

**Bank of Am., N.A. v Lynck**

2019 NY Slip Op 30116(U)

January 8, 2019

Supreme Court, Suffolk County

Docket Number: 026461/2012

Judge: John H. Rouse

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**COPY**

INDEX NO. 026461/2012

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 12 - SUFFOLK COUNTY

**PRESENT:**

Hon. John H. Rouse  
Acting Supreme Court Justice

MOTION DATE: 09/05/2018  
ADJ. DATE: 11/28/2018  
Mot. Seq. 002-MG

MOTION DATE: 09/05/2018  
ADJ. DATE: 11/28/2018  
Mot. Seq. 003-MD  
CASEDISP

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BANK OF AMERICA, N.A.,

Plaintiff

-against-

MAURA LYNCK A/K/A MAURA E. LYNCH, MARTIN  
LOPEZ, HARDY PLUMBING HEATING & AIR  
CONDITIONING, INC., MARCELO M. SUAREZ OROZCO  
BANK OF AMERICA, N.A. SUCCESSOR BY MERGER TO  
BAC HOME LOANS SERVICING, LP

Defendants

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**JUDGMENT OF  
FORECLOSURE AND  
SALE**

with

**DECISION & ORDER**

District: 0300  
Section: 197.00  
Block: 01.00  
Lot: 026.004

7 East Gate Road  
Wainscott, New York

**TO:**

MCCABE, WEISBERG & CONWY, LLC  
145 HUGUENOT STREET, STE 210  
NEW ROCHELLE, NY 10801  
914-636-8900

GRAUSSO & FOY, LLP  
8 MAIN STREET, STE 5  
PATCHOGUE, NY 11772  
631-517-9260

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by Plaintiff for confirmation of the report of the referee and Judgment of Foreclosure and Sale dated August 6, 2018, with Exhibits A-C attached thereto; Notice of Cross Motion to vacate Plaintiff's default and dismiss the action, with Exhibits A-G attached thereto; it is:

**ORDERED** that the motion (Seq. #002) by Plaintiff for Judgment of Foreclosure and Sale is granted; and it is further

**ORDERED** that the cross motion (Seq. #003) by Defendant to vacate Plaintiff's default and dismiss the action is denied; and it is further

**ORDERED** that the report of the referee is confirmed as provided further herein; and it is further

**ORDERED** that Kevin J. Fitzgerald Esq., with an office at Smithtown, NY  
186 West Main St, 11787 Phone: (631) 360-7272, is appointed Referee to have a notice of sale published in *The Southampton Press* and to conduct a public auction of the property, in accordance with RPAPL §231; and it is further

*JHR*  
*ASL*

**ORDERED** that the sale be held on *the front steps of the Southampton Town Hall located at 116 Hampton Road, Southampton, NY*; and it is further

**ORDERED** that the property be sold in accordance with RPAPL § 1351(1), and the date of the Judgment is deemed the date it is entered; and it is further

**ORDERED** that the Referee shall deposit the down payment and proceeds of sale, as necessary, in an IOLA account in his/her own name as Referee, in accordance with CPLR § 2609; and it is further

**ORDERED** that after the property is sold the Referee shall execute a deed to the purchaser, in accordance with RPAPL § 1353 and the terms of sale, which shall be deemed a binding contract; and it is further

**ORDERED** that the Referee shall pay from the sale proceeds the expenses of sale, and pay to the Plaintiff or its attorney, the amount of the debt, interest and costs, in accordance with RPAPL § 1354, as follows:

*JHR*  
*ASL*

FIRST: The statutory fees of the Referee for conducting the sale, in accordance with CPLR § 8003(b), \$ 500.00, or in the event a sale was cancelled or postponed, Plaintiff shall compensate the Referee in the sum of \$250.00 for each adjournment or cancellation, unless the Referee caused the delay.

SECOND: The expenses of the sale including posting and publishing.

THIRD: The Referee shall also pay to the Plaintiff or its attorney the following:

- A. Costs and Disbursements. \$ \_\_\_\_\_ adjudged to the Plaintiff for costs and disbursements in this action, to be taxed by the clerk and inserted herein, with interest at the statutory rate from the date of entry of this judgment.

- B. Amount due as determined by the Court upon this motion of Principal \$ 1,264,988.47; Interest to date of \$ 405,766.05; Escrow Amounts for Taxes and Insurance \$44,913.94 through March 5, 2014, for the sum of \$1,715,668.46 and added to this amount such taxes and insurance costs as have been paid by Plaintiff for the maintenance of the property since March 6, 2014 with interest added to this sum at the rate of \$138.53 per day beginning on January 9, 2018 for prejudgment interest through and including the date judgment is entered by the Clerk of the court, and upon this sum of principal and interest shall be added interest at the rate of nine percent per annum until such amount is paid in full to Plaintiff after the closing of the sale of the subject premises.
- C. Attorney's Fees of \$2,450.00 is hereby awarded to the Plaintiff as reasonable legal fees herein, with interest at the statutory rate from the date of entry of this judgment.

FOURTH: That the Referee shall pay from the sale proceeds all taxes, assessments and water rates that are liens upon the property and redeem the property from any sales for unpaid taxes, assessments, or water rates that have not apparently become absolute, and any other amounts due in accordance with RPAPL § 1354(2).

FIFTH: Surplus monies arising from the sale shall be paid into Court by payment to the Suffolk County Comptroller by the referee conducting the sale within five days after receipt, in accordance with RPAPL § 1354(4); and it is further

**ORDERED** that if the Plaintiff is the purchaser of the property, the Referee shall not require a down payment or that the amount bid be paid in cash, but shall execute and deliver a deed to the Plaintiff upon payment to the Referee of the amounts specified in items "First", "Second", AND "Fourth" above. The Referee shall allow the Plaintiff to pay the amounts in item "Fourth" above when it is recording the deed. The balance of the bid, after deducting the amounts paid by the Plaintiff, shall be applied to the amount due Plaintiff as specified in item "Third" above. If there is surplus after applying the balance of the bid, the Plaintiff shall pay that amount to the Referee, who shall deposit it in accordance with paragraph "Fifth" above; and it is further

**ORDERED** that, in accordance with Real Property Actions and Proceedings Law § 1353, if the plaintiff (or its affiliate, as defined in paragraph (a) of subdivision one of section six-1 of the banking law) is the purchaser, such party shall place the property back on the market for sale or other occupancy: (a) within one hundred eighty days of the execution of the deed of sale, or (b) within ninety days of completion of construction, renovation, or rehabilitation of the property, provided that such construction, renovation, or rehabilitation proceeded diligently to completion,

whichever comes first, provided however, a court of competent jurisdiction may grant an extension for good cause; and it is further

**ORDERED** that all expenses of recording the Referee's deed, including real property transfer tax, which is not a lien upon the property at the time of sale, shall be paid by the purchaser, not by the Referee from sale proceeds. Transfer Tax shall be paid by the Purchaser in accordance with Tax Law § 1404(b)(1). Purchaser shall be responsible for interest and penalty due on any real property taxes accruing after the sale; and it is further

**ORDERED** that the property is sold in "as is" condition as of the date of sale, the Purchaser assumes all risk of loss or damage to the property from the date of the sale until the date of closing, and the sale is subject to the following items, which are neither valid exceptions to clear title nor valid reasons to adjourn the closing:

- A. Any facts that a survey or physical inspection of the property would disclose;
- B. Rights of the public to any part of the property that is within the bounds of any street, alley, or highway
- C. Any covenants, restrictions, easements, public utility agreements of record, building and zoning ordinances and violations of same;
- D. Rights of tenants or persons in possession of the property. It shall be the
- E. responsibility of the Purchaser to evict or remove any tenants or persons in possession of the property.
- F. The right of redemption of the United States of America, to redeem the property within 120 days of sale.
- G. Any rights pursuant to CPLR § 317, § 2003, and § 5015 or any appeal of the underlying action;

and it is further

**ORDERED** that the purchaser be let into possession on producing the Referee's Deed; and it is further

**ORDERED** that upon the sale the Defendants in this action and all persons claiming through them are barred and foreclosed of all right, claim, lien, title, interest and equity of redemption in the property, except, as required by 28 U.S.C. § 2410, that should the United States be a named defendant its equity of redemption shall continue for 120 days as measured from the date of the sale whereupon it too will be foreclosed; and it is further

**ORDERED** that if the Referee does not appear at the place and time appointed for the sale, the Court may appoint a Substitute Referee; and it is further

**ORDERED** that the Referee is subject to the requirements of Rule 36.2(c) of the Chief Judge, and if the Referee is disqualified from receiving appointment pursuant to provisions of that Rule, the Referee shall notify the Appointing Judge forthwith; and it is further

**ORDERED** that within thirty days after completing the sale and executing the proper conveyance to the purchaser, unless the time is extended by the Court, the officer making the sale shall file with the clerk a report under oath of the disposition of the proceeds of the sale in accordance with RPAPL § 1355(1); and it is further

**ORDERED** that the Referee appointed herein shall file the completed and signed Foreclosure Surplus Monies Form, in accordance with the Suffolk County Administrative Order # 41-13, with both the Suffolk County Clerk and the Supreme Court Calendar Clerk within 30 days of the foreclosure sale date; and it is further

**ORDERED** that a copy of this Judgment with Notice of Entry shall be served upon any party entitled to service and upon the Referee appointed to sell. The legal description of the property being foreclosed is:

SCHEDULE "A"

Address:  
✓ 7 EAST GATE ROAD  
WAINSCOTT NY 11975

ALL THAT CERTAIN PLOT, PIECE OR PARCEL OF LAND, WITH THE BUILDINGS AND IMPROVEMENTS THEREON ERECTED, SITUATE, LYING AND BEING IN THE TOWN OF EAST HAMPTON, COUNTY OF SUFFOLK AND STATE OF NEW YORK, BEING KNOWN AND DESIGNATED AS PART OF LOT 2 IN BLOCK NO.3 AS SHOWN ON A CERTAIN MAP ENTITLED, "SUBDIVISION MAP OF MIDHAMPTONS MALL SECTION", FILED IN THE OFFICE OF THE CLERK OF THE COUNTY OF SUFFOLK ON JULY 29, 1927 AS MAP NUMBER 625, AND AN ABANDONED PART OF MALL BEING BOUNDED AND DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT ON THE WESTERLY SIDE OF EAST GATE ROAD, 157.50 FEET NORTHERLY FROM THE CORNER FORMED BY THE INTERSECTION OF THE WESTERLY SIDE OF EAST GATE ROAD AND THE NORTHERLY SIDE OF ARDSLEY ROAD;

RUNNING THENCE NORTH 89 DEGREES 58 MINUTES 40 SECONDS WEST, 225.00 FEET;

THENCE NORTH 00 DEGREES 01 MINUTE 20 SECONDS EAST, 157.50 FEET;

THENCE SOUTH 89 DEGREES 58 MINUTES 40 SECONDS EAST, 226.00 FEET TO THE WESTERLY SIDE OF EAST GATE ROAD;

THENCE SOUTH 00 DEGREES 01 MINUTE 20 SECONDS WEST, ALONG THE WESTERLY SIDE OF EAST GATE ROAD, 157.50 FEET TO THE POINT OR PLACE OF BEGINNING.

and the property is described by Suffolk County Tax Map Number:

District: 0300  
Section: 197.00  
Block: 01.00  
Lot: 026.004

### **ENTER JUDGMENT**

### **DECISION**

This action in foreclosure was commenced with respect to premises located at 7 East Gate Road Wainscott, New York. In this action Plaintiff alleged that on October 27, 2007 Defendant Maura Lynch a/k/a Maura E. Lynch executed a note evidencing an indebtedness in the amount of \$1,265,000.00 that was secured by a mortgage on the subject premises. The Defendant defaulted in repayment of the note on February 1, 2011. This action was commenced by filing on August 27, 2012. On November 5, 2012 Plaintiff alleges it served Maura E. Lynch by leave and mail service by leaving the summons, complaint and RPAPL § 1303 Notice with Abby Ruiz a person at 43 Harbor Drive, Sag Harbor, NY who described herself as the baby sitter for Defendant Maura E. Lynch. The process server in his affidavit described Abby Ruiz as being caucasian with black hair, age 17, wearing glasses, standing between five feet four inches and five feet seven inches in height and weighing between 100 and 124 pounds. This was followed by a mailing to 43 Harbor Drive, Sag Harbor, New York.

