| **Globe Trade Capital LLC v Hoey** |
|---|
| 2017 NY Slip Op 33363(U) |
| June 1, 2017 |
| Supreme Court, Suffolk County |
| Docket Number: Index No. 70272/2014 |
| Judge: Jerry Garguilo |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| This opinion is uncorrected and not selected for official publication. |

E-FILE

SHORT FORM ORDER INDEX NO. 70272/2014

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

**PRESENT:**
**HON. JERRY GARGUILO**
**SUPREME COURT JUSTICE**

**ORIG. RETURN DATE: 4/19/17**
**FINAL SUBMITTED DATE: 5/24/17**
**MOTION SEQ#005, 006**
**MOTION: 005-MD, 006-MD**

GLOBE TRADE CAPITAL LLC,

Plaintiff,

-against-

THOMAS J. HOEY JR., WENDY HOEY, THOMAS J. HOEY, JR. 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.

**PLAINTIFF'S ATTORNEY**:
MEYER, SUOZZI, ENGLISH & KLEIN, P.C.
COUNSELORS AT LAW
BY: HOWARD BRUCE KLEINBERG
990 STEWART AVENUE, SUITE 300
P.O. BOX 9194
GARDEN CITY, NY 11530
516-741-6565

**DEFENDANT HOEY LIVING TRUST'S ATTORNEY**:
JOHN MANNONE, ESQ.
2911 ROCKAWAY AVE
OCEANSIDE, NY 11572

**DEFENDANT PRO SE**:
WENDY HOEY
176 BRIXTON ROAD
GARDEN CITY, NY 11530
and
9 QUARTER COURT
WESTHAMPTON, NY 11977

**DEFENDANT PRO SE**:
THOMAS HOEY #92147-054
MDC BROOKLYN
METROPOLITAN DETENTION CENTER
P.O. BOX 329002
BROOKLYN, NY 11232

**DEFENDANT'S ATTORNEY**:
*Attorney for the County of Suffolk*
DENNIS M. BROWN
SUFFOLK COUNTY ATTORNEY
H. LEE DENNISON BUILDING
100 VETERANS MEMORIAL HWY
HAUPPAUGE, NEW YORK 11788

**REFEREE**:
JOHN C. JULIANO, ESQ.
39 DOYLE CT.
EAST NORTHPORT,
NEW YORK 11731

THOMAS HOEY and WENDY HOEY, as Trustees of the THOMAS J. HOEY JR. and WENDY HOEY LIVING TRUST
9 QUARTER COURT
WESTHAMPTON, NY 11997

THOMAS HOEY and WENDY HOEY, as Trustees of the THOMAS J. HOEY JR. and WENDY HOEY LIVING TRUST
176 BRIXTON ROAD
GARDEN CITY, NY 11530

**DEFENDANT'S ATTORNEY:**
*Attorney for the Town of Southampton*
TIFFANY S. SCARLATO
SOUTHAMPTON TOWN ATTORNEY
BY: KARA L. BAK, ATA
116 HAMPTON ROAD
SOUTHAMPTON, NEW YORK 11968

The Court has considered the following in connection with its determination:[1]

1. Defendant, Wendy Hoey's Notice of Motion to Vacate Judgment with supporting papers, inclusive of Wendy Hoey's Affidavit dated March 28, 2017; Exhibits 1 through 6; and Memorandum of Law In Support;
2. Affirmation of Howard B. Kleinberg In Opposition To the Motion to Vacate Judgment of Foreclosure and Sale, by Defendant Wendy Hoey with Exhibits A through Z; and Memorandum of Law; and
3. Reply Memorandum of Law In Support of Defendant Wendy Hoey's Motion To Vacate Judgment Due to Lack of Service of Original Process.

