

New York Community Bank v Moskovits

2022 NY Slip Op 32352(U)

July 8, 2022

Supreme Court, Kings County

Docket Number: Index No. 4525/2014

Judge: Robin K. Sheares

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
New York Community Bank,

Plaintiff,

- against -

Yaakov Moskovits, et. al.,

Defendant.
-----X

Index No. 4525/2014

Motion Sequence No. 03

DECISION/ORDER

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this Motion:

<u>Papers</u>	<u>NYSCEF Document No.</u>
<u>Sequence # 03</u>	
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed	3; 13; 15 -16; 18
Exhibits	4 - 12
Opposition	22
Exhibits	23 - 27
Reply	29
Exhibits	30

Based on the foregoing papers, and after oral arguments, Defendant’s Order to Show Cause to vacate the default and dismiss the complaint pursuant to CPLR §3211(a)(8); vacating the default pursuant to CPLR §5015(a) and allowing Defendants to interpose an answer; to vacate the August 8, 2016 Order of Reference, and the July 20, 2017 Judgment of Foreclosure and Sale; and dismissing this action due to Plaintiff’s failure to demonstrate its standing as the holder of the note and mortgage is GRANTED in PART and DENIED in PART.

Defendant Agness Moskovits, co-owner of the subject property, argues that she was not served. She states that she did not reside at the subject property at the time of service. As proof,

she submits her driver's license (issued December 27, 2011, expired March 9, 2018) which lists 2643 Est 64th Street, Brooklyn, New York 11234 as her address¹.

Defendant Yaakov Moskovits, the other co-owner of the subject property, argues that his wife Pnina was never given the summons and complaint, would not have answered the door at 6:12 pm on a Friday, and would never have told anyone that her daughter Agness lived at that the subject property.

The moving papers include an affidavit from Pnina Moskovits, a non-party, which states that she would not have answered the door at such an hour on a Friday, would never have told anyone that her daughter Agness lived there, and, if she had been served, she would have immediately notified the defendants so that they could take the appropriate action. Mrs. Moskovits also stated that the Affidavit of Service which lists the spelling of her name as PENINA is incorrect.

A review of the records indicates that neither defendant filed an Answer in this action. However, the orders entered prior to the entry of the Order of Reference and Judgment of Foreclosure and Sale reveal that at least one of the defendants participated in the CPLR §3408 settlement conferences that were conducted in the specialized mortgage foreclosure part of this court². It is unclear as to whether the defendant appeared pro se or with an attorney.

It is well established that a process server's sworn affidavit of service constitutes prima facie evidence of proper service. (see *ACT Props., LLC v Garcia*, 102 AD3d712, 957 NYS2d 884, 2013 N.Y. App. Div. LEXIS 160, 2013 WL 163736 [2d Dept 2013]; *Deutsche Bank Natl. Trust Co. v Pietranico*, 102 AD3d724, 957 NYS2d 868, 2013 N.Y. App. Div. LEXIS 165, 2013 WL

¹ The address of the subject property is 2609 East 65th Street, Brooklyn, New York 11234.

² The July 20, 2015 Directive states that the defendant appeared, but does not state the name of the appearing defendant. Additionally, the October 13, 2015 order names the defendant by the last name, but fails to state the defendant's first name.

163762 [2d Dept 2013]; *Bank of NY v Espejo*, 92 AD3d 707, 939 NYS2d 105 [2d Dept 2012]; *Deutsche Bank Natl. Trust Co. v Hussain*, 78 AD3d 989, 912 NYS2d 595 [2d Dept 2010]; *Wells Fargo Bank, NA v McGloster*, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]). However, the process server's affidavit can be rebutted by a sworn denial of service in the defendant's affidavit which contains specific and detailed contradictions of the allegations contained in the process server's affidavit (see *Bank of NY v Espejo*, 92 AD3d 707, 939 NYS2d 105 [2012], supra; *Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d 343, 756 NYS2d 92 [2d Dept 2003]). Bare, conclusory, and unsubstantiated denials of receipt of process are insufficient to rebut the presumption of proper service created by the affidavit of the plaintiff's process server and to require a traverse hearing. (see *US Bank N.A. v Tate*, 102 AD3d 859, 958 NYS2d 722, 2013 N.Y. App. Div. LEXIS 313, 2013 WL 239055 [2d Dept 2013]; *Stevens v Charles*, 102 AD3d 763, 958 NYS2d 443, 2013 WL 164319 [2d Dept 2013]; *Irwin Mtge. Corp. v Devis*, 72 AD3d 743, 898 NYS2d 854 [2d Dept 2010]; *Beneficial Homeowner Serv. Corp. v Girault*, 60 AD3d 984, 875 NYS2d 815 [2d Dept. 2009]).

A defendant who fails to swear to specific facts to rebut the statements in the process server's affidavit is not entitled to a hearing on the issue of service (see *Chichester v Alal-Amin Grocery & Halal Meat*, 100 AD3d 820, 954 NYS2d 577 [2d Dept 2012]; *Bank of NY v. Espejo*, 92 AD3d 707, 939 NYS2d 105 [2012], supra; *US Natl. Bank Assn. v Melton*, 90 AD3d 742, 934 NYS2d 352 [2011]; *Countrywide Home Loans Servicing, LP v. Albert*, 78 AD3d 983, 912 NYS2d 96 [2d Dept 2010]); *Mortgage Elec. Registration Sys. v Schotter*, 50 AD3d 983, 857 NYS2d 592 [2d Dept. 2008]).

