

Wells Fargo Bank, NA v McPhee-Djan
2019 NY Slip Op 33923(U)
August 5, 2019
Supreme Court, Westchester County
Docket Number: 55194/2017
Judge: Terry Jane Ruderman
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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WELLS FARGO BANK, NA,

Plaintiff,

DECISION AND ORDER

-against-

Sequence No. 3
Index No. 55194/2017

KWABENA OFOSU MCPHEE-DJAN a/k/a KWABENA
O. MCPHEE DJAN, DOROTHY FERGUSON MCPHEE-DJAN
a/k/a DOROTHY MCPHEE DJAN a/k/a DOROTHY MCPHEE,
LAURA FERGUSON,

Defendants.

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RUDERMAN, J.

The following papers were considered in connection with the motion by defendants Kwabena Ofosu McPhee-Djan and Dorothy Ferguson McPhee-Djan for an order pursuant to CPLR 5015 (a) (4) vacating the order of reference, judgment of foreclosure and sale entered on their default, vacating the foreclosure sale, the defendants' default in answering the complaint and dismissing the action:

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause, Affirmation, Affidavit, Exhibits A - J	1
Affirmation in Opposition, Exhibits A - D	2

This action to foreclose on a residential mortgage concerns a mortgage on the property located at 20 Trenor Drive in New Rochelle, New York, securing a note in the principal amount of \$756,000.00 executed on October 29, 2013. The loan went into default for the payment due November 1, 2016, and this foreclosure action was commenced by filing a summons and complaint on April 17, 2017. Defendants defaulted in answering the complaint. However, from the Foreclosure Settlement Conference Intake Forms completed and filed in this matter, it

appears that defendants were aware of the existence of the action by the time of the first conference on July 6, 2017. Nowhere do defendants deny defaulting on the debt.

The Order of Reference dated May 1, 2018 and the Judgment of Foreclosure and Sale dated September 5, 2018 were entered on default. The foreclosure sale took place on November 14, 2018. Included in the efilng records are affidavits of mailing for each noticed motion and each resulting order, indicating that the motion papers and orders were mailed to Kwabena Ofosu McPhee-Djan at the subject premises, and to Dorothy Ferguson McPhee-Djan at 963 Kent Avenue, E I, Brooklyn, NY 10804.

In now moving to vacate their default in answering the complaint, defendants deny that they were served as described in the affidavits of service, which state that each defendant was served by substituted service made at the subject premises on Laura Ferguson, a family member, described as female with light brown skin, black hair, age 24, height 5'2" and 120 lbs. Each of defendants' affidavits states,

"I have no family member by the name of 'LAURA FERUGSON' [sic] and no individual by the name of LAURA FERUGOSON [sic] resides with me at 20 Trenor Drive, New Rochelle. Furthermore, there is no adult female who resides at or has been present at the aforementioned premises that matches the physical description set forth in the [a]ffidavit or [sic] service."

They also deny receiving the asserted follow-up mailing. Finally, defendants challenge the sufficiency of plaintiff's notices pursuant to RPAPL 1304.

Analysis

Defendants' effort to vacate their default based on the manner in which they were served in this action must fail. "To be entitled to vacatur of a default judgment under CPLR 5015 (a) (4), a defendant must overcome the presumption raised by the process server's affidavit of service" (*Federal Natl. Mtge. Assn. v Alverado*, 167 AD3d 987, 988 [2d Dept 2018]). Although

“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” (*see e.g. Wells Fargo Bank, N.A. v Christie*, 83 AD3d 824 [2d Dept 2011] [emphasis added]), the Second Department has elaborated that “[i]n order to warrant a hearing to determine the validity of service of process, the denial of service must be substantiated by *specific, detailed facts that contradict the affidavit of service* (*Wells Fargo Bank, N.A. v DeCesare*, 154 AD3d 717, 717 [2d Dept 2017] [emphasis added]).

Since “[v]alid service pursuant to CPLR 308 (2) may be made by delivery of the summons and complaint to a person of suitable age and discretion who answers the door at a defendant’s residence” regardless of whether the recipient is a resident of the subject property (*id.*), it is not enough to disclaim the existence of a family member meeting the description in the process server’s affidavit (*id.*). To be entitled to a traverse hearing, the defendant’s proof must contradict, with specific detailed, facts, the process server’s claim.

The assertions that “I have no family member by the name of ‘LAURA FERUGSON’ [sic] and no individual by the name of LAURA FERUGOSON [sic] resides with me at 20 Trenor Drive, New Rochelle” are insufficient, not least because the woman who accepted service could have a different, even a slightly different, name. As to defendants’ claims that “there is no adult female who resides at or has been present at the aforementioned premises that matches the physical description set forth in the [a]ffidavit or [sic] service,” without more, this vague assertion leaves room for the possibility that there *is* such woman of slightly different description. Indeed, as counsel for plaintiff observes, the woman to whom the process server handed the documents could have been defendant Dorothy Ferguson McPhee-Djan, using another name. If that were the case, the denials in defendants’ affidavits would be accurate.

Therefore, defendants' challenge does not validly negate service of process on them made pursuant to CPLR 308 (2), so as to warrant vacatur of their default pursuant to CPLR 5015 (a) (4).

It should also be noted that defendants were well aware of this litigation virtually throughout. Notwithstanding defendants' denial of receipt of the follow-up mailing under CPLR 308 (2), they were mailed every essential litigation document filed with this Court during these proceeding, and do not deny those mailings. Nor can they deny their awareness of the litigation by the time of the Foreclosure Settlement Conferences that were held from July to November 2017. Their delay in moving to vacate their default until after they defaulted not only in answering the complaint, but on the motion for an order of reference and the subsequent motion for a judgment of foreclosure and sale, tends to establish the strategic and disingenuous nature of this eventual application.

Finally, the judgment in this matter is not invalidated by defendants' claim that plaintiff failed to annex a copy of the 1304 notice to the motion for a judgment of foreclosure and sale. The document was included, albeit behind and as part of the affidavit of merit filed as exhibit L to the motion, NYSCEF Doc. No. 50, although it was not annexed to the moving papers in the location indicated in counsel's affirmation in support. Defendants do not deny that the 1304 notices were sent to them as required.

Based upon the foregoing, it is hereby,

ORDERED that defendants' motion to vacate the foreclosure sale, the judgment of foreclosure and sale and the order of reference, and to dismiss the complaint, is denied.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
August 5, 2019


HON. TERRY JANE RUDERMAN, J.S.C.