

BDJ Equities LLC v Archimedean Solutions LLC

2019 NY Slip Op 33648(U)

December 11, 2019

Supreme Court, New York County

Docket Number: 850287/2018

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

-----X
BDJ EQUITIES LLC,

Plaintiff,

- v -

ARCHIMEDEAN SOLUTIONS LLC, MARY E. KAPLAN,
Defendant.

INDEX NO. 850287/2018
MOTION DATE N/A, N/A
MOTION SEQ. NO. 002 003

**DECISION + ORDER ON
MOTION, JUDGMENT OF
FORECLOSURE AND SALE**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 52, 53, 54, 55, 56, 57, 58, 59, 60

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 62

were read on this motion to/for JUDGMENT - FORECLOSURE & SALE

The motion (MS002) by defendants Archimedean Solutions LLC and Mary E. Kaplan (“Defendants”) to vacate their default is denied. The motion (MS003) for a judgment of foreclosure and sale by plaintiff is granted. These motions are consolidated for disposition.

Background

In this foreclosure case, Defendants move to vacate their default on the ground that they were not properly served. Defendants claim that the consolidated mortgage note required notices to be sent to an attorney’s address and plaintiff failed to comply. Defendant Kaplan attaches an affidavit in which she takes issue with the affidavit of service from plaintiff. Specifically, she claims that “unlike the person described as being served as having blond hair, I have mostly grey hair, and am 83 years old. Second, the affidavit states that the person served weighs between 161-200 pounds, but I weigh only around 130 pounds. Third, I have a back injury and was

typically in a wheelchair during the month of October 2018, or sitting in a chair, which would surely have been noted by the process server in the affidavit of service. While I do not know who it was that was served by plaintiff's process server on October 24, 2018, I do know that it was not me" (NYSCEF Doc. No. 28, ¶ 5).

In opposition, plaintiff claims that a bare and unsubstantiated denial of service is not enough to rebut the affidavit of service. Plaintiff insists Defendants have not raised a meritorious defense sufficient to vacate their default. Plaintiff also argues that nothing in the loan documents compelled plaintiff to serve legal process on Defendants' lawyer; plaintiff observes that it could not have simply served the summons and complaint on Defendants' attorney instead of serving it on Defendants.

Discussion

"The affidavit of service filed by plaintiff was prima facie evidence that defendant was properly served with the summons and complaint" (*JPMorgan Chase Bank v Dennis*, 166 AD3d 530, 530, 89 NYS3d 135 [1st Dept 2018]). "To rebut this prima facie showing, defendant was required to submit a sworn, nonconclusory denial of service or swear to specific facts to rebut the statements in the process server's affidavit" (*id.* at 531).

Here, Defendants failed to submit a nonconclusory denial of service sufficient to require a traverse hearing. The affidavit of service claims service was effectuated on defendant Kaplan and characterized her as a white female with blonde hair, over 65 years old, between 5'4" and 5'8", and between 161-200 pounds (NYSCEF Doc. No. 42). Kaplan's claim that she had mostly grey hair is not enough to raise an issue of fact because she does not identify the color of the rest of her hair. Moreover, the age was marked correctly as over 65 (plaintiff claims she is 83) and plaintiff does not dispute the height. The difference in weight is not enough to compel a traverse

hearing either—she claims she weighs “around 130 pounds”, which could be more than 130 pounds. An approximate thirty-pound difference – at most -- is not enough to rebut the affidavit of service.

The Court also observes that Kaplan does not deny that she was living at the location where service was effectuated or deny that she was there that day. And the fact that the process server did not note Kaplan was in a wheelchair is not a sufficient reason to find service was not effectuated because Kaplan claimed she “typically” used a wheelchair or was sitting in a chair. She did not claim she always uses a wheelchair or that she was using a wheelchair exclusively on the day of service.

