

Bank of Am., N.A. v Camacho
2023 NY Slip Op 31860(U)
May 25, 2023
Supreme Court, Kings County
Docket Number: Index No. 512671/2019
Judge: Cenceria P. Edwards
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 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 23rd day of November, 2022.

P R E S E N T:

HON. CENCERIA P. EDWARDS, C.P.A.,

Justice.

X

BANK OF AMERICA, N.A.,

Plaintiff(s),

-against-

ENRIQUE CAMACHO, SECRETARY OF HOUSING AND URBAN DEVELOPMENT and “John Doe” and/or “Jane Doe” # 1-10 inclusive, the last ten names, being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons, corporations or heirs at law, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendant(s).

-----X

AMENDED ORDER

Calendar #(s): 3

Index #: 512671/2019

Mot. Seq. #(s): 1

The following e-filed papers read herein:

NYSCEF Doc. Nos.:

Notice of Motion/Order to Show Cause/Petition/Cross-Motion and Affidavits (Affirmations) and Exhibits _____

20-37

Opposing Affidavits (Affirmations) and Exhibits _____

Reply Affidavits (Affirmations) and Exhibits _____

On June 7, 2019, Plaintiff Bank of America, N.A. commenced this action against, *inter alia*, Defendant-mortgagor Enrique Camacho (“Camacho”) to foreclose his residential mortgage secured against real property located at 274 Stagg Street, Brooklyn, NY 11206. Plaintiff asserts it is entitled to foreclose because Camacho failed to pay the monthly installments of principal and interest on his loan/note, as promised. As of December 1, 2018, Camacho owed \$247,419.33.

Plaintiff filed the instant *ex-parte* motion, pursuant to CPLR 3215, for leave to enter a default judgment against all non-appearing defendants, including Camacho, for their failure to

answer the complaint. Plaintiff also seeks an order to appoint a referee and amend the caption. When a movant presents an *ex-parte* application to the court, a thorough review of the movant's submissions is required to determine whether, in this case, plaintiff has demonstrated its entitlement to entry of a default judgment.

"A plaintiff seeking leave to enter a default judgment under CPLR 3215 must file proof of: (1) service of a copy or copies of the summons and the complaint, (2) the facts constituting the claim, and (3) the defendant's default" (*CitiMortgage, Inc. v Weaver*, 197 AD3d 1087, 1088 [2d Dept 2021] [internal quotation marks omitted; see CPLR 3215(f)]. "To demonstrate the facts constituting the claim, the movant need only submit sufficient proof to enable a court to determine if the claim is viable" (*Lancer Ins. Co. v Fishkin*, 211 AD3d 719, 721 [2d Dept 2022])).

Based upon review of the Plaintiff's documentary submissions, the question herein for this Court's determination is whether Plaintiff sustained its burden of proof that service of process of the summons and complaint was properly effectuated upon the Defendants. For the reasons articulated below, the Court finds that analysis of this issue suffices to dispose of the instant motion with denial for entry of a default judgment against Defendants, Camacho, John Doe, and Jane Doe.

PLAINTIFF'S SUBMISSIONS

In support of its motion for default judgment against Defendant-mortgagor Camacho, Plaintiff Bank America submits two (2) affidavits of service (*see* Exhibit J), purporting to show that its process server effectuated service of the summons and complaint upon Camacho twice on July 3, 2019, and again on August 27, 2019, pursuant to CPLR 308(4). Plaintiff additionally submits two (2) more affidavits of service wherein the same process server avers that he also served Defendants John Doe and Jane Doe using the same method, and on the same dates and times, as set forth in the second affidavit pertaining to the purported August 27, 2019, service upon Camacho.

In the first affidavit of service, the process server averred that he taped the summons and complaint along with other statutory notices to the subject premises, described as a "2 STORY RESIDENCE/ GRAY DOOR," on July 3, 2019 at 6:49AM after three prior unsuccessful attempts to personally serve Camacho, swearing: "Deponent was unable, with due diligence to find defendant or a person of suitable age and discretion on 6/21 @1:27PM; 7/1 @10:41AM; and 7/2 @6:04PM." The process server also averred that he mailed the documents to the subject premises pursuant to CPLR 308(4).

