

**State of N.Y. Mtge. Agency v Santangelo**

2018 NY Slip Op 30392(U)

March 9, 2018

Supreme Court, Queens County

Docket Number: 16053/09

Judge: Darrell L. Gavrin

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This opinion is uncorrected and not selected for official publication.

## MEMORANDUM

SUPREME COURT: QUEENS COUNTY  
IA PART 27

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STATE OF NEW YORK MORTGAGE AGENCY  
641 Lexington Avenue  
New York, NY 10022

Plaintiff,

- against -

JERRY SANTANGELO, BOENING BROS,  
MANHATTAN BEER DISTRIBUTORS LLC, MIRO  
AMUSEMENTS CORP., NEW YORK CITY  
ENVIRONMENTAL CONTROL BOARD, NEW  
YORK CITY PARKING VIOLATIONS BUREAU,  
NEW YORK CITY TRANSIT ADJUDICATION  
BUREAU, "JOHN DOE #1" TO "JOHN DOE #10,"  
the last 10 names being fictitious and unknown to  
plaintiff, the or parties intended being the persons or  
parties, if any, having or claiming an interest in or lien  
upon the mortgaged premises described in the verified  
complaint,

Defendants.

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INDEX NO. 16053/09

MOTION DATE Sept. 22, 2017

MOTION CAL. NO. 85

MOTION SEQUENCE NO. 2

In 2000, Jerry Santangelo executed and delivered a note in favor of CFS Bank in the principal amount of \$134,900.00, plus interest. As security for the note, Santangelo executed and delivered a mortgage dated February 1, 2000, and recorded on February 22, 2000 (the subject mortgage), encumbering his real property known as 162-28 104th Street, Hamilton Beach, New York (the subject property) to CFS Bank. The subject mortgage was assigned by CFS Bank to plaintiff, by assignment of mortgage executed on February 1, 2000, and recorded on February 22, 2000.

Plaintiff commenced this foreclosure action on June 17, 2009, alleging it is the owner and holder of the note and subject mortgage, and that defendant, Santangelo, defaulted in paying the monthly mortgage installment due on February 1, 2009. Plaintiff alleges that as a consequence, it elects to accelerate the amount due under the mortgage. Plaintiff further alleges that if applicable, plaintiff complied with RPAPL 1304.

Defendant, Manhattan Beer Distributors, LLC, served an answer, admitting that it is a holds a judgment lien recorded against the property. The remaining defendants failed to timely appear or answer the complaint.

The matter was referred to the Foreclosure Settlement Conference Part (FSCP) where, a conference was held on May 26, 2016, and continued on September 8, 2016, November 17, 2016, January 19, 2017, and February 1, 2017. By order dated February 1, 2017, the Court Attorney Referee determined that the case met the criteria of the FSCP, but had not settled, and granted plaintiff leave to proceed with the action. The Court Attorney Referee directed plaintiff to appear at a status conference on April 18, 2017, and file an “[f]oreclosure [a]ffirmation” or certificate of merit pursuant to Administrative Order 208/13, and an application for an order of reference by the status conference date. By status conference order dated April 18, 2017, the Court Attorney Referee directed plaintiff to appear at a final status conference on June 27, 2017, and file an “[f]oreclosure [a]ffirmation” or certificate of merit pursuant to Administrative Order 208/13, and an application for an order of reference by the final status conference date.

Plaintiff timely moves for summary judgment against defendant, Manhattan Beer Distributors, LLC, for leave to enter a default judgment against the remaining defendants based upon their failure to appear or answer the complaint, for leave to amend the caption and for an order of reference. Defendant, Santangelo, opposes the motion, and cross-moves to, in effect, vacate his default in answering, and dismiss the complaint insofar as asserted against him, pursuant to CPLR 3211(a)(8), and or alternatively, for leave to serve and file a late answer, pursuant to CPLR 2004 and 3012(d), and for a stay of the action. Plaintiff opposes the cross motion. The remaining defendants have not appeared in relation to the motion or cross motion.

With respect to that branch of the cross motion by defendant, Santangelo, in effect, to vacate his default in answering, pursuant to CPLR 5015(a)(4), and to dismiss the complaint, pursuant to CPLR 3211(a)(8), insofar as asserted against him, based upon lack of personal jurisdiction, defendant, Santangelo, asserts that plaintiff failed to serve him with process and he never received the summons and complaint.

