

LaSalle Bank, N.A. v Ferrari
2019 NY Slip Op 33891(U)
February 10, 2019
Supreme Court, Suffolk County
Docket Number: 032699/2008
Judge: James Hudson
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**Supreme Court of the County of Suffolk
State of New York - Part XL**

PRESENT:

HON. JAMES HUDSON

Acting Justice of the Supreme Court

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LaSALLE BANK, NA, AS TRUSTEE FOR
WAMU MORTGAGE PASS-THROUGH
CERTIFICATE SERIES 2006-AR11,
Plaintiff,

INDEX NO.:032699/2008

**MOT. SEQ. NO.:002-Mot D; CASEDISP
003-Mot D
004-MD**

-against-

RAYMOND FERRARI; PATRICIA MURPHY;
WASHINGTON MUTUAL BANK;
SUMMERFIELD AT HOLTSVILLE
HOMEOWNERS ASSOCIATION, INC.;
HEATHERWOOD HOUSE AT PORT
JEFFERSON, LLC; VELOCITY INVESTMENTS,
LLC; BANK OF AMERICA, SHERMAN
ACQUISITION LIMITED PARTNERSHIP;
CAPITAL ONE BANK; STATE OF NEW YORK;
UNITED STATES OF AMERICA - INTERNAL
REVENUE SERVICE; NEW YORK STATE
DEPARTMENT OF TAXATION AND
FINANCE; "JOHN DOES" and "JANE DOES",
said names being fictitious, parties intended being
possible tenants or occupants of premises, and
corporations, other entities or persons who claim,
or may claim, a lien against the premises,

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Jefferson, LLC
1787 Veterans Memorial Highway
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Defendants.

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Upon the following documents numbered 1-44 read on these motions to Appoint a Referee (mot. seq. no.002); Dismissal (mot. seq. no.:003); and to Extend Time of Service (mot. seq. no.:004); (and after hearing counsel in support and opposed to the motion) it is,

ORDERED, that the Motion of the Plaintiff (seq. no.:002) which requests an order of reference to appoint a referee to compute the sums due and owing to the Plaintiff pursuant to RPAPL §1321 is denied; and it is further

ORDERED, that the request by Plaintiff that it be awarded default judgment against all Defendants pursuant to CPLR§3215 is denied; and it is further

ORDERED, that the request by Plaintiff that Defendant Raymond P. Ferrari be dropped from the action as he is no longer a necessary party and all papers and proceedings heretofore filed herein be deemed amended accordingly is granted; and it is further

ORDERED, that the request by Plaintiff that the caption be amended by striking the names of "John Does" and "Jane Does" is granted.

ORDERED, that the cross-motion of Defendant Patricia Murphy (seq. no.:003) ("Defendant") which requests an order pursuant to CPLR Rule 3211(a)(8) dismissing the Complaint against Defendant for lack of personal jurisdiction is granted; and it is further

ORDERED, that the request by Defendant that requests, in the alternative that the Complaint be dismissed against the Defendant pursuant to CPLR §3215(c) as default was not entered within one year is denied as moot.

ORDERED, that the motion by Plaintiff (seq. no.:004) which requests an order pursuant to CPLR §§306-b, 2004, extending the time for Plaintiff to serve Defendant Patricia Murphy with the summons, complaint, and any other initiatory documents that may be required is denied; and it is further

ORDERED, that the request by Plaintiff that, upon proof that Defendant Raymond Ferrari is deceased, the Court order the voluntary discontinuance of this action as against Raymond Ferrari is denied.

Case History

This is a matter seeking foreclosure and sale of residential real property situate in Holtsville, Town of Brookhaven, Suffolk County, New York. On July 31st, 2006 Mortgagor/Defendant Raymond P. Ferrari closed on a residential property loan secured by a Note and Mortgage on 58 Peach Tree Court, Holtsville, New York 11742, more particularly known and designated as D: 0200, S: 835.00, B: 05.00, L: 001.040 ("subject loan", "subject premises"). On December 11th, 2006, by Quit Claim Deed, Defendant Raymond P. Ferrari deeded the subject premises to himself and Defendant Patricia Murphy as joint tenants with rights of survivorship. On March 3rd, 2008 Defendant Raymond P. Ferrari died. On April 1st, 2008, the subject loan went into default, which default continues through the present. On May 20th, 2008 Plaintiff, apparently unaware of the earlier demise of the sole Mortgagor/Defendant, sent a Demand Letter Accelerating Debt to Defendant Raymond P. Ferrari, deceased. On August 27th, 2008 Plaintiff commenced the instant foreclosure action.

