

**U.S. Bank N.A. v Packard**

2018 NY Slip Op 30019(U)

January 9, 2018

Supreme Court, Suffolk County

Docket Number: 2265/2014

Judge: Howard H. Heckman

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

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

INDEX NO.: 2265/2014  
MOTION DATE: 10/26/2017  
MOTION SEQ. NO.: #003 MD

-----X  
U.S. BANK N.A.,

Plaintiffs,

-against-

LISA A. PACKARD, ADAM L. PACKARD,

Defendants.

-----X

**PLAINTIFF'S ATTORNEY:**  
GROSS POLOWY, LLC  
1775 WEHRLE DR., STE. 100  
WILLIAMSVILLE, NY 14221

**DEFENDANT'S ATTORNEY:**  
THE SCHWARTZ LAW GROUP, P.C.  
326 BROADWAY, STE. 203  
BETHPAGE, NY 11714

Upon the following papers numbered 1 to 34 read on this motion 1; Notice of Motion/ Order to Show Cause and supporting papers 1-21; Notice of Cross Motion and supporting papers \_\_\_; Answering Affidavits and supporting papers 22-34; Replying Affidavits and supporting papers \_\_\_; Other \_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by defendant Lisa Packard brought on by Order to Show Cause (Baisley, J.) dated October 11, 2017 seeking an order pursuant to CPLR 5015 & 6301: 1) staying the sale of the foreclosed premises scheduled for October 12, 2017; 2) vacating the Judgment of Foreclosure and Sale (Iliou, J.) dated December 16, 2015 and the Order (Iliou, J.) dated May 28, 2015 granting plaintiff's unopposed motion for summary judgment and the appointment of a referee; and 3) enjoining further prosecution of this action is denied; and it is further

**ORDERED** that the stay imposed by execution of this Order to Show Cause (Baisley, J.) is hereby vacated and the substitute referee is directed to forthwith reschedule a foreclosure sale of the premises and to notify all appropriate parties.

Plaintiff commenced this action to foreclose a mortgage in the original sum of \$175,000.00 executed by defendant Lisa A. Packard on April 6, 2006. Defendant defaulted in making timely monthly mortgage payments beginning September 1, 2012 and continuing to date. By Order (Iliou, J.) dated May 28, 2015 plaintiff's unopposed summary judgment motion was granted and a referee was appointed to compute the sums due and owing to the plaintiff. A Judgment of Foreclosure and Sale (Iliou, J.), was granted on December 16, 2015. The foreclosure auction scheduled for October 12, 2017 was stayed as a result of this application. Two prior sales scheduled for July 13, 2016 and March 9, 2017 were cancelled based upon bankruptcy petition filings one day prior to each scheduled sale date: the first by defendant Lisa Packard and the second by defendant Adam Packard.

Defendant Lisa Packard's motion seeks an order enjoining further prosecution of this action including staying the sale of the premises and vacating the Judgment of Foreclosure and Sale (Iliou, J.) dated December 16, 2015 and the Order (Iliou, J.) dated May 28, 2015 granting summary

judgment in favor of the plaintiff. Defendant claims that the plaintiff failed to obtain personal jurisdiction over her and therefore this foreclosure action must be dismissed.

A defendant seeking to vacate a default pursuant to CPLR 5015 must provide a reasonable excuse for the default and demonstrate a potentially meritorious defense (*see Eugene DiLorenzo, Inc. v. A.C. Dutton Lbr., Co.*, 67 NY2d 138, 501 NYS2d 8 (1986); *Deutsche Bank National Trust Co. v. Gutierrez*, 102 AD3d 825, 958 NYS2d 472 (2<sup>nd</sup> Dept., 2013)). However, absent proper service of the summons and complaint upon a defendant, a court lacks jurisdiction and the complaint must be dismissed with respect to the defendant not served without the need to demonstrate an arguably meritorious defense (CPLR 5015(4); *Prudence v. Wright*, 94 AD3d 1073, 943 NYS2d 185 (2<sup>nd</sup> Dept., 2012); *Emigrant Mortgage Co., Inc. v. Westervelt*, 105 AD3d 896, 964 NYS2d 543 (2<sup>nd</sup> Dept., 2013); *Deutsche Bank National Trust Co., Inc. v. Pestano*, 71 AD3d 1074, 899 NYS2d 269 (2<sup>nd</sup> Dept., 2010)).

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 (2<sup>nd</sup> Dept., 2016); *FV-I, Inc. v. Reid*, 138 AD3d 922, 31 NYS3d 119 (2<sup>nd</sup> Dept., 2016); *Wachovia Bank, N.A. v. Greenberg*, 138 AD3d 984, 31 NYS3d 110 (2<sup>nd</sup> Dept., 2016); *MERS v. Losco*, 125 AD3d 733, 5 NYS3d 112 (2<sup>nd</sup> Dept., 2015); *NYCTL v. Tsafatinos*, 101 AD3d 1092, 956 NYS2d 571 (2<sup>nd</sup> Dept., 2012)). A defendant may rebut the process server's affidavit by submitting an affidavit containing specific and detailed contradictions of the claims set forth 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. Peralta*, 142 AD3d 988, 37 NYS3d 308 (2<sup>nd</sup> Dept., 2016); *Washington Mutual Bank v. Huggins*, 140 AD3d 858, 35 NYS3d 127 (2<sup>nd</sup> Dept., 2016); *Wells Fargo Bank, N.A. v. Christie*, 83 AD3d 824, 921 NYS2d 127 (2<sup>nd</sup> Dept., 2011); *U.S. Bank, N.A. v. Tate*, 102 AD3d 859, 958 NYS2d 722 (2<sup>nd</sup> Dept., 2013); *Beneficial Homeowner Service Corp. v. Girault*, 60 AD3d 984, 875 NYS2d 815 (2<sup>nd</sup> Dept., 2009)).

The record shows that the process server served defendant Lisa Packard by substituted service by delivery of the summons and complaint with RPAPL 1303 notice to Adam L. Packard (defendant Lisa Packard's husband), a person of suitable age and discretion at defendant's place of residence on February 7, 2014 at approximately 11:20 a.m followed by a first class mailing of the same documents three days later. Based upon the submission of the process server's affidavit, prima facie evidence exists to sustain a finding of proper service pursuant to CPLR 308(2).

Having established a showing of jurisdiction over defendant Lisa Packard, it is incumbent upon Packard to rebut the prima facie showing by submission of admissible, credible, specific and substantive evidence regarding lack of service. Neither the affidavit submitted by Lisa Packard, nor the memorandum of law submitted by her attorney, provide sufficient admissible proof to rebut the plaintiff's prima facie showing. An attorney's memorandum of law is primarily a vehicle provided to the court to encapsulate a party's contentions. It is used as an aid to the court to present arguments in support of a position advocated by the party. The memorandum of law submitted by the defendant contains no admissible proof which can be used to contradict relevant, admissible evidence submitted by the opposing party and cannot form the predicate for substantive opposition.

Moreover, Packard's one page, five paragraph affidavit wholly fails to contradict the claims set forth in the process server's affidavit sufficient to raise a genuine issue of fact contradicting the

plaintiff's prima facie showing. Although the memorandum cites to documentary evidence \*1 circumstantially indicating Packard had alternate domiciles in 2013 and early 2014, nowhere does defendant assertively testify that *she did not reside* in the premises where the summons and complaint were served on the date the summons and complaint were served, and nowhere in the affidavit does Packard swear to specific and detailed contradictions of the process server's claims of substituted service upon her husband on the date and time in issue. The only claim defendant makes relevant to any of the underlying issues raised in opposition to plaintiff's motion is a one sentence paragraph stating only:

"I have reviewed the memorandum prepared by my attorney as to factual content and I represent to the Court, that to the extent of factual content, the memorandum is true and complete to the best of my knowledge."

Such a generalized statement concerning "factual content" wholly fails to provide any substantive, specific contradictions of the process server's claims and absent a specific denial of service by the defendant herself, together with an explanation of the exact circumstances which were in existence when service was made (and not merely a "factual content" recitation in an unsigned attorney's memorandum of law), no legal basis exists to continue the delay occasioned by the temporary stay of the sale of the mortgaged premises since sufficient proof has been submitted to establish a jurisdictional predicate. Under these circumstances the law is clear that to obtain a preliminary injunction, the moving party must establish by clear and convincing evidence: 1) a likelihood of success on the merits; 2) irreparable injury absent injunctive relief; and 3) that the equities balance in his favor (*Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 NY3d 839, 800 NYS2d 48 (2005)); *Zoller v. HSBC Mortgage Corp (USA)*, 135 AD3d 932, 24 NYS3d 168 (2<sup>nd</sup> Dept., 2016); *Chase Home Finance, LLC v. Cartelli*, 140 AD3d 911, 2016 NY Slip Op 04685 (2<sup>nd</sup> Dept., 2016)). Based upon this record defendant is not entitled to injunctive relief since she has failed to make the required showing of these three elements.

This record also reveals a procedural pattern of delay reflective of an intentional design by the mortgagors to continuously thwart plaintiff's prosecution of this foreclosure action. In July, 2014 defendant Lisa Packard's application for a loan modification was denied. Case management records indicate that two CPLR 3408 court mandated settlement conferences were thereafter held on September 17, 2014 and December 3, 2014. The Packard defendants both appeared for the initial conference and defendant Lisa Packard sought an adjournment so that additional information could

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\*1- Defense counsel's memorandum of law claims that Exhibit "I" contains "Orders of Protection...issued by the Family Court, Suffolk County which precluded the defendant Lisa Packard ... from having any contact or connection with the (mortgaged premises)... during 2013, 2014, and 2015." Exhibit "I" contains only one Order of Protection dated January 18, 2013, which was effective for one year and expired on January 19, 2014. This Court would expect that counsel's misrepresentation was not an intentional misrepresentation since the date of service, February 7, 2014, would not have been affected by this Order, and such a misrepresentation, if intentional, borders on sanctionable conduct. In point of fact, this record contains no admissible denial of service by the defendant and the circumstantial evidence presented in counsel's unsigned memorandum does not show any more than Lisa Packard's use of a second address for a variety of purposes and reasons not relevant to this jurisdictional inquiry yet reflective of continuing interactions between and among the Packard family at the jurisdictional place of abode.

be obtained with respect to Packard's husband's income. There is no indication that the Packard defendants were represented by counsel and there is no record of a notice of appearance having been filed.<sup>2</sup> On December 3, 2014 the court attorney/referee responsible for conducting the settlement conference marked the action "not settled" and the action was referred for assignment to an IAS Part.

Two subsequent motions were submitted without opposition resulting in a Judgment of Foreclosure and Sale. It was not until the mortgaged premises were actually scheduled for a foreclosure sale on July 13, 2016 when, one day earlier on July 12, 2016, defendant Lisa Packard fortuitously filed a Chapter 7 bankruptcy petition resulting in a temporary stay of prosecution until more than five months later when the Bankruptcy Court (Grossman, U.S.B.J.) issued an order granting plaintiff permission to proceed with the sale. Thereafter, a second sale scheduled for March 9, 2017 was fortuitously stayed as a result of defendant Lisa Packard's husband, Adam Packard's filing of a second Chapter 7 petition in bankruptcy, one day before the scheduled sale date on March 8, 2017. A Final Decree and Order of Discharge (Scarcella, U.S.B.J.) dated June 30, 2017, was issued resulting in a third sale scheduled for October 11, 2017. Again, fortuitously, defendant Lisa Packard submitted this motion one day before the third scheduled sale date, for the first time claiming that despite having taken part in loan modification negotiations during a six month period from July, 2014 through December, 2014; and having failed to oppose two subsequent motions seeking a foreclosure judgment; and having failed to submit any application seeking leave to appear in this action to vacate her default and to serve a late answer; and having submitted a petition in bankruptcy one day before the initial foreclosure sale was scheduled to be conducted, she was never aware of this 2014 foreclosure proceeding having never been served with the summons and complaint. And tellingly in support of this motion defendant provides no affidavit explaining the details surrounding her claims, but submits instead an unsigned memorandum of law which relates a series of arguments and contentions, yet fails to provide admissible evidence to contradict the evidence submitted by the plaintiff.

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\*2- The law is clear that had an attorney represented Packard and filed a notice of appearance on her behalf the jurisdictional claims she now raises would have been waived (CPLR 320; *American Home Mortgage Servicing, Inc. v. Arklis*, 150 AD3d 1180, 56 NYS3d 332 (2<sup>nd</sup> Dept., 2017)). Despite taking part in loan modification negotiations and court settlement conferences, a pro se defendant's failure to file a notice of appearance creates the anomalous result of retaining a pro se's additional right to contest jurisdiction during this (third) final hour, under these circumstances. In this case, however, defendant not only took an active part in loan modification negotiations, but also took the additional step of filing a bankruptcy petition (identifying and including the mortgage and the secured creditor in the petition), which filing clearly reflects defendant's awareness and participation in these proceedings based upon the timing of the filing, having been done one day prior to the scheduled sale of the premises. Such conduct and participation in this foreclosure action, qualifies the defendant as having conferred personal jurisdiction over her by the court even were this court to conclude that personal service of the summons and complaint was not made upon the defendant pursuant to CPLR 308(2)(see *Cadlerock Joint Venture, LP v. Kierstedt*, 119 AD3d 627, 990 NYS2d 522 (2<sup>nd</sup> Dept., 2014); *Rubino v. New York*, 145 AD2d 285, 538 NYS2d 547 (1<sup>st</sup> Dept., 1989); *Taveras v. City of New York*, 108 AD3d 614, 969 NYS2d 481 (2<sup>nd</sup> Dept., 2013); *J.A.P. v. A.J.P.*, 55 Misc 3<sup>rd</sup> 608, 49 NYS3d 820 (Monroe Cty Sup. Ct., 2017)).

Under these circumstances, no legal basis exists to justify any further delay in scheduling the sale of the premises since the defendant has failed to make any showing of a likelihood of success on the merits, irreparable injury, or that the balancing of the equities weigh in her favor given the fact that there has been no mortgage payments forthcoming in excess of five years. .

Accordingly, the defendant's motion is denied in its entirety and the temporary stay is hereby vacated; and it is further

**ORDERED** that Daniel J. Murphy, Esquire, 224 Griffing Avenue, Riverhead, New York 11901 (# 631-810-7564) is hereby appointed as substitute referee to conduct the sale of the mortgaged premises. Plaintiff is directed to notify the court appointed substitute referee to forthwith reschedule the foreclosure sale on notice to all appropriate parties.

Dated: January 9, 2018

HON. HOWARD H. HECKMAN, JR.

J.S.C.