In the affidavits regarding the second attempts at service¹, the process server reiterates the initial four (4) dates of service documented in the first affidavit of service (July 3rd) and alleges that service of process was effectuated upon Camacho, Jane Doe, and John Doe on August 27, 2019 @6:07AM by taping the summons and complaint along with other statutory notices to the door of the subject premises a "2 STORY RESIDENCE/ GRAY DOOR" after several

¹ With respect to the service purportedly completed in August 2019, the process server submitted separate affidavits for the three individual defendants: Camacho, Jane Doe, and John Doe. Except for the names of these defendants, each affidavit contains identical information as to the dates, times, and methods of service,

unsuccessful attempts on: “6/21 @1:27PM; 7/1 @10:41AM; 7/2 @6:04PM; 7/3 @6:50AM; 7/11 @5:37PM; 7/18 @4:59PM; 8/3 @2:36PM; and 8/6 @12:53PM.” Also, the process server swore: “Deponent spoke with a neighbor at 272 Stagg Street, who stated to deponent that said Defendant lived there, and had no knowledge of place of employment of the Defendant(s).” The process server also averred that he mailed the documents pursuant to CPLR 308(4).

In further support of its motion, plaintiff submits Exhibit H, which includes the mortgages, notes, and “1-4 Family Riders (Assignment of Rents),” along with the “Recording and Endorsement Cover Page” from the NYC Department of Finance Office of the City Register, which summarizes the recording of Camacho’s two (2) mortgages with plaintiff on October 29, 2007, and June 10, 2011, secured against the subject premises, classified as– “Dwelling Only - 2 family.” Several pages identify the subject premises as a “2-family” building or contain the “1-4 Family Riders (Assignment of Rents)” (see Exhibit H, pp. 20, 29, 33, 64, 74, 84, 89, 111 and 120). The “1-4 Family Riders (Assignment of Rents)” for both mortgages contain Camacho’s notarized signature wherein he assigned his rents and leases to Plaintiff in 2007, and again in 2011 (see Exhibit H, pp. 64 and 84).

LAW AND ANALYSIS

Plaintiff asserts it satisfied the first prong of the legal requirement to enter a default judgment - proper service of the summons and complaint upon all defendants. “The plaintiff has the burden of proving the court’s personal jurisdiction over a defendant” (*E. Sav. Bank, FSB v Campbell*, 167 AD3d 712, 714 [2d Dept 2018]), and must do so by a preponderance of the evidence (see *id*; see also *U.S. Bank N.A. v Mangroo*, 200 AD3d 930, 931 [2d Dept 2021]; *Wilmington Trust Co. v Gewirtz*, 193 AD3d 1110, 1112 [2d Dept 2021]; *Gottesman v Friedman*, 90 AD3d 608, 609 [2d Dept 2011]). For the reasons articulated below, the court finds that analysis of this issue suffices to dispose of the instant motion.

The following well-known principles of law govern this court’s analysis. First, it is axiomatic that “[s]ervice of process must be made in strict compliance with statutory ‘methods for effecting personal service upon a natural person’ pursuant to CPLR 308” (*Estate of Waterman v Jones*, 46 AD3d 63, 65 [2d Dept 2007], quoting *Macchia v Russo*, 67 NY2d 592, 594 [1986]). Moreover, “notice received by means other than those authorized by statute cannot serve to bring a defendant within the jurisdiction of the court” (*Feinstein v Bergner*, 48 NY2d 234, 241 [1979]).

Plaintiff asserts, in its process server’s affidavits and documentary submissions, that it served defendant-mortgagor Camacho and the “John Doe” and “Jane Doe” defendants via “nail and mail” pursuant to CPLR 308(4). “Nail and mail service is effected ‘by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person . . . at his or her actual place of business’” (*Estate of Waterman v Jones*, 46 AD3d at 65-66, quoting CPLR 308[4]). Importantly, “[s]ervice pursuant to CPLR 308(4) may be used only where personal service under CPLR 308(1) and (2) cannot be made with ‘due diligence’” (*Wilmington Sav. Fund Socy., FSB v Zabrowsky*, 212 AD3d 866, 868-869 [2d Dept 2023]; citing, *inter alia*, *Fed. Natl. Mtge. Assn. v*

Castoldi, 187 AD3d 988, 990 [2d Dept 2020] and *Coley v Gonzalez*, 170 AD3d 1107, 1108 [2d Dept 2019])

It has been consistently held that when a process server resorts to service utilizing the “nail and mail” method, “[t]he due diligence requirement of CPLR 308(4) must be strictly observed,” since this is the least likely method of service to effectuate delivery of the summons and complaint to a defendant (see *Matter of Ferrera v Serrano*, 189 AD3d 1230, 1231 [2d Dept 2020]; *Fed. Natl. Mtge. Assn. v Castoldi*, 187 AD3d at 990; *Coley v Gonzalez*, 170 AD3d at 1108). “What constitutes due diligence is determined on a case-by-case basis, focusing not on the quantity of the attempts at personal delivery, but on their quality” (*Fed. Natl. Mtge. Assn. v Castoldi*, 187 AD3d at 990, quoting *McSorley v Spear*, 50 AD3d 652, 653 [2d Dept 2008]).

Accordingly, the precise issue before this Court is whether plaintiff satisfied the “due diligence” requirement by making satisfactory attempts to serve the summons and complaint upon defendants Camacho, along with Jane Doe and John Doe, under CPLR 308(1) (delivery in-person) and CPLR 308(2) (delivery to person of suitable age and discretion), prior to resorting to nail and mail service, pursuant to CPLR 308(4).

AFFIDAVIT OF SERVICE #1 JULY 3, 2019

In the process server’s first attempt at service of the summons and complaint, he alleged that service was effectuated on July 3, 2019, at 6:49AM, when he “taped” the summons and complaint and other statutory documents to the door of the subject property at 274 Stagg Street, described in the affidavit as both defendant-mortgagor Camacho’s “last known address” and “place of residence,” after he was unable to serve Camacho in person (CPLR 308[1]) or a person of suitable age and discretion (CPLR 308[2]) on three different occasions. The Court notes in reviewing the affidavit of service that all four service attempts upon Camacho were made only on weekdays, June 21 @1:27PM (Friday); July 1 @10:41AM (Monday); July 2 @6:04PM (Tuesday); July 3 @6:49AM (Wednesday) before taping it to the door on the day before a highly celebrated holiday, July 4th. In addition, they were also made during the hours of the day when Camacho could have been reasonably expected to be at work or traveling to or from work, and/or on vacation during a highly traveled holiday season. Moreover, the process server did not make any attempts to serve Camacho at his work or place of business.

Consequently, service of process was not properly effectuated on July 3, 2019, with all non-quality attempts at service made on weekdays and/or during expected travel times to and from work (see *Coley v Gonzalez*, 170 AD3d at 1108, citing, *inter alia*, *McSorley v Spear*, 50 AD3d at 653-654; see also *Serrano v Staropoli*, 94 AD3d 1083, 1085 [2d Dept 2012]). This Court finds it disconcerting that with four attempts at service, Plaintiff’s licensed process server never made any effort to speak with a neighbor or anyone else to determine Camacho’s home habits, comings and goings, whereabouts, or his place of work or business (see *Estate of Waterman v Jones*, 46 AD3d at 67). Therefore, the Court finds that nail and mail service on July 3, 2019 was improper, as Plaintiff’s process server failed to exercise the required due diligence (see *Greene Major Holdings, LLC v Trailside At Hunter, LLC*, 148 AD3d 1317, 1321 [3d Dept 2017], citing, *inter alia*, *Serrano v Staropoli*, 94 AD3d at 1085 and *McSorley v Spear*, 50 AD3d at 653-654).

AFFIDAVIT OF SERVICE #2 AUGUST 27, 2019

As set forth in three separate affidavits of service upon Camacho, Jane Doe and John Doe, the process server's next attempt at effectuating service of process was made on August 27, 2019 @6:07AM. This was the second attempt to effectuate service upon Defendant-mortgagor Camacho, and the first attempt to do so upon the John/Jane Doe defendants. The process server alleges in the affidavits that service upon each of these Defendants was effectuated by taping the papers on the door of the subject premises a "2 STORY RESIDENCE/GRAY DOOR" after nine attempts. Each affidavit includes the four previous attempts at personal service detailed in the prior affidavit (July 3rd), plus five new additional attempts on: 7/11 @5:37PM (Thursday); 7/18 @4:59PM (Thursday); 8/3 @2:36PM (Saturday); and 8/6 @12:53PM (Tuesday). Contrary to the process server's first attempt to effectuate service on Camacho, on the process server's second attempt at serving all of these defendants, he attested, in identical language on each of the affidavits: "Deponent spoke with a neighbor at 272 Stagg Street, who stated to deponent that said Defendant(s) lived there and had no knowledge of place of employment of the Defendant(s)."

The Second Department has held that where a description of the person attesting to a defendant's whereabouts is not provided, then the "due diligence" requirement is not met (*see Cadlerock Joint Venture, L.P. v Kierstedt*, 119 AD3d 627, 629 [2d Dept 2014]). Plaintiff's process server averred he spoke with an unnamed neighbor, yet he failed to provide even an inkling of a description of the neighbor, such as his or her sex, or approximate height and weight. This Court finds it questionable that the licensed process server, after an alleged nine visits to the subject premises and having never found the Defendants or anyone else to serve, resorted to "nail and mail" service and did not describe the person he claimed to have spoken with on that lone occasion. The absence of any description of this purported neighbor vitiates the process server's credibility (*see id.* ["The process server's testimony that he inquired as to the defendant's whereabouts from a neighbor was not credible, since he was unable to provide any description of the neighbor—even a description of the neighbor's sex."])).

This Court also notes that the process server included the four attempts attested to in the first affidavit regarding solely Camacho, into the second affidavit to appear as if he properly effectuated service upon Camacho, along with John and Jane Doe, on August 27th after making a total of nine visits to the property, which is inaccurate reporting and misleading to a cursory reader. Also, there is no indication that the process server attempted to locate any of these Defendants' respective places of employment to effectuate service of process under CPLR 308(1) or (2) before resorting to nail and mail at their alleged residence. Despite readily available access to the internet, social media, search companies, etc., Plaintiff and its process server neglected to use any means to determine Camacho's or the Doe defendants' whereabouts (*see Faruk v Dawn*, 162 AD3d 744, 746 [2d Dept 2018]). The Court, thus, finds that the process server failed to exercise due diligence; consequently, service of process was not properly effectuated under CPLR 308(4) (*see id.*; *Cadlerock Joint Venture, L.P. v Kierstedt, supra*).

Additionally, Plaintiff failed to establish proper service because the copies of the summons and complaint were not affixed to the Defendants' respective apartment doors. Where "nail and

mail” service is attempted upon a defendant who lives in a multi-family residence, the defendant must be served at the apartment where he or she resides (*see Encarnacion v Ogunro*, 162 AD3d 981, 982-983 [2d Dept 2018]; *Sinay v Schwartzman*, 148 AD3d 1068, 1070 [2d Dept 2017]; *Lombay v Padilla*, 70 AD3d 1010, 1012 [2d Dept 2010]). Hence, affixing papers to an outside door accessible to the “public at large” is not proper service (*see Sinay v Schwartzman*, 148 AD3d at 1070; *Lombay v Padilla*, 70 AD3d at 1011-1012).

Plaintiff is keenly aware that the subject premises is at least a two (2)-family dwelling, or up to four (4) families, as its Exhibit H is replete with varying documents classifying the subject premises as a “Dwelling Only - 2 family” in its recording with the NYC Department of Finance Office of the City Register, and in Plaintiff’s 1-4 Family Rider (Assignment of Rents) (see Exhibit H, pp. 20, 29, 33, 64, 74, 84, 89, 111 and 120). Moreover, Plaintiff’s process server swore he affixed the copies of the summons and complaint to a “2 STORY RESIDENCE/GRAY DOOR,” and his description of the outer façade of the subject premises as a 2-story gray building implies that it was not a one-family residence, but a multi-family building he viewed from the street. However, the process server failed to indicate whether he affixed the documents to the exterior door accessible from the street, or to an interior apartment door where Defendants Camacho and John/Jane Doe “actually” resided. Relatedly, Plaintiff’s submissions also fail to show that it, or its process server, made any diligent efforts to determine Camacho or John/Jane Doe’s correct apartment number(s) (*see e.g. Matter of Lorna Y. v Jeffrey Z.*, 185 AD3d 1235, 1238 [3d Dept 2020] [in attempting “nail and mail” service, “diligent efforts need to be made to verify or confirm that the business or home address is the proper address sufficient to give actual notice”]; *Ariowitsch v Johnson*, 114 AD2d 184, 185-186 [3d Dept 1986] [no personal jurisdiction where nail and mail service “was effectuated at the wrong apartment in defendant’s building”]; *Evans v Sedgwick*, 66 AD2d 700, 700 [1st Dept 1978] [nail and mail service rejected where papers affixed to the door of the apartment building, with no showing that the door of the defendant’s apartment was inaccessible]).

Accordingly, the Court finds that service of process was not properly effectuated since Plaintiff failed to satisfy the due diligence requirements of CPLR 308(1) and (2) before resorting to nail and mail service under CPLR 308(4). Additionally, service of process was improper because the process server failed to submit proof that he affixed the papers to a door that led to the Defendants’ respective apartments.

CONCLUSION

Upon review of Plaintiff’s submissions, namely, the affidavits of service of the summons and complaint upon defendants Camacho, Jane Doe, and John Doe, and the documents in support referred to herein, focusing on the quality of the attempts at service, and not the quantity, the Court finds that both sets of affidavits of service are facially insufficient. Specifically, the Court finds that the affidavits are replete with subpar attempts at service, and they also failed to document a person spoken with to ascertain these defendants’ whereabouts (affidavit of service #1 July 3, 2019), or provide a description of the neighbor spoken to (set of affidavits of service for August 27, 2019). Since the process server’s attempts at service pursuant to CPLR 308(1) and (2) “fall short of establishing due diligence in the first instance” (*Greene Major Holdings, LLC v Trailside*

At Hunter, LLC, 148 AD3d at 1321) as required under the law, it was improper for Plaintiff to resort to “nail and mail” service under CPLR 308(4), which method is far less likely to give Camacho and the Jane and John Doe defendants notice of this action (*see id.*; *Serraro v Staropoli*, 94 AD3d at 1085; *McSorley v Spear*, 50 AD3d at 653-654). In any event, the Court finds that service of process was not properly effectuated under CPLR 308(4) for the additional reason that the process server taped the documents to the exterior door of the building, and not the defendants’ apartment door(s).

In sum, Plaintiff, Bank of America, failed to meet its burden of proof by a preponderance of the evidence to establish that the summons and complaint were properly served on Defendants Camacho, John Doe, and Jane Doe. As Plaintiff has failed to satisfy the first prong required to demonstrate its entitlement to a default judgment, its motion is denied.

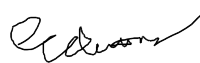
Accordingly, the above-referenced motion by Plaintiff (motion sequence #1) is DENIED in its entirety, and it is

ORDERED that, within 30 days of entry of this Order, Plaintiff shall serve a copy of this Order, by certified mail, with notice of entry on all parties and persons entitled to notice and shall file proof of said service.

The foregoing constitutes the Decision and Order of this Court.

E N T E R,

Dated: May 25, 2023



S.C.J. Cenceria P. Edwards, C.P.A.