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| Bank of Am., N.A. v Rolf |
| 2018 NY Slip Op 31767(U) |
| July 25, 2018 |
| Supreme Court, Suffolk County |
| Docket Number: 38412/2011 |
| 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.: 38412/2011
MOTION DATE: 7/3/2018
MOTION SEQ. NO.: #004 MG

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BANK OF AMERICA, N.A.,

Plaintiff,

-against-

CHRISTOPHER ROLF, et al.,

Defendants.
-----X

PLAINTIFF'S ATTORNEY:
KNUCKLES, KOMOSINSKI & MANFRO, LLP
565 TAXTER ROAD, SUITE 590
ELMSFORD, NY 10523

DEFENDANT'S ATTORNEY:
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350 FIFTH AVENUE, SUITE 7710
NEW YORK, NY 10118

Upon the following papers numbered 1 to 35 read on this motion 1-8 ; Notice of Motion/ Order to Show Cause and supporting papers 1- ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 9-24 ; Replying Affidavits and supporting papers 25-29, 30-32, 33-35 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by plaintiff Bank of America, N.A., for an order pursuant to CPLR 1018 & RPAPL 1371: 1) substituting U.S. Bank National Association, not in its Individual Capacity, but solely as Legal Title Trustee for BCAT 2016-18TT as the named party plaintiff in place and stead of Bank of America, N.A.; 2) confirming the referee's report of sale dated August 23, 2017; and 3) granting leave to enter a deficiency judgment against defendant/mortgagor Christopher Rolf is granted.

Plaintiff's foreclosure action was commenced to foreclose a mortgage executed by defendant Christopher Rolf in the original sum of \$1,480,000.00 on October 21, 2005. By Order (Iliou, J.) dated December 12, 2014, plaintiff's motion seeking an order granting summary judgment and for the appointment of a referee was granted. By Order (Iliou, J.) dated March 23, 2015, defendant's motion seeking an order granting leave to reargue the prior December 12, 2014 Order was denied. A Judgment of Foreclosure and Sale was granted on February 22, 2017. The mortgaged premises were sold at public auction to Blake Stone, LLC, on July 7, 2017 for the sum of \$1,223,794.32.

Plaintiff's motion seeks an order substituting the named party plaintiff, confirming the referee's report of sale and granting a deficiency judgment against the mortgagor/defendant Rolf in the sum of \$970,016.80 with interest from August 23, 2017. In his opposition defendant Rolf claims that: 1) plaintiff's motion is a nullity since it was not served upon defendant Rolf's counsel as statutorily required; 2) plaintiff failed to personally serve the deficiency motion upon Rolf and therefore the application must be denied as untimely; and 3) the amount sought by the plaintiff as the deficiency is excessive since plaintiff misapplied the statutory formula for computing the deficiency judgment.

A judgment of foreclosure and sale entered against a defendant is final as to all questions at issue between the parties, and all matters of defense which were or might have been litigated in the

foreclosure action are concluded (*Long Island Savings Bank v. Mihalios*, 269 AD2d 502, 704 NYS2d 483 (2nd Dept., 2000); *Signature Bank v. Epstein*, 95 AD3d 1199, 945 NYS2d 347 (2nd Dept., 2012)). Jurisdiction over the defendant Rolf has been established, as has the judgment debtor's personal liability for entry of a deficiency judgment. Moreover, defendant/judgment debtor Rolf is not contesting the timeliness of plaintiff's application (i.e. within ninety (90) days of the transfer of the deed) since the record is undisputed that the November 16, 2017 "nail and mail" service of this motion was done within ninety days of the transfer of the deed on August 23, 2017. The issues Rolf is contesting is more specifically whether plaintiff's actual service of the deficiency motion provided adequate notice to the judgment debtor pursuant to RPAPL 1371(2), and whether plaintiff's computation of the amount due the mortgage lender representing the deficiency judgment is correct.

