

Heres v U.S. Bank N.A.
2022 NY Slip Op 33165(U)
September 8, 2022
Supreme Court, Kings County
Docket Number: Index No. 524197/2018
Judge: Richard J. Montelione
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At IAS Part DJMP of the Supreme Court of the State of New York, Kings County, on the ____ day of _____ 2022

SEP 08 2022

PRESENT: HON. RICHARD J. MONTELEONE, J.S.C. SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS: PART DJMP

DECISION AND ORDER

-----X ANA HERES,

Index No.: 524197/2018 Mot. Seq. 2

Plaintiff, -against-

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE FOR LEHMAN BROTHERS STRUCTURED ASSET INVESTMENT LOAN TRUST SAIL 2006-BNC01, JOHN DOE #1-10, JANE DOE #1-10,

Defendants. -----X

The following papers were read on this motion pursuant to CPLR 2219(a):

Papers	Numbered
Notice of Motion (NYSCEF # 5); Memorandum of Law in Support dated August 12, 2020 (NYSCEF # 17); Attorney Affirmation in Support of Motion affirmed by Ashley Newman, Esq. on August 12, 2020; Exhibits (NYSCEF # 18-36).....	5-36
Plaintiff’s Memorandum of Law in Opposition dated January 12, 2021 (NYSCEF # 39); Attorney Affirmation in Opposition to Motion Affirmed by Michael Lorusso, Esq. on January 12, 2021 (NYSCEF #40); Exhibit (NYSCEF # 41).....	39-41
Defendant’s Memorandum of Law in Reply dated April 19, 2021 (NYSCEF # 43); Attorney Affirmation in Reply affirmed by Ashley Newman, Esq. on April 19, 2021 (NYSCEF # 44); Exhibit (NYSCEF # 45).....	43-45

This is an action to cancel and discharge a mortgage on 752 Hendrix Street, Brooklyn, NY 11207 (“the property”) as accelerated and barred by the statute of limitations. Defendant U.S. Bank National Association, Trustee for Lehman Brothers Structured Asset Investment Loan Trust Sail 2006-BNC01 (“defendant”), the assignee of the mortgage, moves this court for an order (a) vacating the default judgment this court issued by orders dated September 24, 2019 and entered September 30, 2019 and November 14, 2019 and entered on November 19, 2019, pursuant to CPLR 5015(a) and/or CPLR 317; (b) dismissing the complaint, pursuant to CPLR 3211(a)(8) and CPLR 306-b; or in the alternative permitting defendant to serve a late answer, pursuant to CPLR 3012(b).

On December 30, 2005, non-party Fenton Reese executed a note in the amount of \$486,000 in favor of BNC Mortgage, Inc., and executed a mortgage in favor of Mortgage Electronic Registration Systems, Inc. (“MERS”) as mortgagee as nominee for BNC, which encumbers the property. The mortgage was recorded in the Office of the City Register of the City of New York, Kings County on January 19, 2006, at City Register File Number (“CRFN”) 2006000030777. The note and mortgage were transferred to defendant by an assignment of mortgage executed in September of 2008 and recorded in March of 2010 at CRFN

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2010000081031 and a correction assignment of mortgage was issued on February 13, 2013 and recorded on April 17, 2013 at CRFN 2013000152669.

On January 17, 2007, Fenton Reese executed a deed transferring title of the property to Ana Heres (“plaintiff”). On February 20, 2007, the deed was recorded in the Office of the City Register of the City of New York, Kings County at CRFN 2007000095607. Defendant alleges that Fenton Reese defaulted in making the monthly mortgage payment due on March 1, 2014 and monthly thereafter.

Defendant brought three separate actions to foreclose the mortgage. The first, commenced on October 18, 2007 (bearing Index No. 39759/2007), was voluntarily discontinued on November 16, 2016. The second, commenced on April 5, 2013 (bearing Index No. 4720/2013), was voluntarily discontinued on September 20, 2016. The third, commenced on September 19, 2019 (bearing Index No. 520568/2019) is currently pending.

Plaintiff commenced this action on December 3, 2018, by filing the summons and complaint. Defendant was allegedly served pursuant to BCL 307. In this action, plaintiff contends that by commencing the 2007 action, defendant accelerated the mortgage and caused the statute of limitation to begin to run on the entire mortgage. *See Milone v. U.S. Bank N.A.*, 164 A.D.3d 145, 152 (2d Dep’t 2018). Since the state of limitation for a foreclosure action is six years, plaintiff maintains the statute of limitations on the entire mortgage has already expired. *See HSBC Bank USA, N.A. v. Gold*, 171 A.D.3d 1029, 1030 (2d Dep’t 2019); *see* CPLR 213(4). On July 23, 2019, plaintiff filed a motion for default judgment in this action, which this court granted by order dated September 24, 2019 and entered September 30, 2019. The September 24, 2019 order directed plaintiff to settle an order on notice. The court issued the settled order and judgment on November 14, 2019, which was entered on November 19, 2019, and directed the Kings County Clerk to cancel and discharge the mortgage.