In sum, the alleged inaccuracies in the affidavit of service are not enough to compel a traverse hearing. An affidavit of service need not be perfectly accurate in order to establish that service was properly effectuated. And the Court need not hold a traverse hearing over hair color (especially without an indication as to what Kaplan’s hair color was other than grey) and weight.

The Court also rejects Defendants’ claim regarding the purported failure to serve process on their attorney. Of course, plaintiff could not have obtained jurisdiction over Defendants had it served only her attorneys. Therefore, Defendants’ claim that “No papers were served at [the attorney’s address]” (NYSCEF Doc. No. 27) is not a ground to vacate based on improper service.

Plaintiff also moves (MS003) to confirm the report of Thomas Kleinberger who found that plaintiff is owed \$5,578,786.88 as of July 31, 2019. In opposition, Defendants argue that a judgment should not be entered because she was not served and take issue with the referee’s calculations of default interest.

The Court also grants the motion for a judgment of foreclosure and sale. The Court has already rejected Defendants’ claims about improper service and Defendants did not provide any

specific reason why the referee's report should be ignored. Offering a conclusory assertion that the interest calculation is not enough; Defendants did not offer their own calculations or explain with any detail why the referee's report is wrong.

Accordingly, it is hereby

ORDERED that the motion (MS002) by defendants Archimedean Solutions LLC and Mary E. Kaplan to vacate their default is denied; and it is further

ORDERED and ADJUDGED that the motion (MS003) for a judgment of foreclosure and sale and to confirm the referee's report is granted; and it is further

ORDERED that the mortgaged property described in the complaint and as described in this judgment, or such part thereof as may be sufficient to discharge the mortgage debt, the expense of sale and the costs of this action as provided in the RPAPL be sold within 90 days of this judgment, in one parcel, at a public auction at the New York County Courthouse located at 60 Centre Street, New York, New York under the direction of **Thomas Kleinberger, Esq.**, who is appointed Referee for this purpose; and it is further

ORDERED that the Referee shall give public notice of the time and place of sale in accordance with RPAPL 231(2) in the *New York Law Journal*; and the referee need not conduct the sale unless plaintiff shall provide the referee with proof of publication of the notice of sale, and if the sale is adjourned due to plaintiff's failure to provide such proof, then said adjournment shall not be considered at the referee's request; and it is further

ORDERED that by accepting this appointment the Referee certifies that she/he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36), including, but not limited to §36.2 (c) ("Disqualifications from appointment"), and §36.2 (d) ("Limitations on appointments based upon compensation"), and, if the Referee is disqualified from receiving an

appointment pursuant to the provisions of that Rule, the Referee shall immediately notify the Appointing Judge; and it is further

ORDERED that the Referee is prohibited from accepting or retaining any funds for herself/himself or paying funds to him/herself without compliance with Part 36 of the Rules of the Chief Administrative Judge; and it is further

ORDERED that the Referee shall conduct the foreclosure sale only if Plaintiff, its successors and/or assignees or its representatives is present at the sale or the Referee has received a written bid and Terms of Sale from Plaintiff, its successors and/or assigns, or its representatives; and it is further

ORDERED that if the Referee cannot conduct the sale within 90 days of the date of this judgment, plaintiff must make a motion to extend the time to sell the subject property explaining the reasons for the delay; and it is further

ORDERED that at the time of sale the Referee may accept a written bid from the Plaintiff or the Plaintiff's attorney, just as though Plaintiff were physically present to submit said bid; and it is further

ORDERED that the Referee shall accept the highest bid offered by a bidder who shall be identified upon the court record, and shall require that the successful bidder immediately execute Terms of Sale for the purchase of the property, and pay to the Referee in cash, certified check or bank check, ten percent (10%) of the sum bid, unless the successful bidder is Plaintiff, in which case no deposit against the purchase process shall be required and it is further

ORDERED that notwithstanding the previous paragraph, the Referee shall have the right to refuse cash payments and require a bank or certified check from the successful bidder and the