RPAPL 1355(2) provides in pertinent part:

Report of sale; confirmation

2. A motion to confirm such report of sale shall not be made within three months after the filing of the report and shall in any event be made not later than four months after the filing of such report, except that if there be no surplus moneys arising from the sale of the mortgaged premises under such judgment, an application for confirmation of the report of sale may be made at any time after the report shall have been filed eight days.

RPAPL 1371 provides in pertinent part:

Deficiency judgment

1. If a person who is liable to the plaintiff for the payment of the debt secured by the mortgage is made a defendant in the action, and has appeared or has been personally served with the summons, the final judgment may award payment by him of the whole residue, or so much thereof as the court may determine to be just and equitable, of the debt remaining unsatisfied, after a sale of the mortgaged property and the application of the proceeds, pursuant to the directions contained in such judgment, the amount thereof to be determined by the court as herein provided.

2. Simultaneously with the making of a motion for an order confirming the sale, provided such motion is made within ninety days after the date of the consummation of the sale by the delivery of the proper deed of conveyance to the purchaser, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment upon notice to the party against whom such judgment is sought or the attorney who shall have appeared for such party in such action. Such notice shall be served personally or in such other manner as the court may direct. Upon such motion the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date such premises were bid in at auction or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the

judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus costs and disbursements of the action including the referee's fee and disbursements, less the market value as determined by the court or the sale price of the property whichever shall be higher.

RPAPL 1371 does not inflexibly require that service be personal; it states that service may be made in such other manner as the court may direct, and cases interpreting this provision have not required that a court ratify another form of service beforehand but have allowed subsequent court approval nunc pro tunc. RPAPL 1371(2) has been liberally construed to require only "substantial compliance" where actual notice of the underlying application has been timely received (*Bianco v. Coles et al.*, 131 AD2d 10, 520 NYS2d 261 (3rd Dept., 1987); *Catholic Women's Benev. Legion v. Burke et al.*, 253 AD2d 261, 1 NYS2d 720 (1st Dept., 1938); *Columbus Realty Investment Corp. v. Weng-Heng Tsiang*, 226 AD2d 259, 641 NYS2d 265 (1st Dept., 1996); *Sarasota Inc. v. Homestead Acres at Greenport, Inc.*, 249 AD2d 290, 670 NYS2d 878 (2nd Dept., 1998); *Heritage Savings Bank v. Grabowski*, 70 AD2d 989, 417 NYS2d 802 (3rd Dept., 1979); *FDIC v. Steele*, 1993 WL 246331 (U.S.D.C., S.D. N.Y., 1993); *Mortgagee Affiliates, Inc. v. Jerder Realty Corp.*, 62 AD2d 591, 406 NYS2d 326 (2nd Dept., 1978); see also *144 Bleecker Street Corp. v. Souto Geffen Co.*, 277 AD2d 133, 717 NYS2d 013 (1st Dept., 2000); *Gateway State Bank v. Puma*, 220 AD2d 373, 644 NYS2d 560 (2nd Dept., 1996)) since the statute "was not designed to provide loopholes to a mortgagor to escape an obligation assumed by him" (*Catholic Women's Benevolent Legion v. Burke*, *supra* pg. 264).

