

US Bank N.A. v Knight
2022 NY Slip Op 31209(U)
April 7, 2022
Supreme Court, Kings County
Docket Number: Index No. 506381/2013
Judge: Lawrence Knipel
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Part, Part FRP 3 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 7th day of April, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,
Justice.

-----X
US BANK NATIONAL ASSOCIATION, not in its individual capacity, but solely as TRUSTEE FOR THE RMAC TRUST, SERIES 2012-5T

Plaintiff,

- against -

Index No. 506381/2013

SANDRA KNIGHT, CARLLOYD C. GOWE a/k/a CARLLOYD GOWE, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, WORKERS COMPENSATION BOARD OF NEW YORK STATE, "JOHN DOE #1" through "JOHN DOE #10" inclusive the names of the ten last name Defendants being fictitious, real names unknown to the Plaintiff, the parties intended being persons or corporations having an interest in, or tenant or persons in possession of, portions of the mortgaged premises described in the Complaint,

Defendants

-----X

<u>The following e-filed papers read herein:</u>	<u>NYSCEF Doc Nos.</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) _____	_____ 195-215 _____
Opposing Affidavits (Affirmations) _____	_____ 216-220 _____
Reply Affidavits (Affirmations) _____	_____ 221-222 _____

Upon the foregoing papers in this real property action, plaintiff US Bank National Association, not in its individual capacity, but solely as Trustee for the RMAC Trust, Series 2012-5T (US Bank) moves (in motion [mot.] sequence [seq.] number [no.] 7) for an order,

pursuant to CPLR 306-b, granting it an extension of time to complete service of process on defendant Carlloyd Gowe (Mr. Gowe) in the event this court finds it lacks personal jurisdiction over Mr. Gowe, or alternatively, pursuant to CPLR 2004, cancelling the Traverse Hearing and granting US Bank an extension of time to complete service of process on Mr. Gowe and extending time for Mr. Gowe to answer the complaint.

Background

US Bank commenced this residential foreclosure action with the filing of a summons, complaint, and notice of pendency on October 22, 2013. Thereafter, the parties participated in settlement conferences. Subsequently, US Bank moved for default judgment and an order of reference against all defendants; Mr. Gowe cross-moved for an order dismissing the action for improper service and vacating his default. Mr. Gowe presented that at the time of the alleged service of process on him, he was in custody at an immigration detention center. US Bank ultimately withdrew its motion and the matter was set down for a Traverse hearing. On September 18, 2017, the parties appeared for a Traverse hearing, which resulted in a referee's report recommending a finding that service of process was effectuated on Mr. Gowe and that this court had acquired jurisdiction over him. Shortly thereafter, US Bank moved to confirm the referee's report. US Bank's motion was denied upon the revelation that the counsel who appeared on behalf of Mr. Gowe was disbarred at the time of the Traverse hearing and, as a result, a second Traverse hearing was directed.

On March 26, 2018, a second Traverse hearing was held, which resulted in an order, dated July 24, 2018, wherein the referee found that Mr. Gowe was being held in an immigration facility during the time of alleged service of process, and determined that proper service was not made on Mr. Gowe (July 2018 Order). Thereafter, US Bank moved for, among other relief, an extension of time to serve Mr. Gowe. The court, by order dated February 6, 2019, granted US Bank an extension of 120 days to complete service of process on Mr. Gowe (February 2019 Order).

On March 16, 2019, US Bank purportedly personally served Mr. Gowe with the summons and complaint in accordance with the February 2019 Order.¹ Additionally, on August 22, 2019, US Bank delivered copies of the same, pursuant to CPLR 3215 (g). On October 16, 2019, US Bank then moved for an order of default judgment against all defaulting defendants, including Mr. Gowe. Mr. Gowe cross-moved for dismissal claiming again that he was in custody at the time of the alleged service of process. By order dated August 12, 2020, the court granted the cross motion to the extent that a third Traverse hearing was directed, while holding US Bank's default judgment motion and the remainder of the cross motion in abeyance. The third Traverse hearing remains pending.

US Bank now moves for an order granting a conditional extension of time to serve Mr. Gowe in the event the third Traverse hearing results in the determination that this court lacks personal jurisdiction over Mr. Gowe, or alternatively, cancelling the pending

¹ US Bank notes that subsequent to serving Mr. Gowe, the process server, Mr. David P. Feldman, passed away and accordingly is unavailable to testify at the pending Traverse hearing.

Traverse hearing, extending the time to serve Mr. Gowe, and extending the time for Mr. Gowe to serve responsive pleadings.

The Parties' Positions

US Bank contends that it is entitled to a conditional extension of time to serve Mr. Gowe should the third Traverse hearing result in a determination that the court lacks personal jurisdiction over Mr. Gowe. It argues that the action was timely commenced and that the interest of justice weighs in its favor to permit a further extension of time to complete service of process. US Bank presents that when determining whether a plaintiff is entitled to an extension of time to serve pleadings, a myriad of considerations must be assessed. In mortgage foreclosure actions, it maintains that a particularly important consideration in the calculus is whether the plaintiff presents a potentially meritorious claim, promptness in the affirmative relief sought, and the lack of an identifiable prejudice to the defendant.

