

Deutsche Bank Natl. Trust Co. v Molyaev

2022 NY Slip Op 34804(U)

October 10, 2024

Supreme Court, Kings County

Docket Number: Index No. 522308/2017

Judge: Cenceria P. Edwards

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FRP1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 30th day of June, 2022.

P R E S E N T:
HON. CENCERIA P. EDWARDS, CPA.,
Justice.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS
CERTIFICATE TRUSTEE ON BEHALF OF BOSCO CREDIT II
TRUST SERIES 2010-1,

Plaintiff(s),

-against-

JOSEP MOLYAEV, BOARD OF MANAGERS OF LINDEN
GARDENS CONDOMINIUM, et. al,

Defendant(s).

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**AMENDED
ORDER**

Calendar #(s): 14

Index #: 522308/2017

Mot. Seq. #(s): 3

The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Order to Show Cause, Affidavits (Affirmations) and Exhibits _____	_____ 84-102 _____
Opposing Affidavits (Affirmations) and Exhibits _____	_____ 103-113 _____
Reply Affidavits (Affirmations) and Exhibits _____	_____ 114-118 _____
Sur-Reply Affidavits (Affirmations) and Exhibits _____	_____ 119 _____

On November 16, 2017, Plaintiff commenced this action to foreclose on the residential property located at 291 Martense Street, Unit 4J, Brooklyn, NY 11226 (the “subject premises”), owned by defendant-mortgagor Josep Molyaev (“Defendant”), alleging that Defendant failed to pay the monthly installment payment due on April 1st, 2008, and all those thereafter. A default judgment and order of reference (“ORef”) was entered on or about May 21, 2019, against Defendant for his failure to answer the complaint followed by a judgment of foreclosure and sale (“JFS”) issued on or about January 27, 2020 (*see* NYSCEF Doc. #s 36 and 67). Resultingly, by Order to Show Cause (“OSC”), dated June 7, 2022, Defendant, by his attorney, moves the Court

(his first time in appearance) pursuant to CPLR §§ 5015 (a)(4) and 3211 (a)(8), for an Order, *inter alia*, vacating his default in answering, vacating the ORef and JFS, and dismissing the complaint.

In support of this motion, Defendant asserts that the Court lacks jurisdiction over him because he was never served with process and submits an affidavit from himself and two affidavits from a nonparty. Specifically, Defendant denies that he was ever served with the summons and complaint since he does not reside at 108-48 69th Road, Forest Hills, New York 11375 (“the Service Property”), the premises at which he was allegedly served on November 20, 2017. Defendant avers that he has resided with his family at 78-39 162nd Street, 2nd Floor, Fresh Meadows, New York 11366, since August of 2009, he has “never resided at [the Service Property] or even visited such premises,” and “this address is wholly unfamiliar to me” (*see* NYSCEF Doc. #87, ¶¶ 8-11 and 14). In support, Defendant submits copies of a Con Edison electric bill for the period of October 24, 2017, through November 23, 2017, addressed to him and his wife at his home on 78-39 162nd Street in Fresh Meadows, as well as a TD Bank statement for the period of October 23, 2017, through November 22, 2017, addressed solely to him at a different address “7839 52nd St, Fl 2, Fresh Meadows, NY 11366” (*see* NYSCEF Doc. #94). Defendant also denies the description attributed to him in the affidavit of service, attesting that at the time of service, he was 50 years old (born in November of 1967) and did not look like someone who was 70 to 79 years old, he had a full head of dark brown hair, was 5’ 7” tall, and weighed approximately 140 pounds (*see* NYSCEF Doc. #87, ¶15).

In an affidavit of service filed November 28, 2017, Plaintiff’s process server, Samuel Berg, avers that he personally delivered the summons, complaint, and other initiating papers (“the papers”), to Defendant at the Service Property in Forest Hills on November 20, 2017, at 6:00 a.m. (*see* NYSCEF Doc. #4). Berg described Defendant as a White male, age 70-79, with brown, balding hair, at an approximate height of “5ft4in – 5ft8in,” and weighing approximately 190-209 pounds (*see id.*).

Defendant avers that he purchased the subject premises in Brooklyn, New York “for my own and personal use back in [*sic*] November 27, 2006,” he lived there “for over a year,” and the mortgage that is the subject of this foreclosure action is a second mortgage he obtained upon said

purchase (*see* NYSCEF Doc. #87, ¶¶ 4-5). Defendant further avers that he never received any papers related to the action; specifically, the summons and complaint; a demand notice pursuant to the terms of the mortgage agreement; any statutorily required foreclosure-related notices, or any motion papers, notices of sale, or notices of entry of any orders. Defendant further attests, “I had absolutely no knowledge” of this action “until less than two weeks ago,” when his attorney found it after searching the court’s online records for his name (*see id.* at ¶¶ 6-8, 20, and 23-28).¹

Analysis

“[O]rdinarily, a proper affidavit of a process server attesting to personal delivery of a summons to a defendant is sufficient, *prima facie*, to establish jurisdiction. Where, however, where there is a sworn, nonconclusory denial of service by a defendant, the affidavit of service is rebutted and the plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing” (*E. Sav. Bank, FSB v Campbell*, 167 AD3d 712, 714 [2d Dept 2018] [internal citations omitted]).

To the extent Defendant argues that service was invalid solely because he did not reside at the Service Property, this is unavailing, as CPLR § 308 (1) merely requires delivery of the papers in-person to the intended defendant anywhere within the State (*see Estate of Essig v Essig*, 227 AD3d 1379, 1381 [4th Dept 2024]).

Additionally, the alleged discrepancies in physical appearance between Defendant and the person to whom process server Berg delivered the papers are, standing alone, insufficient to raise an issue of fact warranting a hearing; this Court further notes, Defendant failed to substantiate his dispute in appearance with an iota of documentary evidence, a driver’s license, state picture identification, etc., to depict his physical appearance at the time in question (*see HSBC Bank United States, N.A. v Rahmanan*, 194 AD3d 792, 794 [2d Dept 2021]; *PNC Bank, N.A. v Bannister*, 161 AD3d 1114, 1115 [2d Dept 2018]; *US Bank N.A. v Cherubin*, 141 AD3d 514, 516 [2d Dept 2016]).

However, Defendant also submits an affidavit, dated June 7, 2022, from nonparty Rafael Tabibov, who claims to have owned the Service Property since 2002 and states, in pertinent part, as follows: “no individual by the name of [Defendant] ever resided [at] or visited [the Service

¹ Defendant’s affidavit was executed and filed on June 7, 2022 (*see* NYSCEF Doc. #87, pp. 5-6).

Property]”; he is “not aware of any papers pursuant to this matter being ever delivered to [the Service Property]”; and “no member of my household, including myself, was ever served with any documents pursuant to this matter” (*see* NYSCEF Doc. #88, ¶¶ 1 and 3-4). Tabibov further avers: he was 38 years old in 2017; “the only person in my household who could be described as being 70-79 years old is my father Michael Tabibov,” who is 70 years old; his father “does not speak much English, and if any papers were given to him, he would advise me of the same”; and “[n]o person by [Defendant’s] name was or could be served at my home” (*see id.* at ¶¶ 5-7).

In opposition, Plaintiff argues that Defendant failed to rebut the presumption of proper service arising from the affidavit of service because, *inter alia*, he failed to submit evidence substantiating the alleged discrepancies in appearance between him and the person served. As discussed above, the Court, in agreement with Plaintiff, notes that Defendant failed to substantiate the alleged discrepancies.²

Plaintiff also urges the Court to disregard the affidavit of nonparty witness Tabibov, arguing that his assertion that he owns the Service Property “is blatantly false and clearly refuted by evidence” (NYSCEF Doc. #104 [Plaintiff’s Memorandum of Law], p. 6), to wit, an ACRIS printout annexed to its opposing papers as Exhibit “H” (*see* NYSCEF Doc. #112). According to Plaintiff, the printout shows that Tabibov deeded away the premises on August 6, 2013, several years before the challenged service. Moreover, even accepting that the identified parcel is the Service Property, the ACRIS printout indicates that Tabibov conveyed the premises to ANLH, LLC (“the LLC”) on August 6, 2013, but is silent as to the relationship, if any, between him and the LLC. The printout also indicates that Tabibov’s 2013 conveyance to the LLC was for a reported \$25,000.00, the LLC took out a mortgage against the premises on October 19, 2018, for \$1.9 million, and Tabibov was then issued satisfactions of mortgage by two separate entities on October 19, 2018, and November 13, 2018, respectively (*see id.*).

² As the alleged discrepancies include two to three decades in age, between 50 and 69 pounds in weight, and a full head of dark hair versus gray and thinning hair, the Court disagrees with Plaintiff’s characterization of these as “too minor, slight and inconsequential to warrant a hearing” (NYSCEF Doc. #104 [Plaintiff’s Memo of Law], pp. 7-8).

In further support of his motion, Defendant submits reply papers with another affidavit from Tabibov, who disputes Plaintiff's characterization of his ownership of the Service Property (*see* NYSCEF Doc. #115). In this second affidavit, Tabibov states that he "is the owner of ANLH, LLC," and the 2013 deed transfer "was for a nominal value of twenty-five thousand (\$25,000) dollars, signed by me as a seller, and the purchaser" (*id.* at ¶4). He further explains that when the LLC obtained the \$1.9 million mortgage against the premises in 2018, he "signed all mortgage documents" (*see id.* at ¶5). Tabibov expressly states that the Service Property "belongs to my family and me," and otherwise reiterates that Defendant never resided or visited the premises, no papers pertaining to this action were ever delivered there, and no member of his household was served with said papers (*see id.* at ¶¶ 6 and 18).

