

Varveris v Lawrence
2021 NY Slip Op 32867(U)
December 15, 2021
Supreme Court, Kings County
Docket Number: Index No. 518350/21
Judge: Lawrence S. Knipel
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At an IAS Term, Part Comm 6 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 15th day of December, 2021.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

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MANUEL VARVERIS,

Plaintiff,

- against -

Index No. 518350/21

SHIRLEEN LAWRENCE AS ADMINISTRATOR OF THE ESTATE OF MICHAEL LAWRENCE, SHIRLEEN LAWRENCE, CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, PEOPLE OF THE STATE OF NEW YORK, CITY OF NEW YORK PARKING VIOLATIONS BUREAU, "JOHN DOE" and "JANE DOE", said names being fictitious and unknown to the Plaintiff, the persons or parties being the possible tenants, occupants, persons, or corporations, if any, having or claiming an interest in or lien upon the premises,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	_____ 32-34, 36-39
Opposition Affidavits (Affirmations) Annexed _____	_____ 42-46
Reply Affidavits (Affirmations) _____	_____ 47

Upon the foregoing papers in this action to foreclose a mortgage encumbering the property at 8922 Flatlands Avenue in Brooklyn (Property), defendants Shirleen Lawrence (Lawrence), in her personal capacity and as the Administratrix of the Estate of Michael

Lawrence (the Estate) (collectively, defendants), move (in motion sequence [mot. seq.] two) for an order, pursuant to CPLR 3211 (a) (8), dismissing the complaint based on a lack of personal jurisdiction over them.

Background

On July 23, 2021, plaintiff Manuel Varveris (Varveris) commenced this foreclosure action by filing a summons, an unverified complaint and notice of pendency against the Property. The complaint seeks to foreclose on the Property based on a \$190,000.00 promissory note allegedly executed by Michael Lawrence, now deceased, on or about March 3, 2010, which was secured by a mortgage encumbering the Property. The complaint alleges that “the mortgagor(s), their successor(s), assign(s), and/or transferee(s), have failed to comply with the terms and conditions of said above-named instruments by failing or omitting to repay the matured principal balance of \$190,000.00, which became due and payable on March 3, 2011” (complaint at ¶ 7).

On August 10, 2021, Varveris electronically filed two August 4, 2021 affidavits of service in which the process server attested that on July 28, 2021, at 12:45 p.m., both Lawrence and the Estate were served with the pleadings at 968 E. 103rd Street in Brooklyn by delivering the papers to “DAME ‘DOE’, CO-OCCUPANT” (described as a black female with black hair, 5’8” - 5’11,” 25-30 years old and 131-160 lbs.) and subsequently mailing the papers to the same address on August 4, 2021 (*see* NYSCEF Doc Nos. 20-21).

Defendants’ Instant Dismissal Motion

On September 20, 2021, Lawrence and the Estate filed the instant motion to

dismiss the complaint for lack of personal jurisdiction. Lawrence submits an affidavit attesting that she resides *on the second floor* at 968 103rd Street in Brooklyn, “a two-family dwelling,” and annexes her drivers’ license as proof of such residency. Lawrence notes that the August 4, 2021 affidavits of service upon her and the Estate “do[] not indicate, which unit [the process server] visited.” Lawrence attests that the process server “did not speak to me[,]” “I don’t know anyone who meets that description” of the “Dame Doe Co-Occupant” described in the affidavits of service and no one who lives or was visiting my home meets that description. Lawrence further attests that “I later learned that [the process server] gave the papers to the neighbor in the first floor apartment” named Dane Wright, who “does not accept mail for me and is not authorized to accept mail on my behalf.” Lawrence explains that “[t]here are clearly 2 mailboxes . . . near the door to each unit which is separated by outside steps” and “[i]t can be seen from the street that the property is a two-family dwelling.”

Defendants also submit an affidavit from Dane Wright, Lawrence’s neighbor, who attests that he resides on the first floor at 968 103rd Street in Brooklyn and that he does not occupy an apartment with Lawrence. Dane Wright alleges that the process server came to his door and spoke to him, rather than a black female, as described in the August 4, 2021 affidavits of service. Dane Wright notes that “I am a Black Man with black hair and a Beard.” Dane Wright further attests that the process server “asked about Shirleen Lawrence and handed me the papers” and “I explained to [the process server] that Shirleen Lawrence lived on the second floor and that the second-floor entrance was upstairs.” Although Dane Wright told the process server that he does not accept packages

for Lawrence, he avers that the process server “asked me to hand the papers to her” and “I told him it was not my business, but he would not accept the papers back.” According to Dane Wright, when the process server left, he put the papers on the outside steps leading to Lawrence’s apartment.

Defense counsel submits an affirmation asserting that “[t]he service that the process server claimed to have made is jurisdictionally defective” because “[t]he process server went to the wrong address and left papers with a neighbor who refused to accept service for the Defendant[s]” and “[t]he process server then filed an affidavit that did not contain the proper address as it did not have an apartment number.” Defense counsel argues that Varveris failed to serve either Lawrence or the Estate because the pleadings were not left with a person of suitable age and discretion at Lawrence’s dwelling place or usual place of abode and thereafter the papers were erroneously mailed “to an address that does not contain an apartment number.” Defense counsel asserts that this dismissal motion is timely because service of process was completed on August 20, 2021, ten days after the affidavits of service were filed with the court on August 10, 2021, and defendants timely moved to dismiss on September 20, 2021.

