

S2 Group LLC v Gonzaga

2012 NY Slip Op 31369(U)

May 8, 2012

Sup Ct, Queens County

Docket Number: 27413/08

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

S2 GROUP LLC,

Plaintiff,

-against-

JACINTO GONZAGA, et al.,
Defendants.

Index No. 27413/08

Motion
Date October 11, 2011
November 22, 2011

Motion
Cal. No. 26, 13

Motion
Sequence No. 7, 6

In a decision/Order dated December 20, 2011, this Court held, in relevant part:

Upon the foregoing papers it is ordered that the motion by plaintiff for a judgment of foreclosure and sale and for the confirmation of the referee's report of sale; cross motion by defendant, Jacinto Gonzaga for an order pursuant to 3012(d) granting an extension of time to file a late answer and for an order dismissing the plaintiff's Complaint due to plaintiff's lack of standing and the Order to Show Cause by defendant Jacinto Gonzaga for an order discharging Elizabeth Gill, Esq. as Receiver, for an order directing the plaintiff to provide the defendant with a current payoff letter certifying the amount presently due on the mortgage purportedly held by the plaintiff, and for an order staying the May 20, 2011 order of this Court appointing the Receiver are hereby consolidated solely for purposes of disposition of the instant motion, cross motion and Order to Show Cause and are hereby decided as follows:

A traverse hearing shall be held on Tuesday, March 6, 2012, 2:00 P.M., IAS Part6, courtroom 24, 88-11 Sutphin Blvd., Jamaica,

New York, to determine the propriety of service pursuant to CPLR 308 and to determine whether jurisdiction was properly obtained over defendant, Jacinto Gonzaga. . . .

This Court's order dated May 20, 2011 is stayed.

Movants' and cross movant's remaining requests shall be held in abeyance and be determined upon the disposition of the traverse hearing.

A traverse hearing on the issue of service was held on March 6, 2012. Defendant Jacinto Gonzaga asserted that he was not served with a copy of the summons and complaint.

At the hearing, plaintiff presented credible evidence in the form of testimony by Alan Feldman, who at the time of the alleged service was a licensed process server. Mr. Feldman testified that he had no personal knowledge of the service of the Summons and Verified Complaint, but offered his affidavit of service into evidence. Mr. Feldman testified that prior to his first attempt of service his office performed a "skip" search for defendant's address which search indicated that defendant Janet Jacinto Gonzaga resided at 169-01 140th Avenue, Laurelton, New York 11434. Mr. Feldman then attempted service at that address on three occasions: on 11/25/08 at 4:00PM, on 11/26/08 at 6:20AM, and on 11/28/08 at 8:40AM. The affidavit of service indicates (and Mr. Feldman testified) that after he was unable with due diligence to serve the defendant in person, on December 1, 2008, he affixed to the door at 42-82 79th Street, Elmhurst, New York 11373, a copy of the Summons and Verified Complaint with copy of the RPAPL 1303 Notice printed on a colored paper other than that of the Summons and Verified Complaint, and he subsequently deposited a copy of the Summons and Verified Complaint with copy of the RPAPL 1303 Notice in a postpaid, properly addressed plain envelope marked "Personal and Confidential" in an official depository under the exclusive care and custody of the United States Post Office in the State of New York, on December 2, 2008 to 42-82 79th Street, Elmhurst, New York 11373 by first class. Mr. Feldman's testimony clearly demonstrated that plaintiff complied with the service requirements of CPLR 308(4), also referred to as "nail and mail", in that after exercising due diligence to serve the defendant in person, he "nailed and mailed" the documents to the defendant's last known address.

Defendant Jacinto Gonzaga who did not testify, denied proper

service of the Summons and Verified Complaint. Defendant's mere denials of receipt of process are insufficient to rebut plaintiff's evidence (see, *Truscello v. Olympia Const., Inc.*, 294 AD2d 350 [2d Dept 2002]). Defendant's bald assertion that he never received the Summons and Complaint by mail was insufficient to dispute the veracity of the process server's affidavit (see, *Fairmont Funding Ltd. v. Stefansky*, 235 AD2d 213 [1st Dept 1997]). Such a properly executed affidavit of service created a presumption of mailing by plaintiff and of receipt by defendant (see, *Kihl v. Pfeffer*, 94 NY2d 118 [NY 1999] (stating that a mere denial of receipt is not enough to rebut the presumption)).

The court does not credit the defendant. The court concludes that plaintiff properly obtained personal jurisdiction over defendant when he was properly served pursuant to CPLR 308(4). As defendant failed to present sufficient evidence to rebut plaintiff's prima facie case, that branch of defendant Jacinto Gonzaga's cross motion to dismiss the Complaint on the ground that the court lacks jurisdiction over the defendant is denied.

As it has been determined that moving defendant was indeed properly served, the court will now address the remainder of movant's and cross movant's requests.

The cross motion by defendant, Jacinto Gonzaga for an order permitting defendant to file a late Answer is hereby denied.

As this Court determined above, service was properly made on defendant Gonzaga, who is the owner and resident of the premises located at 47-12 41st Street, Sunnyside, New York in 2008 ("the Premises"). Said documents properly served were a Summons and Complaint alleging default by defendant Gonzaga and seeking foreclosure of the Premises.

