COPY

SHORT FORM ORDER

INDEX No: 32725/2009

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT F. QUINLAN
Justice of the Supreme Court

MOTION DATE: 01/21/16 #002
03/24/16 #003
04/28/17 #004 & #005
06/08/17 #006
SUBMIT DATE: 7/13/17
Motion Sequence.: 002 - Mot D
003 - Mot D
004 - Mot D
005 - MG
006 - MG

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CITIMORTGAGE, INC.,

Plaintiff,

-against-

MICHAEL PATRICK HAGGERTY, JR., INDIVIDUALLY AND NAMED CO-EXECUTOR, if he be living and if he be dead, the respective heirs-at-law, next-of-kin, distributees, executors, administrators, trustees, devisees, legatees, assignees, lienors, creditors and successors in interest and generally all persons having or claiming under, by or through said defendant who may be deceased, by purchase, inheritance, lien or inheritance, lien or otherwise any right, title or interst in or to the real property described in the complaint, LAURA SACCENTE, if she be living and if she be dead, the respective heirs-at-law, next-of-kin, distributees, executors, administrators, trustees, devisees, legatees, assignees, lienors, creditors and successors in interest and generally all persons having or claiming under, by or through said defendant who may be deceased, by purchase, inheritance, lien or inheritance, lien or otherwise any right, title or interest in or to the real property described in the complaint, ANDREA MIDDLETON A/K/A ANDREA RODRIGUEZ, INDIVIDUALLY AND NAMED CO-EXECUTOR, STATE OF NEW YORK, WASHINGTON MUTUAL BANK FA, UNITED STATES OF AMERICA, DANIELLE PRICE,

Defendants.

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Upon the following papers numbered 1 to 64 read on this application for an order vacating the "disposed" calendar status of the action, restoring the action to the court's calender, striking the answer of defendants Michael P. Haggerty, Jr. and

Laura Saccente, granting summary judgment, granting default against the non-appearing defendants, amending the caption and substituting FANNIE MAE as plaintiff; Notice of Motion/Order to Show Cause and supporting papers 1-29 (Seq. #002); Notice of Cross Motion and supporting papers 30-49 (Seq. #003); Answering Affidavits (Attorney Affirmation in Further Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Cross Motion) and supporting papers 50-60 ; Replying Affidavit of Defendant 61-64 ; ~~Other~~; and

Upon the following papers numbered 1 to 83 read on this application by plaintiff for an order extending time to serve defendant Laura Saccente pursuant to CPLR 306-b, authorizing service pursuant to CPLR 308(5), and discontinuing the action as against defendants Michael Patrick Haggerty, Jr. and Andrea Middleton a/k/a Andrea Rodriguez; Notice of Motion/Order to Show Cause and supporting papers 1-26 (Seq. #004); Notice of Cross Motion of the Guardian Ad Litem and supporting papers 27-53 (Seq. #005); Notice of Cross Motion of Defendant Laura Saccente and supporting papers 54- 72 (Seq. #006); Answering Affidavits (Attorney Affirmation in Opposition and in Reply) and supporting papers 73-80 ; Reply Affirmation 81-83 ; ~~Other~~; it is,

ORDERED that motions sequence #002, #003, #004, #005 and #006 are consolidated for purposes of this determination; and it is further

ORDERED that that part of plaintiff Citimortgage, Inc.'s motion (Seq. #002) for an order restoring the action to the calendar is denied as moot as the clerk administratively restored the action to the court's active calendar effective January 9, 2016; and it is further

ORDERED that that part of plaintiff's motion for an order amending the caption and substituting FANNIE MAE as plaintiff is granted upon the proof submitted; and it is further

ORDERED that the caption shall appear as set forth below; and it is further

ORDERED that upon the proof submitted the default of all non-appearing, non-answering defendants are fixed and set; and it is further

ORDERED that in all other respects, plaintiff's motion is denied; and it is further

