 775 [2d Dept 2007]). When a defendant seeking to vacate a default raises a jurisdictional objection pursuant to CPLR 5015 (a) (4), the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacatur of the default under CPLR 5015 (a) (1) (see *Roberts v Anka*, 45 AD3d 752, 846 NYS2d 280 [2d Dept 2007]). Under CPLR 317, a defendant is not required to offer a reasonable excuse for his or her default (see *Eugene DiLorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141, 501 NYS2d 8 [1986]); but must demonstrate that he or she did not personally receive notice of the summons in time to defend the action (Id., at 143; see also *Clover M. Barrett, P.C. v Gordon*, 90 AD3d 973, 2011 NY Slip Op 09581 [2d Dept 2011]).”

Here, the Sheriff's affidavit of service constituted prima facie evidence of proper service upon Defendant pursuant to CPLR 308 (2) and Defendant's failure to rebut the presumption of proper service created by the Sheriff's affidavit is fatal (see *Beneficial Homeowner Service Corp. v Girault*, 60 AD3d 984, 875 NYS2d 815 [2d Dept 2009]). Defendant failed to state that he did not receive service, or that he did not receive service of process in time to defend the action. Therefore, vacatur pursuant to CPLR 5015 (a) (4) and CPLR 317 is denied.

As to the branch of the motion which seeks vacatur of the judgment of foreclosure and sale granted on default, the Court, in its discretion may relieve a party from the effect of its default upon proof the default was the result of fraud, misrepresentation, or misconduct by an adverse party (see CPLR 5015 [3]; *Oppenheimer v Westcott*, 47 NY2d 595, 419 NYS2d 908 [1979]). A judgment will be vacated and the default excused if the movant articulates an extrinsic fraud wherein it was tricked or induced by the Plaintiff into defaulting thereby preventing the movant from fully and fairly litigating the matter (see *Bank of N.Y. v Stradford*, 55 AD3d 765, 869 NYS2d 554 [2d Dept 2008]). To the extent that Defendants' allegations may be read to make out a claim of vacatur for extrinsic fraud in the procurement of the foreclosure judgment, he has not established that any conduct by the Plaintiff caused him to default or prevented him from fully and fairly litigating this matter (see *Putnam County Natl. Bank of Carmel v Simpson*, 204 AD2d 297, 614 NYS2d 149 [2d Dept 1994]). Therefore, vacatur pursuant to CPLR 5101 (a) (3) is denied.

Globe Trade Capital LLC v Thomas J. Hoey, Jr.

Index No. 14/70272

Page No. 4

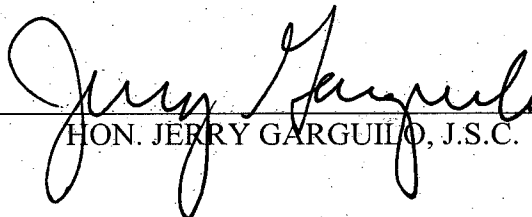
With regard to service of process upon the Trust, as previously discussed in the prior order, Wendy Hoey, was properly served as Trustee of the Trust by substituted service as documented by an affidavit of service (Plaintiff's Exhibit D), dated January 20, 2015. The process server avers in the affidavit that he "served Thomas Hoey and Wendy Hoey as Trustees of the Thomas J Hoey, Jr. and Wendy Hoey Living Trust at 176 Brixton Road, Garden City, New York by personally delivering and leaving same with Thomas Hoey at that address." Inasmuch as Wendy Hoey, as Trustee of the Trust, was served by substituted service, the Court concludes that the Trust was properly served. In any event, a plain reading of the Trust reveals that only 176 Brixton Road, Garden City, New York is listed as property of the Trust, and the Trust is silent as to the subject foreclosed premises located at 9 Quarter Court, Westhampton, New York.

The court finds that the remainder of the defendants' arguments have no merit.

Turning to Plaintiff's motion (008) to confirm the Referee's Report of Sale and a deficiency judgment, after the Court has determined that the Plaintiff has duly submitted the pertinent documents, that the Plaintiff is entitled to the relief requested. Accordingly, Plaintiff's motion is granted.

Accordingly, the motion (007) by Defendants Wendy Hoey and Thomas J. Hoey, Jr., both individually and as Trustees of the Thomas J. Hoey, Jr and Wendy Hoey Living Trust, to vacate the default judgment pursuant to CPLR 5015 and dismissing the action with prejudice is denied in its entirety. In addition, Plaintiff's motion (008) seeking to confirm the Referee's Report of Sale and a deficiency judgment is granted.

DATED: December 21, 2017


HON. JERRY GARGUILO, J.S.C.