A process server’s affidavit of service constitutes *prima facie* evidence of valid service (*see American Home Mtge. Servicing, Inc. v Gbede*, 127 AD3d 1004, 1005 [2d Dept 2015]; *Velez v Forcelli*, 125 AD3d 643, 644 [2d Dept 2015]). A mere conclusory denial of service is insufficient to rebut the presumption of proper service arising from the process server’s affidavit (*see Washington Mut. Bank v Huggins*, 140 AD3d 858, 859 [2d Dept 2016]; *Matter of Romero v Ramirez*, 100 AD3d 909, 910 [2d Dept 2012]). A hearing to determine the validity of service of process is not warranted unless the denial of service is substantiated by specific, detailed facts that contradict the affidavit of service (*see Washington Mut. Bank v Huggins*, 140 AD3d 858, 859; *Wachovia Bank, N.A. v Greenberg*, 138 AD3d 984, 985 [2d Dept 2016]; *Wells Fargo Bank, N.A. v Christie*, 83 AD3d 824 [2d Dept 2011]).

In support of its motion, plaintiff offers an affidavit of service dated June 25, 2009, of a licensed process server, indicating service of process upon defendant, Santangelo, by service of a copy of the summons and complaint upon “JOAN DAVIS (CO-OCCUPANT)” on June 22,

2009, at 5:31 a.m., at the subject premises, as the dwelling place of defendant, Santangelo, and a subsequent mailing of a copy of the summons and complaint to him. This affidavit of service constitutes *prima facie* proof of proper service upon defendant, Santangelo, pursuant to CPLR 308(2), (*see Bank of New York v Samuels*, 107 AD3d 653 [2d Dept 2013]; *Skyline Agency, Inc. v Ambrose Coppotelli, Inc.*, 117 AD2d 135, 139 [2d Dept 1986]). Likewise, the affidavit of Dorrett Philip dated June 25, 2009, indicates that on that date, service of a copy of the summons was made upon defendant, Santangelo, by mail at the subject premises, as Santangelo's dwelling place.

Defendant, Santangelo, states that he resides at the subject property, and does not know who Joan Davis is or was, and never knew or resided with "such a person." Defendant, Santangelo, however, makes no sworn denial that anyone matching the physical description of Joan Davis was present at the subject property on June 22, 2009, and accepted service on behalf of Santangelo. Thus, defendant, Santangelo, has not rebutted the sworn allegation of the process server that a person fitting the physical description of Joan Davis was present at the subject property at the time and accepted service on behalf of Santangelo (*see US Bank Nat. Assn. v Ramos*, 153 AD3d 882 [2d Dept 2017]; *Washington Mut. Bank v Huggins*, 140 AD3d 859, 859 [2d Dept 2016]; *Bank of N.Y. v Espejo*, 92 AD3d 707, 708 [2d Dept 2012]). In addition, to the extent defendant, Santangelo, states he did not reside with such person, valid service, pursuant to CPLR 308(2), may be made by delivery of the summons and complaint to a person of suitable age and discretion who answers the door at a defendant's residence, but is not a resident of the subject property (*see Bank of New York v Espejo*, 92 AD3d 707, 708; *U.S. 1 Brookville Real Estate Corp. v Spallone*, 21 AD3d 480, 481-482 [2d Dept 2005]). Moreover, defendant, Santangelo's conclusory assertion that he did not receive the mailed papers was similarly inadequate to overcome the inference of proper mailing that arose from the affidavits (*see European Am. Bank v Abramoff*, 201 AD2d 611, 612 [2d Dept 2014]; *Colon v Beekman Downtown Hosp.*, 111 AD2d 841, 841 [2d Dept 1985]). Thus, a hearing to determine the validity of service of process upon defendant, Santangelo, is not warranted.

That branch of the cross motion by defendant, Santangelo, in effect, to vacate his default in answering, pursuant to CPLR 5015(a)(4), and to dismiss the complaint insofar as asserted against him, pursuant to CPLR 3211(a)(8), based upon lack of personal jurisdiction is denied.

To the extent defendant, Santangelo, cross-moves to, in effect, vacate his default in answering, pursuant to CPLR 5015(a)(1), and for leave to serve and file a late answer, pursuant to CPLR 2004 and 3012(d), he must show both a reasonable excuse for the default and the existence of a potentially meritorious defense (*see CPLR 2004; 3012[d]; Chase Home Fin., LLC v Minott*, 115 AD3d 634, 634 [2d Dept 2014]; *Community Preserv. Corp. v Bridgewater Condominiums, LLC*, 89 AD3d 784, 785 [2d Dept 2011]; *Taddeo-Amendola v 970 Assets, LLC*, 72 AD3d 677 [2d Dept 2010]). Here, defendant, Santangelo, has failed to establish a reasonable excuse for his default in answering. His submissions do not rebut the *prima facie* proof of proper service of process set forth in the affidavit of service. Since defendant, Santangelo, has failed to demonstrate a reasonable excuse, it is unnecessary to consider whether he sufficiently demonstrated the existence of a potentially meritorious defense (*see TCIF REO GCM, LLC v Walker*, 139 AD3d 704 [2d Dept 2016]; *HSBC Bank USA, N.A. v Lafazan*, 115 AD3d 647, 648

