

Vin-Mike Enter. v Grigg
2015 NY Slip Op 31625(U)
August 17, 2015
Supreme Court, Suffolk County
Docket Number: 12-25112
Judge: Thomas F. Whelan
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SHORT FORM ORDER

INDEX No. 12-25112

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION
I.A.S. COMMERCIAL PART 45 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE: 4/28/15
SUBMIT DATE: 7/10/15
Mot. Seq. 003: ADJOURNED FOR
HEARING - 10/2/15
CASE DISP: NO

-----X
VIN-MIKE ENTERPRISES, :
 :
 : Plaintiff, :
 :
 : -against- :
 :
 DANA GRIGG, JANET JONES, NATIONWIDE :
 CREDIT SERVICE, INC. and JOHN DOE #1 :
 through JOHN DOE #10, inclusive, the last 10 :
 names being fictitious and unknown to the plaintiff :
 it being intended to designate fee owners, tenants :
 or occupants of the lien premises and/or lien upon :
 the lien premises described in the complaint, if the :
 aforesaid individuals defendants are living, and if :
 any or all of said individual defendants be dead, :
 their heirs at law, next of kin, distributees, :
 executors, administrators, trustee, committees, :
 devisees, legatees and the assignees, lienors, :
 creditors and successors in interest of them, and :
 generally all persons having or claiming under, by, :
 through, or against the said defendants named as a :
 class, or any right, title or interest in or lien upon :
 the premises described in the complaint herein, :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 8 read on this motion for dismissal
_____ ; Notice of Motion/Order to Show Cause and supporting papers 1 - 4 ; Notice of
Cross Motion and supporting papers _____ ; Opposition papers 5-6 ; Reply papers 7-8 ;
Other _____ ; (and after hearing counsel in support and opposed to the motion) it is,

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ORDERED that those portions of this motion (#003) by defendant, Dana Grigg, for dismissal of the complaint and, in effect, the vacatur of the judgment of foreclosure and sale issued herein on January 8, 2014 is adjourned to Friday, **October 2, 2015** at 9:30 a.m. for a traverse hearing which shall be held in the courtroom of the undersigned located in the Annex Building of the Supreme Court at One Court Street, Riverhead, New York 11901; and it is further

ORDERED that the remaining portions of this motion, wherein defendant Grigg seeks a discretionary vacatur of his default in answering together with, in effect, all orders and judgments entered thereon with leave to serve a proposed amended answer in the form of the one attached to the moving papers is considered under 5015(a)(1), 317 and 3012(d), and is adjourned to Friday **October 2, 2015** for submission, as determination of this relief must abide the court's determination of the jurisdictional matters framed as the subject of the traverse hearing scheduled above.

The plaintiff commenced this action in August of 2012 to foreclose the lien of certain consolidated mortgages given by defendant Grigg on property known as 94 Senix Ave., Center Moriches, New York. Following the defaults in answering of all persons served with process, the plaintiff moved, ex parte, for default judgments on its complaint and the appointment of a referee to compute amounts due under the consolidated mortgages for which foreclosure is sought in this action. Upon the plaintiff's filing of a Request for Judicial Intervention with its motion for an order of reference on default in December of 2012, the action was assigned to the specialized residential mortgage foreclosure part of this court. Personnel assigned thereto scheduled and held a settlement conference of the type contemplated by CPLR 3408 on February 21, 2013, at which, the moving defendant failed to appear, after which, quasi judicial personnel characterized this action as one in the nature of a commercial mortgage foreclosure action. The action was then released from the specialized mortgage foreclosure part and assigned to the commercial case inventory of this court on that date. The plaintiff's motion (#001) was granted by order dated January 29, 2013 and a copy thereof was served with notice of entry upon defendant Grigg on July 17, 2013. In December of 2013, the plaintiff moved, ex parte, for an order confirming the report of the referee to compute and for a judgment of foreclosure and sale. That motion (#002) was granted by order and judgment dated January 8, 2014.

By notice of motion dated March 16, 2015, defendant Grigg interposed this motion (#003) and therein seeks relief from the "Order of Reference and decision granting Plaintiff judgment dated January 13, 2013 pursuant to CPLR 5015(a)(1) and dismissal of the complaint". Defendant Grigg seeks that same relief pursuant to CPLR 317. Defendant Grigg seeks no relief from the judgment of foreclosure and sale issued in favor of the plaintiff on January 8, 2014. Defendant Grigg further demands dismissal of the action due to a purported failure to serve him with a RPAPL § 1304 notice and pursuant to CPLR 3211(a)(3) due to a lack of capacity to sue and pursuant to CPLR 3211(a)(8) due to a purported lack of jurisdiction over the person of defendant Grigg. A demand for an order cancelling an impending sale of the mortgaged premises is next requested followed by a demand for leave to serve a late answer and the scheduling of a CPLR 3408 settlement conference. Defendant

Grigg demands a dismissal of the complaint due to the complained of improprieties in service due to his non-residency at the address where service was made, or, at the very least, a traverse hearing on this issue of service, without any reference to or reliance upon the provisions of CPLR 5015(a)(4).

The defendant's motion is opposed, on various grounds, by the plaintiff. One of such grounds sounds in estoppel as it is based upon defendant Grigg's representations, both oral and in writing in the various loan documents executed by him, that he resided at 17 Darcy Avenue in Manorville, New York and that the mortgaged premises were intended to be used for investment purposes as a rental. The plaintiff thus contends, among other things that the loan was commercial in nature and that none of the notice requirements imposed by RPAPL §§ 1303 and 1304 nor the conference requirements imposed by CPLR 3408 are applicable here. Finally, the plaintiff challenges the defendant's denial of service as legally insufficient.

For the reasons stated, the motion is granted only to the limited extent set forth below.

Rule 5015(a) of the Civil Practice Laws and Rules governs the instant motion by defendant Grigg, as a judgment of foreclosure and sale issued on January 8, 2014 in favor of the plaintiff upon a confirmation of the report of the referee to compute who was appointed in the January 29, 2013 order of reference issued pursuant to CPLR 3215 and RPAPL §1321. Subparagraph (a) of Rule 5015 mandates that a person seeking relief from a judgment or order entered in an action move for such relief "with such notice as the court may direct". Motions pursuant to CPLR 5015(a) are thus required to be interposed by the presentation of an order to show cause providing in blank for court directives regarding the method and manner of service. At least one appellate court has determined that the failure to move for relief pursuant to CLR 5015(a) by order to show cause is a jurisdictional defect warranting the vacatur of any order issued on an application not compliant with these requirements (*see Smith v Smith*, 291 AD2d 828, 736 NYS2d 557 [4th Dept 2002]; 133 Siegel's Prac. Rev. 4, David d Siegel [2003]).

Here, the instant motion was interposed by a mere notice of motion rather than by order to show cause. The court thus had no opportunity to direct the method and manner of service. However, the plaintiff opposed the defendant's motion and did so without claiming any prejudicial effect. The court shall thus consider the merits of the defendant's motion as any jurisdictional defect was waived by the plaintiff's failure to object thereto.

CPLR 5015(a) provides both jurisdictional and discretionary grounds for the vacatur of a judgment or order entered upon the default of a party. The successful invocation of this jurisdictional defense is a complete defense to the complaint and where it is established, the dismissal of an action against a defendant is warranted without any demonstration of his or her possession of a meritorious defense or other elemental showing (*see Prudence v Wright*, 94 AD3d 1073, 943 NYS2d 185 [2d Dept 2012]; *see also Emigrant Mtge. Co., Inc. v Westervelt*, 105 AD3d 896, 964 NYS2d 543 [2d Dept 2013]; *Deutsche Bank Natl. Trust Co. v Pestano*, 71 AD3d 1074, 899 NYS2d 269 [2d Dept

2010]). Alternatively, a defendant who successfully establishes the defense of improper service may elect to waive the jurisdictional aspect of such defense and appear in the action so as to defend against the claims interposed in an effort to succeed on the merits and avoid a second commenced action by the plaintiff. To do so, however, such defendant must satisfy the two prong test applicable to the discretionary vacatur permitted under CPLR 5015(a)(1) which requires a showing of a reasonable excuse for the default, such as the improper service, and the movant's possession of a meritorious defense to the action (*see Equicredit Corp. of Am. v Campbell*, 73 AD3d 1119, 900 NYS2d 907 [2d Dept 2010]; *Ramirez v Romualdo*, 25 AD3d 680, 808 NYS2d 733 [2d Dept 2006]). In addition, Rule 5015(a)(1) requires the application for discretionary vacatur on excusable default grounds to be made within one year after service of the subject order or judgment with notice of its entry.

Where a claim for vacatur rests upon a jurisdictional defense, appellate case authorities have instructed that the trial court must consider the efficacy of such defense prior to determining whether discretionary grounds for a vacatur of the default exist under CPLR 5015(a)(1) or CPLR 3012(d) (*see Community West Bank, N.A. v Stephen*, 127 AD3d 1008, 9 NYS3d 275 [2d Dept 2015]; *E*Trade Bank v Vasquez*, 126 AD3d 933, 934, 7 NYS3d 285, 286 [2d Dept 2015]; *HSBC Bank USA Natl. Ass'n v Miller*, 121 AD3d 1044, 995 NYS2d 198 [2d Dept 2014]; *Youngstown Tube Co. v Russo*, 120 AD3d 1409, 993 NYS2d 146 [2d Dept 2014]; *Canelas v Flores*, 112 AD3d 871, 977 NYS2d 362 [2d Dept 2013]). While hardly a model of clarity, it appears that defendant Grigg predicates his demand for dismissal of the complaint, or for a traverse hearing, on the grounds of improper service process by the plaintiff and that such demand was perceived as such by the plaintiff. The court shall thus consider this jurisdictional issue first in accordance with the above cited case authorities.

It is axiomatic that "a process server's affidavit of service constitutes prima facie evidence of proper service" (*Scarano v Scarano*, 63 AD3d 716, 716, 880 NYS2d 682 [2d Dept 2009]; *see NYCTL 2009-A Trust v Tsafatinos*, 101 AD3d 1092, 1093, 956 NYS2d 571 [2d Dept 2012]). A defendant can rebut the process server's affidavit by a sworn denial of service in an affidavit containing specific and detailed contradictions of the allegations in the process server's affidavit (*see U.S. Bank Natl. Ass'n v Losner*, 125 AD3d 640, 999 NYS2d 749 [2d Dept 2015]; *Bank of NY v Espejo*, 92 AD3d 707, 939 NYS2d 105 [2d Dept 2012]; *Deutsche Bank Natl. Trust Co. v Pestano*, 71 AD3d 1074, *supra*; *Bankers Trust Co. of California, NA v Tsoukas*, 303 AD2d 343, 756 NYS2d 92 [2d Dept 2003]). "Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavits" (*Countrywide Home Loans Serv., LP v Albert*, 78 AD3d at 984–985, 912 NYS2d 96 [2d Dept 2010]; [internal quotation marks and citation omitted]; *see Mortgage Elec. Registration Sys., Inc. v Losco*, 125 AD3d 733, 2015 WL 542795 [2d Dept 2015]; *JPMorgan Chase v Todd*, 125 AD3d 953, 2015 WL 775077 [2d Dept 2015]; *Emigrant Mtge. Co., Inc. v Westervelt*, 105 AD3d 896, *supra*; *Countrywide Home Loans Serv., LP v Albert*, 78 AD3d 983, 984–985, *supra*).

CPLR 308(2) provides, in part, that personal service upon a natural person shall 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 ... mailing the summons to the person to be served at his or her last known residence” (*see 1136 Realty, LLC v 213 Union Street Realty Corp.*, ___ AD3d ___, 12 NYS3d 294 [2d Dept 2015]; *Samuel v Brooklyn Hosp. Ctr.*, 88 AD3d 979, 980, 931 NYS2d 675 [2d Dept 2012]). A vacation home may constitute a dwelling place or usual place of abode of a defendant within the purview of CPLR 308(2) and 308(4) (*see Washington Mut. Bank v Murphy*, 127 AD3d 1167, 10 NYS3d 95 [2d Dept 2015]; *Krechmer v Boulakh*, 277 AD2d 288, 289, 715 NYS2d 253 [2d Dept 2000]). A temporary residence elsewhere or a temporary absence from the place designated by a defendant as his residence or dwelling place or usual place of abode which lacks the requisite degree of “permanence or stability” will support a finding of due and sufficient service of process at the address designated by the defendant (*see Tribeca Lending Corp. v Crawford*, 79 AD3d 1018, 916 NYS2d 116 [2d Dept 2010]; *Argent Mtge. Co., LLC v Vlahos*, 66 AD3d 721, 887 NYS2d 225 [2d Dept 2009]; *Dunn v Burns*, 42 AD3d 884, 839 NYS2d 894 [4th Dept 2007]; *Litton Loan Serv., LP v Vasilatos*, 7 AD3d 580, 777 NYS2d 165 [2d Dept 2004]; *Northeast Sav., F.A. v Picarello*, 232 AD2d 384, 648 NYS2d 145 [2d Dept 1996]).

Here, the plaintiff’s process server attested to service of the summons and complaint upon defendant Grigg pursuant to CPLR 308(2) by delivery to Robert Donald, a person of suitable age and discretion found at 17 Darcy Road, Manorville, New York, which was described as defendant Grigg’s usual place of abode, and by mailing same to said address. A prima facie case of due service was thus made.

However, defendant Grigg has adduced some proof that he did not “reside” at the place at which service was effected at the time of such service but instead resided at the mortgaged premises. Although the Darcy Avenue address was the address that defendant Grigg listed on the loan documents as his residence address and thus may have constituted the last known address for purposes of the mailing made by the plaintiff’s process server pursuant to the dictates of CPLR 308(2) (*see Washington Mut. Bank v Murphy*, 127 AD3d 1167, *supra*), defendant Grigg’s claim that he did not reside at the Darcy Avenue address at the time of service gives rise to questions of fact with respect to the propriety of the in-hand delivery of the summons and complaint at such address to Mr. McDonald and the subsequent mailing thereto (*see id*; *see also Central Mtge. Co. v Ward*, 127 AD3d 803, 9 NYS3d 61 [2d Dept 2015]; *Webb v Pearce*, 114 AD3d 671, 979 NYS2d 667 [2d Dept 2014]; *Krechmer v Boulakh*, 277 AD2d 288, *supra*). While neither the New York State Identification Card nor the single utility account billing statements produced by defendant Grigg, which list the mortgaged premises as the address of defendant Grigg are not conclusive evidence that he did not reside at the Darcy Avenue address at the time of service, such proof coupled with the affidavits of defendant Grigg and Mr. McDonald give rise to questions of fact regarding whether such address was defendant Grigg’s dwelling place or usual place of abode at the time of service. Accordingly, a hearing on the issue of service must be held.

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The instant motion is thus adjourned to Friday, **October 2, 2015** at 9:30 a.m. for a traverse hearing which shall be held in the courtroom of the undersigned located in the Annex Building of the Supreme Court at One Court Street, Riverhead, New York 11901. The court reserves its decision on the remaining portions of the instant motion pending determination of the jurisdictional issue that is the subject of the traverse hearing scheduled herein.

DATED: 8/17/15



THOMAS F. WHELAN, J.S.C.