

Everbank v Kelly

2017 NY Slip Op 32749(U)

December 18, 2017

Supreme Court, Suffolk County

Docket Number: 21683/2013

Judge: Martha L. Luft

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - COUNTY OF SUFFOLK

PRESENT:

Hon. Martha L. Luft
Acting Justice Supreme Court

DECISION AND ORDER

EVERBANK, X

Plaintiff,

-against-

JAMES A. KELLY a/k/a JAMES KELLY,
EDWARD J. BRESSLER a/k/a EDWARD
BRESSLER, SECRETARY OF HOUSING
AND URBAN DEVELOPMENT, PETRO
INC., ANDREA MAJESKI, KEITH
SANDERS, WORKERS
COMPENSATION BOARD OF THE
STATE OF NEW YORK, PECONIC BAY
MEDICAL CENTER, CLERK OF THE
SUFFOLK COUNTY DISTRICT COURT,
SOUTHSIDE HOSPITAL, STATE OF
NEW YORK ON BEHALF OF
UNIVERSITY HOSPITAL I/P SUNY AT
STONY BROOK, COMMISSIONER OF
TAXATION AND FINANCE, NEW YORK
STATE BOARD OF ELECTIONS,
VELOCITY INVESTMENTS LLC, JERZY
CZOCH, CAPITAL ONE BANK,
JOSEPHINE C. MASTURZO a/k/a
JOSEPHINE C. KELLY, WORLDWIDE
ASSET PURCHASING LLC, INTERNAL
REVENUE SERVICE UNITED STATES
OF AMERICA, CRYSTAL KELLY,

Defendants.

X

Mot. Seq. No. 003 - **MG**
Orig. Return Date: 01/26/2016
Mot. Submission Date: 03/29/2016

Mots. Seq. No. 004 - **MD**
Orig. Return Date: 03/29/2016
Mot. Submit Date: 03/29/2016

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Upon reading and filing of the following: (1) Notice of Motion dated December 18, 2015 and supporting papers by plaintiff; (2) Order to Show Cause dated March 10, 2016 and supporting papers by defendant Bressler; (3) Response to Order to Show Cause dated March 24, 2016 and supporting papers by plaintiff; it is

ORDERED that the motion by defendant Edward J. Bressler (Seq. #004) is denied; and it is further

ORDERED that the motion by plaintiff (Seq. #003) is granted.

On September 14, 2017, the court conducted a traverse hearing in this foreclosure matter with regard to whether service was properly effected upon defendant Edward J. Bressler (“Bressler”). The impetus for the hearing arose in the context of motion practice by the plaintiff and Bressler. Plaintiff moved for confirmation of the referee’s report and judgment of foreclosure. Shortly thereafter, Bressler moved, by order to show cause, to vacate the default entered against him.

By order dated December 15, 2016, the court (Tarantino, J.) determined to consolidate the two motions and to hold the decision on them in abeyance pending a traverse hearing, the result of which could impact the court’s jurisdiction. The need for a traverse hearing was triggered by the two sworn affidavits submitted in support of Bressler’s motion which the court found to be sufficiently specific and detailed to rebut the prima facie showing of proper service contained in the process server’s affidavit of service, and the second affidavit of service establishing the mailing of the summons and complaint and RPAPL §1303 notice, in satisfaction of the requirements of CPLR §308 (2).

The sworn affidavit of Crystal Kelly, Bressler’s daughter, stated that she recalled that a man came to her home at 82 Lynbrook Road¹, Mastic Beach, New York on or about August 22, 2013 and handed her three sets of papers and asked her name. She swore that he asked her no other questions whatsoever. Bressler’s affidavit swears that he never lived at 82 Lynbrook Road, Mastic Beach and, in fact, has resided at 15 Old Neck Road South, Center Moriches, New York for forty-nine years.

At the traverse hearing, there were two witnesses. Plaintiff produced its process server, Thomas Burke (“Burke”). He testified, in relevant part, that he was given the papers on August 22, 2013 by Integrity Real Property Services (“Integrity”), which had been a client of his for a number of years at the time. The company instructed him as to the address at which he was to serve the papers, and he did not do any additional research as to the proper address for the parties to be served. The affidavits of service were prepared by Integrity and he reviewed and confirmed their accuracy before signing them. He typically signed them at Integrity’s office, before a notary, a few days after service was completed.

In this case, Burke went to 82 Lynbrook Drive, Mastic Beach on August 22, 2013 for the purpose of serving Bressler and co-defendant James Kelly. A woman came to the door who identified herself as Crystal Kelly, and as the daughter and wife of the two gentlemen to be served. He inquired as to whether both gentlemen resided at that address and was told they did. He then inquired if either was in the military and was told they were not. He handed three sets of papers consisting of the summons, complaint and RPAPL 1303 Notice to Ms. Kelly, and

¹The affidavit refers to Lynbrook “Road,” however it is clear from the Note and Mortgage that underlie this matter that the street is, in fact, Lynbrook “Drive” and it shall be referred to as such in this decision.

departed. He reported the information to Integrity, the affidavits of service were prepared and on August 26, 2013 he signed before a notary and the additional mailing of the papers was accomplished. On September 4, 2013 Integrity filed the documents with the court.

Bressler also testified. He stated that he had never lived at 82 Lynbrook Drive in Mastic Beach. He testified that he lives at 15 Old Neck Road South, Center Moriches, New York, a home he owns with his wife, and at which he has resided since 1975.

Crystal Kelly was present in the courtroom throughout the hearing. However, she was not called to testify.

Based upon the credible testimony presented at the hearing regarding the events of August 22, 2013, the court finds Burke's description thereof to be credible and draws a strong negative inference against defendant in this regard based upon the failure of Crystal Kelly to testify. *Adam K. v Iverson*, 110 AD3d 168, 177, 970 NYS2d 297, 305 (2d Dept. 2013) (missing witness rule applies in non-jury civil trials). Her affidavit, submitted in support of Bressler's motion, provided facts essential to overcoming the presumption of proper service accorded Burke's affidavit of service. Ms. Kelly was certainly available, since she was sitting in the courtroom throughout the hearing. In fact, the court indicated its anticipation of her testimony in a ruling sustaining an objection during Bressler's testimony, by holding that the information proffered would be more appropriately related to the court by Ms. Kelly. The court can only infer from her failure to testify that her sworn testimony would not have supported her father's case.

Thus, the issue to be determined is whether Burke acted reasonably in the face of the misrepresentation of fact by Ms. Kelly. *Fashion Page, Ltd. V Zurich Ins. Co.*, 50 NY2d 265, 428 NYS2d 890 (1980); *Arvanitis v Bankers Trust Co.*, (1st Dept. 2001). The court finds that Burke reasonably relied upon the statement by an adult daughter that her father resides at that address.

In addition, the court notes that the mortgage provides, at ¶ 13 that any notices provided for therein shall be directed to the "Property Address," defined as "82 Lynbrook Drive, Mastic Beach, NY 11951." It also contains an Occupancy Rider signed by Bressler, promising that he intends to occupy the Lynbrook Drive property. Such circumstances further bolster the "presumption of proper service at the address where all notices under the mortgage were to be sent." *Bank of New York v Espejo*, 92 AD3d 707, 708, 939 NYS2d 105, 106 (2d Dept. 2012) (affidavit stating defendant lived in Florida at time of service insufficient to rebut presumption of proper service at address in New York where mortgage notices to be sent).

Based upon the foregoing, service was properly accomplished upon Bressler and personal jurisdiction obtained.

It should be noted that defendant's argument, raised in counsel's closing statement, that

there had been no proper showing of the additional mailing of the papers required by CPLR § 308 (2) is misplaced for two reasons. First, the court's December 15, 2016 order took note of the fact that a second affidavit of service, a copy of which is annexed as part of Exhibit "D" of plaintiff's response to defendant's motion showing mailing on August 26, 2013, established such mailing in satisfaction of the statute, and neither Ms. Kelly's nor Bressler's affidavit submitted in support of defendant's motion calls that fact into dispute. Second and more telling is the fact that Burke testified that the mailing was accomplished on the same day he went to Integrity's office to sign his affidavit of service before a notary. Such testimony sufficiently established that the mailing occurred. *See Bossuk v Steinberg*, 58 NY2d 916, 460 NYS2d 509 (1983) (employee who effected mailing need not be produced, proof of regular practice of mailing sufficient).

Having found that the court has personal jurisdiction of Bressler, plaintiff's motion for confirmation of the referee's report and a judgment of foreclosure and sale, as well as Bressler's motion to vacate the order of reference or to compel the acceptance of his proposed verified answer against him may now be addressed.

The court will first consider Bressler's motion. It is well established that to prevail on a motion to be relieved from an order upon the basis of excusable default pursuant to CPLR 5015 (a) (1) the movant must establish both a reasonable excuse for the default and a meritorious defense to the action. *King v King*, 99 AD3d 672, 951 NYS2d 565 (2d Dept. 2012); *DiGiacomo v Levine*, 76 AD3d 946, 907 NYS2d 499 (2d Dept. 2010).² If no reasonable excuse for the default is established, there is no need to address whether a meritorious defense has been shown. *Paulus v Christopher Vacirca, Inc.*, 128 AD3d 116, 119, 6 NYS3d 572, 574 (2d Dept. 2015), citing, *Cervini v Cisco General Const., Inc.*, 123 AD3d 1077, 1 NYS3d 195 (2d Dept. 2014); *Cavalry SPV I, LLC v Frenkel*, 119 AD3d 724, 725, 989 NYS2d 344 (2d Dept. 2014); *Manufacturers and Traders Trust Co. V Consolidated Const. Group, LLC*, 114 AD3d 834, 980 NYS2d 793 (2d Dept. 2014).

In the present matter, Bressler's only excuse for his default is that he was not properly served. In fact, his entire testimony at the traverse hearing focused solely on the fact that he never resided at 82 Lynbrook Drive. Since the court has just determined that service was proper, it is clear that Bressler has failed to establish a reasonable excuse for his default. *ACT Properties, LLC v Garcia*, 102 AD3d 712, 957 NYS2d 884 (2d Dept. 2013); *Deutsche Bank National Trust Co. v Pietranico*, 102 AD3d 724, 957 NYS2d 868 (2d Dept. 2013); *Indymac Federal Bank FSB v Quattrochi*, 99 AD3d 763, 952 NYS2d 239 (2d Dept. 2012).

Moreover, the circumstance that is the linchpin of the situation is Bressler's own apparent misrepresentation to the plaintiff of his true address at the time he signed the mortgage. There is

² Bressler also moves pursuant to CPLR § 3012 (d). The same standard applies in that context, *viz.*, the movant must show both a reasonable excuse for the delay in serving an answer and demonstrate a potentially meritorious defense to the action. *State Farm Mut. Auto. Ins. Co. v Austin Diagnostic Medical PC*, 153 AD3d 576, 60 NYS3d 98 (2d Dept. 2017).

no indication in the record that he ever notified the plaintiff of a change of address. Bressler cannot rely upon his own lack of forthrightness as being a reasonable excuse for his default.

Although under the circumstances there is no need to address whether any meritorious defenses have been raised, the court feels compelled to note the lack of merit in Bressler's purported defense concerning his not being a signatory to the loan modification agreement. Bressler points out that a loan modification agreement was entered into in 2012, but was only signed by the co-borrower, James Kelly, Bressler's son-in-law, not by Bressler himself. What Bressler neglects to mention is that the loan modification agreement expressly provides, at ¶ 3 (D), in pertinent part:

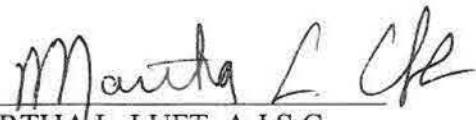
That all terms and provisions of the Loan Documents [defined as the Mortgage and the Note], except as expressly modified by this Agreement, remain in full force and effect; nothing in this Agreement shall be understood or construed to be a satisfaction or release in whole or in part of the obligations contained in the Loan Documents...

Of course the only terms that were modified pertained to the payment schedule, not to the underlying obligations in the note and mortgage. The very purpose of a loan modification agreement is to provide relief to the borrower who is in or close to defaulting. To assert, as Bressler does, that, because he did not sign this agreement providing relief to his son-in-law, he is no longer bound by his own obligation under the note and mortgage is unsupportable, and clearly contrary to the plainly stated contractual provisions.

Turning now to the plaintiff's motion, the court finds that plaintiff sufficiently established compliance with CPLR 3215 (c), as directed by the court in the April 16, 2015 Order Appointing Referee to Compute (Tarantino, J.). Thus, plaintiff will now be granted judgment upon the defaults of the defendants. A Judgment of Foreclosure and Sale will be signed simultaneously with this decision and order.

ENTER

Date: December 18, 2017
Riverhead, New York



MARTHA L. LUFT, A.J.S.C.

FINAL DISPOSITION

NON-FINAL DISPOSITION