ORDERED that defendant Laura Saccente's cross-motion for an order granting leave to serve an amended answer (Seq. #003) is granted to the extent that defendant Laura Saccente is granted leave to amend her answer as set forth herein and the proposed amended answer is deemed served; and it is further

ORDERED that plaintiff Citimortgage, Inc.'s motion (Seq. #004) for an order extending time to serve defendant Laura Saccente pursuant to CPLR 306-b, authorizing service pursuant to CPLR 308(5), and discontinuing the action against defendants Michael Patrick Haggerty, Jr. and Andrea Middleton a/k/a Andrea Rodriguez is granted to the extent that the action is discontinued against defendants Michael Patrick Haggerty, Jr. and Andrea Middleton a/k/a Andrea Rodriguez; and it is further

ORDERED that in all other respects, plaintiff's motion (Seq. #004) is denied; and it is further

ORDERED that the caption shall now appear as follows:

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CITIMORTGAGE, INC.,

Plaintiff,

-against-

LAURA SACCENTE, STATE OF NEW YORK,
WASHINGTON MUTUAL BANK FA,
UNITED STATES OF AMERICA,
DANIELLE PRICE,

Defendants.
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; and it is further

ORDERED that plaintiff is to serve a copy of this order upon the calendar clerk of this part within thirty (30) days of this order, and all further proceedings are to be under the amended caption; and it is further

ORDERED that the cross-motion of the guardian ad litem (Seq. #005) for an order relieving and discharging the guardian ad litem for defendants Michael Patrick Haggerty, Jr., and Laura Saccente, and awarding $250.00 as a reasonable fee for services rendered in this matter, is granted in accordance with the court's decision placed on the record on January 17, 2017; and it is further

ORDERED that defendant Laura Saccente's cross motion (Seq. #006) for an order dismissing the action against her pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction, is granted.

This is an action to foreclose a mortgage on residential real property known as 30 Woodmere Drive, Mastic Beach, Suffolk County, New York ("the property") given by Michael P. Haggerty, Sr. ("decedent") in the original sum of $92,500.00 to L'Argent Funding Consultants, Ltd. ("L'Argent") to secure a note given the same date. Decedent died on December 30, 2008, prior to commencement of this action. Decedent purportedly defaulted in payment under the terms of the mortgage and note and plaintiff Citimortgage, Inc. ("plaintiff"), a successor in interest to L'Argent, commenced this action on August 17, 2009 by filing a summons, complaint and notice of pendency with the Suffolk County Clerk. Plaintiff commenced this action against the following defendants: the Estate of Michael P. Haggerty, Sr., as the purported owner of record of the property and obligor on the note secured by the mortgage on the premises; Michael Patrick Haggerty, Jr. ("Haggerty Jr.") and Andrea Middleton a/k/a Andrea Rodriguez ("Middleton") individually and as co-executors and 50% residuary devisees; and Laura Saccente ("Saccente") as holder of a possible fee interest as the purported specific devisee under the last will and testament of decedent. Plaintiff also named as defendants State of New York, Washington Mutual Bank FA, United States of America, and John Doe/Jane Doe defendants. Service upon all defendants was completed except as to defendants the Estate of Michael P. Haggerty, Sr., Michael Patrick Haggerty, Jr. and Laura Saccente.

SURROGATE'S COURT PROCEEDINGS

In determining the necessary parties to be named and served as defendants in this action plaintiff relied upon a title search and a petition filed in Surrogate's Court, Suffolk County. The petition that plaintiff relied upon was filed by Haggerty Jr., for probate of a will dated February 28, 2008 ("2008 Will"). However, the 2008 Will was actually the second will offered for probate, a will dated March 28, 2006 ("2006 Will") was first offered for probate, and although the earlier probate proceeding of the 2006 Will was clearly identified in Haggerty Jr.'s

