SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
**Justice**

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VICTORIA LAUREN,

Petitioner,

- against -

FEDERAL HOME LOAN MORTGAGE CORP.

Respondent.

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Index No.: 14040/2013

Motion Date: 09/13/13

Motion No.: 83

Motion Seq.: 1

The following papers numbered 1 to 18 were read on this order to show cause brought by the petitioner, VICTORIA LAUREN, seeking a temporary restraining order, a preliminary injunction and a permanent injunction restraining the law firm of Fein, Such & Crane, LLP from proceeding with an eviction proceeding to obtain possession of the property located at 59-21 Calloway Street, Apartment 4J, Corona, Queens County, New York:

| | Papers Numbered |
|---|---|
| Order to Show Cause-Affirmation-Exhibits-Service | 1 - 8 |
| Affirmation in Opposition-Affidavit(s)-Exhibit(s) | 9 - 14 |
| Reply Affirmation | 15 - 18 |

In order to finance the purchase of 657 shares of stock in the Calloway Chateau Apartment Corporation located at 59-21 Calloway Street, Corona, New York, representing the rights to Unit 4J, the petitioner borrowed the sum of $116,280 from Washington Mutual Bank. The petitioner signed a note and security agreement in favor of Washington Mutual on August 22, 2006 pursuant to which the loan was to be repaid in monthly installments of $734.97. Petitioner turned over the shares of stock to the respondent to hold as security.

The respondent, FEDERAL HOME LOAN MORTGAGE CORP (FHLMC) contends that the petitioner, Ms. Lauren, defaulted on the note

and security agreement by failing to pay the monthly installment commencing with the payment due on December 1, 2010. By notice dated March 3, 2011, respondent mailed the petitioner a letter advising her that she was in default and to reinstate the loan would have to pay $34,904.26. On April 25, 2012, Fein, Such & Crane, LLP, attorneys for the respondent, sent the petitioner a notice of default, acceleration and intent to sell collateral. The petitioner was notified that the total due as of the date of the notice was $167,417.26 including principal, interest, escrow advances, corporate advances of $31,816.72, representing unpaid maintenance charges and attorney fees. Petitioner was also served with a notice of sale for an auction to take place on May 25, 2012. According to the affirmation of Craig K. Beideman, Esq., attorney for the respondent, the sale was postponed at the direction of the respondent so that they could complete a loss mitigation review. After completing said review, the respondent determined that petitioner was ineligible for modification and a second sale was scheduled for November 9, 2012. The sale was postponed again to December 14, 2012 but due to Hurricane Sandy the sale was postponed until January 18, 2013. Due to FEMA hold a new sale was scheduled for June 14, 2013.

On June 14, 2013, the sale of the petitioner's shares of stock and proprietary lease was sold at auction to respondent, Federal Home Loan Mortgage Corp. who was the successful bidder. Counsel asserts that FHLMC directed the law firm of Fein, Such & Crane to commence eviction proceedings against petitioner, Ms Lauren.

By letter dated June 26, 2013, Ms. Lauren disputed the amount charged to her of $32,719.73 which was stated to be a mortgage recoverable corporate advance. Petitioner stated in her letter that the mortgage recoverable corporate advance amount of $32,719.73 is a loan for which she did not sign and which should be removed from her mortgage. Fein, Such & Crane refused to validate the debt subsequent to the auction, stating that the time for same had expired. On July 12, 2013, petitioner was sent a notice to quit the premises.

On July 29, 2013, the petitioner commenced the instant special proceeding seeking to restrain the respondent from proceeding with an eviction proceeding, to obtain possession of the property and to grant a reasonable reinstatement amount of $26,800.00 which she asserts would reduce the principal from $110,359 to $105,626. Petitioner states that she has not been provided with any documents explaining why the amount of $31,606 was added to her mortgage, increasing the reinstatement amount as of November 9, 2012 to $65,855. She states that the sum of

$31,606.12 representing outstanding maintenance, late charges, administrative fees and attorneys fees was an unnecessary fee added in July 2010 which prohibited her from complying with the proposed reinstatement amount.

In opposition to the petition, the respondent, Federal Home Loan Mortgage Corp. argues first that the order to show cause is jurisdictionally defective as it was not served personally on the law firm of Fein, Such & Crane, LLP on or before August 8, 2013 as required by the service provision of the order to show cause. Instead, the petitioner's affidavit of service signed by process server Donna Thompson states that the order to show cause was served on Fein Such & Crane on August 8, 2013 by certified mail. The receipt attached to the affidavit of service indicates that the order to show cause was actually sent by express mail on August 8, 2013. Counsel argues that the failure to serve the order to show cause as directed by the court deprives the court of the jurisdiction necessary to grant the relief sought by the movant (citing Goldmark v Keystone & Grading Corp., 226 AD2d 143 [1st Dept. 1996][pursuant to statute (CPLR 304, 403 [d]), the mode of service provided for in the order to show cause is jurisdictional in nature and must be literally followed]).

With respect to the merits, counsel states that the petitioner is not entitled to a preliminary injunction in ths matter. Counsel states that the petitioner has not shown a likelihood of ultimate success on the merits, irreparable harm if the injunction is denied and a balance of equities in favor of the movant. Counsel argues that the petitioner has not disputed that she defaulted on the loan and security agreement and has not proferred a meritorious defense for being in default. Counsel states that the charge of $31,606.12 contained in the reinstatement letter is based upon maintenance fees owed to Calloway Chateau Apartment Corporation and if incorrect may give rise to a claim against Calloway. However, respondent contends that the alleged overcharge by Calloway does not relieve the petitioner of her obligation to pay respondent the amounts due under the note and security agreement

Counsel also states that the petitioner has failed to show irreparable harm if a preliminary injunction is not granted Counsel also asserts that balancing the equities favors the respondent. Counsel states that since 2010 the petitioner has not made any payments on the note and she has not proposed how she is going to repay the arrears and interest due on the note.

In reply, petitioner's counsel Augustin D. Tella, Esq. states that the court has not been deprived of jurisdiction

albeit that service of the order to show cause not served personally as the court directed because the respondent received a full set of motion papers by mail and fax and had sufficient opportunity to prepare a response on the merits. Counsel claims that the petitioner did not default on the note or security interest and if there was a default said default was excusable and petitioner has a meritorious defense. He states that the foreclosure was based upon petitioner's failure to pay maintenance to the coop board and that the respondent, without consulting with the petitioner, paid certain sums to the coop board to settle the purported arrears in maintenance charges and added said sum to the petitioner's mortgage.

Upon review of the petitioner's order to show cause and petition for a preliminary injunction restraining the respondent from proceeding with an eviction proceeding, and the respondent's opposition thereto, this court finds that the order to show cause is denied and the petition dismissed without prejudice to filing and properly serving a new Order to Show Cause.

Here, because the Order to Show Cause and petition were not served in accordance with the Court's directives, the court does not have jurisdiction to rule on the petition because the respondent was deprived of legally effective notice. The instant order to show cause required personal service on the respondent Federal Home Loan Mortgage Corp. However, the petitioner failed to serve the respondent and only served the respondent's counsel Fein Such & Crane, LLP. Moreover, even if service on counsel would have been sufficient, counsel was served by express mail and not by personal service as directed in the order to show cause. In this regard the courts have held that "pursuant to statute (CPLR 304; CPLR 403 [d]), the mode of service provided for in the order to show cause is jurisdictional in nature and must be literally followed" (Goldmark v Keystone & Grading Corp., 226 AD2d 143 [1st Dept. 1996] citing Matter of Bell v State Univ., 185 AD2d 925 [2d Dept. 1992][the mode of service provided for in the order to show cause is jurisdictional in nature and must be literally followed. The petitioner's failure to effect personal service deprived the court of personal jurisdiction over the respondents]; Crown Waterproofing, Inc. v Tadco Constr. Corp., 99 AD3d 964 [2d Dept. 2012]; Matter of Ruine v Hines, 57 AD3d 369 [1st Dept. 2008]; Matter of Feldman v Feldman, 54 AD3d 372 [2d Dept. 2008]; Matter of Correnti v. Suffolk County Dist. Attorney's Off., 34 AD3d 578 [2d Dept.2006][petition dismissed where order to show cause served by regular mail rather than certified mail as directed]) "Moreover, the fact that respondents received actual notice did not invest the court with jurisdiction. Notice received in a manner other than that

authorized by statute does not confer jurisdiction (Goldmark v Keystone & Grading Corp., supra. quoting Macchia v Russo, 67 NY2d 592 [1986]), and the fact that respondent received actual notice of the action is of no moment (see Jewell v Iyer, 26 Misc. 3d 131(A)[1st Dept. App. Term 2010]).

Therefore, for the reasons stated above and because the order to show cause instituting the proceeding was not served on respondent Federal Home Loan Mortgage Corp. and served by mail upon respondent's counsel and did not conform to order's provision that it be served upon the respondent personally, petitioner's order to show cause for a preliminary injunction is denied and the petition is dismissed without prejudice pursuant to CPLR 2214(d), CPLR 304 and CPLR 403[d](see Matter of Smith v New York County Dist. Attorney's Off., 104 AD3d 559 [1st Dept. 2013]).

Dated: Long Island City, N.Y.
December 13, 2013

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**ROBERT J. MCDONALD**
**J.S.C.**