

Bank of New York Mellon v Wilson

2012 NY Slip Op 33403(U)

November 1, 2012

Sup Ct, Queens County

Docket Number: 7008/12

Judge: Bernice D. Siegal

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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

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The Bank of New York Mellon fka the Bank of New York,
as Trustee for the Certificate Holders CWABS, Inc., Asset-
Backed Certificates, Series 2006-25,

Index No.: 7008/12
Motion Date: 9/5/12
Motion Cal. No.: 28
Motion Seq. No.: 1

Plaintiff,

-against-

Kevin Wilson; Sherwin Wilson, Mortgage Electronic
Registration Systems, Inc., Acting Soley as a Nominee for
America’s Wholesale Lender, its Successor and Assigns,
New York State Department of Taxation and Finance;
Criminal Court of The City of New York, Queens Supreme
Court (Kew Gardens), New York City Environmental
Control Board; New York City Parking Violations Bureau;
New York City Transit Adjudication Bureau, and

“John Doe #1 to John Doe #10, the last 10 names being
fictitious and unknown to plaintiff, the persons or parties
intended being the persons or parties, if any, having or
claiming an interest in or lien upon the mortgaged
premises described in the verified complaint,

Defendants.

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The following papers numbered 1 to 4 read on this motion by plaintiff for an order granting
defendants’ motion to dismiss the summons and complaint pursuant to CPLR §3211(a)(8).

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits- Memo of Law.....	1 - 4
Affirmation in Opposition.....	5 - 9
Reply.....	10 - 12
Supplemental Affidavit.....	13 - 14
Reply Affirmation in further support.....	15

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Defendants Kevin Wilson and Sherwin Wilson (“Kevin” and “Sherwin,” respectively, and collectively as “defendants”) move for an order dismissing the summons and complaint pursuant to CPLR 3211(a)(8).

Facts

Kevin Wilson executed a note dated November 21, 2006 whereby he promised to pay the principal sum of \$466,400. As security for payment of this debt, defendants executed and delivered a mortgage in the principal sum of \$466,400, with interest, mortgaging the premises known as 253-56 149th Road, Rosedale, New York 11422 (“Premises”) as collateral security for the note.

Subsequently, defendants failed to comply with the terms of the Note and Mortgage and defaulted on the payments due on March 1, 2008. The summons and complaint and Notice of Pendency were filed on April 3, 2012.

According to the affidavit of service for Sherwin, service was made on the defendant on April 7, 2012 by delivering a copy of the summons and complaint to Muriel Campbell. According to the affidavit of service for Kevin Wilson, service was made by affixing a copy of the summons and complaint at 133-36 148th St, Jamaica, NY 11436 and by mailing same to 133-36 148th St. Jamaica, NY 11436. Defendants claim that Kevin was never personally served and that Sherwin received notice of the within action when he received a copy of the summons and complaint in the mail on or about April 14, 2012 at the property address.

Contention

Defendants contend that plaintiff failed to properly serve the defendants in accordance with CPLR §308(2).

Defendants' motion to dismiss is granted, to the extent of setting the matter down for a traverse hearing, as more fully set forth below.

Discussion

Defendants bring the within motion to dismiss based upon improper service because service was not made properly under CPLR §308(2), which provides, in relevant part, that service may be made “by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business.”

A “plaintiff bears the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process’ (citation omitted).” (*Munoz v. Reyes*, 40 A.D.3d 1059 [2nd Dept. 2007].) As a general proposition, a “process server’s sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to CPLR 308(2).” (*Bankers Trust Co. of California, N.A. v. Tsoukas*, 303 A.D.2d 343, 344 [2nd Dept. 2003] see, *Lattingtown Harbor Property Owners Ass’n, Inc. v. Agostino*, 34 A.D.3d 536 [2nd Dept. 2006].) However, “a defendant may rebut that affidavit with a ‘detailed and specific contradiction of the allegations in the process server’s affidavit’ sufficient to create a question of fact warranting a hearing.” (*SFR Funding, Inc. v. Studio Fifty Corp*, 36 A.D.3d 604 [2nd Dept. 2005]; *U.S. Bank Nat. Ass’n v. Vanvliet*, 24 A.D.3d 906, 908 [3rd Dept.2005]; see, also, *Rosario v. Beverly Road Realty Co.*, 38 A.D.3d 875 [2nd Dept. 2007].) Furthermore, [i]t is hornbook law that a constitutionally proper method of effecting substituted service need not guarantee that in all cases

the defendant will in fact receive actual notice. (*Bossuk v. Steinberg*, 58 N.Y.2d 916, 918 [1983] citing *Dobkin v. Chapman*, 21 N.Y.2d 490). It suffices that the prescribed method is one “reasonably calculated, under all the circumstances, to apprise [the] interested part[y] of the pendency of the action.” (*Id.* 919.) Bare and unsubstantiated denials of service is insufficient to rebut the presumption of proper service created by the plaintiff’s duly executed affidavit of service. (*Reich v. Redley*, 96 A.D.3d 1038 [2nd Dept 2012] citing *Citimortgage, Inc. v. Phillips*, 82 A.D.3d 1032 [2nd Dept 2011]; *Valiotis v. Psaroudis*, 78 A.D.3d 683 [2nd Dept 2010].)

The affidavit of service attesting to service upon Sherwin indicates that service was effectuated when a “black” female named Muriel Campbell (“Campbell”) was served “personally” at the property address on April 7, 2012. However, documentary evidence submitted with the moving papers including a Stipulation entered into between Campbell and Sherwin respecting a non payment proceeding against Campbell and a Marshall’s Notice of Legal Possession dated 5/26/2010 together with Marshall’s Inventory together with Sherwin’s supplemental affidavit¹, in which he contends that Campbell was a former tenant of the defendants and that she was evicted by a City Marshall on or about May 26, 2010, bolster Sherwin’s contention that Campbell could not have been at the residence to accept service nearly two years later and therefore, he was not served.

With respect to service upon Kevin, the court notes that service was made by nail and mail at 133-36 148th St, Jamaica, NY 11436. However, Kevin, in his affidavit², contends that he never received a copy of the summons and complaint and was only made aware of the within action when

¹The court granted defendants an adjournment to submit a supplemental affidavit as the original motion to dismiss failed to include an affidavit from Sherwin.

² The court notes that the affidavit of Kevin Wilson improperly states, at the start, that “I, CINDY MARTIN”, being duly sworn.”

his mother notified him that a “package” was left at her residence on or about June 16, 2012.

Where, as here, “there is a sworn denial that delivery to the defendant was accomplished, the affidavit of service is rebutted and the plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing.” (*Toyota Motor Credit Corp. v. Hardware Lam*, 93 A.D.3d 713, 714 [2nd Dept 2012] quoting *Bankers Trust Co. of California, N.A. v. Tsoukas*, 303 A.D.2d 343 [2nd Dept 2003].) Accordingly, a hearing is required to determine whether the defendants were properly served.

Conclusion

For the reasons set forth above, defendants’ motion to dismiss is granted to the extent of setting the matter down for a traverse hearing. The hearing shall be held on February 6 , 2013 at 12:00PM in Part 19 of the Queens Supreme Court, 88-11 Sutphin Blvd., Jamaica, N.Y Counsel for the parties are directed to bring to the Traverse courtesy copies of all pleadings, as well as copies of the papers submitted on this motion and the prior underlying motion. The matter shall be marked FINAL as against the defendants.

Dated: November 1 , 2012

Bernice D. Siegal, J. S. C.