

NYCTL 2014-A Trust v Stillman
2019 NY Slip Op 33713(U)
November 18, 2019
Supreme Court, Kings County
Docket Number: 505233/2015
Judge: Mark I. Partnow
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At an IAS Term, Part FRP 2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of November, 2019.

P R E S E N T:

HON. MARK I. PARTNOW,

Justice.

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NYCTL 2014-A TRUST and THE BANK OF NEW YORK
MELLON as Collateral Agent and Custodian for the NYCTL
2014-A TRUST,

Plaintiffs,

- against -

MS#3 & MS#2

Index No. 505233/2015

JOSEPH STILLMAN, MINNA KOTKIN, IF LIVING AND IF HE/SHE BE DEAD, ANY AND ALL PERSONS UNKNOWN TO PLAINTIFFS, CLAIMING, OR WHO MAY CLAIM TO HAVE AN INTEREST IN, OR GENERALLY OR SPECIFIC LINE UPON THE REAL PROPERTY DESCRIBED IN THIS ACTION ; SUCH UNKNOWN PERSONS BEING HEREIN GENERALLY DESCRIBED AND INTENDED TO BE INCLUDED IN THE FOLLOWING DESIGNATION , NAMELY, THE WIFE, WIDOW, HUSBAND, WIDOWER, HEIRS AT LAW, NEXT OF KIN, DISTRIBUTEES, DESCENDANTS, EXECUTORS, ADMINISTRATORS, DEVISEES, LEGATEES, CREDITORS, TRUSTEES, COMMITTEES, LIENORS, SUCCESSORS IN INTEREST AND ASSIGNEES OF SUCH DECEASED , ANY AND ALL PERSONS DERIVING INTEREST IN OR LIEN UPON , OR TITLE TO SAID REAL PROPERTY BY , THROUGH OR UNDER THEM , AND THEIR RESPECTIVE WIVES, WIDOWS, HUSBANDS, WIDOWERS, HEIRS AT LAW, NEXT OF KIN, DISTRIBUTEES, DESCENDANTS, EXECUTORS, ADMINISTRATORS, DEVISEES, LEGATEES, CREDITORS, TRUSTEES, COMMITTEES, LIENORS, SUCCESSORS IN INTEREST, AND ASSIGNS, ALL OF WHOM AND WHOSE NAMES, EXCEPT AS STATES , ARE UNKNOWN TO PLAINTIFFS , NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU AND "JOHN DOE NO. 1" THROUGH "JOHN DOE NO. 100" INCLUSIVE, THE NAMES OF THE LAST 100 DEFENDANTS BEING FICTITIOUS , THE TRUE NAMES OF SAID DEFENDANTS BEING UNKNOWN TO PLAINTIFF , IT

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BEING INTENDED TO DESIGNATE FEE OWNERS , TENANTS, OR OCCUPANTS OF THE LIENED PREMISES AND /OR PERSONS OR PARTIES HAVING OR CLAIMING AN INTEREST IN OR A LIEN UPON THE LIENED PREMISES , IF THE AFORESAID INDIVIDUAL DEFENDANTS ARE LIVING, AND IF ANY OR ALL OF SAID INDIVIDUAL DEFENDANTS BE DEAD , THEIR HEIRS AT LAW, NEXT OF KIN, DISTRIBUTEES, EXECUTORS, ADMINISTRATORS, TRUSTEES, COMMITTEES, DEVISEES, LEGATEES, AND THE ASSIGNEES, LIENORS, CREDITORS AND SUCCESSORS IN INTEREST OF THEM, AND GENERALLY ALL PERSONS HAVING OR CLAIMING UNDER , BY, THROUGH, OR AGAINST THE SAID DEFENDANTS NAMES AS A CLASS , OF ANY RIGHT, TITLE, OR INTEREST IN OR LIEN UPON THE PREMISES DESCRIBED IN THE COMPLAINT ,

Defendants.

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The following papers numbered 1 to 8 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavit (Affirmation) _____
Reply Affidavit (Affirmation) _____

1-3 4-5
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7-8

Upon the foregoing papers in this tax lien foreclosure action, plaintiffs NYCTL 2014-A Trust and The Bank of New York Mellon as Collateral Agent and Custodian for the NYCTL 2014-A Trust (collectively, NYCTL) seek an order appointing a referee to ascertain and compute the amounts due to plaintiff, deeming service timely, nunc pro tunc, upon Minna Kotkin pursuant to CPLR 308(2), amending the caption, and relieving the appointed Guardian Ad Litem. Defendant, Minna Kotkin (Kotkin) cross-moves, pursuant to CPLR 3215(c) and CPLR 306-b, for an order dismissing the complaint.

Background

The Tax Lien Foreclosure Action

On April 30, 2015, NYCTL commenced this action to foreclose, based upon a tax lien assigned to it by the City of New York, upon the property at 188 Freeman Street in Brooklyn, New York (Block 2513, Lot 15) by filing a summons, complaint and notice of pendency. Kotkin and defendant Joseph Stillman (Stillman) have been the fee owners of the property since 1999.