On November 22, 2012 Defendant, Maura Lynch filed a voluntary petition chapter 13 petition in bankruptcy in which she listed 43 Harbor Drive, Sag Harbor, NY as her residence. Notably Ms. Lynch did not list as a creditor in her bankruptcy petition the Plaintiff in this action, Bank of America, N.A., or its predecessors in interest. In her sworn statement filed with that bankruptcy court Defendant Lynch did not list the property that is the subject of this foreclosure, 7 East Gate Road Wainscott, New York as an asset.<sup>1</sup> The only real property listed in her schedule of assets was described as: a residential condo located at 90 Alton Road, Miami Beach, Florida with a secured creditor to whom she was indebted in the amount of \$89,962.59; a single family residence located at 43 Harbor Drive, Sag Harbor, NY with a secured creditor to whom she was indebted in the amount of \$313,000.00. Upon motion of the Plaintiff in this action Plaintiff was granted a default judgment against the defendant and a referee to compute was appointed.

Plaintiff now moves for judgment of foreclosure and sale and the confirmation of the report of the referee. The Defendant cross moves and alleges that she could not have been served by leave and mail service with her baby sitter because, she alleges, that on the date such service was made, no one could have been at her home because of *Super Storm Sandy*. Plaintiff's affidavit of service alleges service was effected on November 5, 2012 at 3:45 p.m. It was October 29, 2012 this storm made landfall in New Jersey. The damage in New Jersey, New York City, Nassau and

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<sup>1</sup>The Defendants petition is bankruptcy is a matter of public record, electronically on file with the Bankruptcy Court for the Eastern District of New York and open to the public for examination.

Western Suffolk County was substantial due to wind and tidal surge. Eastern Suffolk County, while suffering tidal surges and flooding escaped the most damaging aspects of this storm. In support of her cross motion Defendant simply alleges that service upon her babysitter could not have been made. Defendant, however, does not contend that she did not have a baby sitter named Abby Ruiz as described by the process server, Defendant did not submit an affidavit from Abby Ruiz, and Defendant offers no explanation for how the process server could have come by the name and description of this person at her residence.

It has long been established that a process server's sworn affidavit of service constitutes *prima facie* evidence of proper service. See *ACT Props., LLC v Garcia*, 102 AD3d712; *Deutsche Bank Natl. Trust Co. v Pietranico*, 102 AD3d724; *Bank of NY v Espejo*, 92 AD3d 707; *Deutsche Bank Natl. Trust Co. v Hussain*, 78 AD3d 989; *Wells Fargo Bank, NA v McGloster*, 48 AD3d 457. A defendant can rebut the process server's affidavit by a sworn denial of service in an affidavit containing specific and detailed contradictions of the allegations in the process server's affidavit. See *Bank of NY v Espejo*, 92 AD3d 707. Bare, conclusory and unsubstantiated denials of receipt of process are insufficient to rebut the presumption of proper service created by the affidavit of the plaintiff's process server and to require a traverse hearing. See *US Bank N.A. v Tate*, 102 AD3d 859; *Stevens v Charles*, 102 AD3d 763; *Irwin Mtge. Corp. v Devis*, 72 AD3d 743; *Beneficial Homeowner Serv. Corp. v. Girault*, 60 AD3d 984.

A defendant who fails to swear to specific facts to rebut the statements in the process server's affidavit is not entitled to a hearing on the issue of service. See *Chichester v Alal-Amin Grocery & Halal Meat*, 100 AD3d 820; *Bank of NY v. Espejo*, 92 AD3d 707; *US Natl. Bank Assn. v Melton*, 90 AD3d 742; *Countrywide Home Loans Servicing, LP v. Albert*, 78 AD3d 983. Here the process server provided a detailed description of the person with whom he left service of process, including the date and time, and Defendant's contentions are completely inadequate to require a traverse hearing. Plaintiff does not argue that there is excusable neglect or a meritorious defense to the foreclosure action that has been proceeding against real property that is not her residence. Accordingly, the cross motion (003) is in all respects denied. The Plaintiff's motion for confirmation of the report of the referee is granted (002) to the extent the court has independently evaluated the amounts presently due under the note as provided in the order above, and the Plaintiff shall have judgment of foreclosure and sale. (002).

The foregoing shall constitute the decision and order of the court.

Dated: January 8, 2019

  
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 JOHN H. ROUSE, Acting J.S.C.

FINAL DISPOSITION