Varveris’ Opposition

Varveris, in opposition, submits an attorney affirmation asserting that “[s]ubsequent to the defendants’ dismissal motion, the moving defendants were served again taking into account the arguments and information set forth in the dismissal motion.” Varveris’ counsel asserts that the defendants have now been properly served, and thus, the dismissal motion should be denied. Annexed to counsel’s affirmation are

two October 27, 2021 affidavits of service attesting that on October 26, 2021, at 6:38 p.m., both Lawrence and the Estate were served with the pleadings at 968 E. 103rd Street, 2nd floor, in Brooklyn by delivering the papers to “JOHN DOE, FAMILY MEMBER/CO-OCCUPANT” and subsequently mailing the papers to the same address on October 27, 2021 (*see* NYSCEF Doc Nos. 45 and 46).

On October 27, 2021 (the same day Varveris electronically filed his opposition to defendants’ dismissal motion), the new affidavits of service of the pleadings upon Lawrence and the Estate were electronically filed (*see* NYSCEF Doc Nos. 40 and 41).

Defendants’ Reply

Lawrence and the Estate, in reply, submit an attorney affirmation asserting that “[t]he Defendants[] reject the Plaintiff’s new claim of service and do not address said new service as it is procedurally improper without permission of the Court to amend or supplement the Plaintiff’s service pursuant to CPLR § 3025 (b) and common law.” Defense counsel also asserts that plaintiff “failed to submit an opposition responsive” to defendants’ dismissal motion, and instead, re-served defendants on October 26, 2021 at the “proper address as found on the Defendant’s driver’s license[,]” and thus, plaintiff essentially admits that the initial service was defective. Defense counsel argues that plaintiff’s October 2021 service upon defendants was “procedurally improper” because plaintiff failed to obtain leave of court, pursuant to CPLR 3025 (b), before amending his affidavits of service.

Discussion

CPLR 308 (2) permits personal service on a natural person by delivering the

pleadings within the state to a person of suitable age and discretion at the dwelling place or usual place of abode of the person to be served and, within 20 days thereafter, mailing a copy of the pleadings to the dwelling place or usual place of abode in a specified manner.

CPLR 306-b requires that service of a summons and complaint “shall be made within one hundred twenty days after the commencement of the action . . .” Importantly, the Second Department has recognized that a plaintiff whose initial attempts at service were improper may attempt to re-serve the defendants until the 120-day statutory period has expired (*Kazimierski v New York Univ.*, 18 AD3d 820 [2005]).

“Although the ultimate burden of proof regarding personal jurisdiction rests with the plaintiff, to defeat a CPLR 3211 (a) (8) motion to dismiss a complaint, the plaintiff need only make a prima facie showing that the defendant is subject to the personal jurisdiction of the court” (*Whitcraft v Runyon*, 123 AD3d 811, 812 [2014]). The production of “[a] process server’s affidavit of service constitutes prima facie evidence of proper service” (*Scarano v Scarano*, 63 AD3d 716, 716 [2009]; *see also Trovato v Galaxy Sanitation Servs. of New York, Inc.*, 171 AD3d 830, 831 [2019] [same]).

Here, in opposition to defendants’ dismissal motion, Varveris produced two October 27, 2021 affidavits of service attesting that on October 26, 2021, at 6:38 p.m., both Lawrence and the Estate were *re-served* with the pleadings at 968 E. 103rd Street, 2nd floor, in Brooklyn by leaving the pleadings with a person of suitable age and discretion at Lawrence’s residence and by mailing same to defendants at said address the following day. Varveris’ re-service of the summons and complaint upon defendants was timely,

pursuant to CPLR 306-b, since defendants were re-served on October 27, 2021, within 120 days after Varveris' commencement of this action on July 23, 2021. Such service was deemed complete on November 6, 2021, 10 days after Varveris' affidavits of service were electronically filed on October 27, 2021 (*see* NYSCEF Doc Nos. 40 and 41). Varveris' new affidavits of service constitute prima facie proof of proper service upon defendants and render defendants' instant dismissal motion based on the July 2021 affidavits of service moot.

Defense counsel refused to address or challenge the "new service" on the ground that it was "procedurally improper" because Varveris failed to obtain leave of court, pursuant to CPLR 3025 (b). Contrary to defense counsel's unsupported contention, Varveris was not required to obtain leave of court before re-serving defendants with process and filing new affidavits of service, pursuant to CPLR 3025 (b), which, by its express terms, only applies to amendments to pleadings and supplemental pleadings. Regardless, defense counsel expressly admits that Varveris re-served defendants on October 26, 2021 at the "proper address as found on the Defendant's driver's license" Accordingly, it is

ORDERED that defendants' dismissal motion (mot. seq. two) is denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

7 HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE