

**Direct Lending Group, Inc. v Barina Group LLC**

2022 NY Slip Op 34661(U)

December 1, 2022

Supreme Court, Nassau County

Docket Number: Index No. 616735/2019

Judge: David P. Sullivan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU

PRESENT: HON. DAVID P. SULLIVAN,  
*Supreme Court Justice.*

-----X FORECLOSURE PART  
Direct Lending Group, Inc.,

Plaintiff(s),

Index No. 616735/2019  
Motion Seq. Nos. 003, 004  
Motion Submitted: 10/03/22

-against-

Barina Group LLC, Rina Paterno, Midland Funding LLC,  
AJ Lending Partners LLC, Webster Business Credit  
Corporation, Matthew Williams, Seaway Waterproofing,  
NYS Department of Taxation & Finance, State of New York,  
Discover Bank, "John Doe #1-5" and "Jane Doe #1-5",

Defendant(s).

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Upon the foregoing papers, Defendant Rina Paterno and Defendant Barina Group LLC's ("Barina") motion for an Order pursuant to CPLR §306-b, §1001, §1003, §3211(a)(8), §3215(c) & §5015(a)(4) and RPAPL§1311(1) or in the interest of substantial justice, vacating this Court's Order entered on February 3, 2022 ("February 2022 Order") denying Plaintiff's pending motion for a Default Judgment, Order of Reference and Judgment of Foreclosure and Sale and dismissing the underlying action in its entirety and Plaintiff's motion for a Default Judgment, Order of Reference and Judgment of Foreclosure and Sale are consolidated for disposition and determined as set forth hereinafter.

**Factual History**

This action was allegedly commenced by the filing of a Summons and Complaint on December 2, 2019. Plaintiff Direct Lending Group ("Plaintiff") commenced this action to foreclose on a commercial mortgage securing the property at 836 Clocks Boulevard, Massapequa, New York 11758. Plaintiff's process server states he personally served the Summons and

Complaint on Rina Paterno and Barina on December 16, 2019 at 8:30 a.m. at 42 Round Tree Drive, Melville New York 11747 (“business address”). Paterno is a member of Barina. The Affidavit of Service describes Rina Paterno as a 59-year-old white male, with brown/grey hair, a moustache and beard, who is 5 feet 10 inches and 180 pounds.

Rina Paterno, Barina Group, Midland Funding LLC, AJ Lending Partners LLC, Webster Business Credit Corporation, Matthew Williams, Seaway Waterproofing, NYS Department of Taxation & Finance, State of New York, Discover Bank, “John Doe #1-5” and “Jane Doe # 1-5” (“Defendants”) failed to appear in this action. On June 24, 2021, Plaintiff moved this Court for leave to amend the caption of the Summons and Complaint and file and serve the Summons and Complaint. This motion was granted on default. The Affidavit of Service of the Amended Complaint reflects service was made on Rina Paterno, on February 7, 2022, by substitute service at the home of her husband, Barry Paterno at 42 Round Tree Drive, Melville New York 11747 and describes Barry Paterno, as a 63-year-old white male with grey hair, 5 feet 10 inches and 230 pounds. Defendants did not answer the Amended Complaint and Plaintiff brought the pending motion, which is consolidated herein. In response, Rina Paterno brings this Order to Show Cause, seeking an Order vacating the February 2022 Order, denying the pending motion and dismissing this action in its entirety.<sup>1</sup>

#### **Dismissal of the Action in its Entirety for Failure to Properly Effectuate Service**

Rina Paterno argues that this action must be dismissed in its entirety contending this Court lacks personal jurisdiction over her and Barina based upon Plaintiff’s failure to properly serve the Summons and Complaint. The process server’s affidavit detailing the service of the Summons and

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<sup>1</sup> This Court treats Defendant’s Order to Show Cause as a Cross-Motion to Plaintiff’s pending motion for Default Judgment, Order of Reference and Judgment of Foreclosure and Sale

Complaint states that Rina Paterno and Barina were personally served on December 16, 2019 at 8:30 a.m. at the business address in Melville, New York. The affidavit describes Rina Paterno as a 59-year-old white male, with brown/grey hair, a moustache and beard, 5 feet 10 inches and 180 pounds. In her affidavit in support of this motion, Rina Paterno disputes the facts contained in the affidavit of service, claiming that on December 16, 2019, starting at 8:00 am she dropped her children at school in Port Jefferson, then drove to Mineola where she remained until she picked her children up from school at 3:40 pm. Thus, Rina Paterno denies being present at the business address in Melville, on the date of service. Moreover, Rina Paterno claims it is clear that she was not served with the Summons and Complaint based up on the description provided in the affidavit of service which describes her 59-year-old white male, with brown/grey hair, a moustache and beard, 5 feet 10 inches and 180 pounds. Rina Paterno's driver's license, submitted in support of this motion, supports her claim she was not personally served as her license reflects she is a white female, who is 5 feet and 1 inch tall and not 59-year-old white male who is 5 feet 10 inches tall. Rina Paterno also attests that she has never identified as a man, nor has she ever worn a moustache or beard, further, supporting her argument that she was not personally served with the Summons and Complaint.

