SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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K.R CRESCENT LLC,

Index No.: 652145/2015

Plaintiff,

DECISION & ORDER

-against-

QUEENSBORO LIC DEVELOPMENT, LLC, 38-40 CRESCENT, INC. d/b/a CRESCENT GRILL, DANIEL J. DOUGHERTY, SHAUN A. DOUGHERTY and D'ARCY N. DUKE,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

Defendants, Queensboro LIC Development, LLC (Queensboro), 38-40 Crescent, Inc. (Crescent) (collectively, the Borrowers), Daniel J. Dougherty, Shaun A. Dougherty, and D'Arcy N. Duke (collectively, the Guarantors), move to vacate the default judgment issued against them on September 16, 2016 (Dkt. 58). Plaintiff K.R. Crescent LLC (K.R.) opposes the motion.[1] Defendants' motion is denied for the reasons that follow.

I. Procedural History & Factual Background

The court assumes familiarity with the allegations in this case, which are set forth in the court's Memorandum Decision dated October 16, 2015 (Dkt. 22). In short, Noah Bank commenced this action to collect on two loans made to the Borrowers and the unconditional, personal guaranties thereof executed by Guarantors. *See* Dkt. 4 (Amended Complaint) (the AC). Defendants were served with the AC, and additional service was effected as required by CPLR 3215(g)(3) and (4). *See* Dkt. 5-7 (affidavits of service). The AC sought judgment on the amounts owed under the loan agreements and guaranties, and foreclosure on the collateral.

[1] The original plaintiff in this action was Noah Bank. K.R. was substituted as plaintiff pursuant to an assignment of cause of action and judgment dated November 30, 2015, wherein K.R. became the assignee of Noah Bank. *See* Dkt. 58 at 2; Dkt. 31 (Assignment)

After the time for defendants to respond to the complaint expired, on August 21, 2015, Noah Bank moved for a default judgment. Dkt. 8. Defendants were served with the motion but did not respond. *See* Dkt. 20 (affidavit of service). The court granted the motion, on default, on October 16, 2015. Dkt. 22. Judgment was entered on September 16, 2016, awarding K.R., as assignee of Noah Bank, the right to recover the unpaid principal, interest, and late fees on the loans at issue, along with costs and disbursements, as well as the right to foreclose on the collateral. Dkt. 58.

Pursuant to the Judgment, a Notice of Sale was served on July 27, 2017, and a public auction of the assets comprising the collateral was scheduled for August 7, 2017. *See* Dkt. 70 (Marshal's Notice of Sale). On August 4, 2017, defendants entered a notice of appearance and moved to vacate the default judgment against them. Dkt. 60 & 61. K.R. opposed the motion. On August 7, 2017, the court issued an order temporarily restraining K.R. and the New York City Marshal from enforcing the Judgment pending a hearing on the motion to vacate. Dkt. 72. The court reserved on the motion after oral argument. *See* Dkt. 79 (8/10/17 Tr.).

II. Discussion

Relying on CPLR 5015(a)(4) and 317, defendants seek to vacate the judgment against all of them – the Borrowers and the Guarantors -- based on an alleged failure to properly serve only one of the Guarantors, D'Arcy Duke. Defendants claim that the process server failed to use due diligence in attempting to personally serve Duke, as required by CPLR 308(4), before resorting to "nail and mail" service, and that substitute service upon Duke was further marred by the fact that the "nailing" was done at an improper address.[2] *See* Dkt. 62 ¶¶ 9-14. Defendants submit the

[2] Where service cannot be made with due diligence by delivering the summons directly to the person to be served or else to a person of suitable age and discretion at the actual place of

affidavit of defendant Shaun Dougherty, dated August 3, 2017, which states that he used to reside at 34-24 87th Street, Jackson Heights, New York—the address at which process for Duke was "nailed"—and that this address "is not" Duke's actual place of business, dwelling place, or usual place of abode. *See* Dkt. 63. Defendants claim that Duke actually resides at 125 Damian Drive, Johnstown, Pennsylvania, and allege that Noah Bank, and K.R. as its assignee, are well aware of this fact based on the additional service sent to her at that address. Dkt. 62 ¶ 15, citing Dkt. 66 (Aff. of Additional Notice Pursuant to CPLR 3215(g)(3)). Defendants have not submitted an affidavit from Duke.

