Short Form Order

Index No. 27607/2008

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - COUNTY OF SUFFOLK

PRESENT:
Hon. Martha L. Luft
Acting Justice Supreme Court

DECISION AND ORDER ON TRAVERSE HEARING AND MOTIONS

Mot. Seq. No.:	008 - MG
Orig. Return Date:	01/04/2017
Mot. Submit Date:	01/10/2017
Mot. Seq. No.:	009 - MG
Orig. Return Date:	05/22/2018
Submit Date:	08/07/2018

x

BAYVIEW LOAN SERVICING,

Plaintiff,

-against-

LAURIE VALENZUELA, GEORGE C. VALENZUELA, CITIBANK, NA, BROOKHAVEN MEMORIAL HOSPITAL, PEOPLE OF THE STATE OF NEW YORK, "JOHN DOE" and "JANE "DOE", said names being fictitious, parties intended being possible tenants or occupants of premises,

Defendants.

x

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REFEREE
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Upon the traverse hearing conducted on June 11, 2018 in connection with motion #008 and upon the following papers read on the motion (009), notice of motion, affirmation in support of plaintiff's motion, together with all exhibits, and affirmation in opposition, together with an exhibit, it is hereby

ORDERED that the motion (#008) by defendant George C. Valenzuela is granted, and the Final Judgment of Foreclosure and Sale signed on February 16, 2016 and entered on April 1, 2016 is hereby vacated for lack of personal jurisdiction over him; and it is further

ORDERED that plaintiff's motion (#009) for an order pursuant to CPLR §306-b, extending its time to effectuate proper service upon George C. Valenzuela is granted, provided that service is completed within one hundred and twenty (120) days of service of a copy of this Decision and Order with notice of entry.

By order dated January 12, 2018, the motion (#008) by defendant, George C. Valenzuela to vacate the judgment of foreclosure and sale entered on April 1, 2016 based upon a lack of personal jurisdiction was granted to the extent of setting this matter down for a traverse hearing. After a number of adjournments, such hearing was conducted and post-hearing submissions were received and considered by the court.

By notice of motion dated April 19, 2018 (#009), the plaintiff moved for an extension of time to "re-serve" Mr. Valenzuela pursuant to CPLR §306-b. Because the issues are inter-related, the court will address both the determination of the traverse hearing and the plaintiff's motion in this decision and order.

THE TRAVERSE HEARING

At the hearing, plaintiff produced Keith Swensen, the process server who purportedly effected service upon defendant. Mr. Swensen testified that he had no independent recollection of serving the papers in this matter, given that the event occurred almost a decade earlier on July 29, 2008. He could only rely upon his affidavit of service for the facts. Such affidavit reflected that a copy of the papers were served upon "Stephanie Valenzuela - Fam. Mem" as a person of suitable age and discretion, at 130 Tarpon Ave., Medford, New York 11763, the premises which is the subject of the foreclosure action. The affidavit of service also reflects that the mailing and filing required by CPLR §308 (2) were timely completed. A second affidavit of service upon co-defendant, Laurie Valenzuela, demonstrates that service was effected upon her, Stephanie's mother, on the same date and by the same method.

Stephanie Valenzuela testified that she is the daughter of the defendant and was seventeen years old at the time a man came to the house with some papers on July 29, 2008. She vaguely recollected the incident. She stated that the man was looking for her father and that she told him that her father did not live there, and that she did not know where her father was. The man then gave her some papers and asked her to sign something. She then gave the papers to her mother. She further testified that her parents were going through a messy divorce at the time and that there was an order of protection requiring that her father stay away from her mother and from her home, among other things, including that he have no third party contact with the mother. The order of protection was issued March 8, 2007 and remained in effect until March 8, 2012.

Mr. Valenzuela testified, as well. He confirmed the terms of the order of protection, and placed a copy into evidence. He stated that the last time he lived at the premises, prior to the date of service, was the end of 2005. Mr. Valenzuela testified that he had about eight to ten different addresses during the five-year period that the order of protection was in effect. He placed five items into evidence reflecting five of those eight to ten addresses. The towns included were a post office address and a street address in East Moriches, as well as addresses in Newburgh, West Babylon, and Westhampton. He also stated that he and his wife have reconciled and that he moved back into the marital premises in November of 2015.

It is well established that the plaintiff had the burden of proof to establish personal jurisdiction at the traverse hearing. *See, e.g.,* ***Teitelbaum v North Shore-Long Island Jewish Health System, Inc.***, 160 AD3d 1009, 76 NYS3d 185 (2d Dept. 2018). In order to demonstrate proper service pursuant to CPLR §308 (2), delivery of the summons "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" must be shown. In the present matter, it is undisputed that the papers were delivered to defendant's seventeen-year old daughter at the mortgaged premises.

Whether a residence is someone's usual place of abode requires that it be a place where the individual lives "with a degree of permanence and stability and to which he intends to return

(*citations omitted*)." ***Deutsche Bank Nat. Trust Co. V O'King***, 148 AD3d 776, 777, 51 NYS3d 523, 525 (2d Dept. 2017). In the present matter, by his own testimony, Mr. Valenzuela had eight to ten different addresses during the five years the order of protection was in effect. One cannot draw the conclusion that any degree of permanence and stability attached to any of those locations. Plaintiff cites ***Northeast Savings, FA v Picarello***, 232 AD2d 384, 385, 648 NYS2d 145 (2d Dept. 1996) ("***Picarello***") for the proposition that where the individual's absence from the mortgaged premises was transient, and "no degree of permanence and stability [could] be reasonably ascribed to [the transient] accommodation," the mortgaged premises "remained his usual place of abode (*citations omitted*)." In that case, the defendant had kept some possessions at the premises and had never changed his address with the plaintiff bank, nor with the post office or Department of Motor Vehicles. While he may have intended to establish a permanent residence elsewhere, the fact was that he never did.

The starkest distinction between ***Picarello*** and the current matter is the fact that a five-year order of protection was in effect at the time of service, which prohibited Mr. Valenzuela from setting foot in the premises and also from any communication with his wife, the co-defendant. His transience was not ambivalent and was not a matter within his control. There is nothing in the record that would lead the court to conclude that he intended, at the time, to return to the mortgaged premises, even though he did, in fact, eventually do so.

The existence of the order of protection also implicates whether defendant's daughter, Stephanie, was a "person of suitable age and discretion." No issue was regarding her suitability based upon her age (seventeen) was raised. *Compare* ***Bossuk v Steinberg***, 58 NY2d 916, 460 NYS2d 509 (1983) (no question had been raised whether fourteen and fifteen-year olds were of suitable age and discretion). However, where there is some sort of conflict of interest between the family members, the recipient of service may not be considered to be a person of suitable age and discretion. ***Bakht v Akhtar***, 18 Misc.3d 78, 79, 852 NYS2d 581, 583 (Sup. Ct., App. Term, 2d & 11th Dist. 2007). The conflict of interest need not pertain to the litigation in which service is being effected, but may stem from a separate pending proceeding. ***House of Bowery Corp. v Ensley***, 182 Misc.2d 471, 698 NYS2d 816 (Civ. Ct., NY Co. 1999). In ***Home Properties, LP v Kalter***, 24 Misc.3d 391, 876 NYS2d 623 (Dist. Ct., Nassau Co. 2009), the court found that the respondent's wife was not a person of suitable age and discretion due to the fact that at the time of service she had an order of protection directing the respondent to stay away from her.

The test to be applied is an objective one, ***id.***, and the conflict of interest need not be known to the process server. ***Bakht v Akhtar***, 18 Misc.3d at 79-80, 852 NYS2d 581, 583-584. The key consideration is whether the person receiving service is more likely than not to deliver the process to the party. ***Id.***

Although the order of protection itself was issued on behalf of Laurie Valenzuela and not Stephanie, it cannot be questioned that the proscriptions therein would have an impact on Stephanie, as well. She was residing with her mother, so the prohibition against the defendant

coming to the residence, or calling the residence without a doubt affected the daughter. She testified that she told the process server that she did not even know where her father lived, indicating that she had little, if any contact with him at the time. Under these circumstances, it simply cannot be said that Stephanie was more likely than not to deliver the process to her father, and thus, she cannot, in this case, be considered a person of suitable age and discretion.

Based upon the foregoing, the plaintiff has failed to sustain its burden of proof in establishing personal jurisdiction over George C. Valenzuela, and his motion to vacate the judgment of foreclosure and sale is, therefore, granted.

PLAINTIFF'S MOTION FOR AN EXTENSION OF TIME TO SERVE DEFENDANT

Pending before the court concurrently with the defendant's motion and resulting traverse hearing, is a motion pursuant to CPLR §306-b for an extension of time to serve Mr. Valenzuela. The statute provides two bases for such a request: "good cause shown or in the interest of justice." It is a matter within the court's discretion. ***Leader v Maroney, Ponzini & Spencer***, 97 NY2d 95, 101, 736 NYS2d 291, 294 (2001) ("***Leader***"). The fact that plaintiff's service upon Mr. Valenzuela has been found defective does not preclude the court from granting the motion based upon the "interest of justice" standard, which is "more flexible" than the "good cause shown" standard and can "accomodate[] late service that might be due to mistake, confusion, or oversight, so long as there is no prejudice to the defendant (*citing* ***Leader***)." ***Estate of Fernandez by Salsbury v Wyckoff Heights Medical Center***, 162 AD3d 742, Slip Op. 04306, __NYS3d__, (2d Dept. 2018); *see also* ***Earle v Valente***, 302 AD2d 353, 754 NYS2d 364 (2d Dept. 2003) (interest of justice extension granted where service was defective, but was timely made within the 120-day period).

Among the factors to be considered are such things as the diligence or lack thereof in the attempt at service, the expiration of the statute of limitations, the meritorious nature of the cause of action, the length of the delay in service, the promptness of the request for the extension of time and any prejudice to the defendant. ***Estate of Fernandez***, 162 AD3d 742, Slip Op. at p. 1. Just as was the case in ***Estate of Fernandez***, in the present matter, the action was commenced timely and the statute of limitations had expired when defendant filed his motion to vacate the judgment. The meritorious nature of the plaintiff's cause of action was established by order granting the motion for a judgment of foreclosure and sale and the denial of co-defendant Laurie Valenzuella's cross-motion to vacate her default and dismiss the complaint, dated February 16, 2016, as well as the final judgment of foreclosure and sale, signed the same date. No demonstrable prejudice to Mr. Valenzuela has been shown.

Moreover, the essence of the court's ruling regarding the defect in the service of process pertained to the impact of the order of protection, of which the court has no reason to believe the process server was aware. Stephanie did not testify that she told him of its existence.

Based upon all of the facts and circumstances of this case, in the interest of justice, plaintiff's motion for an extension of time to serve Mr. Valenzuela is granted.

The court reminds all parties that, while the determination herein requires that the judgment in this matter be vacated, it in no sense disturbs the established fact of co-defendant Laurie Valenzuela's default, as determined in the order dated January 27, 2014 (Tarantino, J.).

ENTER

Dated: August 24, 2018
Riverhead, NY

MARTHA L. LUFT, A.J.S.C.

___FINAL DISPOSITION

_X_NON-FINAL DISPOSITION