A motion to confirm a referee's report of sale pursuant to RPAPL 1355(2) is primarily relevant in two situations: the first, where surplus moneys remain after the sale requiring the referee to submit additional documents relevant to determine the disposition of those remaining funds; and the second, where plaintiff is seeking a deficiency judgment. In this case plaintiff is seeking a deficiency judgment and is therefore required to make a motion to confirm the referee's report of sale together with a motion seeking a deficiency judgment. As a result plaintiff served a combined motion to confirm the referee's report of sale and for leave to enter a deficiency judgment. RPAPL 1371(2) specifically provides for a timely combination motion to be "simultaneously" served "upon notice to the party against whom such judgment is sought or the attorney who shall have appeared for such party in such action..... with such notice required to be served "personally or in such other manner as the court may direct." The importance of this service provision is reflected in the requirement that the combination application be served timely and "personally" or in a manner directed by the court. Clearly the statutory scheme reflects an intent, in situations where there are no surplus monies but where there is a likelihood that a deficiency judgment will be sought, to permit these additional service requirement options. Defendant/judgment debtor claims that the motions must be served separately to the extent that service of the RPAPL 1355(2) motion be served on counsel only and argues that plaintiff's service of the combination motion on the defendant rendered plaintiff's application a "nullity". However to interpret the statutes service requirements as wholly separate (as defendant/judgment debtor advocates) in this situation (i.e. to limit service by mail on defense counsel for the RPAPL 1355 application; and to require a different method for the RPAPL 1371 "simultaneous" application) would frustrate legislative intent and alter the legislative design. Under these circumstances the statutes should not be interpreted so as to create unreasonable, mischievous or absurd results (see McKinney's Consolidated Laws of New York Book 1, *Statutes* Sections 73, 76, 92, 95, 143, 145 & 148) and striking plaintiff's application as a "nullity" is clearly unwarranted and without legal authority.

With respect to the issue of the actual service of the combination motion, as recited above, RPAPL 1371(2), as interpreted by the relevant case law, sets forth the requirements for service of a motion seeking leave to obtain a deficiency judgment. The statute provides the motion must be served personally or in such manner as the court directs, and the law provides that in situations where the judgment debtor has actual notice of a timely application seeking a deficiency judgment the judgment creditor must “substantially comply” with those service requirements (*Bianco v. Coles et al., supra.*). The service requirements are thus clearly not as stringent as the personal jurisdictional requirements set forth for commencing an action which is reasonable given the fact that the judgment debtor’s liability has been established and the only remaining issue to be determined is the amount of damages due the mortgage lender with the proofs involved limited to the judgment amount (previously established in the judgment of foreclosure itself minus the fair market value of the mortgaged premises or sales price (established by confirmation of the referee’s report of sale), whichever is higher.

With respect to consideration of whether plaintiff has complied with RPAPL 1371(2) service requirements, the law concerning “personal” service in the jurisdictional sense (which is not determinative in this application) provides that service pursuant to CPLR 308(4) may be used only where personal service under CPLR 308(1) & 308(2) cannot be made with “due diligence” (CPLR 308(4); *Amtrust-NP SFR, LLC v. Emmel*, 140 AD3d 993, 34 NYS3d 163 (2nd Dept., 2016); *LaSalle Bank, N.A. v. Hudson*, 139 AD3d 811, 31 NYS3d 188 (2nd Dept., 2016)). The term “due diligence” is not defined by statute, but has been interpreted and applied on a case-by-case basis (*Estate of Waterman v. Jones*, 46 AD3d 63, 843 NYS2d 462 (2nd Dept., 2007)). 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 (2nd Dept., 2016); *NYCTL v. Tsafatinos*, 101 AD3d 1092, 956 NYS2d 571 (2nd Dept., 2012)). A defendant may rebut the process server’s affidavit by submitting an affidavit containing specific and detailed contradictions of the claims 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. Tate*, 102 AD3d 859, 958 NYS2d 722 (2nd Dept., 2013); *Beneficial Homeowner Serv. Corp. v. Girault*, 60 AD3d 984, 875 NYS2d 815 (2nd Dept., 2009)).

In this case the process server’s affidavit states that he visited the judgment debtor’s residential premises in lower Manhattan on five separate occasions during different hours of the day and that on one visit a voice on the intercom identifying himself as the defendant stated that he would not accept any papers. The affidavit goes on to state that service was done by “nail and mail” on November 16, 2017 at 9:02 p.m. with the required first class mailing completed on November 21, 2017. In opposition, defendant/judgment debtor Rolf, his son and his personal assistant submit affidavits claiming that the process server’s affidavit is “false”; that process was never served; that none of the three heard the “buzzer ring on any of (the five) days”; that the process server never spoke with Rolf; and that since Rolf is a paraplegic he is unable to physically access the intercom. Based upon this record the affidavit of the process server constitutes prima facie evidence of proper service pursuant to CPLR 308(4) given the claim that service was attempted on five separate occasions during different hours of the day. Defendant/judgment debtor’s submission of affidavits claiming the process server’s affidavit is totally false raise issues of credibility which, if submitted solely with respect to the issue of personal jurisdiction and without any factual inconsistencies, might be sufficient to contradict the process server’s claims. However a close reading of defendant’s affidavit reveals a crucial inconsistency which belies the judgment debtor’s claim that the process

server is a “habitual liar” and that his affidavit is a total fabrication and establishes that Rolf had timely and actual prior notice of plaintiff’s motion sufficient to prove plaintiff’s substantial compliance with RPAPL 1371 service prerequisites.

Paragraph nine (9) of Rolf’s affidavit concedes that the judgment debtor “received a partial copy of the instant moving papers; which were left on my door.” This admission wholly contradicts the three affidavits submitted by the defaulting mortgagor and his non-party witnesses since, in its limited fashion, it is a concession that the process server was in New York City and did in fact attempt to serve the motion papers outside Rolf’s Manhattan apartment. And in this context the inquiry is not, as defendant argues, whether CPLR 308(4) was “violated” because defendant “never received a complete of the motion (sic) (papers), since the issue is not one of personal service, but rather goes to the question of whether plaintiff substantially complied with RPAPL 1371 service requirements. Defendant’s admission establishes that the judgment debtor had actual notice of plaintiff’s motion well within the ninety (90) day period which is all that is required to establish substantial compliance with the RPAPL 1371 service requirements (*Bianco v. Coles, supra.*; *Catholic Women’s Benevolent Legion v. Burke, supra.*; *Heritage Savings Bank v. Grabowski, supra.*). While the method of service in this case was not improper, this court retains the inherent authority to validate plaintiff’s service nunc pro tunc (*Bianco v. Coles, supra.*). In view of the fact that the judgment debtor concedes having received timely notice of this motion; was thereafter afforded the right to contest the merits of plaintiff’s application by submitting opposition to plaintiff’s motion; and has not been prejudiced in his ability to oppose plaintiff’s motion, plaintiff’s service of the motion was in such manner as this court would direct and therefore no basis exists to deny plaintiff’s application.

With respect to computation of the amount of the deficiency judgment, the statute is clear that the deficiency is determined by subtracting the greater of the fair market value and the auction sale price (known formally as the subtrahend) from the amount set forth in the judgment (known as the minuend), with the result being the deficiency amount (known as the difference). In this case the subtrahend would be the sum of \$1,970,000.00 (the greater of the fair market value over the auction sale price) and the minuend is the sum of \$2,286,777.52 (the judgment amount) which results in the difference (the deficiency) in the sum of \$316,777.52 with interest from August 23, 2017. To the extent that defendant has raised an objection to the plaintiff’s computation of the deficiency judgment amount, defendant/judgment debtor’s objection is sustained. Defendant/judgment debtor’s remaining argument claiming that plaintiff’s service of an IRS Form 1099-C form resulted in a waiver of plaintiff’s right to seek a deficiency is equally without merit and provides no justification for denying plaintiff a deficiency judgment .

Accordingly, plaintiff’s motion for an order confirming the referee’s report of sale and for leave to enter a deficiency judgment is granted to the extent indicated hereinabove. Plaintiff is directed to submit and serve the proposed judgment on notice to the defendant/judgment debtor within ten days of the date of this order with notice of entry.

Dated: July 25, 2018

HON. HOWARD H. HECKMAN, JR.

J.S.C.