petition for probate of the 2008 Will (see Petition for Probate, File No. 336P2009/A, at ¶4, annexed as Exhibit "F" to plaintiff's motion Seq. #002), it was apparently overlooked by plaintiff. Likewise, plaintiff failed to monitor the probate proceeding of the 2008 Will as plaintiff also overlooked the "Objections to Probate" and "Application to Deny Probate of 2/28/08 Will & Renew Probate of 3/28/06 Will," filed by Michelle Brill, the named executrix under the 2006 Will, in which Ms. Brill asserted that decedent's signature on the 2008 Will was a forgery (see Exhibits "K" and "L" to plaintiff's motion Seq. #002). Plaintiff also overlooked the Decree of Probate of the 2006 Will and Decision of the Hon. John M. Czygier, Jr., Surrogate, Suffolk County, dated June 15, 2010 finding the 2008 Will was not executed in accordance with EPTL 3-2.1, denying probate of the 2008 Will, and granting probate of the 2006 Will (see Exhibit "M" to plaintiff's motion Seq. #002).

PROCEDURAL HISTORY

While probate of the two wills was proceeding in Surrogate's Court, plaintiff filed a motion for service by publication on Haggerty Jr. and Saccente (seq. #001) which was granted by order dated March 17, 2010 (Spinner, J.). That order also granted plaintiff's application to amend the caption by removing the Estate of Michael P. Haggerty, Sr. as defendant and appointed Stephen L. O'Brien, Esq. to act as Guardian Ad Litem and Military Attorney ("guardian") for Haggerty Jr. and Saccente. Defendants Haggerty Jr. and Saccente appeared by filing of a notice of appearance of the guardian ad litem and the guardian's verified answer dated June 17, 2010.

Plaintiff's counsel appears to have taken no further action in this foreclosure proceeding, and eventually the clerk's office purged the action from the court's inventory on December 30, 2014 due to inactivity. In the interim it appears from the submissions that although there was activity among the parties regarding the property, there was no activity in the court proceeding until January, 2016 when plaintiff filed the present motion (Seq. #002) for summary judgment and defendant Saccente's counsel filed a notice of appearance dated January 20, 2016 and cross-moved in opposition to plaintiff's motion, as well as for leave to amend Saccente's answer filed by the guardian (Seq. #003). The action was transferred by Administrative Order #58-16 of District Administrative Judge C. Randall Hinrichs to Part 27 in October of 2016 and the motions were scheduled for oral argument on January 17, 2017. At oral argument the action was conferenced, and upon the application of the guardian the court placed a decision on the record relieving the guardian of his duties, directed he be paid the sum of $250.00 for his services, adjourned the oral argument to March 6, 2017, and directed plaintiff's counsel to submit an order on notice.[1] Thereafter a number of conferences were held between March and August 2017 and additional motions were filed: plaintiff's motion for an order extending time to serve defendant Saccente pursuant to CPLR 306-b, authorizing service pursuant to CPLR 308(5), and discontinuing the action against defendants Haggerty, Jr. and Middleton (Seq. #004) ; the guardian's cross-motion to be relieved (Seq. #005); and defendant Saccente's cross-motion for an order dismissing the action pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction (Seq. #006).

The court turns first to plaintiff's motion (Seq. #002) to vacate the "disposed" calendar status, restoring the case to the calendar, for an order striking the answer and affirmative defense of defendants' Haggerty, Jr. and Saccente, granting plaintiff summary judgment and appointment of a referee to compute, for default against the non-appearing defendants, to amend the caption and to substitute FANNIE MAE as plaintiff. Defendant Saccente cross-moves for an order denying plaintiff's motion and for an order granting leave to serve an amended answer (Seq. #003).

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[1]The court did not sign either plaintiff's proposed order, or the guardian's counter proposed order, since counsel filed motions requesting similar relief (see Mot. Seq. #005).

CASE ALREADY RESTORED TO ACTIVE CALENDAR

According to the court's internal Case Management System there was no conference on December 30, 2014 and counsel are misinterpreting an administrative act of the clerk's office. The New York State Unified Court System's "E-Courts" site indicates that on December 30, 2014 there was an administrative "purge" in "Office Part" - not an order of dismissal by a justice of this court. Therefore any application to "vacate" the "disposed" calendar status is misplaced. Since internal court records show the following comment "1/9/2016 - CASE RESTORED, PURGED IN ERROR" the action has already been administratively restored by the clerk and there is no need for a motion to restore the case and remove the "disposed" status.

SUMMARY JUDGMENT DENIED

Upon the proofs submitted, the default of the non-appearing, non-answering defendants are fixed and set, the caption is amended to substitute FANNIE MAE as plaintiff since plaintiff has established its standing to prosecute the action, but as set forth below, as a result of the court granting defendant Saccente's application to to file an amended answer to the extent authorized by the court, the remaining requests in plaintiff's motion for summary judgment (Seq. #002) are denied.

AMENDMENT OF ANSWER GRANTED

Next the court addresses defendant Saccente's cross-motion to amend her answer (Seq. #003). Saccente argues that she was unaware that she was represented by the guardian and equally unaware that the guardian had interposed an answer on her behalf. She argues she did not review or verify that answer, and that she has retained her own counsel and is entitled to counsel of her own choosing. In opposition plaintiff argues that leave to amend should be denied as Saccente's proposed affirmative defenses are devoid of merit and she unreasonably delayed in moving to amend her answer.

A motion for leave to amend a pleading is generally freely granted, as long as the amendment does not cause prejudice or surprise to the opposing party from the delay in raising it, and such defense is not palpably insufficient or patently devoid of merit (*see Deutsche Bank Trust Co. America v Cox*, 110 AD3d 760 [2d Dept 2013]; *Aurora Loan Services, LLC v Dimura*, 104 AD3d 796 [2d Dept 2013]; *Citimortgage , Inc. v. Pugliese*, 143 AD3d 659 [2d Dept 2016]; *Castle Peak 2012 v Sottile*, 147 AD3d 720 [2d Dept 2017]). The decision whether to allow an amendment is committed almost entirely to the court's discretion (*see HSBC Bank v Picarelli*, 110 AD3d 1031 [2d Dept 2013]; *US Bank N.A. v Lomuto*, 140 AD3d 852 [2d Dept 2016]). Mere lateness is not a barrier to the amendment, it must be lateness coupled with significant prejudice to the other side (*HSBC Bank v Picarelli*, 110 AD3d 1031 [2d Dept 2013]; *BAC Home Loans Servicing, L.P. v Jackson*, 159 AD3d 861 [2d Dept 2018])

Saccente's proposed 3rd, 4th and 6th affirmative defenses based upon plaintiff's lack of standing to commence the action, contained in her proposed amended answer are without merit. In a mortgage foreclosure action plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced (*HSBC Bank USA v Hernandez*, 92 AD3d 843 [2d Dept 2012]; *Wells Fargo Bank, NA v Rooney* 132 AD3d 980 [2d Dept 2015]). Plaintiff establishes its lawful status as assignee, either by written assignment or physical delivery, prior to the filing of the complaint (*see Aurora Loan Services, LLC v Weisblum*, 85 AD3d 95 [2d Dept 2011]; *US Bank, NA v Collymore*, 68 AD3d 752 [2d Dept 2009]; *Bank of NY Mellon v Gales*, 116 Ad3d 723 [2d Dept 2014]). Here plaintiff submits a copy of the original note which contains two undated indorsements. The first indorsement is from L'Argent to Ohio Savings Bank, and a second undated indorsement from Ohio Savings Bank to plaintiff. Additionally plaintiff submits copies of two assignments of mortgage filed with the Suffolk County Clerk. The first assignment dated December 28, 2001 is from L'Argent to Ohio Savings Bank assigning the mortgage "together with the bond(s) or note(s)" and the second assignment dated November

18, 2002 from Ohio Savings Bank to plaintiff transferring "all beneficial interest in and title to said Mortgage , together with the note." Here the written assignments clearly establish plaintiff's standing to commence the action (*see Emigrant Bank v Larizza,* 129 AD3d 904 [2d Dept 2015]*; U. S. Bank N.A. v Akande*, 136 AD3d 887 [2d Dept 2016]; *Deutsche Bank Nat. Trust Co. v Romano*, 147 AD3d 10210 [2d Dept 2017]*; Wells Fargo Bank. N. A. v Archibald*, 150 AD3d 937 [2d Dept 2017]). Saccente's proposed 3rd, 4th and 6th affirmative defenses are insufficient and devoid of merit.

Saccente's proposed 7th affirmative defense, in which she alleges plaintiff failed to serve an acceleration notice on defendant prior to commencing the action, is also patently lacking in merit. Since Saccente is a non-mortgagor she has no ability to raise defenses, such as failure of plaintiff to comply with a statue or conditions of the mortgage, that are personal to the mortgagor, or in this case decedent's estate, who has defaulted and not raised them (*see Home Savings of America, F.A. v Gkianos*, 233 AD2d 422 [2d Dept 1996]; *NYCTL 1996-1 Trust v King*, 13 AD3d 429 [2d Dept 2004]; *Wells Fargo Bank v Bowie*, 89 AD3d 931 [2d Dept 2011]).

The proposed 2nd affirmative defense, that the action is barred by the applicable statute of limitations, is also palpably improper. A mortgage foreclosure action is subject to a 6 year statute of limitations (CPLR 213[4]; *see NMNT Realty Corp. v Knoxville 2012 Trust*, 151 AD3d 1068 [2d Dept 2017]). Acceleration occurs upon the commencement of a foreclosure action (*see Fannie Mae v 133 Mgt., LLC*, 126 AD3d 670 [2d Dept 2015]). Here plaintiff alleges the decedent defaulted on the mortgage by failing to make the monthly payments commencing April 1, 2009 and this action was commenced August 17, 2009. Based upon the record before the court the action is timely.

The 5th affirmative defense is equally lacking in merit. That affirmative defense, which alleges that the underlying mortgages were satisfied and discharged, fails to comply with CPLR 3013 which requires a pleading be "sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each . . . defense." In addition, in support of this claim Saccente offers no proof to even raise a question that this mortgage was satisfied and discharged.

Defendant Saccente's 1st affirmative defense of lack of personal jurisdiction does have merit. The court finds Saccente's argument that the initial answer interposed on her behalf was neither reviewed nor verified by her, or authorized by her, compelling. Also of concern is the fact that service on defendant was purportedly obtained by publication, which has been recognized by the courts as the manner of service least calculated to make a potential defendant aware of an action (*see Boddie v. Connecticut*, 401 U.S. 371 [1971]; *Contimortgage v. Isler*, 48 AD3d 732 [2d Dept 2008]). Defendant's 1st affirmative defense is not palpably insufficient or patently devoid of merit and plaintiff's argument that Saccente was aware of this action "at least as early as November 2013" yet waited until 2016 to file her motion to amend is without support. As noted earlier, any blame for the delay lies equally, if not more so, with plaintiff. Further, plaintiff's failure to monitor the surrogate court proceeding(s), which identified early on the necessary parties to this action, as well as their addresses and counsel, negates any argument of purported prejudice.

Accordingly, defendant Saccente's cross-motion to amend the answer filed on her behalf by the guardian as set forth in her proposed answer (Seq. #003) is granted to the extent her proposed answer is deemed served but is to include only the 1st affirmative defense (lack of jurisdiction); as the 2nd through 7th affirmative defenses are without merit, and are not authorized to be included in the amended answer.

EXTENSION OF TIME TO SERVE DENIED

The court next turns to plaintiff's motion (Seq. #004) for an order extending time to serve defendant Laura

Saccente pursuant to CPLR 306-b, authorizing service on Saccente pursuant to CPLR 308(5) by overnight delivery on defendant's counsel, and for an order discontinuing the action against defendants Haggerty, Jr. and Middleton. That part of plaintiff's motion for an order discontinuing the action against defendants Haggerty, Jr. and Middleton is granted without opposition

In support of its application to extend time to serve Saccente and authorizing service upon her counsel, plaintiff submits the affirmation of its counsel with exhibits including copies of the note, mortgage, assignments, the 2008 and 2006 wills and other filings from Suffolk County Surrogate's Court, the September 3, 2013 deed transferring the property to Saccente, the pleadings, affidavits of service and affidavits of due diligence, and the order permitting service by publication granted March 17, 2010 (Spinner, J.). Plaintiff argues the time to serve defendant should be extended pursuant to CPLR 306-b upon good cause shown based upon affidavits of service and affidavit of due diligence dating back to 2009. In opposition Saccente argues that she has lived in the property since 2001, that despite living at the property plaintiff obtained an order granting service by publication, and that plaintiff's service by publication is untimely and therefore defective and the court lacks jurisdiction over defendant. In opposition to the cross motion and in reply plaintiff argues inter alia that it established due diligence in attempting service and Saccente failed to submit any proof that she has lived at the property since 2001 other than her sworn affidavit. In reply Saccente argues plaintiff failed in its initial attempt to serve defendant in 2009 after commencing the action although plaintiff should have been aware of her address and residence at the property from the Surrogate's court proceedings, and never acted upon that information to obtain service, instead relying upon the unreliable method of obtaining service and giving a party notice of the proceeding by pursuing service by publication. Implicit in Saccente's argument is the failure of the guardian to exercise due diligence by searching the same Surrogate's records to ascertain her residence and attempt to locate her at the property. Further, plaintiff failed to serve Saccente in accordance with the 2010 order of publication, and should not be given a third opportunity at service 8 years after commencing the action.

PLAINTIFF FAILED TO ESTABLISH 'GOOD CAUSE'

Pursuant to CPLR 306–b, a court may, in the exercise of its sound discretion, grant a motion for an extension of time within which to effect service for good cause shown or in the interest of justice (*see, Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95 [2001]; *Bumpus v. New York City Tr. Auth.*, 66 AD3d 26 [2d Dept 2009]). 'Good cause' and 'interest of justice' are two separate and distinct standards. Good cause requires a showing of reasonable diligence in attempting to effect service (*see Bumpus v. New York City Tr. Auth., supra*), while the broader interest of justice ground allows the court to balance a number of relevant factors in reaching its determination including diligence, or lack thereof, along with any other relevant factor such as expiration of the statute of limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendants (*see Leader v. Maroney, Ponzini & Spencer, supra*). Here plaintiff only argues the 'good cause' prong of CPLR 306-b, foregoing the broader 'interest of justice' grounds.

Plaintiff previously relied upon its "diligence" in attempting to serve Haggerty Jr. and Saccente in 2009 when the court granted plaintiff's first motion for an order extending time for service and for service by publication (Seq. #001). Pursuant to CPLR 316 (c) the first publication of the summons must be made within 30 days after the order of publication is granted and failure to comply with the statutory requirement is a jurisdictional defect (*see Caton v Caton*, 72 Misc. 2d 544 [Sup Ct Monroe Co. 1972]; *In re Kaila B.*, 64 AD3d 647 [2d Dept 2009]). Upon the evidence submitted, and as plaintiff concedes service by publication was untimely, and the court lacks jurisdiction over both defendants, hence plaintiff's application to extend time for service.

The court notes this motion is plaintiff's second request for an extension of time to effect service which was only filed by plaintiff after it became apparent during court conferences that service by publication, attempted

some seven years earlier, was, in fact, untimely. Here plaintiff does not establish good cause to extend the time for service as it failed to show any diligence in following up to ensure service by publication was completed properly. Moreover while plaintiff may have established diligence in support of its first motion, plaintiff fails to show any diligence thereafter, either in complying with the court's order for service by publication, or in moving this action towards conclusion, ultimately resulting in this action being administratively purged by the clerk. The court further notes that during the very time that plaintiff was making application to this court for service by publication, there were not one, but two, proceedings in Suffolk County Surrogate's Court involving the very same property and parties in this action, actions which plaintiff was aware of, or should have been aware of, and calling into question plaintiff's basis in moving for service by publication in the first instance. The submissions show plaintiff was aware of the probate proceeding in Surrogate's Court, as Haggerty, Jr., the proponent of the 2008 Will, was named as a defendant in this action in his capacity as co-executor. Unfortunately for plaintiff, its counsel at the time failed to fully explore the Surrogate proceedings, was unaware of the probate battle and the decision of Judge Czygier rejecting the 2008 will and the appointment of a different executor under the 2006 will which was accepted to probate. Although this could be characterized as law office failure, it certainly is not a hallmark of "diligence" required to establish "good cause" necessary for an extension of time to effect service. In analogous circumstances it has been held that a court should not exercise its discretion to accept "law office failure" as a reasonable excuse for inaction or delay where there is a long period of unexplained inaction or apparent willful neglect (*see Roussodimou v Zafiriadis*, 238 AD2d 568 [2d Dept 1997]; *Santiago v New York City Health & Hospitals Corp.*, 10 AD3d 393 [2d Dept 2004]; *Star Indus., Inc. v Innovative Beverages, Inc.*, 55 AD3d 903 [2d Dept 2008]; *Carrillon Nursing and Rehabilitation Center, LLP v Fox*, 118 AD3d 933 [2d Dept 2014]).

Even though plaintiff did not argue the 'interest of justice' standard, the court would have denied plaintiff's motion on that ground if it had been raised. The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties; the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the statute of limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendants (*see Leader v Maroney, Ponzini & Spencer, supra*). Again the court notes plaintiff's extreme lack of diligence in prosecuting this action, as well as the fact that plaintiff's motion was made eight years after commencing the action, and only after court conference when plaintiff learned its service by publication was untimely. Plaintiff offers no explanation why publication was not timely, moreover, the failure to complete service by publication was not due to any action or inaction by Saccente.

Based upon the foregoing that part of plaintiff's motion for an order extending the time to serve Saccente pursuant to CPLR 306-b (Seq. #004) and authorizing alternative means of service pursuant to CPLR 308(5) is denied.

GUARDIAN RELIEVED AND DISCHARGED

The guardian ad litem's cross-motion (Seq. #005) for an order relieving and discharging him from representation is granted in accordance with the court's decision placed on the record on January 17, 2017, and a fee of $250.00 is to be paid by plaintiff to the guardian for his services.

SACCENTE'S MOTION TO DISMISS GRANTED

As plaintiff acknowledges that it had been previously unable to serve defendant Saccente personally before it obtained the order of publication dated March 17, 2010 (Spinner, J.), and also acknowledges that its attempt at service by publication in compliance with that order was defective and therefore ineffective in obtaining jurisdiction over Saccente, as the court has granted Saccente's application to file an amended answer which raises the

affirmative defense of lack of personal jurisdiction, and as Saccente has timely moved for dismissal of the action against her based upon lack of personal jurisdiction over her for lack of service, pursuant to CPLR 3211(a)(8) (Seq. #006), upon this record, the court is compelled to grant her motion and dismiss the action against her.

The court has fixed the default of the remaining defendants, all of whom appear to be either lien holders or others with a claim against the property, but not the mortgagors. Further plaintiff has voluntarily discontinued the action against the purported "co-executors" of the 2008 will which was denied probate, and never sought to substitute the executor of the 2006 will granted probate or to proceed against the executor on behalf of the Estate of Michael P. Haggerty, Sr. as to the unsecured debt reflected in the note, which estate had been removed as a defendant in the action at plaintiff's request, by the order of March 17, 2010 (Spinner, J). Accordingly the court sees no reason to schedule any further conference in this action.

This constitutes the Order and decision of the court

Dated: December 26, 2018

Hon. Robert F. Quinlan, J.S.C.

___ FINAL DISPOSITION _X_ NON-FINAL DISPOSITION