Short Form Order

Supreme Court of the County of Suffolk
State of New York - Part XL

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

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WELLS FARGO BANK, N.A.,

Plaintiff,

-against-

LILLIAN M. HADLEY;
United States of America acting through
The Secretary of Housing and Urban Development;
Anne Simonella,
Alberto Rodriguez and
Maria Rodriguez,

Defendants.

x----------x

INDEX NO.:001749/2011

MOT. SEQ. NO.:005-MD

SHAPIRO, DICARO & BARAK, LLC
Attorneys for Plaintiff
175 Mile Crossing Boulevard
Rochester, NY 14624

YOUNG LAW GROUP, PLLC
Attorneys for Defendant Lillian M. Hadley
80 Orville Drive, Suite 100
Bohemia, NY 11716

U.S. ATTORNEY-EASTERN DISTRICT
271 Cadman Plaza East
Brooklyn, NY 11201

Upon the following papers numbered 1 to 22 read on this Motion/Order to Show Cause for a Preliminary Injunction; Notice of Motion/ Order to Show Cause and supporting papers 1-9; ~~Notice of Cross Motion and supporting papers 0~~; Answering Affidavits and supporting papers 10-20; Reply Affidavits and supporting papers 1-22; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. no.:005) of Defendant Lillian M. Hadley ("Defendant") for an order pursuant to CPLR Rule 5015 (a) (4) asserting lack of personal jurisdiction, CPLR Rule 3211 (a) (8) asserting lack of personal jurisdiction over the Defendant and therefore vacating the judgment of foreclosure and sale entered July 6th, 2017 and the order of reference entered October 21st, 2016; and dismissing the underlying complaint for lack of personal jurisdiction is denied in its entirety; and it is further

ORDERED that the temporary stay is hereby vacated; and it is further

ORDERED that the judicial auction sale records and proceeds from the August 6th, 2018 sale of the subject premises are released forthwith. Plaintiff is directed to file its records of sale with the Suffolk County Clerk and other entities as required.

Case History

This is an action to foreclose a residential "Reverse Mortgage," more correctly termed a Home Equity Conversion Mortgage on real estate situated at 4 Sonia Road, Bay Shore Bay Shore, New York.

Defendant Lillian M. Hadley and Dolores Whelan (deceased), on November 26th, 2007 closed on a reverse mortgage on their home secured by a note and mortgage executed to Plaintiff Wells Fargo Bank, N.A.. Ms. Whelan died on April 25th, 2010.

On January 11th, 2011 Plaintiff filed a summons, complaint and notice of pendency to commence the instant foreclosure action. The filed affidavit of service asserts service of those documents upon Defendant was made on January 15th, 2011. Same affidavit states service was made at the subject premises, 4 Sonia Road, Bay Shore, New York, by personal service pursuant to CPLR §308 (2), by substituted service upon Alberto Rodriguez.

The history of this case is long and convoluted. Defendant has not submitted an answer.

A CPLR Rule 3408 settlement conference was held June 28th, 2013. The record reflects that Defendant personally appeared at that conference. Defendant does not dispute that personal appearance.

Following the unsuccessful attempt to settle the case, Plaintiff filed several motions, each on notice to Defendant. The Judgment of Foreclosure and Sale was issued July 6th, 2017. A judicial sale of the subject premises was scheduled for November 8th, 2017.

On November 7th, 2017, Defendant filed for Chapter 7 bankruptcy protection (Case No.:17-76858).

The judicial sale was rescheduled for April 20th, 2018. On April 19th, 2018, Defendant commenced a second bankruptcy, seeking Chapter 13 protection. On June 4th, 2018 that bankruptcy case was dismissed.

A third judicial sale was noticed, scheduled and completed on August 6th, 2018. Defendant's instant motion was commenced August 6th, 2018 by order to show cause ("OSC"). Same OSC did not vacate the auction sale.

Discussion

The January 11th, 2011 service of process of the summons, complaint and notice of pendency are challenged by Defendant in her instant motion. Defendant alleges lack of personal jurisdiction.

Defendant's Appearance

CPLR Rule 3408. Mandatory Settlement Conference in Residential Foreclosure Actions provides, in pertinent part:

> "1. ...in any residential foreclosure action involving a home loan...in which the defendant is a resident of the property subject to foreclosure...the court shall hold a mandatory conference within sixty days after the date when proof of service upon such defendant is filed with the county clerk...for the purpose of holding settlement discussions pertaining to the relative rights and obligations of the parties under the mortgage loan documents, including, but not limited to: (I) determining whether the parties can reach a mutually agreeable resolution...evaluating the potential for a resolution in which payment schedules or amounts may be modified...; or (ii) whatever other purposes the court deems appropriate;
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> 2. (ii) (c) At any conference held pursuant to this section, the plaintiff and the defendant shall appear in person or by counsel, and each party's representative at the conference shall be fully authorized to dispose of the case. If the defendant is appearing pro se, the court shall advise the defendant of the nature of the action and his or her rights and responsibilities as a defendant;
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> 2. (ii) (l) At the first settlement conference held pursuant to this section, if the defendant has not not filed an answer or made a pre-answer motion to dismiss, the court shall: 1. advise the defendant of the requirement to answer the complaint; 2. explain what is required to answer a complaint in court; 3. advise that if an answer is not interposed the ability to contest the foreclosure action and assert defenses may be lost; and..

> 2. (ii) (m) A defendant who appears at the settlement conference but who failed to timely answer,...shall be presumed to have a reasonable excuse for the default and shall be permitted to serve and file an answer, without any substantive defenses deemed to have been waived within thirty days of the initial appearance at the settlement conference. The default shall be deemed vacated upon service and filing of an answer." McKinney's CPLR Rule 3408 [2018].

Plaintiff asserts, and Defendant does not deny, that Defendant Lillian M. Hadley personally appeared at, and participated in a CPLR Rule 3408 mandatory settlement conference in this foreclosure case on June 28, 2013.

The case file contains a detailed report made by Plaintiff's Counsel regarding that conference and the testimony of Defendant before the Court.

The mandatory foreclosure conference was scheduled by the Suffolk County Supreme Court; on notice to the Defendant, Lillian M. Hadley; calendared with the caption and index number of the instant case. Same notice to Defendant clearly stated that it was a foreclosure conference; and required that the parties and/or Counsel check in with a court officer and note their appearances before the Court Referee.

The assigned Court Referee presided over that conference as a judicial officer of the Court. The parties to that foreclosure conference had the power to settle the instant litigation with the assistance of the Court, as provided by law. That conference was a formalized proceeding held in Part 128A of the Suffolk County Supreme Court, One Court Street, Riverhead, NY 11901.

In Personam Jurisdiction is Conferred by Defendant's Appearance

The practical approach to securing jurisdiction - or concluding that participation in litigation waives any jurisdictional defects in service of process - is longstanding (***J.A.P. v. A.J.P.***, 55 Misc3d 608, 613, 49 NYS3d 820, 825 [Sup Ct. Monroe Cty. 2017]; *ref to and quoting* ***McClure Newspaper Syndicate v. Times Printing Co.***, 164 AD 108,109, 149 NYS 443 [1st Dept 1914]) - a voluntary general appearance by a defendant in an action, for any purpose, is equivalent to personal service of the summons upon him.

The Court of Appeals determined that counsel for a defendant who asserted only a "special appearance" had in fact, by so appearing, generally appeared in the case (***Henderson v. Henderson***, 247 NY 428, 160 NE 775 [1928]). Judge O'Brien, writing for the Court

found that an appearance does not permit the "Defendant, participating in litigation as an actor in genuine and substantial sense, to contest the jurisdiction of his person by coupling with the participation a disclaimer of his willingness to be affected by its consequences." (***Id.*** at 433, 777).

The question of when one becomes an actor participating on the merits "is one largely of degree and the application of the rule must necessarily depend upon the facts" (***J.A.P.*** at 613, 825, *quoting* ***Henderson v. Henderson***, 247 NY 428, 432, 160 NE 775 [1928]; *see* ***Verdone v. Verdone***, 20 Misc2d 970, 188 NYS2d 689 [Sup Ct. Suffolk Cty. 1959]; ***Spota v. White***, 53 Misc3d 1210 [A], 2016 WL 6427362 [Sup Ct Suffolk Cty. 2016]).

> "New York Courts, when considering a defendant's objection to the lack of personal jurisdiction, have carved out a practical exception to rules regarding service. If a litigant, aware of some legal action even though never served, acts in a fashion that can be interpreted as participating in the litigation, then the defendant loses his right to challenge the court's jurisdiction" (***J.A.P.*** at 612, 824; *ref to* ***Rubino v. New York***, 145 AD2d 285, 538 NYS2d 547 [1st Dept 1989]; ***Taveras v. City of New York***, 108 AD3d 614, 969 NYS2d 481 [2d Dept 2013]).
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> "When a defendant participates in a lawsuit on the merits, he indicates his intention to submit to the court's jurisdiction over the action. By appearing "informally" in this manner, he confers *in personam* jurisdiction on the court" (***Rubino*** at 287, 548); *see* McLaughlin, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C320:2, pp. 363-364; 1 Weinstein-Korn-Miller § 320.12; ***Taylor v. Taylor***, 64 AD2d 592, 407 NYS2d 172 [1st Dept 1978]).

In a recent Second Department wrongful death action, it was held that lifeguard/employees of the Defendant City of New York, who, although neither was ever served, made an informal appearance in the case, and thereby waived any objection to personal jurisdiction (***Taveras v. City of New York***, 108 AD3d 614, 618, 969 NYS2d 481, 485 [2d Dept 2013]) *see* ***Finn v. Church for Art of Living, Inc.***, 90 AD3d 826, 935 NYS2d 93 [2d Dept 2011]; ***USF & G v. Maggiore***, 299 AD2d 341, 749 NYS2d 555 [2d Dept 2002], *see also* ***Rubino v. City of New York***, 145 AD2d 285, 538 NYS2d 547 [1st Dept 1989]; ***McGowan v. Ballanger***, 32 AD2d 293, 301 NYS2d 712 [3d Dept 1969]).

In a residential mortgage foreclosure case, Defendant's appearance by Counsel at three settlement conferences was acknowledged in the motion Court's settlement conference orders; and Defendant was deemed thereby to be an appearing party (***Nationstar Mortgage, LLC v. Martin***, 156 AD3d 533, 65 NYS3d 715 [1st Dept 2017]).

Earlier this year, Justice Heckman in Suffolk County decided a foreclosure case where the Defendant/Mortgagor had participated in two foreclosure settlement conferences. Defendant thereafter claimed that the Plaintiff had failed to obtain personal jurisdiction over her and moved to stay the sale and dismiss the foreclosure action (***U.S. Bank N.A. v. Packard***, 2018 WL 454395 [Suffolk Sup. 2018] NY Slip Op. 30019[U]).

The Court record, (as in the case at bar), showed that the Defendant was served by substituted service at her place of residence, followed by a first class mailing of the three documents. The Court noted "...nowhere does Defendant assertively testify that *she did not reside* in the premises where the summons and complaint were served on the date the summons and complaint were served..." (***Id.*** at 2).

The Court determined that, (as in the case at bar), the record "reveals a procedural pattern of delay reflective of an intentional design by the mortgagors to continuously thwart Plaintiff's prosecution of this foreclosure action." (***Id.*** at 3).

The ***Packard*** Court noted that case management records indicated that two CPLR 3408 Court mandated settlement hearings were held and that the Defendants had appeared *pro se*. "There is no indication that the ***Packard*** Defendants were represented by counsel and there is no record of a notice of appearance having been filed." (***Id.***).

The Court further noted that two subsequent motions were filed without opposition and that the Defendant thereafter filed for Chapter 7 bankruptcy protection, and that her husband and Co-Mortgagor filed a separate bankruptcy petition one day before the scheduled date of sale. (***Id.*** at 4).

The Court observed that Defendant filed her motion to dismiss due to lack of personal jurisdiction one day before the third scheduled sale date, asserting that she had never been served withe the summons and complaint (***Id.***).

The Court opined (elaborating upon the facts that there was no indication that the ***Packard*** defendants were represented by counsel and there was no indication of a notice of appearance having been filed):

> "Despite taking part in loan modification negotiations and court settlement conferences, a *pro se* defendant's failure to file a notice of appearance creates the anomalous result of retaining a *pro se's* additional right to contest jurisdiction during this (third) final hour, under these circumstances. In this case, however, defendant not only took an active part in loan modification negotiations, but also took the additional step of filing a bankruptcy petition (identifying and including the mortgage and the secured creditor in the petition), which filing clearly reflects defendant's awareness and participation in these proceedings based upon the timing of the filing, having been done one day prior to the sale of the premises. Such conduct and participation in this foreclosure action qualifies the defendant as having conferred personal jurisdiction over her by the court even were this court to conclude that personal service of the summons and complaint was not made upon the defendant pursuant to CPLR 308 (2), *see* ***Cadlerock Joint Venture LP v. Kierstedt***, 119 AD3d 627, 990 NYS2d 522 [2d Dept 2014]; ***Rubino v. New York***, 145 AD2d 285, 538 NYS2d 547 [1st Dept 1989]; ***Taveras v. City of New York***, 108 AD3d 614, 969 NYS2d 481 [2d Dept 2013]; ***J.A.P. v. A.J.P.***, 55 Misc3d 608m 49 NYS3d 820 [Monroe Sup Ct 2017])." (***Id.***, Footnote 2).

Judge Heckman concluded:

> "Under these circumstances, no legal basis exists to justify any further delay in scheduling the sale of the premises since the Defendant has failed to make any showing of a likelihood of success on the merits, irreparable injury, or that the balancing of the equities weigh in her favor given the fact that there have been no mortgage payments forthcoming in excess of five years." (***Id.*** at 5).

The Court denied the Defendant's motion, vacated the stay and order a rescheduling of the sale. (***Id.***).

In his affirmation in support of the instant motion to dismiss (seq. no.:005), Defendant's Counsel relies upon the Second Department Appellate Division case, ***Wells Fargo Bank, N.A. v. Final Touch Interiors, LLC***, to prove his argument that the appearance

of Defendant Lillian Hadley at the June 28th, 2013 foreclosure conference did not constitute an appearance sufficient to confer personal jurisdiction (***Wells Fargo Bank. N.A. v. Final Touch Interiors, LLC***, 112 AD3d 813, 977 NYS2d 351 [2d Dept 2013]).

This case may be distinguished from the case at bar. In ***Final Touch***, the Court found that the Defendants did not appear in their personal capacities at the settlement conference; but solely as representatives of the Defendant Corporate Entity. The Court held that their appearance in their corporate capacities did not bind them personally, and ordered a traverse hearing. (***Id.***).

Notwithstanding CPLR Rule 3408, (c) and (l), under the totality of the circumstances standard articulated by the courts, it is apparent that, as in ***Packard***, *infra.*, Defendant Hadley has had significant and persistent involvement with her foreclosure case.

Additionally, (and in further similarity to the facts and circumstances in ***Packard***), Defendant Hadley has never declared that, at the time of service she did not reside at the subject premises herein.

Service of Process is Presumptive Proof of Personal Service

The case record reflects personal service pursuant to CPLR 308 (2) at Defendant's residence. Notably, Ms. Hadley has not averred that the address where service of process was effected was not her residence at the time.

Defendant, in her affidavit in support of the instant motion (seq. no.:005), refutes receipt of service of process of the summons and complaint. Defendant notably fails to deny that Alberto Rodriguez was physically present at her residence to accept service on January 11th, 2011. Defendant merely states that Mr. Rodriguez *did not reside* at her residence on the date and time service of process was effected.

It must also be noted that neither Defendant nor her Counsel has actual knowledge of the facts and circumstances of that service of process. Critically, an affidavit of Alberto Rodriguez denying service of process is conspicuously absent from the record.

It is established by law that a process server's affidavit of service constitutes *prima facie* evidence of proper service (***Margarella v. Ullian***, —NYS3d—, 2018 WL 4100980 [2d Dept 2018] *see* ***Citimortgage, Inc. v. Baser***, 137 AD3d 735, 26 NYS3d 352 [2d Dept 2016]; ***American Home Mtge. Servicing, Inc. v. Gbede***, 127 AD3d 1004, 5 NYS3d 879 [2d Dept 2015]; ***Indymac Fed. Bank, FSB v. Hyman***, 74 AD3d 751, 901 NYS2d 545 2d Dept 2010]).

> "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' " (***Bank of New York v. Samuels***, 107 AD3d 653, 654, 968 HYS2d 93 [2d Dept 2013] *citing* ***Scarano v. Scarano***, 63 AD3d 713, 716, 880 NYS2d 149 [2d Dept 2009]; *quoting* ***Simons v. Grobman***, 277 AD2d 369, 370, 716 NYS2d 692 [2d Dept 2000]; *see* ***Matter of Romero v. Ramirez***, 100 AD3d 909, 955 NYS2d 353 [2d Dept 2012]; ***Indymac Fed. Bank FSB v. Quattrochi***, 99 AD3d 763, 952 NYA2d 239 [2d Dept 2012]; ***Tikvah Enters, LLC v. Neuman***, 80 AD3d 748, 915 NYS2d 508 [2d Dept 2011]).

In an action to recover damages for breach of contract and on an account stated, it was found that the defendant's affidavit was insufficient to rebut the presumption of proper service. The Court determined that Defendant's affidavit failed to swear to specific facts to rebut the statements of the process server. The Court held that a hearing on the issue of service was not required (***Servpro Industries, Inc. v. Anghel***, 121 AD3d 665, 993 NYS2d 724 [2d Dept 2014] *see* ***Deutsche Bank Natl. Trust Co. v. White***, 110 AD3d 759, 972 NYS2d 664 [2d Dept 2013]; ***Citimortgage, Inc. v. Bustamante***, 107 AD3d 752, 968 NYS2d 513 [2d Dept 2013]; ***US Natl. Bank Assn. v. Melton***, 90 AD3d 742, 934 NYS2d 352 [2d Dept 2011]).

In a recent mortgage foreclosure case, the Court held that the Mortgagor's conclusory and unsubstantiated denial of service was insufficient to rebut the presumption of proper service established by a duly executed affidavit of service (***U.S. Bank National Association v. Hasan***, 126 AD3d 683, 5 NYS3d 460 [2d Dept 2015] *see* ***Bank of N.Y. v. Samuels***, 107 AD3d 653, 968 NYS2d 93 [2d Dept 2013]; ***Deutsche Bank Natl. Trust Co. v. Pietranico***, 102 AD3d 724, 957 NYS2d 868 [2d Dept 2013]).

In a mortgage foreclosure case, the Court found that Defendants did not swear to specific facts to rebut the statements in the process server's affidavit, as required to rebut process server's affidavit as *prima facie* evidence of proper service (McKinney's CPLR 308(2) [2018]; ***Wachovia Bank Nat. Ass'n v. Carcano***, 964 NYS2d 246, 106 AD3d 726 [2d Dept 2013]).

In the case at bar, Defendant Lillian Hadley has personally appeared at her settlement conference. In her affidavit in support of the instant motion she has failed to assert specific

facts to rebut the process server's affidavit of service. The Defendant has failed to offer an affidavit refuting the process server's affidavit from an individual with personal knowledge of the facts and circumstances. Therefore, this case does not require nor justify holding a traverse hearing.

Defendant Lillian Hadley has throughout this case, engaged in an extensive pattern of behavior and participation which demonstrate her active involvement in the case. Thus, she has waived, by her actions, the defense of lack of personal jurisdiction. Those who seek the Court's protection under such circumstances cannot deny the Court's Jurisdiction.

Defendant's motion pursuant to CPLR Rule 5015 (a) (4) and CPLR Rule 3211 (a) (8) to vacate the judgment of foreclosure and sale as well as the order of reference, and dismissing the underlying complaint for lack of personal jurisdiction is denied.

The remainder of Defendant's arguments in support of its motion also fail to persuade the Court.

The foregoing decision constitutes the Order of the Court.

DATED: SEPTEMBER 17th, 2018
RIVERHEAD, NY

HON. JAMES HUDSON
Acting Justice of the Supreme Court