On October 1st, 2008 the Plaintiff served the summons and complaint upon Defendant Patricia Murphy by substituted service upon an individual whom the process server described as "Robert Murphy, brother" upon the filed Affidavit of Service. Plaintiff has not filed an affidavit of another service of process in this case upon Defendant Patricia Murphy. On November 15th, 2016, Plaintiff, in his motion seq. no.:004, (decided *infra.*), first requested an extension of time to make service upon Defendant Murphy.

On October 10th, 2008 the Plaintiff served the Summons and Complaint upon Defendant Raymond P. Ferrari by substituted service upon an individual whom the Process Server described as "Lila Ferrari, ex-wife" upon the filed Affidavit of Service. On August 15th, 2008, the subject mortgage was assigned to the Plaintiff; which assignment was recorded on July 31st, 2009.

On February 27th, 2009 the Plaintiff filed motion seq. no.:001 requesting an order of reference and the appointment of a Referee, which request was denied on August 14th, 2009 by the late Justice Costello. On September 22nd, 2014, the Plaintiff filed a motion (seq. no.:002) repeating its request for an order of reference and the appointment of a Referee and for additional relief. That motion is decided herein. On October 28th, 2014 a CPLR Rule 3408 foreclosure settlement conference was scheduled and the case released to the trial part. On December 22nd, 2014. Defendant Patricia Murphy filed a cross-motion (seq. no.:003) which requests dismissal of the Complaint and additional relief. That cross-motion is decided herein.

On September 28th, 2016 Judge Martin wrote a Decision and Order regarding motion seq. 002 and cross-motion seq. no.:003. In that Decision, Judge Martin decided part of the motion and cross-motion and reserved decision on the remaining portions of the motion for an order of reference "pending determination of the jurisdictional issue that is the subject of the traverse hearing and the Plaintiff's submission of evidentiary proof of Ferrari's (Defendant Raymond Ferrari) death." That traverse hearing was scheduled to take place on November 11th, 2016. That traverse was not held as scheduled.

In regards to that portion of motion seq. no.:002 which Judge Martin decided in his September 28th, 2016 Decision and Order, the entirety of the relief requested was:

"adjourned to December 20th, 2016 for submission, as determination of this relief must be held in abeyance pending the court's determination of the jurisdictional matters framed as the subject of the traverse hearing, scheduled above, and the plaintiff's submission of evidentiary proof of the defendant Raymond P. Ferrari's death."

As to the portion of cross-motion seq. no.:003 which Judge Martin decided in his September 28th, 2016 Decision and Order, the entirety of the relief requested was “adjourned to November 16th, 2016 at 10:00 am for a traverse hearing...”

On November 15th, 2016 the Plaintiff filed a motion (seq. no.:004) requesting an extension of time to serve the Defendant Patricia Murphy. That motion is decided herein. On March 8th, 2018 the Court ordered the case stayed pending, *inter alia*, the production of proof confirming the death of Raymond Ferrari. Subsequently, Plaintiff’s Counsel provided the Court with a copy of a New York City Death Certificate, bearing the number 156-08-009989. That Death Certificate reports that Raymond P. Ferrari, late of 10 Tudor Road, Centereach, NY 11720, died on March 3rd, 2008. Plaintiff’s Counsel, in further compliance with the March 8th, 2018 Order, produced a copy of the Suffolk County Surrogate’s Court Administration Proceeding Petition for the Estate of Raymond Ferrari a/k/a Raymond P. Ferrari, File No. 660A/2008. Plaintiff’s Counsel also provided a copy of the Letters of Administration in that Estate, which name Eileen Lutz as Estate Administrator. Ms. Lutz is identified in the petition as the Decedent’s sister. On December 5th, 2018 this Court, in consideration of motion seq. no.:002, cross-motion seq. no.:003 and motion seq. no.:004, issued a Memorandum Decision staying motion seq. nos.:002, 003 and 004 pending a traverse hearing pursuant to the September 28th, 2016 Order of Judge Martin. The September 28th, 2016 Order is law of the case.