Claimed discrepancies between the appearance of the person served and the description of such person set forth in the process server's affidavit that are unsubstantiated and of a minor, slight

or inconsequential nature are likewise insufficient to warrant a hearing on the issue of service (see *Indymac Fed. Bank, FSB v Hyman*, 74 AD3d 751, 901 NYS2d 545 [2d Dept 2010]; *Beneficial Homeowner Serv. Corp. v. Girault*, 60 AD3d 984, 875 NYS2d 815 [2009], supra; *Cavalry Portfolio Servs., LLC v Reisman*, 55 AD3d 524, 865 NYS2d 286, [2d Dept 2008]; *Wells Fargo Bank, N.A. v McGloster*, 48 AD3d 457, 849 NYS2d 784 [2008], supra; *NYCTL 1997-1 Trust v Nillas*, 288 AD2d 279, 732 NYS2d 872 [2d Dept 2001]).

In the moving papers, Defendants state that the description contained in the Affidavit of Service does not match that of Mrs. Pnina Moskovits. Specifically, Defendants state that the Affidavit of Service indicates that Ms. Pnina Moskovits' weight was between 140 to 150 pounds, when in reality, she weighed between 180 and 200 pounds at the time of service. The Court finds that the claimed discrepancy between Mrs. Pnina Moskovits' weight is minor, slight, and inconsequential.

Also, the Court also finds that there is no jurisdictional defect in service due to the misspelling of Mrs. Pnina Moskovits first name as set forth in the process server's affidavits³. The Court notes that "under the doctrine of *idem sonans*, strict accuracy in spelling names is not required in legal documents or proceedings. All that is required is that the name as spelled, although different from the correct spelling, conveys a sound practically identical with the sound of the correct name when pronounced." (*Sporza v German Sav Bank*, 119 A.D. 172, 104 N.Y.S. 260 [1st Dept 1907], *affd* 192 N.Y. 8, 84 N.E. 406 [1908]). (*Boyle Auto Wreckers, Inc. v Ali*, 8 Misc 3d 1030[A], 1030A, 2005 NY Slip Op 51352[U], *2 [Civ Ct, Bronx County 2005]). Moreover, Mrs. Pnina Moskovits was unknown to the Plaintiff prior to the time of service. She was not a signatory to either the note or the mortgage. Due to her presence at the mortgaged

³ The Affidavit of Service spells her name as PENINA. The correct spelling of the name is PNINA.

premises at the time of service, the court finds that Mrs. Pnina Moskovits was served pursuant CPLR §308(1).

As to Defendant Yaakov Moskovits, the court finds that the unsubstantiated and conclusory denials of service contained in his affidavit on this motion are insufficient to rebut the prima facie showing of proper service created by the process server's affidavits. Therefore, Defendant Yaakov Moskovits was served with process, personally, pursuant to CPLR §308(2), and his application to vacate the default due to a lack of personal jurisdiction and dismissal of the complaint or a traverse hearing on the issue of service of process as to him is DENIED.

However, as to Defendant Agness Moskovits, the Court finds that based on the address contained in the driver's license, there is a question of fact as to whether she was properly served at her last known address. As such, this court refers this matter to a Judicial Hearing Officer or Special Referee for a traverse hearing as to Defendant Agness Moskovits only.

Finally, this Court dismisses Defendant's argument that Plaintiff lacks standing to commence this action. "In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced" (*Bank of N.Y. v Silverberg*, 86 AD3d 274, 279, 926 NYS2d 532 [2011]; see *US Bank N.A. v Cange*, 96 AD3d 825, 826, 947 NYS2d 522 [2012]; *U.S. Bank, N.A. v Collymore*, 68 AD3d 752, 753-754, 890 NYS2d 578 [2009]; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 888 NYS2d 914 [2009]). "Either a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident" (*U.S. Bank, N.A. v Collymore*, 68 AD3d at 754; see *HSBC Bank USA v Hernandez*, 92 AD3d 843, 939 NYS2d 120 [2012]). However, "a transfer or assignment of only the mortgage


without the debt is a nullity and no interest is acquired by it," since a mortgage is merely security for a debt and cannot exist independently of it (*U.S. Bank N.A. v Dellarmo*, 94 AD3d 746, 748, 942 NYS2d 122 [2012]; see *Deutsche Bank Natl. Trust Co. v Barnett*, 88 AD3d 636, 931 NYS2d 630 [2011]). "Where, as here, the issue of standing is raised by a defendant, a plaintiff must prove its standing in order to be entitled to relief" (*Bank of N.Y. v Silverberg*, 86 AD3d at 279; see *Wells Fargo Bank Minn., N.A. v Mastropaolo*, 42 AD3d 239, 242, 837 NYS2d 247 [2007]). (*Homecomings Fin. v Guldi*, 108 AD3d 506, 507-508 [2d Dept 2013]).

Here, the original bank, Ohio Savings Bank was in possession of the note and mortgage. Ohio Savings Bank assigned the mortgage to MERS (Mortgage Electronic Registration System, Inc.), who in January of 2014 assigned the mortgage to Plaintiff, New York Community Bank. According to Plaintiff and the Federal Reserve's National Information Center, Plaintiff acquired Amtrust Bank (the renamed Ohio Savings Bank) in December of 2009 and gained possession of the underlying note which it obtained as part of its acquisition. Since this matter was filed in March of 2014, the Court finds that the Plaintiff had possession of both the note and mortgage prior to the commencement of this action. As such, the Court DENIES the portion of the motion to dismiss for lack of standing.

This constitutes the Decision/Order of the Court.

Dated: ~~June~~ ^{July 8}, 2022

ENTER:



Hon. Robin K. Sheares, A.J.S.C.