

U.S. N.A. v Mangroo

2017 NY Slip Op 32758(U)

December 29, 2017

Supreme Court, Queens County

Docket Number: 17714/2008

Judge: Bernice D. Siegal

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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE BERNICE D. SIEGAL
Justice

IA Part 19

U.S. National Association As Trustee for the x
Structured Asset Investment Loan Trust, 2006-4

Index
Number 17714/2008

Plaintiff,

Motion
Date October 23, 2017

-against-

Motion Seq. No. 7

Mahendranauth Mangroo, Maureen Manoo,
Chase Manhattan Bank USA, NA, JPMorgan
Chase Bank, N.A., Mortgage Electronic
Registration Systems, Inc., as Nominee for
PHH Mortgage Corp., F/K/A Cendant Mortgage
Corp., New York City Environment Control
Board, New York City Transit Adjudication
Bureau,

Defendants.

x

The following papers numbered 1 to 12 read on this motion for an order staying any enforcement efforts of the judgment rendered, including any execution of a warrant of the judgment rendered, including any execution of a warrant of eviction, in the related Housing Court Proceeding between Hiline LLC and Defendant Manoo in the New York City Civil Court, Housing Part, under Index Number 56774/2017; (2) pursuant to CPLR §5015(a)(4), vacating the default ordered and judgment entered against Defendant Manoo; (3) pursuant to CPLR §5015(a)(3), vacating the default orders and judgments entered against Defendant Manoo, including the order directing alternative service pursuant to CPLR §308(5) based upon calculated misrepresentation; (4) pursuant to CPLR §3211(a)(8), dismissing this action against the Defendants; and (5) sanctioning plaintiff for presenting self-serving affidavits and affirmations blatantly contradicting each other.

	PAPERS NUMBERED
Order to Show Cause - Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition.....	5 - 9
Reply Affirmation.....	10 - 12

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Plaintiff commenced the within action for an Order pursuant to CPLR §5015(a)(4), vacating the default ordered and judgment entered against Defendant Maureen Manoo (hereinafter “Manoo”); pursuant to CPLR §5015(a)(3), vacating the default orders and judgments entered against Defendant Manoo, including the order directing alternative service pursuant to CPLR §308(5) based upon calculated misrepresentation; pursuant to CPLR §3211(a)(8), dismissing this action against the Defendants; and (5) sanctioning plaintiff for presenting self-serving affidavits and affirmations blatantly contradicting each other.

For the reasons set forth below, Defendants’ motion is granted solely to the extent of setting the matter down for a traverse hearing to determine the propriety of service upon the Defendants.

Background/Contentions

Plaintiff commenced the within action to foreclose on a Note Mahendranauth Mangroo (“Mangroo”) executed and delivered on April 7, 2006 for the premises at 103-31 105th ST. Ozone Park, NY 11417 (“Premises”). On said date, Mangroo duly executed and delivered a mortgage in the amount of \$261,250.

Plaintiff contends that Defendants defaulted in payment on the monthly installments due April 1, 2008.

On July 16, 2008, Plaintiff commenced the within action by filing the Notice of Pendency and Summons and Complaint.

Plaintiff submits the Affidavits of Service of Alan Feldman wherein he allegedly attempted to serve Mangroo and Manoo.

On October 20, 2008, Plaintiff’s prior counsel submitted a motion for service by

publication on Defendants which was subsequently granted on November 3, 2008. Pursuant to the November 3, 2008 Order, Gary Darche, Esq. was appointed as Guardian Ad Litem for Defendants.

On March 30, 2010, Justice Patricia Satterfield signed the Judgment of Foreclosure and Sale.

On December 27, 2011, a Consent to Change Attorney was filed transferring the within action to the current attorneys of record.

On December 30, 2013, Plaintiff's motion to substitute affidavits of merit and the affirmation in accordance with the Office of Court Administration's Order 431/11 was granted.

Pursuant to a Judgment of Foreclosure and Sale, a foreclosure sale of the Premises was scheduled for August 12, 2016 where the property was sold to third party Hiline LLC.

On August 16, 2016, Mangroo moved by Order to Show Cause to vacate the sale which was denied as no basis to vacate the sale was presented.

Discussion

Service

Defendants contend that the default orders and judgments entered in the within action should be vacated and the within action should be dismissed as Plaintiff failed to obtain personal jurisdiction over Defendants. "A defendant seeking to vacate a default pursuant to CPLR §5015(a)(1) must demonstrate both a reasonable excuse for the default and a potentially meritorious defense to the action." (*Clover M. Barrett, P.C. v. Gordon*, 90 A.D.3d 973 [2nd Dept 2011].) "[O]rdinarily, a proper affidavit of a process server attesting to personal delivery of a summons to a defendant is sufficient to support a finding of jurisdiction." (*Skyline Agency, Inc. v. Ambrose Coppotelli, Inc.*, 117 A.D.2d 135 [2nd Dept 1986].) "It is well settled, however, that

where ‘there is a sworn denial of service by the defendant, the affidavit of service is rebutted and the plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing. (*Frankel v. Schilling*, 149 A.D.2d 657 [2nd Dept 1989]; citing *Skyline Agency, Inc. v. Ambrose Coppotelli, Inc.*, supra.) It is well settled that “bare and unsubstantiated” denial of receipt of process is insufficient to raise an issue of fact for a traverse hearing. (*Abdelqader v. Abdelqader*, 2014 WL 4627786 [2nd Dept 2014 September 17, 2014]; *Deutsche Bank Nat. Trust Co. v. Quinones*, 114 A.D.3d 719 [2nd Dept 2014].)

Initially, the Court notes that Plaintiff served the defendants by publication. “It is well established that CPLR §308(5) vests a court with the discretion to direct an alternative method of service of process when it has determined that the methods set forth in CPLR 308(1), (2) and (4) are ‘impracticable.’” (*Home Federal Sav. Bank v. Versace*, 252 A.D.2d 480, 480 [2nd Dept 1998].) However, “[s]ervice by publication in a ... foreclosure action is permissible where the [defendant] is evading service.” (*Contimortgage Corp. v. Isler*, 48 A.D.3d 732, 734-735 [2nd Dept 2008]; *U.S. Bank Nat. Ass'n v. Patterson*, 63 A.D.3d 1545 [4th Dept 2009]; *State Street Bank and Trust Co. v. , Coakley*, 16 A.D.3d 403 [2nd Dept 2005].) Herein, there is no evidence that Defendants were evading service.

Defendant noted that the July 21, 2008 Affidavit of Service of Alan Feldman (“Feldman”) upon Mangroo stated that he confirmed with the neighbor that Mangroo was not “...in the military service...” However, Feldman also swore in the July 21, 2008 Affidavit of Service upon Manoo that “said address is vacant” as confirmed with “the current neighbors.” The within inconsistent Affidavit of Services were part of the basis for the signing of the Service by Publication. It is critical to note that Alan Feldman lost his license to serve process for violating, on multiple occasions, 6 RCNY 2-234. 6 RCNY 2-234 requires licensed process servers to “at

all times strictly and promptly conform to all laws, rules, regulations and requirements of the federal, state and municipal authorities relating to the conduct of licensees and the service of process in the State of New York and the preparation, notarization and filing of affidavits of service and other documents now in force or hereafter adopted during any license period.”

Furthermore, Defendant, Manoo, rebutted the affidavit of service of Feldman via her affidavit, wherein she stated that she never received any of the court papers alleged to have been served and that she has lived at the Premises at all times relevant.

Where, as here, “there is a sworn denial that delivery to the defendant was accomplished, the affidavit of service is rebutted and the plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing.” (*Toyota Motor Credit Corp. v. Hardware Lam*, 93 A.D.3d 713, 714 [2nd Dept 2012] quoting *Bankers Trust Co. of California, N.A. v. Tsoukas*, 303 A.D.2d 343 [2nd Dept 2003].) Accordingly, the matter shall be set down for a traverse hearing to determine the propriety of service.

Conclusion

For the reasons set forth above, Defendants motion is granted, solely to the extent that a traverse hearing shall be held on February 6, 2018 at 2:15 p.m. in Part 25, Courtroom 48 to determine the propriety of service. A copy of this Order shall be faxed to Plaintiff and Defendants’ counsel.

Dated: December 29, 2017

Bernice D. Siegal, J. S. C.