Deutsche Bank Natl. Trust Co. v Noiis
2023 NY Slip Op 32931(U)
August 22, 2023
Supreme Court, Kings County
Docket Number: Index No. 14225/2012
Judge: Cenceria P. Edwards
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part FRP1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 16th day of August, 2022.

PRESENT:
HON. CENCERIA P. EDWARDS, C.P.A.,
Justice.

---X

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Indenture Trustee for NEW CENTURY HOME EQUITY LOAN TRUST 2005-2,

Plaintiff(s),

-against-

ERICA HENRY NOIIS, et al.,

Defendant(s).

---X

ORDER

Calendar #(s): 18 and 19

Index #: 14225/2012

Mot. Seq. #(s): 4 and 5

The following papers read herein:

Order to Show Cause, Affidavits (Affirmations), and Exhibits	1 (not e-filed)
Notice of Cross-Motion, Affidavits (Affirmations), and Exhibits	NYSCEF doc #s 4-26
Reply Affidavits (Affirmations), and Exhibits	n/a

This is an action to foreclose on a mortgage encumbering the residential real property known as 32 Paerdegat 15th Street, Brooklyn, New York ("the subject premises"). The complaint alleges that on or about January 28, 2005, Plaintiff's predecessor-in-interest and the defendant-borrower Erica Henry Noiis ("Defendant") executed a note in the amount of $468,000.00, secured by a mortgage against the subject premises, and Defendant breached her obligations by failing to tender the monthly installment payment due on April 1, 2010, and all subsequent installment payments. Contending that Defendant never answered the complaint, Plaintiff successfully moved for default judgment, and the Court (Marsha L. Steinhardt, J.) issued an order of reference ("ORef") on or about April 6, 2015. Plaintiff eventually secured a judgment of foreclosure and sale ("JFS"), entered on or about November 13, 2019.

Defendant now moves by order to show cause, pursuant to CPLR §§ 321(c), 3211(a)(8), 5015(a)(3), and 5015(a)(4), to vacate the ORef and JFS, and dismiss this action. She argues that, at a minimum, the JFS should be vacated because it was issued when an automatic stay was in place after her attorney had been disbarred. She further argues that the entire action should be dismissed due to lack of personal jurisdiction. Plaintiff opposes and cross-moves to amend the JFS or, alternatively, for an extension of time to serve Defendant pursuant to CPLR § 306-b.

BACKGROUND

On or about August 20, 2013, after this case's May 15, 2013 release from the foreclosure settlement conference part, Plaintiff moved for a default judgment and ORef. Shortly thereafter, by consent to change attorney form filed October 22, 2013, Farrell Donald, Esq., appeared in this action on Defendant's behalf.[1] There is no indication in this record that Mr. Donald submitted papers in response to Plaintiff's motion, or that he submitted an answer or any other paper in this action on behalf of Defendant. In her affidavit submitted in support of the instant motion, Defendant avers that she told Mr. Donald that she had not been served, and she believed that he would seek relief for her on that basis. However, according to Defendant, Mr. Donald not only failed to do so, but he also repeatedly told her, falsely, that he had been litigating the case on her behalf, and then he eventually stopped answering or returning her calls. Defendant attests that she later learned that Mr. Donald was under investigation for neglecting several client matters during this period, which ultimately led to his suspension in May of 2017, and disbarment in May of 2018. Defendant notes that Plaintiff purportedly served her with notice of entry of the ORef on May 1, 2015, by mailing the order to Daniel Kaiser, Esq., another attorney at a different law practice (*see* NYSCEF doc. no. 17, p. 6). Nothing else in the record indicates that Mr. Kaiser had any connection to Defendant with respect to this action, and Plaintiff has not explained why it treated him as Defendant's attorney of record at this time.

Plaintiff first moved for a JFS in August of 2015 but withdrew that application; the record contains no explanation for the withdrawal. In May of 2019, Plaintiff moved for the same relief, which was granted by order dated June 20, 2019. The judgment was issued on or about November 13, 2019, and Plaintiff served Defendant with notice of entry on December 23, 2019

[1] This appears to be a standard form issued by the Trial Term Support office. Although the form is titled "Change of Attorney," its handwritten markings identify Mr. Donald as a "new" attorney and do not indicate that a change was being made (*see* NYSCEF doc. no. 15). Moreover, since the document does not purport to have been signed by the client and retiring attorney as CPLR §321(b) requires, it is, in effect, a notice of appearance (*see* CPLR 320[a]).

by mailing it directly to her at the subject premises. The foreclosure sale and auction scheduled for January 30, 2020 was cancelled pursuant to the provisions of the signed order to show cause by which Defendant, having since retained new counsel, made the instant motion.

