

NYCTL 2021-A Trust v Labin

2024 NY Slip Op 33377(U)

September 23, 2024

Supreme Court, Kings County

Docket Number: Index No. 528804/2022

Judge: Derefim B. Neckles

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FRP-2 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, 11201 on the 23rd day of September 2024.

P R E S E N T:

HON. DEREKIM B. NECKLES,

Acting Justice.

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NYCTL 2021-A TRUST AND THE BANK OF NEW YORK
MELLON AS COLLATERAL AGENT AND CUSTODIAN,

Plaintiffs,

- against -

Index No. 528804/2022

ESTHER M. LABIN, MERCURY CAPITAL CORP., HSBC BANK USA N.A., THE BOARD OF MANAGERS OF THE BEDFORD PALACE CONDOMINIUM I, "John Doe No. 1" THROUGH "JOHN DOE NO. 100" INCLUSIVE, THE NAMES OF THE LAST 100 DEFENDANTS BEING UNKNOWN TO PLAINTIFFS, IT BEING INTENDED TO DESIGNATE FEE OWNERS, TENANTS OR OCCUPANTS OF THE TAX LIEN PREMISES AND/OR PERSONS OR PARTIES HAVING OR CLAIMING AN INTEREST IN OR A LIEN UPON THE SUBJECT PROPERTY, IF THE AFORESAID INDIVIDUAL DEFENDANTS ARE LIVING, AND IF ANY OR ALL OF SAID INDIVIDUAL DEFENDANTS BE DEAD, THEIR HEIRS AT LAW, NEXT OF KIN, DISTRIBUTEES, EXECUTORS, ADMINISTRATORS, TRUSTEES, COMMITTEES, DEVISEES, LEGATEES, AND THE ASSIGNEES, LIENORS, CREDITORS AND SUCCESSORS IN INTEREST OF THEM, AND GENERALLY ALL PERSONS HAVING OR CLAIMING UNDER, BY, THROUGH, OR AGAINST THE SAID DEFENDANTS NAMED AS A CLASS, OF ANY RIGHT, TITLE, OR INTEREST IN OR LIEN UPON THE PREMISES DESCRIBED IN THE COMPLAINT HEREIN,

Defendants.

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The following e-filed papers read herein:NYSCEF Doc Nos.

Notice of Motion/Affidavits (Affirmations) Annexed	<u>18, 19</u>
Notice of Cross-Motion	<u>39</u>
Opposition	<u>40, 42, 48</u>
Opposition to Cross-Motion	<u>52, 54</u>
Reply to the Opposition to the Cross-Motion	<u>73</u>

Upon the foregoing papers in this action to foreclose a tax lien encumbering the property ("Property") at 727 Bedford Avenue, Unit 1B, in Brooklyn, plaintiffs move (in mot. seq. one), for an order, (1) granting summary judgment in favor of plaintiffs as against defendants Esther Labin and The Board of Managers of the Bedford Palace Condominium, pursuant to CPLR § 3215; (2) appointing a referee to ascertain and compute the amount due pursuant to RPAPL § 1321 and (3) extending the time for service upon defendants (defendant/Labin) *nunc pro tunc*, to and including August 2, 2023 and June 19, 2023, respectively, the dates of service.

Defendant Labin (defendant) cross-moves for an order, (1) dismissing plaintiffs' action for failure of plaintiffs to serve the Summons and Complaint within 120 days of commencement pursuant to CPLR §306-b; (2) cancelling the Notice of Pendency filed herein on October 4, 2022 pursuant to CPLR §6514(a); (3) denying plaintiffs' pending motion for an Order of Reference and (4) amending the caption and for further relief.

Defendant, The Board of Managers of the Bedford Palace Condominium did not oppose plaintiff's motion.

Background

In support of the motion, plaintiffs request, pursuant to CPLR § 306-b, that the time to complete service in this case be extended nunc pro tunc to and including the date service was effectuated on each defendant since service upon defendant in Quebec, Canada, and service upon The Board of Managers of the Bedford Palace Condominium I was effectuated more than 120 days after filing the summons and complaint on October 4, 2022. Plaintiffs explains that they only learned of defendant's actual place of abode by reviewing in detail the pleadings of a mortgage foreclosure action entitled *HSBC Bank, NA v. Esther Labin*, Supreme Court, Kings County, Index No. 500343/2013 and the report of the referee appointed in that action to conduct a traverse hearing. Plaintiffs then put forth that they have a meritorious action and have satisfied a prima facie case to foreclose the subject Tax Lien by producing the Tax Lien Certificate and the Affidavit of Merit of Marie Mulloy, asset manager and authorized signatory for the servicing agent for plaintiffs, sworn to the 1st day of November 2023, in which she attests that no payments have been made on account of the Tax Lien.

Defendant in its opposition to plaintiffs' motion and in support of its cross-motion argue that although plaintiffs attest that they properly served defendant with the summons and complaint on October 27, 2022, this "service" was improper and ineffective because at all relevant times (including the date of the alleged service), defendant did not reside at the subject Property. Defendant further provides that although plaintiffs subsequently served the Summons and Complaint on defendant personally on August 2, 2023, at the

correct address in Quebec, this service was equally improper because it was effectuated after 120 days which is noncompliant with CPLR §306-b.

CPLR §306-b provides in relevant part:

Service of the summons and complaint . . . *shall* be made within one hundred twenty days after the commencement of the action or proceeding . . . If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.

See CPLR §306-b (emphasis added).

Plaintiffs, on June 17, 2024, submitted opposition to defendant's cross-motion and in further support of the motion for default judgement. In the opposition, plaintiffs state that as set forth in the LaManna Aff. and Luna Aff., various searches were performed to locate defendant and in addition to the attempted service at the Property address, the Process Server went to two other addresses in an attempt to serve defendant.

Plaintiffs further contend that despite defendant's assertion that the subject Property is only an investment property, and that for more than forty years, defendant has solely resided in Quebec, Canada, plaintiffs provide several documents that do not list defendant's address as being in Quebec, Canada. For one, the Deed to the Property dated January 24, 2007, lists defendant's address as 162 Ross Street, Brooklyn, New York, 11211. Also, the records of New York City Department of Finance for the Property reflect that defendant is the owner of the Property, list her address as the Property address, and show that property tax bills are sent to her at the Property address. Even the Condominium in which the Property is located is apparently unaware of the Quebec

Address as the Notice of Lien for Unpaid Common Charges, recorded on January 4, 2021 in City Register lists defendant's address as being 162 Ross Street, Brooklyn, NY, 11211. Further, a search of the City Register's records reveals that defendant was also at one time the owner of record of Unit 5 at the same address of the subject Property by deed recorded on February 2, 2007. The Deed to Unit 5 shows that defendant in 2007 also listed her address as 162 Ross Street, Brooklyn, New York, 11211, and when defendant deeded out Unit 5 by deed dated November 11, 2010, she stated on the deed that she was "residing at 725 Bedford Avenue, Apt. 5, Brooklyn, NY11205."

In reply, defendant alleges that defendant met her burden of establishing a right to dismissal due to plaintiffs' admitted noncompliance with CPLR §306-b and their failure to demonstrate entitlement to an extension of time to serve. Defendant provides that in a tax lien foreclosure, in order to establish its prima facie case, a plaintiff must do so through submission of the subject tax lien certificate and proof of defendant's default in payment. *See NYCTL 2011-A trust v Master Sheet Co., Inc.*, 150 AD3d 755, 756 [2d Dept. 2017]. Defendant states that the proof of default proffered with plaintiffs' motion consisted of nothing more than the unsupported assertions of its affiant. Defendant asserts that pursuant to CPLR §306-b, when a plaintiff fails to effectuate proper service of process within 120 days of commencement, the proceeding must be dismissed; unless said plaintiffs can demonstrate entitlement to an extension of time to serve "upon good cause shown or in the interest of justice[.]" *See CPLR §306-b; Quinones v Z & B Trucking, Inc.*, 220 AD3d 903, 903 [2d Dept 2023].

Discussion

New York courts have consistently held that, in order to be entitled to an extension of time to serve process under CPLR §306-b, a plaintiff must demonstrate either “good cause” or that said extension is warranted in the “interest of justice.” See CPLR §306-b. “Good cause” and “interest of justice” are two separate and independent statutory standards.” See *Bumpus v New York City Tr. Auth.*, 66 AD3d 26, 31 [2d Dept 2009]. Good cause (under CPLR §306-b) requires “reasonably diligent efforts in attempting to effectuate proper service upon defendant.” See *Deutsche Bank National Trust Co. v Martinez*, 211 AD3d 909, 911 [2d Dept 2022].

In considering whether the interest of justice warrants an extension of time for service, “the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff’s request for the extension of time, and prejudice to [the] defendant.” The Second Department has recognized that when there is a “lack of diligence” by plaintiffs no “interest of justice” extension is warranted, even though more factors arguably favor plaintiffs. See *Wilson*, 176 AD3d at 1090.

Here, plaintiffs failed to serve defendant within the 120-day period required by CPLR § 306-b. Yet, the inability to serve defendant was not due to a lack of diligence on the part of plaintiffs. Plaintiffs provided documentation of numerous attempts to locate

defendant and of effectuating service. This documentation supports plaintiffs' argument that the extension of time should be granted as good cause has been sufficiently proven.

In regard to the "interest of justice" prong, plaintiffs sufficiently demonstrate that an extension of time to serve is warranted. It has been shown that the numerous deeds and mortgages for the Property, as well as other properties owned by defendant, do not disclose the Quebec Address. Additionally, the length of delay was not substantial as defendant was served at her Quebec Address on August 2, 2023, one hundred and eighty-two (182) days after the 120-day period under CPLR306-b. This is distinguishable to the five and half (5½) year delay in the case cited by defendant, *Wells Fargo Bank, NA v Barrella*, 166 AD3d711 (2nd Dept. 2018), where the court denied the extension. Moreover, Plaintiffs promptly moved to extend the time further supporting plaintiffs' request for the extension of time, and an extension of time would not prejudice defendant as the delay was minimal.

Lastly, plaintiffs have established their prima facie entitlement to summary judgement through the submission of the subject tax lien certificate and proof of default,

Accordingly, it is

ORDERED that plaintiffs' motion (mot. seq. one) is granted in all respects.

ORDERED that defendant's motion (mot. seq. two) is denied in all respects.

This constitutes the decision and order of the court.

E N T E R,



HON. DEREKIM B. NECKLES
A. J. S. C.

HON. DEREKIM B. NECKLES
A.J.S.C.