

Wells Fargo Bank, N.A. v Sewer
2019 NY Slip Op 33597(U)
December 4, 2019
Supreme Court, New York County
Docket Number: 850001/2010
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH

PART IAS MOTION 32

Justice

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INDEX NO. 850001/2010

WELLS FARGO BANK, N.A. SUCCESSOR BY MERGER TO WELLS FARGO HOME MORTGAGE, INC.,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 005

- v -

DOUGLAS E. SEWER, INDIVIDUALLY AND AS SURVIVING JOINT TENANT OF JOSEPH K. SEWER, ADVANTAGE ASSETS II INC., DEPARTMENT OF HOUSING PRESERVATION & DEVELOPMENT, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, RIVERWALK HOLDINGS LTD., WELLS FARGO BANK, N.A., ADELINE LOPES, CINQUE SAUNDERS, DAVID S. HARGRETT, DR. GREG BROWN, DR. LESLIE CHASE,

DECISION + ORDER ON MOTION, ORDER OF REFERENCE

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 258, 263

were read on this motion to/for JUDGMENT - SUMMARY

The motion by plaintiff for summary judgment is granted and the cross-motion by defendant Sewer to dismiss is denied.

In this foreclosure matter, plaintiff seeks to foreclose on a Consolidated Note and Consolidated Mortgage worth \$910,000 relating to a property located at 81 West 119th Street in Manhattan. Plaintiff claims that Sewer stopped making his monthly payments in February 2009.

In opposition and in support of his cross-motion, Sewer claims that he was not served properly, plaintiff failed to send the RPAPL 1304 notice and that plaintiff failed to mail the default notice required under the terms of the mortgage.

In opposition to the cross-motion, plaintiff argues that Sewer waived his personal jurisdiction claims by not making a timely motion to dismiss. Plaintiff points out that Sewer raised the defense of improper service in his Second Answer dated March 27, 2017 but did not seek affirmative relief on this basis until the instant cross-motion was filed on May 1, 2019. Plaintiff also maintains that it served Sewer with the RPAPL 1304 and mortgage default notices.

The Court grants the motion. Plaintiff correctly argues that Sewer did not timely move to dismiss based on lack of proper service within 60 days as required by CPLR 3211(e). Therefore, that argument was waived and cannot be raised in the instant motion. Moreover, plaintiff established that it sent the RPAPL 1304 and default notices through the Penno affidavit (NYSCEF Doc. No. 189, ¶¶ 15, 16). Mr. Penno details how records were kept to document that these notices were sent and attaches exhibits that purport to demonstrate that the notices were sent (*see* NYSCEF Doc. Nos. 196). Sewer's bare denial that he did not receive these documents is not enough to compel the Court to grant his cross-motion.

And, as plaintiff observes, the fact that the U.S. Postal Service's electronic records do not show the notices were mailed is of no moment because those records are only kept for two years. The notices in this case were mailed nearly a decade ago—therefore, the lack of tracking information for these notices is not fatal to plaintiff's motion.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment is granted and the answer, affirmative defenses and counterclaims of defendant Douglas E. Sewer are severed and dismissed; and it is further

ORDERED that the cross-motion by defendant Sewer is denied; and it is further

ORDERED that plaintiff is awarded a default judgment against the non-appearing defendants; and it is further

ORDERED that Richard O. Tolchin with an address of 2 Overlook Road-Suite 1B2, White Plains, NY 10605 914-949-7770 is hereby appointed Referee in

accordance with RPAPL § 1321 to compute the amount due to Plaintiff and to examine whether the tax parcel can be sold in parcels; and it is further

ORDERED that the Referee shall hold no hearing and take no testimony or evidence other than by written submission; the Court is the ultimate arbiter and the Referee's report is merely an advisory finding; and it is further

ORDERED that by accepting this appointment the Referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that, pursuant to CPLR 8003(a), and in the discretion of the court, a fee of \$350 shall be paid to the Referee for the computation of the amount due and upon the filing of his report and the Referee shall not request or accept additional compensation for the

computation unless it has been fixed by the court in accordance with CPLR 8003(b); and it is further;

ORDERED that the Referee is prohibited from accepting or retaining any funds for himself or paying funds to himself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that plaintiff shall forward all necessary documents to the Referee and to defendants who have appeared in this case within 30 days of the date of this order and shall *promptly* respond to every inquiry made by the referee (promptly means within two business days); and it is further

ORDERED that if defendant(s) have objections, they must submit them to the referee within 14 days of the mailing of plaintiff's submissions; and include these objections to the Court if opposing the motion for a judgment of foreclosure and sale; and it is further

ORDERED the failure by defendants to submit objections to the referee shall be deemed a waiver of objections before the Court on an application for a judgment of foreclosure and sale; and it is further

ORDERED that plaintiff must bring a motion for a judgment of foreclosure and sale within 30 days of receipt of the referee's report; and it is further

ORDERED that if plaintiff fails to meet these deadlines, then the Court may *sua sponte* vacate this order and direct plaintiff to move again for an order of reference and the Court may *sua sponte* toll interest depending on whether the delays are due to plaintiff's failure to move this litigation forward; and it further

ORDERED that John Doe #1 (Name Refused) is added to the caption, and the caption shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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WELLS FARGO BANK, N.A. SUCCESSOR BY
MERGER TO WELLS FARGO HOME
MORTGAGE, INC.,
Plaintiff,

v.

DOUGLAS E. SEWER, INDIVIDUALLY AND AS
SURVIVING JOINT TENANT OF JOSEPH K.
SEWER, ADVANTAGE ASSETS II
INC., DEPARTMENT OF HOUSING
PRESERVATION & DEVELOPMENT, NEW YORK
CITY ENVIRONMENTAL CONTROL BOARD,
NEW YORK CITY PARKING VIOLATIONS
BUREAU, NEW YORK CITY TRANSIT
ADJUDICATION BUREAU, RIVERWALK
HOLDINGS LTD., WELLS FARGO BANK, N.A.,
ADELINE LOPES, CINQUE SAUNDERS, DAVID
S. HARGRETT, DR. GREG BROWN, DR. LESLIE
CHASE, JOHN DOE #1 (NAME REFUSED),

Defendant(s).
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and it is further

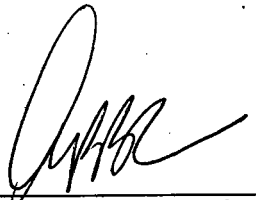
ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being substituted and removed pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh)); and it is further

ORDERED that Plaintiff shall serve a copy of this Order with notice of entry on all parties and persons entitled to notice, including the Referee appointed herein.

Next Conference: April 21, 2020 @ 2:15 p.m. If a motion for judgment of foreclosure and sale has been filed, plaintiff may seek an adjournment of the conference. Please consult this part's rules for information on how to obtain an adjournment. If a motion has been made, then a conference is required to explore the reasons for the delay.

12/4/19
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE