

Bank of Am., NA v Barrett

2025 NY Slip Op 31173(U)

April 7, 2025

Supreme Court, Kings County

Docket Number: Index No. 507815/13

Judge: Cenceria P. Edwards

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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 FRP-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 7th day of April, 2025.

P R E S E N T:

HON. CENCERIA EDWARDS,

Justice.

-----X

BANK OF AMERICA, NA,

Plaintiff,

- against -

Index No. 507815/13

VALERIE BARRETT, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF BENNIE M. GREEN a/k/a BENNIE MAE GREEN a/k/a BENNIE GREEN, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, UNITED STATES OF AMERICA, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, CRIMINAL COURT OF THE CITY OF NEW YORK, METRO PORTFOLIOS, INC., NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION & DEVELOPMENT, ALVIN DEVERTEVILL, CHRISTOPHER DEVERTEVILL, AGNES GREEN, TERENCE PRICHARD, SHAWN "DOE": (REFUSED LAST NAME), PETER NELSON, MARGARET NELSON, JESSIE NELSON,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

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

95-123
127-141, 148

Upon the foregoing papers in this action to foreclose a mortgage encumbering the residential property at 301 East 52nd Street in Brooklyn (Property), defendant Valerie

Barrett (Barrett), individually and as Administratrix of the Estate of Bennie M. Green a/k/a Bennie Mae Green a/k/a Bennie Green (Green or Decedent Borrower) moves (in motion sequence [mot. seq.] four) for an order: (1) dismissing the complaint as against Barrett, pursuant to CPLR 3211 (a) (8) and 308, and (2) vacating the judgment of foreclosure and sale, pursuant to CPLR 317 and 5015, “as the Court does not have personal jurisdiction over [her] or the Estate of Bennie Mae Green; plaintiff[] failed to effectuate proper service of the summons and complaint; plaintiff failed to name the Estate of Bennie Mae Green, a necessary party; and Plaintiff did not secure a Judgment against the proper party . . .” (NYSCEF Doc No. 95).

Background

On December 11, 2013, plaintiff Bank of America, NA (BOA) commenced this foreclosure action by filing a summons, an unverified complaint and a notice of pendency against the Property (NYSCEF Doc Nos. 1-2). The complaint alleges that on or about October 16, 2007, Green executed a promissory note in the principal amount of \$350,150.00, which was secured by a mortgage encumbering her residential Property (NYSCEF Doc No. 1 at ¶¶ 2-3). The mortgage was allegedly consolidated with another \$14,354.73 loan to form a single lien in the amount of \$361,732.00 (*id.* at ¶ 4). The complaint alleges that “[t]he Estate of Bennie Mae Green¹ failed to comply with the terms

¹ Bennie Mae Green, the borrower, died on December 8, 2009, four years prior to BOA’s commencement of this foreclosure action, and Letters of Administration were subsequently issued to Barrett on January 24, 2011 (NYSCEF Doc Nos. 119 and 120).

covenants and conditions of said notes, mortgages and [the] Consolidation Extension and Modification Agreement by failing and omitting to pay, to the plaintiff, payments due on August 1, 2010 . . .” and thereafter (*id.* at ¶ 9).

BOA e-filed affidavits of service upon Barrett attesting that she was served with process on January 7, 2014, at 11:47 a.m. at 4501 Logans Way, Augusta, Georgia by affixing the pleadings to the door and mailing them to that same Georgia address on January 8 and January 9, 2014, after multiple efforts to serve her in person at that address (NYSCEF Doc Nos. 9, 35 and 37). BOA e-filed another affidavit of service attesting that Barrett was served on January 15, 2014, at 5:42 p.m. at the Property in Brooklyn, by affixing the pleadings to the door and mailing them to the Property on January 23, 2014, after multiple efforts to serve her in person at that address (NYSCEF Doc No. 39).

Barrett subsequently appeared in this foreclosure action, both pro sé and with counsel, for settlement conferences, pursuant to CPLR 3408, and she participated in multiple status conferences before the court, but Barrett never formally answered or otherwise responded to BOA’s 2013 complaint.

On September 29, 2015, BOA moved to consolidate this foreclosure action with a 2014 action commenced under Kings County index No. 51057/14, for an order of reference and for a default judgment against Barrett and the other non-answering defendants (NYSCEF Doc No. 30-37). The court (Knipel, J.) issued a January 5, 2016, Order Appointing Referee to Compute and Consolidation of Actions (NYSCEF Doc No. 58).

On October 3, 2016, BOA moved for an order confirming the Referee's Report of amounts due and for a judgment of foreclosure and sale (NYSCEF Doc No. 61). On June 11, 2018, the court (Dear, J.) granted BOA's motion and issued a Judgment of Foreclosure and Sale and directing an auction of the Property (NYSCEF Doc No. 69). BOA subsequently made an application for an extension of time to conduct a foreclosure sale, which was granted by a January 2, 2019 order (NYSCEF Doc No. 75).

A foreclosure sale was noticed for March 28, 2019 (NYSCEF Doc No. 76), but the sale was stayed when Barrett filed an order to show cause (OSC) (NYSCEF Doc No. 82). By a January 6, 2020 decision and order, the court (Dear, J.) denied Barrett's OSC and extended BOA's time within which to conduct a foreclosure sale (NYSCEF Doc No. 91).

BOA subsequently noticed a foreclosure sale to take place on March 12, 2020 (NYSCEF Doc No. 94). Although the sale proceeded and a winning bidder emerged, BOA thereafter stipulated to rescind the sale and return the successful bidder's down payment, and this court ordered that another foreclosure sale proceed as soon as practicable (NYSCEF Doc No. 145).

Barrett's Instant Motion to Vacate and Dismiss

On August 25, 2020, Barrett moved to vacate the Judgment of Foreclosure and Sale, pursuant to CPLR 5015 (a) (4) on the grounds that she was not properly served with process and BOA failed to name the Estate of the Decedent Borrower as a necessary party, and to dismiss the complaint, pursuant to CPLR 3211 (a) (8) (NYSCEF Doc No. 95).

Barrett submitted an affidavit attesting that “I have reviewed the affidavits of service filed in this action and I do not believe I was served as the affidavits indicated” because “the time[-]lines outlined in the affidavits of service are not consistent with my schedule and or whereabouts as I recall them” (NYSCEF Doc No. 97 at ¶¶ 7-8). Barrett attests that “[i]f in fact Plaintiff attempted to effectuate service on me in December of 2013 to January 2014 at [the Property in] Brooklyn New York, it would not have been effective, as I was not at that location from the middle of December 2013 through the second week in January 2014” (*id.* at ¶ 12). Barrett attests that “I did not receive mailed service of process to [the Property] from December 2013 to January 2014” because “I was in the State of Georgia over the holidays starting from the week before Christmas 2013 to the second week of January 2014” (*id.* at ¶¶ 21-22). Barrett also attests that “while I believe, I was at 4501 Logans Way, Augusta GA 30909, in December 2013 and January 2014 no process server came to the house to effectuate service while I was there and I did not receive any mailed service of process to that location” (*id.* at ¶ 23).

Notably, Barrett fails to submit any documentary proof of her actual residence or her whereabouts in January 2014 yet asserts that “I am in the process of trying to find receipts and other documentary evidence . . . that tend to prove that the affidavits of service contain several inaccuracies” (*id.* at ¶ 26).

Defense counsel, without seeking leave, submitted a *56-page, 265-paragraph* moving affirmation, which far exceeds the 7,000-word limit in 22 NYCRR § 202.8-b (a)² (NYSCEF Doc No. 96). Defense counsel argues that the Judgment of Foreclosure and Sale should be vacated and this foreclosure action dismissed on the grounds that:

“the Court never obtained personal jurisdiction over the defendant, plaintiff failed to effectuate proper service of the summons and complaint upon defendant, pursuant to CPLR §317; §5015; § 3211 (a) (8); and §308; and Plaintiff failed to name the estate of Bennie Mae Green as a necessary party to the action” (*id.* at ¶ 21).

Defense counsel asserts that “the sworn affidavit[] of defendant, denying that the place where she was served was not her residence, is enough to invalidate service, thereby negating personal jurisdiction” (*id.* at ¶ 29). However, Defense counsel also acknowledges that “[n]o [traverse] hearing will be necessary . . . unless a defendant rebut[s] the presumption of proper service, by a sworn denial of receipt of process, in an affidavit, *containing specific facts* to rebut the **veracity** or content of the statements in the process server’s affidavits” (*id.* at ¶ 28 [emphasis added]). Defense counsel asserts that “there is no requirement to demonstrate a reasonable excuse or a meritorious defense to vacate a default in answering the complaint, where, as is the case here, there is no personal jurisdiction” (*id.* at ¶ 37).

² 22 NYCRR § 202.8-b (a) provides, in relevant part, that “[w]here prepared by use of a computer, *unless otherwise permitted by the court*: (i) affidavits, affirmations, briefs and memoranda of law in chief shall be limited to 7,000 words each . . .” (emphasis added). Section 202.8-b (c) provides that such submissions shall include a certification by counsel with the word count.

Defense counsel asserts that the affidavits of service upon Barrett in Brooklyn and in Georgia were deficient because both process servers did not attempt personal service with due diligence before resorting to the nail-and-mail service (*id.* at ¶¶ 62 and 69). Defense counsel also argues that the process servers' affidavits were "devoid of any indication that [t]he[y] made any inquiries, let alone genuine inquiries, to attempt to ascertain defendant's whereabouts or place of work" (*id.* at ¶¶ 64 and 71). Counsel also questions the validity of the service upon Barrett in Georgia because the process server, "Ms. Tracy Hoshell, does not appear to be a licensed process server in the state of Georgia as her license number is not listed on the affidavit of service" (*id.* at ¶ 74).

Notably, defense counsel acknowledges that "an appearance by a defendant in an action is deemed to be equivalent of personal service of a summons upon him or her and therefore confers personal jurisdiction over such defendant, **unless** he or she asserts an objection to jurisdiction either by way of motion or in his or her answer" (*id.* at ¶ 30), and that Barrett previously stayed a foreclosure sale on March 27, 2019, by moving by OSC to enjoin and restrain BOA from taking any steps to sell the Property (*id.* at ¶¶ 12 and 33). Defense counsel asserts that Barrett's "filing of the order to show cause does not constitute an appearance in this action" because the letters of administration do not prove that Barrett was authorized to appear on behalf of the Decedent's Estate (*id.* at ¶¶ 204 and 218).

BOA's Opposition

BOA, in opposition, submits an attorney affirmation arguing that:

“Defendant’s participation in this case by way of Settlement Conferences and status conferences over the course of over five and one-half (5 ½) years indicates her intention to submit to the court’s jurisdiction over the action, and by appearing informally she conferred *in personam* jurisdiction on the Court” (NYSCEF Doc No. 127 at ¶ 38).

BOA thus asserts that where, as here, Barrett fully participated in the action by attending settlement conferences and participating in motion practice spanning a period of five years, Barrett has consented to the court’s jurisdiction (*id.* at ¶¶ 38-43).

BOA’s counsel also argues that Barrett was properly served at both the Property address and at her residence in Georgia. Counsel asserts that “[t]he Augusta, Georgia address for Defendant Barrett was listed and acknowledged by Defendant Barrett as her address in the Surrogate’s Court Petition for Letters of Administration” (*id.* at ¶ 44). BOA’s counsel further asserts “that there is no licensing requirement [for process servers in Georgia] and therefore, Ms. Hoshell’s Affidavit of Service is valid in all respects” (*id.* at ¶ 49). In contrast, BOA’s counsel contends that Barrett’s “conclusory” denial of receipt is insufficient to challenge personal jurisdiction:

“[n]owhere in Defendant Valerie Barrett’s Affidavit does she state where she was on any of the six (6) attempts over a period of eleven (11) days that service of process was completed on January 7, 2014. Defendant Barrett, besides her conclusory and vague statements that she was not served, fails to provide any documentary evidence that she was not residing at 4501 Logans Way, Augusta, Georgia 30909 at the time of service” (*id.* at ¶ 50).

Discussion

“Ordinarily, a process server’s affidavit of service establishes a prima facie case as to the method of service and, therefore, gives rise to a presumption of proper service” (*Wells Fargo Bank, NA v Chaplin*, 65 AD3d 588, 589 [2d Dept 2009]). “However, where there is a sworn denial that a defendant was served with process, the affidavit of service is rebutted, and the plaintiff must establish jurisdiction at a hearing by a preponderance of the evidence” (*id.*). However, the Second Department has held that “bare and unsubstantiated denials of service are insufficient to rebut the presumption of proper service created by a duly executed affidavit of service, and *a hearing is not required* where ‘the defendant fails to swear to specific facts rebutting the statements in the process server’s affidavit’” (*Tuttnauer USA Co. v Russo*, 216 AD3d 846, 847 [2d Dept 2023], quoting *US Natl. Bank Assn. v Melton*, 90 AD3d 742, 743 [2d Dept 2011] [emphasis added]).

Here, Barrett provides a moving affidavit with nothing but general and conclusory denials that she was served with process at the Property and at her residence in Georgia without any specific facts to rebut the information listed in BOA’s affidavits of service. While Barrett attests that she is trying to locate documentary evidence to rebut the information in BOA’s affidavits of service, she failed to submit any documentary evidence. For this reason, denial of Barrett’s motion to vacate the Judgment of Foreclosure and Sale pursuant to CPLR 5015 (a) (4) is warranted.

Importantly, the Second Department has held that “a ‘defendant may waive the issue of lack of personal jurisdiction by appearing in an action, either formally or informally,

without raising the defense of lack of personal jurisdiction in an answer or pre-answer motion to dismiss” (*E. Sav. Bank, FSB v Campbell*, 167 AD3d 712, 714 [2d Dept 2018], quoting *Cadlerock Joint Venture, L.P. v Kierstedt*, 119 AD3d 627, 628 [2d Dept 2014]). Here, Barrett has availed herself of this court’s jurisdiction by seeking to enjoin BOA’s the sale of the Property by OSC and by participating in this action for more than five years before challenging BOA’s January 2014 service of process. Under these circumstances, Barrett has waived any challenge to personal jurisdiction over her as Administratrix to the Decedent Borrower’s Estate, and there is no ground to vacate the Judgment of Foreclosure and Sale. Accordingly, it is hereby

ORDERED that Barrett’s motion (mot. seq. four) is denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,



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

April 7, 2025