Under CPLR 317, “[a] person served with a summons other than by personal delivery to him or to his agent for service designated under rule 318, within or without the state, who does not appear may be allowed to defend the action” by seeking to vacate a default judgment within one year of learning of the judgment upon demonstrating a potentially meritorious defense. It is undisputed that plaintiff sought service on defendant via BCL 307, through the Secretary of State. “[S]ervice on a corporation through delivery of process to the Secretary of State is not ‘personal delivery’ to the corporation or to an agent designated under CPLR 318.” *Eugene Di Lorenzo, Inc. v. A.C. Dutton Lbr. Co.*, 67 N.Y.2d 138, 141 (1986); *see Stevens v. Stepanski*, 164 A.D.2d 935, 937 (2d Dep’t 2018). Defendant maintains, and plaintiff does not dispute, that defendant first learned of the November 14, 2019 order discharging the mortgage in January of 2020. Moreover, “there is no necessity for a defendant moving pursuant to CPLR 317 to show a ‘reasonable excuse’ for its delay.” *Eugene Di Lorenzo, Inc.* at 141.

As for a meritorious defense, defendant alleges that active military service of both Fenton Reese and plaintiff cannot be counted toward the statute of limitations. Defendant evidenced plaintiff’s military service by submitting an affidavit she swore to in another action, *Heres v. Reese*, Index No. 10311/2011. In her own affidavit, plaintiff swears she was engaged in military service as of June 6, 2011. *See* NYSCEF # 26. Defendant further evidences plaintiff’s military status with a Status Report Pursuant to Servicemembers Civil Relief Act, which states that as of July 7, 2017, plaintiff was engaged in active military service. *Id.* Under

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New York Military Law 308, “[t]he period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation or order for the bringing of any action or proceeding in any court...by or against any person in military service.” The intent of this statute is to modify, *inter alia*, statutes of limitation. *Stutz v. Guardian Cab Corp.*, 273 A.D.4, 8 (1st Dep’t 1947). Accordingly, defendant argues the statute of limitation on the mortgage has not expired. The court finds defendant has demonstrated a potentially meritorious defense.

Turning now to the branch of defendant’s motion to dismiss the complaint, defendant argues plaintiff’s service of the summons and complaint on defendant was defective, so this court never obtained jurisdiction over defendant. Under CPLR 3211(a)(8) “[a] A party may move for judgment dismissing one or more causes of action asserted against him on the ground that... the court has not jurisdiction of the person of the defendant.” As stated previously, plaintiff attempted service pursuant to BCL 307. Pursuant to BCL 307,

Service may be commenced on an unauthorized foreign corporation by serving the process upon the secretary of state as its agent. N.Y. Bus. Corp. Law § 307(a). Such process must be served personally at the office of the Secretary of State or on the deputy or an authorized agent for service. § 307(b). Thereafter, notice of the service and a copy of the process must either be delivered personally without New York to such foreign corporation in accordance with § 307(b)(1) or sent by or on behalf of the plaintiff to such foreign corporation by registered mail with return receipt requested in accordance with § 307(b)(2).

Flick v. Stewart-Warner Corp., 76 N.Y.2d 50, 55 (1990). BCL 307 requires that a copy of the summons and complaint be

- (1) Delivered personally without this state to such foreign corporation by a person and in the manner authorized to serve process by law of the jurisdiction in which service is made, or
- (2) Sent by or on behalf of the plaintiff to such foreign corporation by registered mail with return receipt requested, at the post office address specified for the purpose of mailing process, on file in the department of state, or with any official or body performing the equivalent function, in the jurisdiction of its incorporation, or if no such address is there specified, to its registered or other office there specified, or if no such office is there specified, to the last address of such foreign corporation known to the plaintiff.

The requirements of BCL 307 are of a “jurisdictional nature which must be strictly satisfied.” *Flick* at 54. In the instant case, after serving a copy of the summons and complaint on the Secretary of State, plaintiff mailed a copy to a San Diego address, which was neither filed with State of California nor defendant’s last known business address. It appears that this address was listed as a “care of” address in the recorded Assignment of Mortgage. See NYSCEF # 28. Defendant further maintains it never received a copy of the

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summons and complaint and submits evidence that the mailing of the summons and complaint was returned to the original sender. See Syphus Affidavit NYSCEF # 28 and NYSCEF # 36. The court notes that plaintiff has not submitted an affidavit of service of the summons and complaint as to any of the John Doe or Jane Doe defendants. Accordingly, this court lacks jurisdiction over this matter and the complaint must be dismissed.

Based on the foregoing, it is

ORDERED that the branch of motion to vacate the default judgment is GRANTED and the order dated September 24, 2019 and entered September 30, 2019 and the order and judgment dated November 14, 2019 and entered on November 19, 2019 are hereby VACATED; and it is further

ORDERED that the branch of the motion to dismiss is GRANTED, and the complaint is dismissed.

All other requests for relief are DENIED.

This constitutes the decision and order of the court.

ENTER



Hon. Richard J. Montelione, J.S.C.

KINGS COUNTY CLERK
FILED
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