Benjamin v Ogarro
2018 NY Slip Op 31125(U)
January 29, 2018
Supreme Court, Queens County
Docket Number: 18145/2014
Judge: Robert J. McDonald

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

MICHAEL BENJAMIN, as Administrator of the Estate of Arlene Todman,

Plaintiff,

- against -

DAVID W. OGARRO and WHITMYRE DAVID OGARRO,

Defendants.

- x

Index No.: 18145/2014

Motion Date: 1/18/18

Motion Nos.: 14 & 15

Motion Seqs.: **7 & 8**

The following papers numbered 1 to 11 read on this Order to Show Cause **(seq. no. 7)** by defendants for an Order vacating the previous order granting plaintiff a default judgment, setting aside the sale of the subject property, restoring the matter to the calendar, extending the time to put in an answer, reducing plaintiff's share of the proceeds, allowing defendant time to refinance the premises and buy out plaintiff, disallowing any funds accruable to defendant to be used in paying plaintiff's attorneys' bills, the mortgage on the house and the referee's fees, and denying plaintiffs' prior motion; and on this motion **(seq. no. 8)** by plaintiff for an Order dismissing defendants' Order to Show Cause with prejudice, deeming that all issues are resolved in favor of plaintiff, sanctioning defendants for frivolous and improper conduct, and granting plaintiff attorney fees and costs and disbursements for the within motion:

	Papers Numbered
Order to Show Cause(seq. no. 7)-Affirmation-Exhibits-Aff. of Service	1 - 4
Affirmation in Opposition-Exhibits	5 - 7
Notice of Motion(seq. no. 8)-Affirmation-Exhibits	8 - 11

This is an action for partition of property located at 143-37 Glassboro Avenue, Jamaica, NY.

Plaintiff commenced this action on December 19, 2014 by filing a summons and complaint. A supplemental summons was filed on January 6, 2015. Although duly served, defendants failed to

appear in this action. On May 21, 2015, this Court granted plaintiff a default judgment and appointed a Referee. The Report of Referee Gary M. Darche was confirmed and ratified and an interlocutory judgment of partition and sale was entered on November 16, 2016. On April 28, 2017, an auction was conducted and the property was sold to Huan Xia and LiDian Ping for the sum of $305,000.

Defendants then filed an Emergency Order to Show Cause on October 11, 2017, seeking the same relief requested herein. The Order to Show Cause was denied with leave to renew because defendant did not notice the third-party purchaser and on the grounds that it was not an emergency. Defendants filed a second Emergency Order to Show Cause on October 17, 2017. The second application was marked off due to defendants' failure to appear at the Centralized Motion Part on the return date. On November 6, 2017, this Court granted plaintiff's unopposed motion for a Final Judgment of Partition and directed plaintiff to submit judgment with a bill of costs. The final judgment is currently pending. Defendants filed a third Emergency Order to Show Cause on November 6, 2017. The third Order to Show Cause was denied on the grounds that it was not an emergency. Defendants then filed the instant and fourth Emergency Order to Show Cause on November 27, 2017, seeking the same relief requested in defendants' prior applications.

The instant Order to Show Cause directed defendants to serve the third-party purchasers and plaintiff's attorney of record with "a conformed copy of this Order to Show Cause, together with copies of the papers upon which it is based" no later than December 1, 2017.

In opposition, plaintiff's counsel affirms that she was only served with the first two pages of the Order to Show Cause and not the entire application.

"[T]he mode of service provided for in [an] order to show cause is jurisdictional in nature and must be literally followed" (Matter of Bell v State Univ. of N.Y. at Stony Brook, 185 AD2d 925, 925 [2d Dept. 1992]). The failure to give proper notice, as here, deprives the court of jurisdiction to hear the motion (see Gonzalez v Haniff, 144 AD3d 1087 [2d Dept. 2016]; Crown Waterproofing, Inc. v Tadco Constr. Corp., 99 AD3d 964 [2d Dept. 2012]).

Here, the Order to Show Cause was not properly served upon plaintiff in that plaintiff was never served with the supporting papers. Therefore, plaintiff was significantly prejudiced in

preparing the opposition to this application. Moreover, the Affidavit of Service merely indicates that a true copy of the "Order to Show Cause" was served on plaintiff's counsel and fails to indicate that the "copies of the papers upon which it is based" were also served.

Accordingly, the Court lacks jurisdiction to hear this application.

Even if this Court were to consider the application, defendant failed to demonstrate that the default judgment should be vacated.

When a defendant seeking to vacate a judgment entered on default, as here, raises a jurisdictional objection, the court is required to resolve the jurisdiction question in determining whether to vacate the judgment (see Canelas v Flores, 112 AD3d 87 [2d Dept. 2013]; Roberts v Anka, 45 AD3d 752 [2nd Dept. 2007]). "It is axiomatic that the failure to serve process in an action leaves the court without personal jurisdiction over the defendant, and all subsequent proceedings are thereby rendered null and void" (Emigrant Mtge. Co., Inc. v Westervelt, 105 AD3d 896 [2d Dept. 2013], quoting Krisilas v Mount Sinai Hosp., 63 AD3d 887[2d Dept 2009]). Thus, under CPLR 5015(a)(4) a default judgment must be vacated once a movant demonstrates lack of personal jurisdiction (see Hossain v Fab Cab Corp., 57 AD3d 484 [2d Dept. 2008]).

A process server's affidavit stating proper service in accordance with CPLR 308 constitutes prima facie evidence of proper service (see Bank, Natl. Assn. v Arias, 85 AD3d 1014 [2d Dept. 2011]; Wells Fargo Bank, NA v. Chaplin, 65 AD3d 588 2d Dept. 2009]; Scarano v Scarano, 63 AD3d 716 [2d Dept. 2009]). However, a defendant's sworn denial of receipt of service, containing specific facts to rebut the statements in the process server's affidavit, "generally rebuts the presumption of proper service established by a process server's affidavit and necessitates an evidentiary hearing" (City of New York v Miller, 72 AD3d 726 [2d Dept. 2010]; see Wells Fargo Bank, N.A. v Christie, 83 AD3d 824 [2d Dept. 2011]; Associates First Capital Corp. v Wiggins, 75 AD3d 614 [2d Dept. 2010]; Washington Mut. Bank v Holt, 71 AD3d 670[2d Dept. 2010]).

Here, the affidavit of service states that defendant was served on January 20, 2015 by affixing a copy of the supplemental summons, summons and verified complaint to the door of defendant's residence.

Defendant submits an affidavit stating that he did not receive a summons and notice by anyone in this matter. He further affirms that he cannot read and that his niece and his pastor read his mail. Defendant's friend Ifeanyi Ejiogu also submits an affidavit stating that defendant is not well educated and has very poor eyesight. He helps defendant read his mail and he informs defendant of the contents.

Although defendant affirms that he was never served in this matter, such bare denial of receipt is insufficient to rebut the presumption of proper service (see Hamlet on Olde Oyster Bay Homeowners Assn., Inc. v Ellner, 57 AD3d 732 [2d Dept. 2008]); Bankers Trust Co. of California, N.A. v Tsoukas, 303 AD2d 343 [2d Dept. 2003]; De La Barrera v Handler, 290 AD2d 476 [2d Dept. 2002]). Defendant does not dispute that the address where the service occurred was not his dwelling house. Additionally, defendant does not affirm that he did not find papers on his front door.

As defendant failed to offer a reasonable excuse for his default and failed to demonstrate that he did not receive timely notice of the pendency of the action, this Court need not address whether defendant has demonstrated a meritorious defense (see CPLR 317, 5015(a); Tribeca Lending Corp. v Correa, 92 AD3d 770 [2d Dept. 2012]; Maida v Lessing's Rest. Servs., Inc., 80 AD3d 732 [2d Dept. 2011]; American Shoring, Inc. v D.C.A. Constr. Ltd., 15 AD3d 431 [2d Dept. 2005]).

Turning to plaintiff's application for sanctions for frivolous and improper conduct under 22 NYCRR 130-1.1, conduct is frivolous if it is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law", if it is "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injury another", or if "it asserts material factual statements that are false."

This Court finds that as this was the first time the application was fully submitted, due to defendant's counsel's prior procedural mistakes, defendants' application is not completely without merit. Thus, sanctions are not warranted. That branch of the motion seeking fees and costs and disbursements for the within motion is denied. The remainder of the motion seeking to deny the Order to Show Cause and to deem that all issues are resolved in favor of plaintiff are denied as moot.

Accordingly, and for all of the above stated reasons, it is hereby

ORDERED, that defendants' application **(seq. no. 7)** is denied; and it is further

ORDERED, that the temporary restraining order contained in the Order to Show Cause dated November 27, 2017 is lifted; and it is further

ORDERED, that plaintiff's motion **(seq. no. 8)** is denied.

Dated: January 29, 2018
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.