It is well-established law that: "[a] defendant who has failed to timely appear or answer the complaint must provide a reasonable excuse for the default and demonstrate a meritorious defense to the action, when . . .moving . . .to compel the acceptance of an untimely answer" (*Lipp v. Port Authority of New York and New Jersey*, 34 AD3d 649 [2d Dept 2006]). Pursuant to CPLR 3012(d), the Court has discretion to compel acceptance of a late pleading, "upon such terms as may be just and upon a showing of reasonable excuse for default".

In the instant action, the Court finds that defendant Gonzaga has failed to provide a reasonable excuse for the default in Answering the Summons and Complaint. Defendant alleges that

he should be allowed to file a late Answer because he had been actively negotiating with the foreclosing bank including signing a Forbearance Agreement on May 1, 2010 and attending foreclosure settlement conferences, as well as engaging in negotiations with Greenpoint Mortgage Funding, Inc., the initial lender, and continuing with the current plaintiff, who was substituted in for Greenpoint Mortgage Funding, Inc. Service of the Summons and Complaint was made upon defendant in the end of 2008, and the Forbearance Agreement was not signed until May 1, 2010. The Court finds that defendant has not provided a reasonable excuse for the lengthy delay of approximately a year and half in that the Forbearance Agreement was signed significantly after the default occurred. Additionally, defendant has provided no evidentiary proof of any active negotiations having occurred prior to the time of the signing of the Forbearance Agreement.

As such, the cross motion by defendant, Jacinto Gonzaga for an order permitting defendant to file a late Answer is hereby denied.

That branch of the motion by plaintiff, S2 Group LLC for a judgment of foreclosure and sale is granted. Plaintiff established a prima facie entitlement to foreclose on a mortgage, by demonstrating the existence of the mortgage and note, ownership of the mortgage, and the defendants' default in payment (see, *Campaign v. Barbra*, 23 AD3d 327 [2d Dept 2005]; *First Trust National Association v. Pinter*, 264 AD2d 464 [2d Dept 1999]). The defendants failed to raise a triable issue of fact.

That branch of the motion by plaintiff to confirm the referee's report dated June 13, 2011 is granted. On July 30, 2009, by Order of the Court, Referee Fearonce G. LaLande, Esq. was appointed to ascertain and compute the amount due to the plaintiff and to examine and report whether or not the mortgaged premises can be sold in parcels. On June 13, 2011, Referee LaLande issued a Report of Sale which was filed with the Court. It is Ordered and adjudged that the report of said referee is in all respects confirmed.

That branch of the motion by plaintiff for an award of attorneys' fees and costs is granted.

That branch of the Order to Show Cause by defendant, Jacinto Gonzaga seeking an order discharging Elizabeth Gill, Esq. as Receiver on the grounds that plaintiff has acted with unclean hands in the course of maintaining this foreclosure action against the defendant is denied.

By Order of this Court dated May 20, 2011, Elizabeth Gill, Esq. was appointed Temporary Receiver of the premises located at 47-12 41st Street, Sunnyside, New York ("the Premises"). Said order permitted the Temporary Receiver to collect all rents, receive all security deposits, employ an agent to manage the Premises to evict non-paying tenants, and to repair the Premises if necessary. Said Order directed that: "before entering upon his duties said Temporary Receiver execute to the People of the State of New York and file with the Clerk of this Court an undertaking in the penal sum of \$56,000.00, conditioned for the faithful discharge of his duties as such Temporary Receiver". It is undisputed that the Temporary Receiver served a Notice to Attorn upon the defendant and the tenants of the Premises on August 11, 2011, and that she did not file the requisite bond with the Clerk of the Court until August 25, 2011.

The Temporary Receiver submits an affidavit in opposition, wherein she affirms, inter alia, that: the bonding agent issued the receiver's bond on August 9, 2011 and the bond was received in her offices on August 11, 2011.

Defendant Gonzaga contends that the Notice to Attorn is invalid as it was served on the tenants at the subject building before the Receiver filed her bond with the Clerk of the Court, and as such, Ms. Gill should be discharged as Receiver. The record reflects that the Receiver's first Notice to Attorn was sent prior to the filing of the bond and after the filing of the bond, Notices to Attorn were delivered to the tenants at the subject building.

Pursuant to CPLR 6405: "Upon motion of any party or upon its own initiative, the court which appointed a receiver may remove him at any time".

The Court holds that: "[t]he contact in question, while slightly premature, was ministerial in nature and did not affect defendant's rights" (*Granite Management and Disposition, Inc. v. Sun*, 221 AD2d 186 [1st Dept 1995]).

Where, as here, discharging the receiver will leave a building vulnerable to the adverse conditions that the receiver was appointed to prevent, termination is not appropriate (see, *Genuth v. First Div. Ave. Realty Corp.*, 88 Misc 2d 586 [Sup Ct, Kings County 1976; *500 West 17th Street Realty, Inc. v. Romax Properties Corp.*, 126 Misc 2d 268 [Sup Ct, NY County 1984]).

That branch of the Order to Show Cause by defendant, Jacinto Gonzaga and directing the receiver/plaintiff to prepare and

transmit to the owner of the subject premises a payoff letter certifying the amount presently due on the mortgage purportedly held by plaintiff is hereby denied.

As this Court has determined that defendant Gonzaga is a defaulting party, who has not Answered the Summons and Complaint, he is not entitled to such relief.

ALL STAYS ARE HEREBY LIFTED AND VACATED.

This constitutes the decision and order of the Court.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: May 8, 2012

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Howard G. Lane, J.S.C.