Referee shall be entitled to qualify bidders and require bidders to show proof of funds before or during the auction; and it is further

ORDERED that in the event the first successful bidder fails to execute the Terms of Sale or fails to immediately pay the ten percent (10%) deposit as required, the property shall be immediately reoffered at auction on the same day; and it is further

ORDERED the Referee shall deposit the down payment and proceeds of sale, as necessary in an FDIC-insured bank where the Referee has an account for that purpose in accordance with CPLR 2609; and it is further

ORDERED that after the balance of the purchase price is paid or credited and the property is sold, the Referee shall execute a deed to the purchaser in accordance with RPAPL 1353 and the terms of sale (which shall be deemed a binding contract); and it is further

ORDERED that in the event a party other than Plaintiff becomes the purchaser at the sale, the closing of title shall be held no later than 30 days after the date of such sale; and it is further

ORDERED that, pursuant to RPAPL 1353(1), if Plaintiff (or its affiliate as defined in paragraph [a] of subdivision one of section six-1 of the banking law) is the purchaser, the property shall be placed back on the market for sale or other occupancy within 180 days of the execution of the deed of sale or within 90 days of construction, renovation, or rehabilitation of the property, provided that such construction, renovation or rehabilitation proceeded diligently to completion, whichever comes first, provided that this court grants an extension upon a showing of good cause; and it is further

ORDERED that the Referee, after receiving the proceeds of the sale, shall pay (from the proceeds) the taxes, assessments, sewer rents, or water rates, which are, or may become, liens on

the property in accordance with their priority according to law with such interest or penalties which may have lawfully accrued thereon to the date of payment; and it is further

ORDERED that the Referee shall deposit the balance of the proceeds from the sale in his or her own name as Referee in an FDIC-insured bank where the Referee has an account for that purpose and shall make the following payments in accordance with RPAPL 1354:

1. The Referee's fees for conducting the sale, which are \$1,100. Plaintiff shall also compensate the Referee in the sum of \$350 for each adjournment or cancellation made on less than two business days' notice unless the Referee caused the delay.
2. All taxes, assessments and water rates that are liens upon the property and monies necessary to redeem the property from any sales for unpaid taxes, assessments or water rates and any other amounts due in accordance with RPAPL 1354(2). The purchaser shall be responsible for interest and penalties accrued *after* the sale. The Referee shall not be responsible for the payment of penalties or fees pursuant to this appointment. The purchaser shall hold the Referee harmless from any such penalties or fees assessed;
3. The expenses of the sale and the advertising expenses as shown on the bills presented and certified by the Referee to be correct, copies of which shall be annexed to the report of sale.
4. The Referee shall also pay to the Plaintiff or its attorneys the following:
 - a. Amount Due from the Referee's Report: \$5,578,786.88 with interest at the note rate from July 31, 2019 until entry of judgment, together with any advances as provided for in the note and mortgage which Plaintiff had made for taxes, insurance, principal, and interest and any other charges due to prior

mortgages or to maintain the property pending consummation of the foreclosure sale, not included in the computation upon presentation of receipts for said expenditures to the Referee, and then with interest from the date of entry of this judgment at the statutory rate until the date the deed is transferred

- b. Costs and Disbursements: _____ (to be filled in by the Clerk) to Plaintiff for costs and disbursements in this action with interest at the statutory judgment rate from the date of entry of this judgment;
- c. The Court declines to award additional allowance.
- d. Attorneys' Fees: \$24,298.71 is hereby awarded as reasonable attorneys' fees with interest at the statutory judgment rate from the date of entry of this judgment.

5. Surplus monies from the sale shall be paid into Court by the Referee within five days after receipt in accordance with RPAPL 1354(4); and it is further

ORDERED that if Plaintiff is the purchaser of the property, or in the event that the rights of the purchasers at the sale and the terms of sale under this judgment shall be assigned to or be acquired by Plaintiff, and a valid assignment is filed with the Referee, the Referee shall not require Plaintiff to pay in cash the entire amount bid at sale, but shall execute and deliver to Plaintiff or its assignee, a deed or deeds of the property sold upon the payment to said Referee of the amounts specified as 1, 2, and 3 above, and the Referee shall allow Plaintiff to pay the amounts specified in 2 and 3 above when it is recording the deed; that the balance of the bid, after deducting the amounts paid by Plaintiff, shall be applied to the amount due to Plaintiff as specified in 4 above; that Plaintiff shall pay any surplus after applying the balance of the bid to the Referee, who shall deposit it in accordance with 5 above; and it is further

ORDERED that all expenses of recording the Referee's deed, including real property transfer taxes, which is not a lien upon the property at the time of sale, shall be paid by the plaintiff from the sale proceeds; and it is further

ORDERED that Plaintiff may seek to recover a deficiency judgment in accordance with RPAPL 1371 if applicable;

ORDERED that if the property is sold in one parcel in "as is" physical order and condition, subject to any condition that an inspection of the property would disclose; any facts that an accurate survey of the property would show; any covenants, restrictions, declarations, reservations, easements, right of way, and public utility agreements of record, if any; any building and zoning ordinances of the municipality in which the mortgaged property is located and possible violations of same; any rights of tenants or persons in possession of the subject property; prior liens of record, if any, except those liens addressed in RPAPL 1354; any equity of redemption of the United States of America to redeem the property within 120 days from the date of sale, any rights pursuant to CPLR 317, 2003 and 5015 or any appeal of the underlying action or additional litigation brought by any defendant or its successor or assignee contesting the validity of this foreclosure; and it is further

ORDERED that the purchaser be let into possession of the property upon production in hand of the Referee's Deed or upon personal service of the Referee's deed in accordance with CPLR 308; and it is further

ORDERED that defendants in this action and persons claiming through them and any person possessing a junior interest in the property after the Notice of Pendency was filed are barred and foreclosed of all right, claim, lien, title, and interest in the property after the sale of the mortgaged property; and it is further

ORDERED that within 14 days after completing the sale and executing the proper conveyance to the purchaser, the Referee shall file with the clerk a report under oath of the disposition of the proceeds of the sale and upload the report to NYSCEF if it is an e-filed case; and it is further

ORDERED that if the purchaser or purchasers at said sale default upon the bid or terms of sale, the Referee may place the property for resale without prior application to this Court unless Plaintiff's attorney elects to make such an application; and it is further

ORDERED that Plaintiff shall serve a copy of this judgment with notice of entry upon the owner of the equity of redemption, any tenants named in this action, and any other parties entitled to service, including the Referee appointed herein; and it is further

ORDERED that nothing herein shall be deemed to relieve Plaintiff of any obligation imposed by RPAPL 1307 or 1308 to secure and maintain the property until ownership of the property has been transferred and the deed duly recorded; and it is further

ORDERED that when the Referee files a report of sale, she or he shall also file a Foreclosure Action Surplus Monies Form and also upload this document to NYSCEF if an e-filed case; and it is further

ORDERED that plaintiff shall upload the notice of sale to NYSCEF at least 21 days before the sale and the Referee and **plaintiff shall e-mail SFC-Foreclosures@nycourts.gov** at least 21 days before the auction date so the auction may be placed on the auction calendar; IF THE AUCTION IS NOT ON THE CALENDAR, then *the auction will not go forward*; and it is further

ORDERED that, without further order of the Court, the referee shall be entitled to an additional fee of \$950 for conducting and attending a closing with a purchaser other than

plaintiff, plus, if such a closing is scheduled for the referee's conference room, then the referee shall be entitled to a reasonable fee for use thereof, without further order of the Court; and it is further

The property is commonly known as 432 Hudson Street, New York, NY 10014. Plaintiff did not attach a legal description in its proposed judgment. The Court also removed the John Does from the caption as a judgment cannot be entered against this party.

12/11/19

DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE