

Citimortgage, Inc. v Kobin

2015 NY Slip Op 32435(U)

December 22, 2015

Supreme Court, New York County

Docket Number: 850174/2013

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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CITIMORTGAGE, INC.,

Plaintiff,

Index No. 850174/2013

-against-

DECISION/ORDER

KRISTOPHER DAVID KOBIN, BOARD OF MANAGERS OF THE 230 RIVERSIDE CONDOMINIUM C/O R.A. COHEN & ASSOCIATES INC., NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU and "John Doe" and/or "Jane Doe" #1-10 inclusive, the last ten names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

| Papers | Numbered |
|--|----------|
| Notice of Motion and Affidavits Annexed..... | 1 |
| Answering Affidavits..... | _____ |
| Replying Affidavits..... | _____ |
| Exhibits..... | 2 |

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In this action to foreclose a mortgage lien on premises located at 230 Riverside Drive Unit 7C, New York, New York, plaintiff now moves without opposition for an order to allow service by publication upon defendant Kristopher David Kobin ("Mr. Kobin") pursuant to CPLR §§ 308(5) and 316, to amend the caption, to appoint a Guardian Ad Litem and Military Attorney and to extend the time to serve the summons and complaints pursuant to CPLR § 2004. For the

reasons set forth below, plaintiff's motion is granted in part and denied in part.

The relevant facts are as follows. On or about April 20, 2007, Mr. Kobin executed a mortgage in favor of Mortgage Electronic Registration Systems, Inc. as nominee for CitiMortgage, Inc. This mortgage was assigned to CitiMortgage, Inc. ("CitiMortgage") on June 30, 2011, and was further assigned to proposed plaintiff Federal National Mortgage Association ("Fannie Mae") on February 18, 2014. CitiMortgage commenced the instant action on or about June 25, 2013. CitiMortgage, through its process service agent, was unable to serve Mr. Kobin. The process server attempted to serve Mr. Kobin at his last known address in New York, the mortgaged premises, and noted that the premises were unoccupied. The building concierge confirmed that the premises had been vacant for some time but did not know where Mr. Kobin had moved. The process server made a request to the United States Post Office in New York and was told that Mr. Kobin had moved but had not left a forwarding address. The process server then conducted an investigation and discovered that Mr. Kobin had potentially moved to Oregon. The process server travelled to the two Oregon addresses he had identified as potential new residences but was unable to locate Mr. Kobin. The process server made a request to the United States Post Office in Oregon and was told that Mr. Kobin had moved but had not left a forwarding address. The process server contacted the Department of Motor Vehicles of New York, the Department of Defense, and the Surrogates Courts of each New York borough, none of which had any records pertaining to Mr. Kobin or his whereabouts.

CPLR § 308(5) allows service "in such manner as the court, upon motion, without notice, directs, if service is impracticable under paragraphs one, two and four of this section." "A plaintiff can demonstrate that service by conventional means is 'impracticable' by making diligent, albeit unsuccessful, efforts to obtain information regarding a defendant's current

residence, business address or place of abode.” *Snyder v Alternate Energy*, 19 Misc.3d 954, 959 (Civil Court, City of New York, 2008) (citing *Franklin v Winard*, 189 A.D.3d 717 (1st Dept 1993)). The courts have repeatedly ordered service by alternative means where conventional service is impracticable rather than deeming attempts at conventional service good and sufficient. *See, e.g., id.* In the instant case, plaintiff has established the impracticability of serving Mr. Kobin by demonstrating CitiMortgage’s unsuccessful attempts to serve Mr. Kobin personally at his last known address in New York and its investigation into Mr. Kobin’s whereabouts which extended to Oregon. Accordingly, the portion of plaintiff’s motion to have the court allow service by publication is granted.

The portion of plaintiff’s motion to amend the caption in this matter to add as defendants New York State Department of Taxation and Finance and United States of America – Internal Revenue Service, to substitute Fannie Mae as plaintiff in place of CitiMortgage and to excise defendants “John Doe” and “Jane Doe” 1-10 is granted without opposition. However, plaintiff’s motion to amend the caption to add as defendants the heirs and successors in interest of Mr. Kobin if Mr. Kobin is deceased is denied on the ground that plaintiff cannot serve a deceased person. A legal action commenced against a deceased person is a legal nullity “since it is well established that the dead cannot be sued.” *Marte v. Graber*, 58 A.D.3d 1, 3 (1st Dept 2008).

The portion of plaintiff’s motion to appoint a Guardian Ad Litem and Military Attorney to represent unknown persons is denied as plaintiff has failed to cite any authority supporting this request.

The portion of plaintiff’s motion to extend its time to serve the summons and complaint on defendants Mr. Kobin, New York State Department of Taxation and Finance and United States of America – Internal Revenue Service is granted without opposition.

Accordingly, it is hereby

ORDERED that the motion to amend the caption to add as defendants New York State Department of Taxation and Finance and United States of America – Internal Revenue Service, to substitute Fannie Mae as plaintiff in place of CitiMortgage and to excise defendants “John Doe” and “Jane Doe” 1-10 is granted; and it is further

ORDERED that the action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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FEDERAL NATIONAL MORTGAGE ASSOCIATION
("FANNIE MAE"), A CORPORATION ORGANIZED
AND EXISTING UNDER THE LAWS OF THE
UNITED STATES OF AMERICA,

Plaintiff,

-against-

KRISTOPHER DAVID KOBIN, BOARD OF
MANAGERS OF THE 230 RIVERSIDE CONDOMINIUM
C/O R.A. COHEN & ASSOCIATES INC, NEW
YORK CITY PARKING VIOLATIONS BUREAU,
NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD AND NEW YORK CITY TRANSIT
ADJUDICATION BUREAU, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE
and UNITED STATES – INTERNAL REVENUE SERVICE,

Defendants.

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And it is further

ORDERED that plaintiff's time to serve defendants Mr. Kobin, New York State Department of Taxation and Finance and United States of America – Internal Revenue Service is extended for sixty (60) days from the date of this order; and it is further

ORDERED that defendant Kristopher David Kobin be served by publication in The New

York Beacon weekly and The New York Law Journal for four consecutive weeks, to be completed within sixty (60) days of this order, and by mailing a copy of the summons and amended complaint along with a copy of this order by certified and regular mail to defendant Kristopher David Kobin's last known address at 230 Riverside Drive, Unit 7C, New York, New York within sixty (60) days of this order; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office (Room 119), who are directed to amend their records to reflect such change in the caption herein.

This constitutes the decision and order of the court.

Dated: 12/22/15

Enter: CK
J.S.C.

CYNTHIA S. KERN
J.S.C.