CPLR § 321(C) AUTOMATIC STAY

Defendant's first argument in support of vacating the JFS is that the Court improperly issued the judgment when all proceedings in this action were stayed by operation of law due to her prior attorney's disbarment. CPLR § 321(c) provides, in relevant part, that "[i]f an attorney [] is removed, suspended or otherwise becomes disabled at any time before judgment, no further proceeding shall be taken in the action against the party for whom he appeared, without leave of the court, until thirty days after notice to appoint another attorney has been served upon that party either personally or in such manner as the court directs." This provision "protects the client by automatically staying the action from the date of the disabling event" (*Wells Fargo Bank, N.A. v Kurian*, 197 AD3d 173, 176 [2d Dept 2021]). Hence, "[o]rders or judgments that are rendered in violation of the stay provisions of CPLR 321(c) must be vacated" (*id.*; *see also Moray v Koven & Krause, Esqs.*, 15 NY3d 384, 389 [2010]). It is undisputed that in October of 2013, Mr. Donald filed with the Court the inaccurately labeled "consent to change attorney" form, indicating that he was appearing as Defendant's attorney (hereinafter, "the *de facto* notice of appearance"), he was suspended from the practice of law in May of 2017, and he was disbarred in May of 2018. Hence, Defendant argues that in 2019, when Plaintiff successfully moved to confirm the referee's report and the Court issued the JFS, this action was stayed by operation of law, rendering the judgment a nullity that must be vacated.

Plaintiff counters that Defendant cannot invoke the protections of CPLR § 321(c) because Mr. Donald did not properly appear on her behalf, insofar as the record lacks proof that he served the *de facto* notice of appearance. Initially, to the extent that Plaintiff's argument may be construed as relying on a premise that service of a paper is always the sole dispositive factor as to its validity or efficacy, the Court notes that this is not fully accurate. For example, it is the filing of a summons with notice or a complaint, not service of same, which commences an action. Additionally, after an action has been commenced, CPLR § 2103(d) provides that when a paper cannot be served upon a party or their attorney, "service may be made by filing the paper as if it were a paper required to be filed." The Court does not, however, presume that Plaintiff has necessarily staked out such a rigid position on this motion.

Plaintiff contends "[t]here is no affidavit of service either on file with the Kings County Clerk or within Plaintiff's Counsel's records of this Consent to Change Attorney" (NYSCEF doc. no. 5 [Affirm. in Support], ¶11; *see also* NYSCEF doc. no. 26 [Memo. of Law], pp. 13-14). Plaintiff is correct that the CPLR provides that a defendant appears in an action "by **serving** an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer" (CPLR §320[a] [emphasis added]). However, on the facts of this case, the Court finds this argument unconvincing. First, it is the filing of a notice of appearance, not its service on other parties, which apprises **a court** of a party's appearance and their attorney of record for all purposes in the litigation. The preceding sentence is not meant to discount the value of service of documents, particularly as it pertains to the important function of notifying parties of relevant developments in the case. It simply underscores that once an attorney files a notice of appearance, they are recognized as the party's attorney of record by the court and remain so until the procedures to terminate or change an attorney are properly employed (*see* CPLR §321[b]).

Although the absence from the court file of an affidavit of service of the *de facto* notice of appearance could suggest that it was never served, that is not dispositive. Not every paper or document generated by and between parties must be filed, and Plaintiff has not argued that any statute or rule requires filing of proof of service of a notice of appearance. Nor is it remarkable, or even probative, that Plaintiff's counsel, as the intended recipient of a document, does not have within its files a copy of the affidavit of service, since such proof is usually retained by the sender. Tellingly, Plaintiff does not affirmatively state that it did not know of the *de facto* notice of appearance. Rather, the Court notes that Plaintiff has been very strategic with its word choice on this topic, stating multiple times that its counsel's records do not contain an affidavit of service (*see* NYSCEF doc. no. 5 [Affirm. in Support], ¶11; NYSCEF doc. no. 26 [Memo. of Law], p. 13), but falling short of saying that it never received the document or knew of its existence. The closest Plaintiff comes to doing so is stating that its counsel "does not possess any records showing receipt of this document" (NYSCEF doc. no. 26 [Memo. of Law], pp. 13-14). Moreover, since the record shows that the *de facto* notice of appearance was on file with the Court since October of 2013, it strains credulity that during the ensuing 5½ years before Plaintiff made its second JFS motion, during which time Plaintiff made multiple court filings of its own, Plaintiff was unaware of Mr. Donald's filing. Assuming *arguendo* that Mr. Donald did not serve the *de facto* notice of appearance, even if said failure to comply with CPLR §320(a)'s literal

command meant that he did not properly effectuate Defendant's appearance for purposes relating to default judgment, on the facts of this case, where the notice was nonetheless in the court file, accessible to all, for years, this Court believes that it is a step too far to retroactively declare that Defendant was unrepresented for all that time.

The Court also agrees with Defendant that, separate and apart from the issue of the automatic stay, since Mr. Donald was her attorney of record, Plaintiff's service of the second JFS motion directly to Defendant was *per se* improper absent a showing that service upon Mr. Donald could not be done (*see* CPLR § 2103[b] and [c]). It is axiomatic that the failure to properly serve a motion deprives a court of jurisdiction to entertain the motion and renders resulting orders and judgments void (*see MTGLQ Invs., L.P. v White*, 179 AD3d 790, 791 [2d Dept 2020]). Additionally, putting aside the issue of Mr. Donald's status, the record shows that Plaintiff believed Defendant was represented by counsel at least as of May 1, 2015, when it served notice of entry of the ORef upon her by sending it to Mr. Kaiser. Plaintiff has offered no explanation for this, and hence, to the extent that Plaintiff's apparent position in 2015 was that Mr. Kaiser represented Defendant, and it has not pointed to any evidence indicating that it was advised that this representation had ceased, Plaintiff's serving of the second JFS motion in 2019 directly to Defendant, instead of Mr. Kaiser, was improper for the same reason explained above.

Plaintiff alternatively argues that the automatic stay should not apply because Mr. Donald failed to notify the parties and the Court of his suspension and disbarment, as the Rules of Professional Conduct require (*see* 22 NYCRR § 1240.15[b]). However, "[a]s a general rule, unrepresented litigants should not be penalized for failing to alert a trial court to the existence of an automatic stay created for the very purpose of safeguarding them against adverse consequences while they are unrepresented" (*Moray*, 15 NY3d at 390). It naturally follows that when a suspended or disbarred attorney fails to notify the court and other parties, the litigant should not be penalized, particularly where, as here, she was also unaware of the disability.

In sum, due to the unique circumstances of this case, including that the *de facto* notice of appearance had been on file for several years, and, thus, was a matter of public record, and the fact that Plaintiff does not deny knowledge of same, the Court finds that Plaintiff likely knew or, in the exercise of due diligence, should have known that Mr. Donald held himself out as Defendant's attorney, and was recognized as such by the Court. Hence, his suspension and subsequent disbarment triggered the automatic stay provisions of CPLR §321(c). Since the

statute's 30-day notice procedure for lifting the stay was not employed, the JFS which was issued while the stay was still in effect must be vacated. Additionally, the particular facts of this case, including the equities affecting Defendant, who reasonably expected that her attorney had properly appeared and was representing her interests in this action, also warrant the Court's exercise of its inherent power to vacate the JFS in the interest of justice (see *Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 68 [2003]; *Hodge v Dev. at Helderberg Meadows, LLC*, 114 AD3d 1122, 1123 [3d Dept 2014]). Accordingly, this branch of Defendant's motion is granted.

PERSONAL JURISDICTION

Defendant alternatively moves to dismiss the action on the ground of lack of personal jurisdiction, alleging that she was never served with process. It is well settled that

> "[t]he plaintiff has the burden of proving the court's personal jurisdiction over a defendant. Ordinarily, a proper affidavit of a process server attesting to personal delivery of a summons to a defendant is sufficient, prima facie, to establish jurisdiction. Where, however, there is a sworn, nonconclusory denial of service by a defendant, the affidavit of service is rebutted and the plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing" (*E. Sav. Bank, FSB v Campbell*, 167 AD3d 712, 714 [2d Dept 2018] [internal citations omitted]).

According to the affidavit of Plaintiff's process server, Defendant was personally served at the subject premises on July 18, 2012 at 1:34 p.m. Defendant denies having ever been served, and in her supporting affidavit, she states that the description provided in the affidavit of service "does not match [her] person." The process server described Defendant as a Black female, age 45, with black hair, with an approximate height of "5ft4in – 5ft7in," and weighing approximately 225 to 250 pounds. In contrast, Defendant avers that at the time of service she was 53 years old and weighed approximately 160 to 180 pounds, and she has never weighed 225 to 250 pounds. Defendant also avers that at that time she wore her hair in long dreadlocks, which she contends is a notable feature that one would expect to be included in a description. However, the process server mentioned only her hair color, and he left the field for "Other Features" blank.

Defendant also avers that while she has always lived at the subject premises, she is confident that she was not there on the date and time of the purported service based on her work routine. According to Defendant, during this time period she worked as a live-in nanny with the Staff family in New Jersey, a job she held for five years. Her weekly schedule was to work in the Staff home for five consecutive days, specifically, Monday through Friday, such that she was

only home on her days off, *i.e.*, Saturdays and Sundays. As July 18, 2012 was a Wednesday, Defendant is certain that she was at the Staff home in New Jersey that day and that the process server could not have served her in Brooklyn at the subject premises, as he claimed.

Defendant also notes that the process server submitted additional affidavits of service for Laila Lake and Sherwin Belill, identified as the defendants listed in the caption as "Jane Doe 1" and "John Doe 1," respectively. According to the affidavits, the process server personally delivered the papers to these persons at the subject premises, on the same day and within minutes of Defendant's purported service. The process server specified that he served Mr. Belill at the basement unit, and Ms. Lake at the first-floor unit, and he also averred that in response to his inquiry, each recipient "respond[ed] that he or she is in fact the person named in this action as the defendant."[2] Defendant acknowledges that she rented out portions of the multi-family residence but avers that the process server's descriptions of Ms. Lake and Mr. Belill do not match any of her tenants or family members who lived there at the time. Defendant, additionally, provided a physical description of her husband, indicating that he was nearly a decade older, almost a foot shorter, and 35 to 50 pounds lighter than the description given for Mr. Belill, seemingly implying that the process server could not have reasonably mistaken her husband for the person alleged to have been Mr. Belill. Defendant further avers that she and her family do not know a "Laila Lake," and no one by that name resided at the property.

In opposition, Plaintiff argues that the alleged discrepancies in Defendant's age and weight are insignificant and unsubstantiated. While a seven-year age difference may be deemed minor with respect to middle-aged adults, the Court disagrees with Plaintiff's characterization of a weight difference ranging from approximately 65 to 90 pounds as insignificant. It is also noted that Plaintiff does not even mention, much less proffer an explanation for the omission of Defendant's alleged long dreadlocked hairstyle from the process server's description, despite the form affidavit's reservation of a specific place to memorialize additional noteworthy features. The Court also rejects Plaintiff's contention that Defendant's affidavit was conclusory. To the contrary, as discussed above, Defendant provided specific factual details controverting the facts attested to by the process server. Plaintiff is correct that Defendant did not proffer documents

[2] These defendants are denominated in the caption as "'John Does' and 'Jane Does', said names being fictitious, parties intended being possible tenants or occupants of premises, and corporations, other entities or persons who claim, or may claim, a lien against the premises."

substantiating her version of events. However, the Court finds that due to the passage of time, it is unlikely that most people would still have pay stubs or timesheets from a former employer a decade after the fact, nor would they likely retain receipts or other documents pertaining to transit. It is also noted that Plaintiff permitted several years to pass before it moved for a JFS, and hence, to the extent that documents would no longer be available, the Court finds that Plaintiff's own unexplained delays have contributed, at least in part, to this.[3]

Moreover, the Court finds that Plaintiff's own submissions in opposition to the motion provide at least some support for Defendant's contentions and raise additional factual issues of their own. To refute Defendant's denial of receipt of the papers, Plaintiff submits an additional affidavit from the process server, who reaffirms that he completed service on July 18, 2012, and submits additional evidence in the form of what he represents to be a timestamped GPS photograph that he took of the property immediately before the service, and his work ticket, which he says he completed contemporaneously and was signed by Defendant. However, the photograph depicts a row of at least four attached houses and is taken from a distance making it impossible to decipher the street numbers on any of them. Additionally, the photograph lists only coordinates, not an address, and thus, does not prove that it depicts the subject premises. In any event, there is no allegation that the process server did not come to the premises, only that he did not serve the three individuals he claimed to have served on July 18, 2012. Nor can the Court simply accept the process server's representation that Defendant signed the work ticket, as that document is unsworn, he makes this assertion for the first time nearly 12 years after the events, and Plaintiff did not proffer proof from a handwriting expert.

It is also noted that the work ticket indicates that the process server attempted service on Defendant on two prior occasions: July 13, 2012 at 9:08 a.m. and July 16, 2012 at 6:25 p.m. It appears, from the "NA" notations following these dates, that the process server received "no answer" on each prior attempt. The Court notes that these dates were on Friday and Monday, respectively, each of which falls within the five-consecutive workday period during which Defendant attested that she would have been in New Jersey at her live-in nanny job. Hence, that the process server could not find Defendant at the subject premises in Brooklyn on these days lends at least some credence to her account. It is also noted that the work ticket contains a

[3] As Defendant moved by order to show cause, she did not have an opportunity to submit reply papers. The Court has taken that into account in scrutinizing the arguments raised in Plaintiff's opposing papers.

written notation above the Defendant's purported signature, which appears to provide a date of July 24, 2012. Since the process server claims to have served Defendant and completed the ticket six days prior, the inclusion of this date directly above the purported signature raises questions as to the accuracy and veracity of the contents of the ticket.

In addition, the Court cannot ignore the evidence submitted on the moving papers-in-chief pertaining to the process server's disciplinary history with the New York City Department of Consumer Affairs ("DCA"). Defendant submitted a copy of the May 13, 2013 notice of hearing and the July 9, 2013 consent order entered into between DCA and the process server to resolve certain charges. The notice indicates that courts ordered traverse hearings in seven actions in which the process server allegedly served process, for which he either failed to report the hearings or failed to report the results of same. The dates of the challenged services in the seven actions spanned August 2005 through July 2012; traverse was overruled in four cases; sustained in two others, and the parties settled the remaining two. The notice also sets forth logbook violations pertaining to six services occurring in May and June of 2012, for which the process server failed to include a description of the premises in relation to certain structures. The Court notes that the events underlying the charges occurred near the time of the July 18, 2012 service that is at issue in the case at bar, and, thus, raises a question as to the process server's credibility in regards to the fulfilment of his duties. The Court also finds it to be telling that Plaintiff makes no mention of the consent order or the underlying charges and does not address how they impact on whether the process server should receive the benefit of the doubt and of the presumption of regularity attendant to his executed affidavit of service.

In sum, the Court finds that Defendant has raised specific, non-conclusory factual allegations controverting the affidavits of service with respect to the following: the significant weight disparity between herself and the woman served; the notable long dreadlock hairstyle she wore, on which the affidavit is silent; that the descriptions of the John and Jane Doe defendants served at the same premises within minutes of her own service do not match those of her tenants, and she and her family did not know the persons allegedly so served; Defendant's unique work schedule suggests that she would not have been home during the entirety of the traditional work week, during which time she was allegedly served; and the notations in the process server's work ticket of prior unsuccessful service attempts during the work week may corroborate Defendant's description of her work schedule. Even if, standing alone, none of the above would be sufficient

to raise questions as to the propriety of the challenged service, the Court finds that, considered *en toto*, these allegations, combined with the documented history of the process server's failure to follow rules for serving process, raise sufficient factual issues necessitating a traverse hearing.

CONCLUSION

For the reasons discussed above, a traverse hearing is required to determine whether Plaintiff properly served Defendant with the summons, complaint, and RPAPL §1303 notice. Since the JFS was issued in violation of the automatic stay imposed pursuant to CPLR §321(c) due to the suspension and subsequent disbarment of Defendant's attorney, it must be vacated regardless of the outcome of the traverse hearing. Hence, the branch of Plaintiff's cross-motion seeking to amend the JFS is also denied. However, as the determination of the validity of service may moot the branch of Plaintiff's cross-motion seeking an extension of time to serve Defendant, it shall be held in abeyance, as will the branch of Defendant's motion seeking dismissal on personal jurisdiction grounds, pending the outcome of the traverse hearing.

Accordingly, the above-referenced motions are decided to the extent that it is

ORDERED that Defendant's motion is granted to the extent that the judgment of foreclosure and sale dated October 23, 2019, and entered on or about November 13, 2019, is vacated, and a traverse hearing shall be held before a referee on the issue of whether Defendant was served with the summons, complaint, and RPAPL §1303 notice on July 18, 2012 pursuant to CPLR §308(1), as alleged in the affidavit of service proffered by Plaintiff; and it is further

ORDERED that the branch of Plaintiff's cross-motion seeking to amend the judgment of foreclosure is denied; and it is further

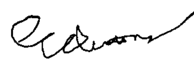
ORDERED that the remaining branches of Defendant's motion and of Plaintiff's cross-motion, shall each be held in abeyance pending the outcome of the traverse hearing.

2023 AUG 24 AM 9:45
KINGS COUNTY CLERK
FILED

The foregoing constitutes the Decision and Order of this Court.

ENTER,

Dated: August 22, 2023



S.C.J. Cenceria P. Edwards, C.P.A.