On January 28th, 2020 the Court held the Court Ordered traverse hearing. Testimony was given by Counsel for the Plaintiff and Counsel for the Defendant Patricia Murphy. No new evidence was presented at the hearing. Pursuant to agreement at that hearing, the Court will now decide motion seq. no.:002, cross-motion seq. no.:003 and motion seq. no.:004.

The September 28th, 2016 Decision and Order

Motion seq. no.:002 and cross-motion seq. no.: 003 were the subject of the September 28th, 2016 Decision & Order (“Decision”) of Judge Daniel Martin. That Decision gave lengthy consideration to both seq. nos.:002 and 003. Judge Martin reserved his Decision subject to the jurisdictional issues regarding Defendants Raymond Ferrari and Patricia Murphy. In the case of Defendant Ferrari the issue was proof of whether and when he was deceased - now established by a New York City Death Certificate as March 3rd, 2008. In the case of Defendant Murphy the issue was whether Plaintiff could prove by preponderance of the evidence at a traverse hearing that Defendant Murphy had been served with process in the instant foreclosure case.

In that September 28th, 2016 Decision, Judge Martin noted that

“...a conference pursuant to CPLR 3408 was initially not held in this action because Ferrari, the sole mortgagor/obligor was deemed deceased, and, ostensibly, because the plaintiff had made a determination based upon its agent’s representations in the affidavit of service upon Ms. Murphy that she did not occupy the property. The conference was continued for control purposes...On the last conference date [October 28, 2014], this case [was] marked to indicate that the parties were unable to modify the loan or otherwise settle this action. Accordingly, the conference mandates of CPLR 3408, if applicable, have been satisfied.”

Judge Martin further stated:

“In her affidavit in support of the cross motion [seq 003, filed 12/3/2014] Ms. Murphy alleges, inter alia, that Ferrari died on March 3, 2008, never lived at the Connecticut property [where substituted personal service was allegedly made upon Mr. Ferrari on October 10, 2008] and was divorced from his ex-wife Shelia for about ten years at the time of his death.”

The extant jurisdictional questions regarding Defendants Ferrari and Murphy are now resolved: Ferrari by proof of his demise and Murphy by traverse hearing testimony.

In the interest of judicial economy and law of the case, the September 28th, 2016 Decision & Order are incorporated herein by reference.

The January 28th, 2020 Traverse Hearing

“At a hearing on the validity of service of process, the plaintiff bears the burden of proving personal jurisdiction by a preponderance of the evidence (see *Deutsche Bank Natl. Trust Co. v. O’King*, 148 AD3d 776, 51 NYS3d 523). The plaintiff failed to meet that burden. Where a process server has no independent recollection of events, a process server’s logbook may be admitted in evidence as a business record (see *Gilmore v. Tindel*, 210 AD2d 1, 618 NYS2d 815). Here, however the logbook was not produced in court or introduced in evidence.”

The court held that the lender failed to prove personal jurisdiction over the borrower. (*Sperry Associates Federal Credit Union v. John*, 160 AD3d 1007, 1009, 76 NYS3d 188 [2d Dept 2018]).

At the January 28th, 2020 traverse hearing the Plaintiff neither produced the Process Server nor anyone else with personal knowledge of the service in question to give testimony nor the Process Server's logbook for introduction into evidence. The minutes of that traverse hearing are incorporated herein by reference.

Plaintiff's Motion for Default Judgment, Removal of Raymond P. Ferrari as a Party Defendant, and Amendment of the Case Caption (Mot. Seq. No.:002)

Plaintiff, in its motion (seq. no.:002) makes several requests for relief. The Court will address Plaintiff's requests in the order presented.

It has been established that the Defendant/sole Mortgagor Raymond Ferrari a/k/a Raymond P. Ferrari died March 3rd, 2008. Mr. Ferrari's demise predated the filing of the instant foreclosure action. The instant foreclosure action is a nullity as against Defendant Ferrari. The Plaintiff in its Complaint requests a deficiency judgment against Defendant Ferrari. The Plaintiff in its instant motion (seq. no.:002) requests that Defendant Ferrari be dropped from the instant foreclosure action. As detailed by Judge Martin in his September 28th, 2016 Decision & Order, the Plaintiff thereby has no action against Defendant Ferrari nor against his Estate.

Plaintiff has no action against any party with whom Plaintiff is in privity of contract, nor any representative nor successor of any such party. Plaintiff's request for an order of reference, that a Referee be appointed to compute the sums due and owing to the Plaintiff under the mortgage complained of pursuant to RPAPL §1321 is denied.

The instant action is a nullity as to Defendant Raymond Ferrari a/k/a Raymond P. Ferrari. The Court lacks personal jurisdiction over Defendant Patricia Murphy (discussed in the Decision of the cross-motion (seq. no.:003, *infra.*). The relief requested by the Plaintiff that it be awarded default judgment against all Defendants pursuant to CPLR §3215 is denied.

The request that Defendant Raymond P. Ferrari be dropped from the action as he is no longer a necessary party and all papers and proceedings heretofore filed herein be deemed amended accordingly is granted.

The request that the caption be amended by striking the names of "John Does" and "Jane Does" is Granted.

Defendant's Cross-Motion for Dismissal of the Complaint as to Defendant Patricia Murphy (Mot. Seq. No.:003)

The Plaintiff has filed an Affidavit of Service which states that service was effected upon Patricia Murphy on October 1st, 2008 by substituted service upon her brother, Robert, at an address in Lindenhurst, New York. Same constitutes *prima facie* proof of proper service (see *Household Fin. Realty Corp. of N.Y. v. Brown*, 13 AD3d 340, 785 NYS2d 742 [2d Dept 2004]). Ms. Murphy has challenged that service. Ms. Murphy, in her Affidavit in Opposition and in support of the cross-motion asserts that she has one brother, named Richard, who does not and at the time in question did not, reside within New York State. Ms. Murphy further states that she has never lived at the service address in Lindenhurst, New York and knows no one who has ever resided at the service address.

The Plaintiff at a traverse hearing has failed to rebut Defendant Murphy's denial of service and has failed to prove personal jurisdiction over Defendant Patricia Murphy.

The relief requested by Defendant Patricia Murphy in her cross-motion (seq. no.:003) that the Complaint against her be dismissed pursuant to CPLR Rule 3211(a)(8), that the Court has not jurisdiction of the person of the defendant, is granted.

The balance of the relief requested in the alternative in the cross-motion (seq. no.:003), that the Complaint be dismissed against Defendant Patricia Murphy pursuant to CPLR §3215(c) is denied as moot.


Plaintiff's Motion for Extension of Time for Service Upon Patricia Murphy (Mot. Seq. No.:004)

It is determined that the Court lacks personal jurisdiction over Patricia Murphy, pursuant to the cross-motion of Patricia Murphy (seq. no.:003); *supra*.

Plaintiff, in its motion (seq. no.:004) requests an order pursuant to CPLR §§306-b, 2004, extending the time for the Plaintiff to serve Patricia Murphy with the Summons, Complaint, and any other initiatory case documents that may be required. Relief has already been granted Patricia Murphy pursuant to CPLR Rule 3211(a)(8). The Complaint as to Defendant Patricia Murphy is dismissed. Plaintiff's request is denied.

Plaintiff's request that, upon proof that Defendant Raymond Ferrari is deceased, that Plaintiff voluntarily discontinue its action as against Raymond Ferrari is not a proper request, and is denied. Voluntary discontinuance does not require a court order. Plaintiff's request in its motion seq. no.:002, that the Defendant Raymond P. Ferrari be dropped from the action and all papers and proceedings heretofore filed herein be deemed amended accordingly has been granted.

DATED: FEBRUARY 10th, 2019
RIVERHEAD, NY



HON. JAMES HUDSON
Acting Justice of the Supreme Court