[2d Dept 2014]; *U.S. Bank N.A. v Stewart*, 97 AD3d 740, 741 [2d Dept 2012]; *see also HSBC Bank USA, N.A. v Roldan*, 80 AD3d 566, 567 [2d Dept 2011]), including plaintiff's purported failure to comply with the notice requirements of RPAPL 1304 and paragraph 22 of the mortgage (regarding service of a 30-day notice of default) (*see HSBC Bank, USA, N.A. v Clayton*, 146 AD3d 942, 942 [2d Dept 2017], *lv to appeal denied* 29 NY3d 1017 [2017]). That branch of his motion to vacate his default in answering, pursuant to CPLR 5015(a)(1), and for leave to serve and file a late answer, pursuant to CPLR 2004 and 3012(d), is denied.

With respect to that branch of the cross motion by defendant, Santangelo, to, in effect, vacate his default in answering, pursuant to CPLR 317, and for leave to serve and file a late answer, a party moving to vacate his or her default in answering, pursuant to CPLR 317, must demonstrate that he or she did not personally receive notice of the summons in time to defend and a potentially meritorious defense (*see* CPLR 317; *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]; *Williamson v Marlou Cab Corp.*, 129 AD3d 711, 713 [2d Dept 2015]).

According to defendant, Santangelo, he first learned of the pendency of the action when he received inquiries regarding the subject property from real estate investors. Defendant, Santangelo, asserts that plaintiff failed to comply with RPAPL 1304 and the condition precedent in the mortgage, and he never received a 90-day notice, pursuant to RPAPL 1304, or 30-day notice of default pursuant to paragraph 22 of the subject mortgage. Defendant, Santangelo, however, has failed to demonstrate that he did not receive actual notice of the summons and complaint in time to defend the action. The mere denial of receipt of the summons and complaint is insufficient "to establish lack of actual notice for the purpose of CPLR 317" (*Matter of Rockland Bakery, Inc. v B.M. Baking Co., Inc.*, 83 AD3d 1080, 1081-1082 [2d Dept 2011]; *see Wassertheil v Elburg, LLC*, 94 AD3d 753, 754 [2d Dept 2012]; *Levine v Forgotson's Cent. Auto & Elec., Inc.*, 41 AD3d 552 [2d Dept 2007]). Since defendant, Santangelo's affidavit is insufficient to establish lack of notice in time to defend for the purpose of CPLR 317, it is unnecessary to determine whether he has demonstrated the existence of a potentially meritorious defense for purposes of CPLR 317 and CPLR 2004 and 3012(d) (*see Xiao Lou Li v China Cheung Gee Realty, LLC*, 139 AD3d 724 [2d Dept 2016]). That branch of the cross motion by defendant, Santangelo, to, in effect, vacate his default in answering, pursuant to CPLR 317, and for leave to serve and file a late answer, pursuant to CPLR 2004 and CPLR 3012(d), is denied.

With respect to that branch of the cross motion by defendant, Santangelo, for a stay in this action pending completion of a review by plaintiff's servicer of his loss mitigation application, defendant, Santangelo, asserts that based upon an initial review of his financial documents and communications with plaintiff, he believes the subject mortgage loan will be modified so that he will be able to afford the new monthly payment amount. He submits exhibits indicating he applied to plaintiff's servicer for loss mitigation in June 2017, and provided certain financial information as per plaintiff's request in August 2017. Defendant, Santangelo, asserts that, pursuant to the Real Estate Settlement Procedures Act (RESPA) (12 USC § 2601 *et seq.*) and Truth in Lending Act (TILA) (15 USC § 1601 *et seq.*), and their respective implementing regulations, Regulation X (12 CFR 1024), and Regulation Z (12 CFR

221 *et seq.*), a lender or servicer is prohibited from simultaneously proceeding with a foreclosure action while evaluating a borrower's application for loss mitigation.

“Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just” (CPLR 2201). “[A] court has broad discretion to grant a stay in order to avoid the risk of inconsistent adjudications, application of proof and potential waste of judicial resources” (*Zonghetti v Jeromack*, 150 AD2d 561, 563).

RESPA and Regulation X, apply to “federally related mortgage loans” (12 USC § 2602[1], 12 CFR 1024.2[b]). Under Regulation X, if a homeowner submits a complete loss mitigation application at least thirty-seven (37) days before a foreclosure sale, the servicer is required, pursuant to 12 CFR 1024.41(c)(1)(I), to complete the loss mitigation review within 30 days and is prohibited from seeking a final judgment of foreclosure or an order of sale until after the borrower's loss-mitigation process has been completed (12 CFR 1024.41[g]). A servicer must comply with the requirements of 12 CFR 1024.41 for a borrower's loss mitigation application, unless the servicer has previously complied with the requirements of that section for a complete loss mitigation application submitted by the borrower and the borrower has been delinquent at all times since submitting the prior complete application (*see* 12 CFR 1024.41[i]). It is unclear whether during the period this motion has been sub judice, plaintiff's servicer has ruled upon his application. Nevertheless, it appears based upon the order dated February 1, 2017, of the Court Attorney Referee, that defendant, Santangelo, previously failed to timely submit a full and complete loan modification application. Under such circumstances, defendant, Santangelo, has failed to establish that plaintiff or its servicer is in violation of RESPA or Regulation X to the extent plaintiff is moving for affirmative relief. Defendant, Santangelo, also has failed to establish that the TILA or Regulation Z requires a lender or its servicer to forbear from prosecuting a foreclosure action following the mortgagor's submission of an application for loss mitigation. Defendant, Santangelo, further has failed to establish any other basis upon which a stay is warranted in this action. That branch of the cross motion by defendant, Santangelo, for a stay of this action pending completion of an evaluation by plaintiff's servicer of his loss mitigation application is denied.

With respect to the motion by plaintiff for leave to amend the caption striking the names of “John Doe #1- #50” and “Mary Roe #1-#50,” and adding the name of Joan Davis in their place and stead, the summons reflects that defendant, “John Doe,” is the sole fictitiously-named defendant. Plaintiff effectuated service upon Joan Davis, s/h/a defendant “John Doe,” and has learned that there were no other occupants or tenants at the subject property at the time of the commencement of this action. That branch of the motion by plaintiff for leave to amend the caption is granted to the extent of substituting Joan Davis for defendant, “John Doe,” and amending the caption accordingly.

That branch of the motion by plaintiff for summary judgment against defendant, Manhattan Beer Distributors, LLC, is granted. Plaintiff has demonstrated the absence of genuine issues of material fact on every relevant issue raised by the pleadings (*see Stone v Continental Ins. Co.*, 234 AD2d 282 [2d Dept 1996]; *accord Morley Maples, Inc. v Dryden*

*Mut. Ins. Co.*, 130 AD3d 1413 [3d Dept 2015]; *Aimatop Rest. v Liberty Mut. Fire Ins. Co.*, 74 AD2d 516 [1<sup>st</sup> Dept 1980]). Here, plaintiff has met these requirements by submitting, *inter alia*, the affidavit of Dawn M. Bechtold, a banking officer and representative of M&T Bank, plaintiff's servicing agent, the note, mortgage, assignment of mortgage and affidavits of service (*see e.g. U.S. Bank N.A. v Poku*, 118 AD3d 980, 981 [2d Dept 2014]).

With respect to that branch of the motion for leave to enter a default judgment against defendants, Santangelo, Boening Bros, Miro Amusements Corp. New York City Environmental Control Board, New York City Parking Violations Bureau, New York City Transit Adjudication Bureau and Joan Davis, "on a motion for leave to enter a default judgment, pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting party's default in answering or appearing" (*BAC Home Loans Servicing, LP v Reardon*, 132 AD3d 790, 790 [2d Dept 2015]; *see CPLR 3215[f]*). Plaintiff has met these requirements by its submissions (*see e.g. U.S. Bank N.A. v Poku*, 118 AD3d 980, 981 [2d Dept 2014]). To the extent defendant, Santangelo, asserts that plaintiff failed to provide him with a 30-day notice of default or a 90-day notice, pursuant to RPAPL 1304, he has failed to establish that he is entitled to an order vacating his default in answering the complaint and compelling plaintiff to accept a late answer. Thus, defendant, Santangelo, is precluded from raising plaintiff's alleged failure to comply with the condition precedent set forth in RPAPL 1304 and in paragraph 22 of the subject mortgage as a defense to this action (*see HSBC Bank USA v Clayton*, 146 AD3d 942 [2d Dept 2017]; *PHH Mortg. Corp. v Celestin*, 130 AD3d 703, 704 [2d Dept 2015]). That branch of the motion by plaintiff for leave to enter a default judgment against defendants, Santangelo, Boening Bros, Miro Amusements Corp. New York City Environmental Control Board, New York City Parking Violations Bureau, New York City Transit Adjudication Bureau and Joan Davis, is granted.

That branch of the motion by plaintiff for leave to appoint a referee is granted.

Settle order.

DATED: March 9, 2018

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DARRELL L. GAVRIN, J.S.C.