On or about August 6, 2014, NYCTL became the owner of certain tax and other NYC liens, as evidenced by an August 6, 2014 Tax Lien Certificate #3A (the Tax Lien Certificate), with an alleged principal balance of \$24,572.01 as of May 16, 2014 (Tax Lien). NYCTL alleges that it is entitled to foreclose upon the Tax Lien because “Defendants Joseph Stillman and Minna Kotkin (collective defendants) have failed to pay the semi-annual interest which has accrued on the tax lien balance on or before February 16, 2015, more than seven months after the sale of the tax lien.”

Stillman was purportedly served pursuant to CPLR 308(2) on June 6, 2015, by delivering the summons and complaint on John Doe, a co-occupant, at 145 Seaman Ave, apartment 4F, New York, New York (Seaman property) and a copy of same was mailed to Stillman at the Seaman property on June 15, 2015. Thereafter, on January 16, 2017, NYCTL moved by motion sequence one to extend time to serve Kotkin and to direct service by alternative means. The motion was heard on April 4, 2017, and was granted upon the collective defendants default. A long form order was issued on April 17, 2017 appointing Alan J. Firestone as Kotkin’s guardian ad litem

and requiring NYCTL to publish the summons in the Home Reporter and the Brooklyn Daily Eagle for four consecutive weeks. A duplicate original order dated April 17, 2017, was scanned into NYSCEF on July 19, 2018.¹ An affidavit of service was filed indicating that the supplemental summons was published in the newspapers on August 3rd, 10th, 17th and 24th. Thereafter, on November 13, 2018, NYCTL filed an affidavit of service purporting to serve the summons and complaint upon Alisa Adolph, Kotkin's co-worker, at 111 Livingston Street on October 30, 2018. On November 26, 2018, NYCTL filed its instant motion for an order of reference and Kotkin filed her cross-motion to dismiss.

NYCTL's Motion

NYCTL filed its instant motion for an order of reference on November 26, 2018. As part of the relief, NYCTL seeks to deem personal service upon Kotkin timely, nunc pro tunc. NYCTL contends that the delay is not significant and resulted in no prejudice to any of the defendants. NYCTL argues that it demonstrated good cause for the extension of time to serve Kotkin. Furthermore, NYCTL argues that since Kotkin has been located and served, Alan J. Firestone the Court appointed guardian ad litem should be relieved from his appointment. In support of their argument that a referee should be appointed to compute the amounts due, NYCTL produces the Tax Lien Certificate with an affidavit from Kurt Shadle (Shadle), the managing director of Tower

¹ The Court only issues duplicate original orders when a party checks on the status of an order and the Court's case management system indicates that an order was issued and entered into the case management system but the order has not been scanned. Under such circumstances, a duplicate original order will be issued and sent to E-file for scanning.

Capital Management, LLC (Tower). Shadle attests that the collective defendants are in default in payment of real estate taxes on the subject property.

Kotkin's Cross-Motion

Kotkin moves, in motion sequence 3, to dismiss the action pursuant to CPLR 306-b and 3215(c). In her affidavit, Kotkin states that she never received any notification from the City that a lien would be filed for unpaid water or sewer charges. Kotkin avers that the first notice she received of the instant action was when she was mailed NYCTL's moving papers that were postmarked November 21, 2018, nearly three and a half years after commencement. Kotkin states that neither she nor Stillman ever resided at the subject property or at 120 Kane Street (Kane property), the two locations service was attempted. Kotkin contends that the subject property is uninhabitable and has been empty for nearly ten years as it has been surrounded by a construction shed for that period of time.

Kotkin further avers that she never received the papers purportedly delivered to her co-worker on October 30, 2018. She argues that NYCTL's claim that it should be excused for the delay in serving her due to difficulties in finding her is absurd as she has been a professor of law at Brooklyn Law School and can be located "with a five second Google search." Additionally, she contends that the delay is significant and prejudicial as interest has been accruing for the entire period as well as attorneys' fees due to unnecessary proceedings.

Kotkin also disputes that Stillman was served with the complaint in this action. She argues that even if service was made on Stillman, the action should nevertheless be dismissed pursuant

to CPLR 3215(c) since nearly four years have passed since the purported service upon Stillman and NYCTL failed to show good cause for their delay.

NYCTL's Opposition to Cross-Motion

In response to Kotkin's cross-motion, NYCTL contends that it has secured personal jurisdiction over the collective defendants. NYCTL also argues that Kotkin has no standing to claim lack of personal jurisdiction on behalf of Stillman as the cross-motion was not supported by an affidavit from Stillman himself and Kotkin cannot raise the defense on behalf of a co-defendant. In any event, NYCTL argues that service was proper on both Stillman and Kotkin. NYCTL asserts that service was proper upon Kotkin since service by publication was granted by the Court and is a valid and widely recognized method of service. Additionally, NYCTL contends that after service by publication was complete, it directed a process server to serve her personally again.

NYCTL claims that Kotkin was properly served pursuant to CPLR 308(5), 314 and 315 and thus dismissal pursuant to CPLR 306-b is unwarranted. NYCTL opines that it has provided good cause for the delay in effecting personal service upon Kotkin. NYCTL argues that the case law is very clear that the Court is without power to reduce the interest accruing on a New York City tax lien. In response to Kotkin's CPLR 3215(c) claim, NYCTL contends that dismissal is time-barred pursuant to CPLR 3215(a). NYCTL further argues that the action should not be dismissed as they have diligently maintained the action since it was commenced by filing motions

for service by publication and appointed a referee. Lastly, NYCTL states that they did not move for a default until personal jurisdiction was obtained over all interest parties.

Kotkin's Reply

In response, Kotkin asserts that she represents Stillman and attached an affidavit from Stillman. The Stillman affidavit states that he was never served with a copy of the complaint. First, Stillman points out that contrary to what is alleged in the affidavit of service, the Seaman property is located in Manhattan and not Brooklyn. Furthermore, Stillman avers that at the time he was purportedly served, he lived at the Seaman property alone and no one would have been in his apartment. Additionally, Stillman asserts that the building does not have a doorman and no one could have taken the complaint.

Discussion

“If service of the summons and complaint is not made upon a defendant within 120 days of commencement of the action, ‘the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service’” (*Nationstar Mortgage, LLC v. Wilson*, 2019 WL 5406721 [2d Dept. 2019][internal citations omitted]). “Good cause and interest of justice are two separate and independent statutory standards” (*id.*). “To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service” (*id.*).

The Court grants NYCTL’s motion to extend time to serve Kotkin as NYCTL established good cause for the delay in serving Kotkin by personal service. However, that

portion of NYCTL's motion to deem such service timely, nunc pro tunc, is denied as deeming Kotkin was properly served, retroactively, would be prejudicial since it would place her in default as of a date prior to this order (see *Khan v. Hernandez*, 122 AD3d 802, 803 [2d Dept 2014]). Thus, service will not be deemed complete as of October 5, 2018, the date the affidavit of service was filed. Rather, Kotkin must be afforded an additional 30 days after service of a copy of this decision and order to appear and answer (*id.*).

That portion of NYCTL's motion to relieve Alan J. Firestone, Esq. of his appointment as guardian ad litem, to amend the caption to substitute the plaintiff and to excise the John Doe defendants from the caption is granted, without opposition. The portion of NYCTL's motion to appoint a Referee is denied, without prejudice and with leave to renew once an answer is interposed by Kotkin or the time to do so expires.

The collective defendants' cross-motion to dismiss is denied in its entirety. The portion of Kotkin's motion alleging that Stillman was not properly served is denied. "Ordinarily, the affidavit of a process server constitutes a prima facie showing of proper service" (*Deutsche Bank Nat. Trust Co. v. Saketos*, 158 AD3d 610, 611 [2d Dept 2018][internal citations omitted]). "However, a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the process server's affidavit, and necessitates an evidentiary hearing" (*id.*). In support of the collective defendants' cross-motion, an affidavit from Stillman was not submitted and was only submitted in reply to NYCTL's

opposition to the cross-motion. Submitting an affidavit to dispute the facts in the process server's affidavit for the first time in reply is improper (*id.* at 612).

Furthermore, the collective defendants' motion to dismiss pursuant to CPLR 3215(c) is denied. "CPLR 3215(c) generally provides that if the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned..." (*Bank of America, NA v. Santos*, 175 AD3d 449, 450 [2d Dept 2019]). However, "[t]he failure to timely seek a default may be excused if sufficient cause is shown why the complaint should no be dismissed, which requires the plaintiff to proffer a reasonable excuse for the delay in timely moving for a default judgment and to demonstrate that the cause of action is potentially meritorious" (*id.*). The Court, in its discretion, finds that NYCTL's excuse is reasonable as moving for a default judgment prior to obtaining jurisdiction over all the defendants would inundate courts and require repetitive motion practice. Accordingly, it is hereby:

ORDERED that NYCTL's motion to amend the caption is granted, without opposition; and it is further

ORDERED that NYCTL's motion to relieve Alan J. Firestone as the guardian ad litem is granted, without opposition; and it is further

ORDERED that NYCTL's motion to extend the time to serve Kotkin is granted, and Kotkin is deemed served; and it is further

ORDERED that Kotkin's time to answer the complaint is extended for 30 days after service of a copy of this decision and order; and it is further

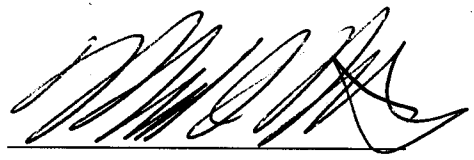
ORDERED that NYCTL's motion for the appointment of a referee is denied, without prejudice and with leave to renew; and it is further

ORDERED that the collective defendants' motion is denied in its entirety.

This constitutes the decision and order of the court.

A long form order to follow.

E N T E R,



J. S. C.

HON. MARK I PARTNOW
SUPREME COURT JUSTICE

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