

Citimortgage, Inc. v Baptiste
2020 NY Slip Op 30655(U)
February 24, 2020
Supreme Court, Kings County
Docket Number: 509217/2016
Judge: Noach Dear
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At an IAS Term, Part FRP-1, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 24th day of February 2020.

PRESENT:

HON. NOACH DEAR,

J.S.C.

Index No.: 509217/2016

_____ x
CITIMORTGAGE, INC.,

Plaintiffs,

DECISION AND ORDER

-against-

FITZROY BAPTISTE, et al,

MS # 1,2

Defendants,
_____ x

Papers

Moving Papers and Affidavits Annexed
Answering Papers and Supplement
Reply Papers

Numbered

1, 2
3-4
5-6

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Defendant moves to dismiss the action for lack of personal jurisdiction and for failure to comply with RPAPL §§1301(3), 1303 and 1320¹. Plaintiff opposes the motion.

By an order dated April 26, 2018, this Court set this matter down for a traverse hearing in front of a Special Referee. A hearing was held on a Hear and Report basis and the Referee recommended that this Court find that service was improper by an order dated December 11, 2018². Subsequently, Plaintiff made a motion to reject the Referee's report, or in the alternative to extend Plaintiff's time to serve the

¹Defendant filed this motion on or about September 8, 2017.

²Traverse Hearing was completed on September 5, 2018.

Defendant³. Defendant opposed the motion and sought to get the report confirmed.

The issue was determined by the evidence presented and the credibility of the two parties. The Special Referee is in the best position to make a determination based on the evidence presented and the credibility of the witness testimony. Plaintiff served Defendant at 42 Amboy Street, Brooklyn, New York. Defendant argued that he has never resided at that address and has always resided at 913 Saratoga Avenue, Brooklyn, New York. In support of his claims, Defendant submitted tax returns for 2016-2017, correspondence from the New York State Department of Taxation and Finance, Defendant's old Driver's License issued March 29, 2010 and expired April 7, 2018 and Defendant's renewed Driver's License issued May 31, 2018. All documents listed his address at 913 Saratoga Avenue. After a review of the transcript and the evidence presented, the Court is in agreement with the Referee's recommendation and confirms the report.

Plaintiff argues this Court should reject the report or in the alternative, in the interest of justice and for good cause shown the Court should allow an extension of time to serve the Defendant. Plaintiff commenced an initial action under Index No. 20277/2011. Plaintiff served Defendant in that case at the subject property located at 913 Saratoga Avenue, Brooklyn, New York and additional correspondence went to the same address. This action was dismissed by an order of the Hon. Yvonne Lewis on September 11, 2015. However, it had not been marked disposed. Plaintiff then commenced this instant action on June 2, 2016. Plaintiff allegedly served Defendant on July 30, 2016 (at the 42 Amboy Street address). As it has already been established by a Special Referee and this Court, Defendant was not properly served because it appears that Defendant has always lived at the property address. The 2011 and 2016 action were both active until Plaintiff discontinued the action by an order dated July 25, 2016.

Pursuant to CPLR 306-b, a court may, in the exercise of discretion, grant a motion for an extension of time within which to effect service for good cause shown or in the interest of justice (see *Leader v*

³ Plaintiff filed this motion on March 7, 2019.

Maroney, Ponzini & Spencer, 97 NY2d 95, 104-105; *Bumpus v New York City Tr. Auth.*, 66 AD3d 26, 31-32). “Good cause’ and interest of justice’ are two separate and independent statutory standards” (*Bumpus v New York City Tr. Auth.*, 66 AD3d at 31). “To establish good cause, a plaintiff must demonstrate reasonable diligence in attempting service. Good cause will not exist where a plaintiff fails to make any effort at service . . . or fails to make at least a reasonably diligent effort at service. By contrast, good cause may be found to exist where the plaintiff’s failure to timely serve process is a result of circumstances beyond the plaintiff’s control” (*id.* at 31-32 [internal citations omitted]). The Court does not find that the Plaintiff used reasonable diligence in serving the Defendant. Defendant’s tax information and DMV records showed that the Defendant resided at the property address. Moreover, the Plaintiff had previously served the Defendant at his proper address in the prior action.

If good cause for an extension is not established, courts must consider the broader interest of justice standard of CPLR 306-b (see *Bumpus v New York City Tr. Auth.*, 66 AD3d at 32). In considering the interest of justice standard, “the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff’s request for the extension of time, and prejudice to defendant” (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d at 105-106). Plaintiff started an initial foreclosure action against the Defendant in 2011. It is not clear why Plaintiff did not opt to reargue/renew the decision dismissing the action by the order dated September 11, 2015. Plaintiff commenced this instant action and thereafter discontinued the prior one.

In attempting to review this matter in the interest of justice, the Court will view each factor independently. The Court has already established that it does not find that the Plaintiff was diligent in its attempt to serve the Defendant. If Plaintiff is not granted an extension of time, the Statute of Limitations will have expired. This factor lies in favor of the extension. As for the meritorious nature of the cause of action, the Court does identify merit, however this action started in 2011 and was dismissed by the

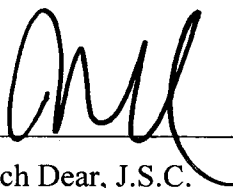
Court and later discontinued. It is not clear if dismissal was based on the merits.

The Defendant filed this motion to dismiss in 2017. After a review of the motion, Plaintiff opted to only oppose the motion and did not move for an extension even though service of process was questionable. The Court agreed that a traverse hearing should be held by an order dated April 26, 2018. Plaintiff again did not move to extend time only to continue on with the traverse hearing. A decision was rendered by the Special Referee on December 11, 2018. Plaintiff moved three months later to reject the report and in the alternative if that relief was not granted requested an extension. Plaintiff does not give any reason for the delay in asking for the extension. Plaintiff proffers that Defendant waited until the Statute of Limitations had expired to file their motion. However, this is immaterial. Even though Defendant's motion to dismiss was filed a few days after the expiration of the statute of limitations, had Plaintiff promptly moved for an extension, the Court would have easily granted it as the delay would have been de minimus and no real prejudice to the Defendant. Therefore, the Court finds that the remaining factors in examining the interest of justice standard: the length of delay in service; the promptness of a plaintiff's request for the extension of time; and prejudice to defendant, weigh in favor of not granting an extension under the statute. Based on the history of the action, the delay in service will be four years. The Plaintiff was not prompt in filing this instant alternate relief. Based on the fact that this is the second action and the Defendant has been litigating this action since 2011, the Court finds that in this case based on the totality of the circumstances, an extension would be prejudicial to the Defendant.

As such, Defendant's motion to dismiss is GRANTED (MS #1) and Plaintiff's motion to reject the Referee's Report and/or extend time to serve is DENIED (MS#2).

The foregoing constitutes the decision and order of the Court.

ENTER:



Hon. Noach Dear, J.S.C.

HON. NOACH DEAR

KINGS COUNTY CLERK
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