Defendant, Wendy Hoey, moves for an order vacating this Court's judgment of foreclosure and sale entered March 21, 2017 alleging that she was not served with the Summons and Complaint on January 14, 2015, at 176 Brixton Road, Garden City, New York. Defendant asserts that she was in Aruba at that time. Defendant also asserts that her husband, co-Defendant Thomas J. Hoey, Jr. was not served at this location because he was incarcerated. Attached as Exhibit D to Plaintiff's Affirmation In Opposition is an Affidavit of Service, indicating that service was effectuated upon Defendant Wendy Hoey pursuant to CPLR 308(2). The person served identified himself as Thomas Hoey, described as being approximately 63 years of age, with balding gray hair, gray mustache and brown eyes. [2] Additional services was effectuated upon Wendy Hoey by depositing a copy of the Summons and Complaint, with corresponding documents and notifications, by first class mail, in an

1. No submissions have been filed with the Court as concerns Defendants Thomas J. Hoey, Jr. individually and Defendant Thomas J. Hoes, Jr. and Wendy Hoey Living Trust. Thus, the Court considers solely the application of Wendy Hoey, individually (“Defendant”).

2. Plaintiff suggests that this individual is the father of Defendant Thomas J. Hoey, Jr.

official depository of the U.S. Postal Service on January 16, 2015.

A review of the Court's computerized records indicates that on June 22, 2015, Defendant participated in a foreclosure settlement conference and thereafter, on October 16, 2015, appeared with counsel, Mr. Anthony C. Curcio. Mr. Curcio was relieved of representation by Short Form Order dated June 1, 2016. Defendant has appeared pro se thereafter.

Plaintiff's Memorandum of Law In Opposition to Defendant's application to vacate the judgment of foreclosure synopsizes Plaintiff's motion practice and case history culminating in the entry of an order granting Plaintiff a Judgment of Foreclosure and Sale. The Court accepts the factual account as accurate. The motion for an order appointing a referee to compute was served on Defendant March 2, 2015 [NYSCEF Doc. No. 27]. The application was granted without opposition on August 3, 2016 and served upon Defendant with Notice of Entry on August 19, 2016 [NYSCEF Doc. No. 57].

By motion dated December 29, 2016, Plaintiff moved for an order granting it a judgment of foreclosure and sale. The motion was served upon Defendant on December 29, 2016. The application was unopposed and an order granting Plaintiff a Judgment of Foreclosure and Sale was entered on March 21, 2017. A copy of the Judgment of Foreclosure and Sale was served upon Defendant with Notice of Entry on March 24, 2017.

In addition to participating in a foreclosure settlement conference and retaining counsel, Defendant engaged in copious amounts of letter correspondence to the Court and to counsel for Plaintiff. Plaintiff makes note that Defendant also "...actively litigated- including making four motions in the related Nassau County Action." That action concerns the foreclosure of Defendants' main residence, whereas the instant action concerns the foreclosure of Defendants' second home located in Westhampton, New York. Both foreclosure actions arise from the same underlying business loans and both homes were pledged as additional collateral. A history of the Nassau County action is synopsized in Plaintiff's Memorandum of Law under Preliminary Statement. The Court accepts the factual accounts as offered.

Initially, in seeking to vacate a default, a Defendant is required to demonstrate a reasonable excuse for the delay in appearing and answering the complaint and a potentially meritorious defense to the action (*see* CPLR 5015 [a] [1]), or, under the circumstances of this case, that service of the summons and complaint was defective (*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]; *Marable v Williams*, 278 AD2d 459, 718 NYS2d 400 [2d Dept 2000]; *Taylor v Jones*, 172 AD2d 745, 569 NYS2d 131 [2d Dept 1991]). Under CPLR 317, a Defendant is not required to offer a reasonable excuse for his or her default (*see Eugene Di Lorenzo, 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, 501 NYS2d 8; *see Fleisher v Kaba*, 78 AD3d 1118, 1119, 912 NYS2d 604 [2d Dept 2010]; *see also Clover M. Barrett, P.C. v Gordon*, 90 AD3d 973, 2011 NY Slip Op 09581 [2d Dept 2011]).