US Bank maintains that these factors are present in the instant action. It argues that its exhibited and previously filed motions for default judgment demonstrates the merits of its foreclosure claim against Mr. Gowe, that it has sought to effectuate service of process in compliance with both procedural law and court orders, participated in two prior Traverse hearings, and that Mr. Gowe's ability to defend that action would not be impacted by an extension of time to serve him. Additionally, US Bank presents arguments that, despite contentions to the contrary and the pending Traverse hearing, its previous efforts to complete service of process on Mr. Gowe were proper and complete, but that it will be

prejudiced by a further Traverse hearing due to the fact that the process server is deceased, and accordingly, unable to testify. For the same reasons, US Bank maintains that judicial economy and public policy support its position that the court should dispense with the need of the Traverse hearing and render an immediate order extending time to serve Mr. Gowe.

In opposition, Mr. Gowe contends that US Bank is improperly seeking a third attempt to serve him, despite a prior extension and the pending Traverse hearing. Mr. Gowe's details the previous attempts of service, including both the first attempt, which was judicially determined to be improper and the second attempt, which he contends was improper and subject to the pending Traverse hearing. Mr. Gowe conclusively asserts that US Bank failed to present any good cause or reasonable diligence in attempting to properly serve him, despite commencing the action eight years prior. Accordingly, he insists the motion must be denied and the issue of service be resolved at the Traverse hearing.

In reply, US Bank asserts that Mr. Gowe fails to present any basis to deny its request to extend time to effectuate service of process. US Bank maintains, as it initially argued, that it established its entitlement to an extension of time to complete service by demonstrating it timely commenced the instant action, and presenting a meritorious claim against Mr. Gowe. In addition, US Bank contends that Mr. Gowe failed to demonstrate any form of prejudice that would result from a granting of the extension of time. Furthermore, it reemphasizes that the Traverse hearing should be cancelled due to the death of its process server and the preservation of judicial resources. Thus, US Bank requests that its relief to extend time to serve Mr. Gowen is granted.

Discussion

CPLR 306-b permits the court to extend the time for service “upon good cause shown or in the interest of justice.” Similarly, CPLR 2004 provides that, upon good cause shown, “the court may extend the time fixed by any statute, rule or order.” “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” (*Wilmington Sav. Fund Socy., FSB v James*, 174 AD3d 835, 837 [2d Dept 2019] [internal quotation marks and citations omitted]). “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” (*State of New York Mtge. Agency v Braun*, 182 AD3d 63, 66 [2d Dept 2020]).

“The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, 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 95, 105-06 [2001]).

“An extension of time for service is a matter within the court’s discretion” (*Estate of Fernandez by Salsbury v Wyckoff Hgts. Med. Ctr.*, 162 AD3d 742, 743 [2d Dept 2018])

[internal quotation marks and citations omitted]). “A proper exercise of discretion results from principled and supported determinations as to what is just and equitable under the law and all of the relevant facts and circumstances of a case” (*Hafkin v N. Shore Univ. Hosp.*, 279 AD2d 86, 90 [2d Dept 2000], *affd sub nom. Leader*, 97 NY2d 95 [2001]).

Here, the circumstances of the case and the relevant facts warrant extending the time for US Bank to complete service of process on Mr. Gowe. In this regard, US Bank has shown diligent efforts in attempting to properly effectuate service of process on Mr. Gowe, filing timely motions seeking extensions, and participating in litigation seeking to prosecute the action. The court notes that certain factors were beyond its control, such as the death of the process server and Mr. Gowe’s repeated periods of being held in custody while attempting to complete service of process. Additionally, US Bank’s proffered papers demonstrate a potential meritorious claim to its residential mortgage foreclosure action. Accordingly, US Bank demonstrated its entitlement to an extension of time to serve Mr. Gowe.

In opposition, Mr. Gowe failed to raise or demonstrate any prejudice he would experience by US Bank being granted a further extension of time to complete service. His contention that this will be the third attempt to complete service of process on him, alone, is insufficient to demonstrate that he will experience prejudice or that the interest of justice favors a denial of US Bank’s motion. Additionally, Mr. Gowe’s assertions that US Bank commenced the action eight years ago does not, at this juncture, support his contention that US Bank should not be afforded additional time to serve the summons and complaint. The

issue of improper service was first raised by Mr. Gowe in 2017, four years after the commencement of the action. Subsequently, the parties appeared for a Traverse hearing on two occasions over the course of two years, culminating in the first extension of time for US Bank to complete service. Finally, the third Traverse hearing was not directed until August 2020, in the midst of the global COVID-19 pandemic, and remains pending and unresolved. Although the action was commenced eight years ago, the court notes that the issue of whether he was properly served was not raised until midway through the litigation. While there are certainly limits to extensions of time to complete service of process, the facts and circumstances of this matter do not support, at this time, a denial of US Bank's sought relief.

To the extent not specifically addressed herein, the parties' remaining contentions have been considered and found to be either meritless and/or moot.

Conclusion

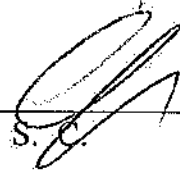
Accordingly, it is hereby

ORDERED the US Bank's motion is granted to the extent that it shall have 120 days from the filing of the notice of entry of this order to complete service of process on Mr. Gowe, that Mr. Gowe shall have 30 days to serve responsive pleadings after service of

process is completed, and that the pending Traverse hearing is cancelled as moot.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

**HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE**