Deutsche Bank Natl. Trust Co. v Olivier
2019 NY Slip Op 32150(U)
May 20, 2019
Supreme Court, Queens County
Docket Number: 708329/16
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Deutsche Bank National Trust Company as Trustee for Morgan Stanley Mortgage Loan Trust 2004-6AR Mortgage Pass-Through Certificates Series 2004-6AR,

Plaintiff,

- against -

Gladys Olivier, et.al.,

Defendants.

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Index Number: 708329/16

Motion Date: 5/6/19

Motion Seq. No.: 3

The following papers numbered 1 to 9 read on this motion by defendant, Gladys Olivier, to dismiss.

	Papers Numbered
Notice of Motion-Affirmation-Affidavit-Exhibits.....	1-5
Affirmation in Opposition-Exhibits.....	6-7
Memorandum of Law.....	8
Reply.....	9

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by Olivier in this mortgage foreclosure action to dismiss the complaint, pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction, and pursuant to CPLR 3211(a)(10) for failure of plaintiff to join an indispensable party defendant is granted.

The record on this motion and the companion motion by plaintiff for a default judgment and order of reference (motion sequence #2) reflect that title to the subject property securing the loan that is the subject of the present foreclosure action was acquired by defendant Gladys Olivier and her husband, Wilner Olivier, on April 20, 1988. The original deed erroneously set forth the last name of said owners as "Oliver", so a correction deed was recorded on January 28, 2004 reflecting the correct name of the owners as "Olivier", presumably attendant to Wilner Oliver's mortgage loan application that is the subject of this foreclosure action.

It is undisputed that Wilner Olivier obtained a loan from the loan originator, M.L. Moskowitz & Co., Inc., d/b/a/ Equity Now, on January 29, 2004 in the principal amount of $216,000.00, and executed a note on said date. Defendant Gladys Olivier did not execute the note and, consequently, Wilner Oliver was the sole obligor on the loan. The mortgage also sets forth only Wilner Olivier as the borrower, but is executed by Wilner Olivier on his own behalf and as attorney-in-fact for Gladys Olivier, whose name is printed on the signature line as a borrower. Wilner Olivier, besides signing his own signature, also signed Gladys Oliver's name. No power of attorney executed by Gladys Olivier granting Wilner Olivier the power and authority to execute the mortgage on her behalf is annexed to the moving or opposition papers of either motion. However, Galdys Olivier does not deny, either in her affidavit in support of her motion to dismiss or in her proposed answer, that she did not grant her husband the authority to sign the mortgage on her behalf as her attorney-in-fact, and her subsequent actions demonstrate that she ratified the signature of her name as written by her husband on the mortgage as her signature. Indeed, she does not argue that her husband took out the loan without her knowledge or consent and does not argue that she did not authorize him to sign the mortgage on her behalf. Therefore, it is undisputed that defendant Gladys Olivier signed the mortgage and agreed thereby that although she did not have any obligation under the note to repay the loan, she agreed nevertheless that the loan may be secured by the subject property and her undivided interest therein. The record on both plaintiff's motion for a default judgment and order of reference and Olivier's instant motion to dismiss is that mortgage was assigned by the originator to plaintiff's predecessor in interest, J.P. Morgan Chase Bank, N.A., on October 30, 2014.

It is also undisputed that the subject property was never occupied by either Gladys Olivier or Wilner Olivier. The unrebutted averment of Olivier is that the property was occupied by her mother and sister. It is also undisputed that Wilner Olivier died on September 17, 2012 and that defendant Gladys Olivier continued making the mortgage loan installment payments in her name thereafter until June 1, 2014. This foreclosure action was commenced on July 15, 2016.

Olivier appeared for a foreclosure settlement conference in the Foreclosure Settlement Conference Part on February 20, 2018. Olivier appeared for the conference pro se and requested to assume the debt so she could apply for a loan modification. The conference was adjourned to April 24, 2018 for plaintiff to consider, at the direction of the Court Attorney-Referee, a loan modification. On April 24, 2018, Olivier filed a pro se answer, with the assistance in its preparation of her now counsel, Legal Services for the Elderly in Queens, which answer contained the affirmative defense

of lack of personal jurisdiction, and Queens Legal Services for the Elderly thereafter, on the same day, April 24, 2018, filed a notice of appearance on behalf of Olivier and served both the answer and the notice of appearance upon plaintiff's counsel also on said date.

The matter was further adjourned for a status conference to August 22, 2018. On May 1, 2018, plaintiff's counsel mailed a notice of rejection of Olivier's answer upon the ground that the answer was untimely. Notwithstanding that the answer and notice of appearance of Queens Legal Services for the Elderly were mailed together to plaintiff's counsel by Olivier's counsel, Queens Legal Services for the Elderly, the notice of rejection was mailed by plaintiff's counsel to Olivier at the address of the subject property, 111-27 126th Street, South Ozone Park, NY, instead of to her counsel at counsel's address. Olivier, nevertheless, through her counsel, proceeded to submit a loss mitigation application to plaintiff on July 5, 2018. On August 22, 2018 the matter was further adjourned for a final status conference to October 19, 2018, at which the case was released and plaintiff was directed to proceed with an application for an order of reference. Plaintiff had denied Olivier's request for an assignment of the loan to her as the debtor's surviving spouse upon the ground that she did not reside at the subject property and, consequently, denied her application for a loan modification, since she was not the debtor.

Plaintiff then moved for a default judgment and an order of reference on December 26, 2018, and Olivier moved by way of the instant separate notice of motion to dismiss the complaint or, in the alternative, for leave to serve a late answer.

It is averred in the affidavit of service of the summons and complaint upon Gladys Oliver that she was served by substituted service by personal delivery to a person of suitable age and discretion, one "Mary Doe", listed as a "co-occupant", at 111-27 126th Street, South Ozone Park, NY 11420, which address is set forth in the affidavit of service as "defendant's actual place of residence", on July 22, 2016 at 11:40 am. Defendant Gladys Oliver avers in her affidavit in support of the instant motion that she was never served with a copy of the summons and complaint and was unaware of the foreclosure action until she received plaintiff's notice of motion for a default judgment. She also avers that since she purchased the subject premises in 1988, she has lived at 114-19 126th Street, South Ozone Park, not the subject property, has not slept at the subject premises and that her mailing address where she receives all of her billing statements, and her address listed on her driver's license, is 114-19 126th Street. She avers that the only occupants of the subject property are her 102-year-old mother and 72-year-old sister, and "maybe" the male tenant who lives in the upstairs apartment, none of whom fits the description set forth

in the affidavit of service of the person purportedly served as being a black female 40-49 years old.

Pursuant to CPLR 308(2), substituted service requires delivery of the pleadings to a person of suitable age and discretion "at the actual place of business, dwelling place or usual place of abode" of the defendant and by mailing a copy thereof to the defendant at her "last known residence" or "actual place of business". It is undisputed that the subject premises where the summons and complaint were purportedly served upon Olivier by substituted service is not, and was not, her residence or place of business.

Indeed, the predicate notice of default to Gladys Olivier was mailed to her by Chase on August 5, 2014 at the 114-19 126th Street address that is her home address. Plaintiff relies upon this notice of default as the condition precedent for the commencement of the foreclosure action. The complaint also states that Wilner Olivier died on or about September 17, 2012, information that was clearly obtained by plaintiff's counsel via Wilner Oliver's death certificate, as said death certificate is annexed to plaintiff's motion for a default judgment and order of reference, and which information was known to plaintiff's predecessor, Chase, and transmitted to plaintiff, since Chase also mailed to the subject property a notice of default and a 90-day notice to cure, both dated August 5, 2014, to the "Estate of Wilner Oliver". Both of these notices are annexed to plaintiff's moving papers and referenced in plaintiff's counsel's affirmation in support of the motion. The death certificate, provided by plaintiff in support of its motion, sets forth the address of both Wilner Olivier and Gladys Olivier as 114-19 126 Street, South Ozone Park. Thus, both Chase and plaintiff knew, prior to commencement of this action, that defendant Gladys Olivier and the decedent Wilner Olivier did not reside at the subject property but lived at the 114-19 126th Street address. Plaintiff further admitted that it knew that defendant Olivier did not reside at the subject property when, pursuant to a letter by its counsel to her present counsel dated July 30, 2018, it denied her request to assume the loan upon the ground that she did not reside at the subject property.

It is thus undisputed that defendant Olivier was not served with the summons and complaint in accordance with CPLR 308. Consequently, plaintiff never acquired personal jurisdiction over her.

Plaintiff's counsel's only argument in reply to Olivier's opposition to plaintiff's motion and in opposition to Olivier's motion to dismiss upon the ground of lack of personal jurisdiction is that she waived her defense of lack of personal jurisdiction by failing to move for dismissal under CPLR 3211(a)(8) within 30 days after the initial foreclosure conference, as required pursuant to

CPLR 3408(m), and failing to interpose a timely answer within the time period required pursuant to CPLR 320 (her proposed answer that was filed and served having been rejected as untimely), and therefore, that personal jurisdiction over her was established, pursuant to CPLR 320(b), by virtue of her counsel filing a notice of appearance without moving for dismissal under CPLR 3211(a)(8) or interposing an answer. Counsel's argument is without merit.

CPLR 3211(e) provides that a defense based upon CPLR 3211(a)(8) "is waived if a party moves on any of the grounds set forth in subdivision (a) without raising such objection or if, having made no objection under subdivision (a), he or she does not raise such objection in the responsive pleading". Olivier did not previously move for dismissal under other CPLR 3211(a) grounds and fail to include (a)(8), and did not interpose an answer and fail to include personal jurisdiction as an affirmative defense in her answer. Thus, Olivier did not waive her defense of personal jurisdiction through the omission of such defense in either a pre-answer motion to dismiss that was made or in her answer. Moreover, there is no point at which a motion to dismiss based upon lack of personal jurisdiction is "untimely". Olivier's time to move for dismissal under CPLR 3211(a)(8) has not expired because CPLR 3211(e) provides that a 3211(a) motion may be made "[a]t any time before service of the responsive pleading is required". Pursuant to CPLR 320(a), the responsive pleading, i.e, the answer, is required to be interposed within 30 days after service is complete where service was effected by substituted service under CPLR 308(2), the method of service averred in the affidavit of service, and service is complete under CPLR 308(2) 10 days after proof of service is filed with the Clerk of the Court.

Since plaintiff was incontrovertibly not served with the summons and complaint in accordance with the requirements of CPLR 3211(a)(2), no responsive pleading was required at all. Indeed, in most cases, an allegation that the defendant was not served and, therefore, that the plaintiff never acquired personal jurisdiction over the defendant is a traversable claim, made in the context of a motion to dismiss, and quite commonly, such a motion is made years after the defendant's time to answer has expired and, very frequently, after a default judgment has been issued against the defendant. There is no deadline for making such a motion, since a defendant cannot be precluded from seeking dismissal upon the ground that she did not move within the time frame required to respond to a complaint that she alleges she was never served with. In this case, it is undisputed that plaintiff did not serve Olivier as required under CPLR 308 and, therefore, that it did not, in fact, acquire personal jurisdiction over her. Consequently, there is no factual issue of service to be determined at a traverse hearing, and the action must be dismissed for lack of personal jurisdiction, as a matter of law.

Plaintiff's counsel also entirely misconstrues CPLR 3408(m). That provision merely extends the deadline for service of an answer by the defendant in a foreclosure action from either the 20 or 30 days after service of the summons and complaint pursuant to CPLR 320 to 30 days after his or her initial appearance at a foreclosure settlement conference mandated under CPLR 3408. This provision was added in recognition of the common scenario where a defendant appears, usually pro se, for the conference without having served an answer within the time frame of CPLR 320 and participates in the conference only to be subsequently confronted with a motion for a default judgment of foreclosure.