Plaintiff argues in opposition that Rina Paterno's whereabouts on December 16, 2019 are irrelevant. Plaintiff contends that even if it did not properly serve the Summons and Complaint, such defect was cured by its subsequent proper service of the Amended Complaint. To support its argument, Plaintiff relies on the decision in Summitbridge Credit Investments LLC v. Wallace, 128 AD3d 676 [2<sup>nd</sup> Dept 2015] which Plaintiff claims stands for the proposition that deficiencies in an affidavit of service may be cured by the filing of a correct or supplemental affidavit. Plaintiff also rejects Rina Paterno's argument that she was never served with the Summons and Complaint

arguing that although the process server incorrectly states he made personal service on Rina Paterno, it was clear the process server actually meant he served Rina Paterno, by substitute service, on her husband "Barry Paterno", as the similarities in the description of the person who was served with the Summons and Complaint matches the description of Barry Paterno, who was served with the Amended Complaint. Accordingly, Plaintiff argues that the similarities in appearance of Barry Paterno, is "evidence enough", to confirm that its process server properly effectuated substitute service on Rina Paterno, by service on her husband.

Plaintiff's argument that it cured its defective service of the Summons and Complaint is unavailing. Plaintiff never submitted a corrected or supplemental affidavit of service of the Summons and Complaint. Instead, two years later Plaintiff filed a new affidavit in connection with its service of Amended Complaint. Accordingly, defects in service of the Summons and Complaint were never cured and this Court lacks jurisdiction over Rina Paterno and Barina. Moreover, even assuming arguendo that the filing of the affidavit of service in connection with the Amended Complaint cures the defects in the service of the Summons and Complaint, the affidavit of service of the Amended Complaint is also defective. It is evident that the affidavit of service of the Amended Complaint is defective as it incorrectly names the husband of Rina Paterno as "Barry" and incorrectly states that service was made as Barry's home in Melville when his home address is in Port Jefferson. The driver's license of Rina Paterno's husband reflects that his name is Christopher and not Barry and that his home address is 105 Peninsula Drive, Port Jefferson, New York 11777 not 42 Round Tree Drive, Melville New York 11747 where service was made.

Based upon the foregoing, Plaintiff fails to prove it properly effectuated service of the Summons and Complaint on Rina Paterno and Barina. Plaintiff's failure to properly effectuate service in this action deprives this Court of personal jurisdiction over Rina Paterno and Barina.

(Wells Fargo Bank, N.A. v. Heaven, 176 Ad3d 761 [2<sup>nd</sup> Dept 2019]). Accordingly, the instant motion to dismiss this action, in its entirety pursuant to CPLR §3211(a)(8), for failure to obtain jurisdiction over Defendants Rina Paterno and Barina, is granted.

#### Dismissal Against Remaining Defendants

RPAPL §1311(1) states that a person whose interest is claimed to be subject and subordinate to a Plaintiff's lien must be made a party to the action. When jurisdiction is not effectuated over a necessary party, a dismissal of the action is required against all Defendants. (LaSalle Bank, N.A. v. Benjamin, 164 AD3d 1223 [2<sup>nd</sup> Dept 2018]). Here, Barina, fee owner of the mortgaged property, has an interest subject and subordinate to Plaintiff's lien. Thus, Barina is a necessary and indispensable party to this action. (LaSalle Bank, N.A. v. Benjamin at 1225). Based upon this Court's dismissal of the Complaint against Paterno and Barina, Plaintiff cannot maintain this action against the remaining Defendants (LaSalle Bank, N.A. v. Benjamin at 1225). Paterno's motion to dismiss this action based upon RPAPL §1311(1) is granted.

Insofar as this action is dismissed in its entirety, Defendant's motion to vacate the February Order granting Plaintiff leave to amend the caption and file and serve the Amended Complaint is denied as moot. Additionally, Defendant's motion seeking an Order denying the pending motion is also denied as moot.

Accordingly, it is


**ORDERED** that Defendant's motion to dismiss the action in its entirety is **GRANTED**;

and it is further

**ORDERED** that Defendant's motion to vacate the Order granting Plaintiff leave amend the caption of the Complaint and to file and serve the Amended Complaint and to deny Plaintiff's pending motion is **DENIED** as moot; and it is further **ORDERED** that all requests for relief not addressed herein are **DENIED**.  
This constitutes the Decision and Order of this Court.

Date: Dec. 1, 2022  
Mineola, New York

ENTER



HON. DAVID P. SULLIVAN, J. S. C.

**ENTERED**

**Dec 09 2022**

NASSAU COUNTY  
COUNTY CLERK'S OFFICE