"[I]t is well established that the affidavit of a process server constitutes prima facie evidence of proper service." *In re de Sanchez*, 57 AD3d 452, 454 (1st Dept 2008). This is so even when "nail and mail" service is employed. *See Wells Fargo Bank, N.A. v Kissi*, 146 AD3d 407, 407 (1st Dept 2017). Conclusory and unsubstantiated assertions are insufficient to rebut the presumption of proper service created by a properly executed affidavit of service. *See id.* ("Defendant's conclusory, undocumented assertion in her affidavit that she had moved . . . was insufficient to rebut the presumption of proper service"); *In re de Sanchez*, 57 AD3d at 454 ("conclusory denials [of receipt of service] insufficient to rebut the presumption of proper service"); *Youngstown Tube Co. v Russo*, 120 AD3d 1409, 1409 (2d Dept 2014) (evidentiary hearing not warranted absent detailed facts sufficient to rebut affidavit of service); *Deutsche Bank Nat. Trust Co. v White*, 110 AD3d 759, 759-60 (2d Dept 2013) (defendant's "bare and

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business, dwelling place, or usual place of abode of the person to be served, CPLR 308(4) allows for service "by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode . . . of the person to be served," and by mailing the summons to such person's last known residence or actual place of business. Such service is commonly known as "nail and mail" service.

unsubstantiated denial of receipt was insufficient to rebut the presumption of proper service, and a hearing on the issue of service was not required.").

Defendants contend that this court lacked jurisdiction to enter the default judgment against them due to the alleged failure to properly serve Duke. They make no claim that they were not properly served. Further, they argue failure of service on Duke but submit no affidavit from Duke contesting the adequacy of service upon her. The conclusory assertion in the affidavit of Shaun Dougherty that process for Duke was "nailed" at the wrong address is insufficient to rebut the presumption of proper service. Dougherty's affidavit does not actually contradict the affidavits of service. According to the process servers' affidavits, attempts to personally serve Duke at the Jackson Heights address were made on June 17 and 18, 2015. Dkt. 3 at 3; Dkt. 5 at 3. Dougherty's affidavit, dated August 3, 2017, asserts that that address "is not" Duke's ***current*** place of business, dwelling place or usual place of abode, but does not state whether the same was true at the time of service in June 2015. *See* Dkt. 63. Moreover, the AC alleges that Shaun Dougherty and Duke are married, and that, as of June 2015, they resided together at the Jackson Heights address. AC ¶ 5. In his affidavit, Dougherty pointedly fails to mention the allegation that he is married to Duke, but admits that he "used to" reside at the Jackson Heights address "until 2015." Dkt. 63. No mention is made of the date he allegedly moved and whether he notified Noah Bank of the move and his new address. Dougherty's affidavit not only fails to rebut the affidavits of service, but leaves ample room for an inference that, when process was served in June 2015, Duke lived with him at the Jackson Heights address, as the AC alleges.

Finally, the fact that additional service, pursuant to CPLR 3215(g)(3), was sent to Duke's Pennsylvania address does not demonstrate that the attempts to serve her at the Jackson Heights address were improper. CPLR 3215(g)(3) requires that additional service be mailed to a defendant's "place of residence." CPLR 308(4) has a similar requirement that the summons be mailed to the defendant's "last known residence" in addition to being "nailed" to the door at the defendant's "actual place of business, dwelling place or usual place of abode." CPLR 308(1) allows for personal service at any location, while CPLR 308(2) provides for service on 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." The "dwelling place or usual place of abode" referred to in CPLR 308(2) and (4) is distinct from a defendant's "last known residence." *See Feinstein v Bergner*, 48 NY2d 234, 239 (1979) ("there has never been any serious doubt that neither ['dwelling place' nor 'usual place of abode'] may be equated with the 'last known residence' of the defendant"). It follows that Duke's "place of residence" could have been in Pennsylvania while her "dwelling place or usual place of abode" was at the Jackson Heights address.

Defendants' challenge to the due diligence of the process servers also is unavailing. The affidavits of service state that four attempts were made to serve Duke at the Jackson Heights address at various times in the early and late afternoon across two successive days. *See* Dkt. 3 at 3; Dkt. 5 at 3. Defendants suggest that greater variation was required in the times at which personal service was attempted to satisfy the due diligence requirement. However, "[t]here are no rigid standards governing the due diligence requirement for substituted service pursuant to CPLR 308(4)." *Bank Leumi Trust Co. of New York v Katzen*, 192 AD2d 401, 401 (1st Dept 1993); *see Hochhauser v Bungeroth*, 179 AD2d 431, 431 (1st Dept 1992) ("No rigid rule has

been prescribed for determining whether 'due diligence' has been exercised"); *Deutsche Bank Nat. Trust Co.*, 110 AD3d at 759 (due diligence requirement "has been interpreted and applied on a case-by-case basis" and "may be met with a few visits on different occasions and at different times to the defendant's residence or place of business when the defendant could reasonably be expected to be found at such location at those times") (internal quotation marks omitted).

In granting the motion for default judgment, the court was satisfied that the four attempts to personally serve Duke demonstrated sufficient due diligence to warrant substitute service under CPLR 308(4). Defendants' submissions are inadequate to upset that determination. The contention that there was insufficient variation in the times at which service was attempted at the Jackson Heights address is contrary to the conclusions reached by numerous courts confronted with similar factual scenarios. *See e.g.*, *Heywood Condominium v Wozencraft*, 148 AD3d 38, 43, 45 (1st Dept 2017) (three attempts at personal service, all on weekdays, during business hours, at home of person to be served, sufficient to satisfy due diligence requirement); *Deutsche Bank Nat. Trust Co.*, 110 AD3d at 759-60 (three attempts to serve defendant at home, at different times and on different days, sufficient due diligence where there was no indication that defendant could not reasonably be expected to be found there at those times or that his workplace was readily ascertainable); *cf. Feinstein*, 48 NY2d at 238 (leaving undisturbed lower court's determination that two attempts at personal service was sufficient due diligence). As already discussed, defendants offer no reason to doubt that the Jackson Heights address was Duke's actual dwelling place or usual place of abode. Nor have they shown that it was unreasonable to expect to find Duke at home at the times at which service was attempted there, or that Duke's workplace was

readily ascertainable. Accordingly, defendants' conclusory assertions of improper service are insufficient to rebut the presumption of proper service, and an evidentiary hearing on the issue is not required. *See Deutsche Bank Nat. Trust Co.*, 110 AD3d at 760.

In addition, to the extent that defendants rely on CPLR 317, they have not shown that they are entitled to relief under that provision. Defendants do not actually deny that Duke received the summons and had actual knowledge of the pendency of this action and the motion for default judgment. To the contrary, the moving papers admit that Duke resides at the Pennsylvania address to which additional notice was sent pursuant to CPLR 3215(g)(3). *See* Dkt. 62 ¶ 15, citing Dkt. 66 (Aff. of Additional Notice Pursuant to CPLR 3215(g)(3)). That is the same Pennsylvania address to which service was mailed pursuant to the "nail and mail" procedure under CPLR 308(4). *See* Dkt. 3 at 3; Dkt. 5 at 3. Accordingly, defendants have not shown that Duke did not personally receive notice of the summons in time to defend this action, as required for relief pursuant to CPLR 317. *See Reliable Abstract Co., v 45 John Lofts, LLC*, 152 AD3d 429, 430 (1st Dept 2017); *Levine v Forgotson's Cent. Auto & Elec., Inc.*, 41 AD3d 552, 553 (2d Dept 2007). Accordingly, it is

ORDERED that the motion to vacate the court's default judgment, dated September 16, 2016 is denied, and it is further

ORDERED that, to the extent that the order, dated August 7, 2017, restraining K.R. and the New York City Marshal from enforcing the Judgment, is still in effect, that order is hereby vacated.

Dated: November 16, 2017

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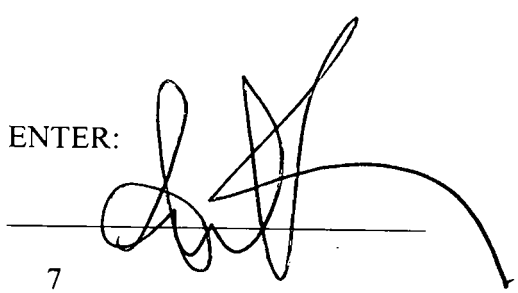

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SHIRLEY WERNER KORNREICH
J.S.C.