Plaintiff filed a notice of rejection of Defendant's reply papers, arguing that they were improper because Defendant brought the instant motion via OSC, which typically does not allow for the movant to submit a reply (*see* NYSCEF Doc. #119). Plaintiff is correct that the Uniform Civil Rules for the Supreme Court and the County Court provide, in pertinent part, "[a]bsent advance permission of the court, reply papers shall not be submitted on orders to show cause" (22 NYCRR § 202.8-d). Defendant filed his own rejection notice, contending that Plaintiff's rejection notice is really an improper sur-reply because it contains substantive argument in response to his reply (*see* NYSCEF Doc. #120). He also argues that his reply was proper because his proposed OSC purported to "reserve[] his right to reply to Plaintiff's opposition" and said clause was not struck from the signed Order (*see* NYSCEF Doc. #99, p. 2), showing that he obtained permission, as the Uniform Civil Rules require. In any event,

"[w]hile unauthorized replies and sur-replies containing new arguments generally should not be considered, the Supreme Court has the authority to regulate the motion practice before it, as well as the discretion to determine whether to accept late papers, or even sur-reply papers, for 'good cause'" (*U.S. Bank, N.A. v Rudick*, 156 AD3d 841, 842-843 [2d Dept 2017], citing, *inter alia*, *Gluck v. New York City Tr. Auth.*, 118 A.D.3d 667 [2d Dept 2017]; CPLR 2214 [c]).

The Court exercises its discretion to consider the supplemental papers proffered by both sides. Given the specific challenge by Plaintiff to Tabibov's ownership of the Service Property, the Court deems it prudent to accept Defendant's reply papers for the purpose of clarifying Tabibov's connection to the premises, particularly since Plaintiff's contrary evidence on the

subject was not conclusive. Additionally, Plaintiff's "sur-reply" was filed only one day after Defendant filed his reply papers, and the Court perceives no prejudice in allowing both sides to develop the record more thoroughly on this significant factual issue.³

The Court rejects Plaintiff's contention that Defendant proffered only a bare conclusory and unsubstantiated denial of service. To the contrary, as discussed, Defendant's insistence that he has never been to the Service Property is corroborated by Tabibov, the purported owner of that home, and Defendant's claim that he resided elsewhere is substantiated by his documentary evidence. However, the Court is baffled, and the record is devoid of why nonparty Tabibov, apparently a total stranger, would submit an affidavit with rants about his own foreclosure woes and berate the attorneys in his foreclosure case, same herein. Still, these are specific factual details contradicting the primary allegation made by the process server – that he served Defendant in-person at 6:00 a.m. at the Service Property. The Court also notes that Defendant did not offer any explanation as to why his attorney was randomly searching court records for his name and found him to be in foreclosure.

Thus, the Court finds that there are questions of fact regarding proper service of process that cannot be resolved on the parties' papers (*see e.g., U.S. Bank N.A. v Giraldo*, 192 AD3d 720, 721-722 [2d Dept 2021]; *Caliber Home Loans, Inc. v Silber*, 173 AD3d 963, 965 [2d Dept 2019]), and "which should be determined only after a hearing" (*Gray v Giannikios*, 90 AD3d 836, 837 [2d Dept 2011]).

Accordingly, the above-referenced motion by Defendant Josep Molyaev (motion sequence #3) is **GRANTED to the extent** that it is hereby:

ORDERED that a traverse hearing shall be held on the issue of whether Defendant Josep Molyaev was properly served with copies of the summons and complaint pursuant to CPLR § 308 (1), as alleged in the affidavit of service proffered by Plaintiff; and it is further

³ Plaintiff's sur-reply is silent regarding Tabibov's explanation of continued ownership and residence at the Service Property. It is noted that in his second affidavit, Tabibov seems to express resentment towards Plaintiff's former attorneys, who commenced the instant action, because they previously commenced a foreclosure action against Tabibov allegedly predicated upon facially defective "sewer service" (*see* NYSCEF Doc. #115, ¶¶ 6-17).

ORDERED that the remainder of the motion by Defendant Josep Molyaev (motion sequence #3) shall be held in abeyance pending the outcome of the traverse hearing; and it is further

ORDERED that the parties shall appear in FRP1, room 756, for a Status Conference on November 13, 2024, at 10:00am, in the interim; and it is further

ORDERED that within 15 days of the entry of this Order, the movant shall serve this Order with Notice of Entry on Plaintiff and all other parties entitled to notice of these proceedings.

The foregoing constitutes the Decision and Order of this Court.

E N T E R,

Dated: October 10, 2024



Hon. Cenceria P. Edwards, JSC, CPA