Here, the process server's affidavit of service constituted prima facie evidence of proper service upon Defendant pursuant to CPLR 308 (2) and Defendant's conclusory and unsubstantiated statements that she was never served with a copy of the summons and complaint are unavailing to rebut the presumption of proper service created by the process server's affidavit (*see Beneficial Homeowner Service Corp. v Girault*, 60 AD3d 984, 875 NYS2d 815 [2d Dept 2009]). In addition, Defendant failed to demonstrate the existence of a meritorious defense (*see* CPLR 317; CPLR 5015 [a][1]; *Irwin Mtge. Corp. v Devis*, 72 AD3d 743, 898 NYS2d 854 [2d Dept 2010]; *Beneficial Homeowner Service Corp. v Girault*, *supra* ). Notably, Defendant did not deny having received the loan proceeds and having defaulted on her loan payments in her moving papers. Therefore, vacatur pursuant to CPLR 5015(a)(4) 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[a][3]; *Oppenheimer v Westcott*, 47 NY2d 595, 419 NYS2d 908 [1979]; *Chemical Bank v Vazquez*, 234 AD2d 253, 650 NYS2d 773 [2d Dept 1996]; *Putnam County Natl. Bank of Carmel v Simpson*, 204 AD2d 297, 614 NYS2d 149 [2d Dept 1994]). Pursuant to CPLR 5015(a)(3) 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]; *Bank of N.Y. v Lagakos*, 27 AD3d 678, 679, 810 NYS2d 923 [2d Dept 2006]; *Putnam County Natl. Bank of Carmel v Simpson*, *supra*). To the extent that Defendant's allegations may be read to make out a claim of vacatur for extrinsic fraud in the procurement of the foreclosure judgment, she has not established that any conduct by the Plaintiff caused her to default or prevented her from fully and fairly litigating this matter (*see Putnam County Natl. Bank of Carmel v Simpson*, *supra*). Therefore, vacatur pursuant to CPLR 5015(a)(3) is **DENIED**.

The Court has considered the following in connection with motion sequence 006:

1. Defendants' Order To Show Cause, with Affidavit of Wendy Hoey and

Memorandum of Law In Support with unmarked exhibits; and
2. Plaintiff's Affirmation In Opposition.

The application seeking a temporary restraining order or preliminary injunction, is made by Defendant Wendy Hoey, individually, Thomas J. Hoey, Jr., individually and Wendy Hoey and Thomas J. Joey, Jr. in their capacities as trustees of the Thomas J. Hoey, Jr. And Wendy Hoey Living Trust. However, no papers have been filed with the Court by Thomas J. Hoey, Jr. Or on behalf of the Trust.

Defendant seeks a temporary restraining order or preliminary injunction to stay the foreclosure sale, having been scheduled for May 25, 2017, pending the determination of Defendant's application to vacate the judgment of foreclosure and sale, due to insufficient service of process.

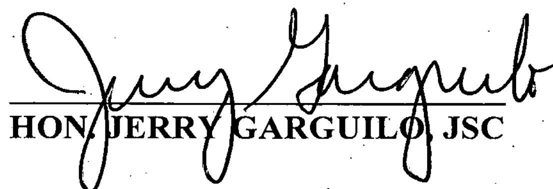
As the Court has determined (mot. seq. 005) that service of process on Defendant Wendy Hoey was proper and that Defendant herein has not presented admissible evidence to rebut the presumption given affidavits of service from service processors, the application is deemed moot and accordingly, **DENIED**. While Defendant states that she was in Aruba when process was effectuated, she does not overcome the presumption that service was completed pursuant to CPLR 308(2).

Here, the process server's affidavit of service constituted prima facie evidence of proper service upon Defendant pursuant to CPLR 308 (2) and Defendant's conclusory and unsubstantiated denial of receipt of the summons and complaint is insufficient to rebut the presumption of proper service created by said affidavit (*see Beneficial Homeowner Service Corp. v Girault*, 60 AD3d 984, 875 NYS2d 815 [2d Dept 2009]). Defendant merely offers a general denial of service (cf. US Bank, NA v Arias, 85 AD3d 1014, 927 NYS2d 362 [2d Dept 2011]. Accordingly, the portion of Defendant's application seeking a vacatur of her default for lack of personal jurisdiction is **DENIED**.

Any matter not herein addressed is deemed **DENIED**.

The foregoing constitutes the decision and **ORDER** of this Court.

**Dated: JUNE 1, 2017**



**HON. JERRY GARGUILO, JSC**