

One W. Bank, FSB v Carmen Baker
2011 NY Slip Op 33696(U)
December 30, 2011
Supreme Court, Queens County
Docket Number: 23931/09
Judge: Bernice Daun Siegal
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE BERNICE D. SIEGAL IAS PART 19
Justice

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ONE WEST BANK, FSB AS SUCCESSOR IN
INTEREST TO INDYMAC BANK, FSB,

Plaintiff,

-against-

Index No.: 23931/09

DECISION AND ORDER

CARMEN BAKER, et.al.,

Defendant.

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Plaintiff commenced this foreclosure proceeding against defendant for property located at 216-33 118th Avenue, Cambria Heights, Queens. Plaintiff filed a Summons and Complaint with the Queens County Clerk's office on September 3, 2009, and completed service of the Summons and Complaint upon defendant on September 29, 2009 by substituted "nail and mail" service. Defendant filed a late Answer, as permitted by the order of the Honorable Patricia Satterfield, dated October 4, 2010. The order also set the matter down for a traverse hearing, as defendant's Answer alleged lack of personal jurisdiction, among other defenses.

A traverse hearing was held on January 25, 2011 and February 1, 2011. Plaintiff called process server Alan Feldman as its only witness. Mr. Feldman testified that he was a licensed process

server who was hired to serve papers upon defendant at 216-33 118th Street, the address of the foreclosed property. He testified that when he attempted to serve defendant at that location, the individuals living there stated that Ms. Baker did not live there, but would not say where she resided. Mr. Feldman then informed his office of the issue with defendant's address, and a search was performed determining that the post office had Ms. Baker receiving mail at 216-29 118th Street. Mr. Feldman then performed service on defendant at the new address by attempting in hand service on four different occasions, and eventually affixing a copy of the Summons and Complaint at the new address, and mailing a copy to defendant at the new address.

Defendant testified on her own behalf and in support of her defense that she was not properly served. She testified that she did not personally receive the Summons and Complaint and that it was not received at her residence located at 216-29 118th Street, but was only found at 216-33 118th Street. She testified that she found a Summons and Complaint on the steps located at 216-33 118th Street. Upon finding the Summons and Complaint, defendant was trying to complete a loan modification and then went to the Legal Aid Society's clinic for assistance.

Defendant argues that service was not properly made because it was not made at defendant's actual residence or her place of business. Defendant argues that plaintiff failed to make

sufficient efforts to ascertain defendant's address and properly serve her, or attempt service through an individual of suitable age and discretion at the foreclosed property. As plaintiff failed to perform due diligence, service under CPLR § 308(4) was improper.

Plaintiff argues that service was proper, in that Mr. Feldman made four attempts to serve defendant at her actual residence. Therefore, under CPLR § 308(4), service by "nail and mail" was properly performed. Plaintiff contends that the quality of service was appropriate, in that Mr. Feldman first attempted to serve defendant on the foreclosed property. When he was informed that she did not live there, an investigation was performed and determined that defendant lived two doors down from the foreclosed property. Mr. Feldman then attempted service upon defendant at her residence, and ultimately served her by "nail and mail".

CPLR § 308(4) states that personal service upon an individual may be made by affixing the pleading to the door of the individual's home and mailing a copy in accordance with the statute, if due diligence was performed in attempting to serve the individual personally or by leaving a copy with a person of suitable age and discretion in the individual's home, and said diligence was unsuccessful.

Based upon the evidence, this Court finds that plaintiff properly performed service upon defendant under CPLR 308(4). (See *Long Island Savings Bank, FSB v. Yaloz*, 289 AD2d 380 [2nd Dept.

2001]; *Citibank v. Demadet*, 243 AD2d 532 [2nd Dept. 1997].) Mr. Feldman attempted to serve defendant personally at the foreclosure address located at 216-33 118th Avenue, and was informed by the occupants that defendant did not live there. Mr. Feldman then sought an investigation through his company to discover defendant's residence, which happened to be two doors down from the foreclosed property, 216-29 118th Avenue. Mr. Feldman then made four attempts to serve defendant at her residence, at varying times of the day, before ultimately performing "nail and mail" service in accordance with CPLR § 308(4).

Defendant's argument that plaintiff should have attempted service at her place of business is unavailing. There is no credible evidence that plaintiff was aware of her place of business, or that defendant was there consistently during business hours so that service could be performed. Further, defendant's argument that service should have been made on a person of suitable age and discretion is without merit. The two women upon whom service was made at the foreclosed property indicated that they did not know where defendant lived, nor did they indicate that they were family members or friends of defendant. Therefore, any service upon them in accordance with CPLR § 308(2) may not have withstood scrutiny.

Further, it is noted that defendant did receive the Summons and Complaint at the foreclosed property, albeit on the steps of

the property. It is further noted that defendant acknowledged that she was in default on her mortgage, that she was attempting to work out a loan modification to address the issue, and that she was aware that she was denied a loan modification. While these facts do not diminish plaintiff's responsibility to properly serve defendant with process, it also indicates that defendant would not have been surprised to discover a foreclosure proceeding was commenced. This Court finds defendant's testimony that she was not served with the Summons and Complaint incredible, particularly in light of the fact that she was living two doors down from the foreclosed property and she herself discovered the pleadings on the steps of the foreclosed property.

As defendant failed to present sufficient, credible evidence in admissible form that she was not properly served with the Summons and Complaint, defendant's application to dismiss plaintiff's Summons and Complaint for lack of personal jurisdiction is denied.

This constitutes the decision of the Court.

Dated: December 30, 2011

Bernice D. Siegal, J.S.C.