In the ordinary case, where a defendant has not interposed a timely answer and is thus in default, his or her remedy would be to seek leave of the court, pursuant to CPLR 3012(d), to serve a late answer and compel the plaintiff to accept a late answer, in the interest of justice, which motion may be brought either by way of a notice of motion or as a cross-motion to the plaintiff's motion for a default judgment, or if a default judgment has already been issued, to move pursuant to CPLR 5015(a) to vacate the default judgment and for leave to interpose a late answer, upon a showing of a reasonable excuse for the default and a meritorious defense. In either case, however, personal jurisdiction is not contested. There is no language in CPLR 3408(m) taking away the right of a defendant to contest personal jurisdiction where the defendant alleges that he or she was not served with the summons and complaint and, consequently, that the plaintiff never acquired personal jurisdiction over the defendant.

The only scenario where the failure to interpose an answer (containing a personal jurisdiction defense) or to move to dismiss for lack of personal jurisdiction effects a waiver of the defense is where the defendant's attorney files and serves a notice of appearance, by which, under CPLR 320, the defendant submits to personal jurisdiction. In this regard, plaintiff's counsel also argues that since Olivier's answer was untimely and was rejected, as it was not served within 30 days after her initial foreclosure settlement conference, the filing of the notice of appearance by Queens Legal Services for the Elderly on April 24, 2018, in the absence of an answer, effected a waiver of her personal jurisdiction defense pursuant to CPLR 320(b). Counsel cites in support of this argument, inter alia, the case of American Home Mortgage Servicing, Inc. v Arklis (150 AD 3d 1180 [2nd Dept 2017]) in which the defendant waived her defense of lack of personal jurisdiction when her attorney filed a notice of appearance on the date of the foreclosure conference without, at that time, also asserting lack of personal jurisdiction in either an answer or a motion to dismiss.

As this Court has noted, Olivier's counsel served the answer,

which contains the affirmative defense of lack of personal jurisdiction, together with the notice of appearance on April 24, 2018. Although the answer was filed and served more than 30 days after the initial foreclosure conference on February 20, 2018 and thus was untimely even under the extended time afforded by CPLR 3408(m), plaintiff waived the untimeliness of the answer by not properly rejecting it.

Defendant's counsel filed a notice of appearance and served the notice of appearance and the answer upon plaintiff's counsel on April 24, 2018. Even though plaintiff's counsel was served with a notice of appearance by Queens Legal Services for the Elderly, counsel, nevertheless, as is set forth in counsel's affirmation of service of the notice of rejection, mailed the notice of rejection of the answer as untimely to Gladys Olivier herself at the address of the subject property, and not to her counsel at their office. Pursuant to CPLR 2103(b), papers to be served in a pending action upon a party shall be served upon the party's attorney either personally or by mail to the attorney at the attorney's office. Therefore, Olivier's answer was never properly rejected. That the answer was filed pro se does not alter this Court's analysis.

Although Olivier filed her answer pro se on the morning of April 24, 2018, her counsel filed their notice of appearance on her behalf and served the notice of appearance together with the answer in the afternoon of the same day. Thus, since Olivier was represented by counsel when plaintiff's counsel was served with her answer, the objection to the answer as being untimely was required to be made to Olivier's counsel. Moreover, not only was the notice of rejection ineffective because it was not served upon Olivier's attorney, it was ineffective, even had a notice of appearance not been filed, because it was not served upon Olivier at her address, but was mailed to her at the address of the subject property.

Plaintiff's counsel was well aware that Olivier did not reside at the subject property but resided at 114-19 126th Street. Although respective counsel do not make such observations, this Court notes, in reading the mortgage, that the mortgage contains a clause in which the mortgagor agrees to reside at the subject property for at least one year after the closing of the loan and an attendant clause wherein it is agreed that the address for the giving of notices to the mortgagor is the address of the subject property unless the mortgagor notifies the mortgagee of a different address. However, these appear to be mere generic boilerplate clauses that were not applicable to the subject loan, since the record reflects that plaintiff and plaintiff's predecessors in interest were aware that neither the now-deceased borrower nor his spouse, Gladys Olivier, resided at the subject property. Indeed, the predicate notice of default was mailed to Gladys Olivier at her address at 114-19 126th Street, thus constituting an acknowledgment

by plaintiff's predecessor, and by plaintiff that commenced this foreclosure action based upon that notice of default, that 114-19 126th Street was the address for service of notices upon Olivier, not the address of the subject property.

Thus, since no objection to the timeliness of the answer was properly given, and since plaintiff did not make the companion motion for a default judgment and order of reference until eight months after plaintiff served and filed her answer, plaintiff waived the untimeliness of the answer (see, e.g., Hosten v Oladapo, 44 AD 3d 1006 [2nd Dept 2007] [plaintiff's failure to reject the answer in a timely manner did not effect a waiver of the late service of the answer where plaintiff moved for a default judgment prior to the service of the answer). Thus, the answer served on April 24, 2018 is deemed timely and the notice of rejection thereof is a nullity. Consequently, since an answer containing the affirmative defense of lack of personal jurisdiction was served together with the notice of appearance, there was no waiver of the defense of lack of personal jurisdiction.

Even if, arguendo, Olivier had waived the defense of personal jurisdiction, the action must still be dismissed pursuant to CPLR 3211(a)(10) for failure of plaintiff to join an indispensable party. This court notes that, pursuant to CPLR 3211(e), a motion under CPLR 3211(10) may be made at any time. Even if Olivier were served with the summons and complaint and either failed to interpose a timely motion under CPLR 3211(a) or to interpose a timely answer, or if she had moved to dismiss under some other provision of CPLR 3211(a) or had answered and did not include an affirmative defense of failure to join a necessary and indispensable party, Olivier was not precluded from moving for dismissal under CPLR 3211(a)(10) at this or any other time.

Even though Wilner Olivier was the only signatory to the note and thus the only obligee, and even though the predicate notice of default and 90-day notice were mailed to the "Estate of Wilner Olivier" at the address of the subject property, this action was commenced solely against Gladys Olivier. Plaintiff's counsel argues that plaintiff need only have commenced the action against Gladys Olivier because sole title to the property devolved to her by operation of law upon her spouse's death and since plaintiff seeks to foreclose upon the property, Wilner' Olivier's estate is not a necessary party since it has no interest in the property. Plaintiff's counsel is partially correct to the extent of his recitation of the law concerning the devolution of property to the surviving spouse.

A conveyance of real property to a husband and wife creates a tenancy by the entirety unless otherwise specified in the deed (see Estates, Powers and Trusts law §6-2.2[b]). Since each spouse owns

title to the property in its entirety, when one spouse dies, the entire title to the property automatically devolves to the surviving spouse (see Schiller v. Schiller, 80 AD 2d 164 [3rd Dept 1981]). Upon Wilner Olivier's death, title to the subject property reverted to Gladys Olivier alone and therefore the property is not part of Wilner Olivier's estate.

This Court also notes, and plaintiff's counsel acknowledges, that the personal representative of the estate of a deceased mortgagor need not be joined in a foreclosure action where the complaint does not seek a deficiency judgment against the estate (see Financial Freedom Sr. Funding Corp. v. Rose, 64 AD 3d 539 [2nd Dept 2009]). However, the complaint does seek a deficiency judgment. It specifically requests that "[t]he obligors may be adjudged to pay any deficiency which may remain after applying all of said monies so applicable thereto unless the obligors were discharged in bankruptcy." Since the sole obligor under the note was Wilner Olivier, the demand in the complaint seeking a deficiency judgment against the obligor asserts a cause of action against his estate, which thus was not only a necessary, but indispensable party.

Accordingly, the motion is granted and the action is dismissed. Consequently, this Court need not reach and will not determine the remaining grounds for the motion, and the alternative branch of the motion for leave to serve a late answer is moot.

Dated: May 20, 2019

KEVIN J. KERRIGAN, J.S.C.

FILED
MAY 22 2019
COUNTY CLERK
QUEENS COUNTY