

SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. JAMES V. BRANDS

Justice.

SUPREME COURT: DUTCHESS COUNTY

US BANK NATIONAL ASSOCIATION, AS
TRUSTEE IN TRUST FOR THE BENEFIT OF THE
CERTIFICATEHOLDERS, MORTGAGE ASSET
SECURITIZATION TRANSACTIONS, INC., FIRST
FRANKLIN MORTGAGE LOAN ASSET-BACKED
CERTIFICATES, SERIES 2005-FF7,

Plaintiff,

DECISION AND ORDER

Index No: 5656/2008

-against-

GILDARDO DIEZ, CHARLES ROBINSON,
GABRIEL ARANGO, MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC., AS NOMINEE
FOR AMERICA'S WHOLESALE LENDER,

Defendants.

The following papers were read and considered on defendant Gildardo Diez's motion to vacate the prior default judgment and dismiss this action for lack of jurisdiction.

EMERGENCY ORDER TO SHOW CAUSE WITH T.R.O.
ATTORNEY AFFIDAVIT OF EMERGENCY
PRIOR PLEADINGS
EXHIBITS A-C
AFFIDAVIT OF GILDARDO DIEZ

AFFIRMATION IN OPPOSITION TO ORDER TO SHOW CAUSE
EXHIBITS 1-5

ATTORNEY AFFIRMATION IN REPLY TO OPPOSITION

Background Facts:

Plaintiff commenced this foreclosure action alleging that defendant Gildardo Diez defaulted under certain loan obligations secured by a mortgage lien on the subject property located at 32 Dutchess Hill Road, Poughkeepsie, New York 12601. The affidavit of service

dated August 4, 2008 ("McCourt Affidavit") states that Diez was served by 'nail and mail' service of the pleadings pursuant to CPLR 308[4] on July 31, 2008 at 7:40a.m with a mailing that followed on August 1, 2008 after three prior attempts at personal service on July 29, 2008 at 8:16p.m., July 30, 2008 at 1:29p.m., and July 31, 2008 at 7:40a.m. (Motion Ex. A). The affidavit of service dated August 6, 2008 ("Yetkofsky Affidavit") attests that an additional mailing was sent to Diez at the subject property. Plaintiff alleges that Diez failed to appear, whereas defendant Robinson and Arango filed an answer. By order dated October 6, 2009, the court granted plaintiff's motion for a default judgment against Diez, summary judgment against Robinson and Arango, and an order of reference. The court granted a judgment of foreclosure and sale on September 30, 2010. A public auction sale of the property was noticed for August 24, 2015.

Diez filed the instant application by Order to Show Cause requesting a temporary restraining order staying the sale pending a determination of his application, which was granted absent objection. His application also seeks to vacate the prior order and default judgment in this matter based on his contention that he was not duly served with the pleadings or the CPLR 1303 notice, and that he first learned of this matter upon receipt of the Notice of Sale in 2015. Diez claims that the McCourt Affidavit fails to attest to the exercise of due diligence in prior efforts to effectuate service and resort to nail and mail service. He claims that he lives alone, had a back injury and thus was home at the subject property on the dates and times of the three purported service attempts. He claims he did not hear a doorbell or knock at his door, nor does the McCourt Affidavit attest to any such efforts at his door or via his neighbor. He further challenges the veracity of assertions made in the affidavit wherein it states Diez confirmed non-military status despite also stating nail and mail service in his absence. Diez claims that as a result of the improper service of the pleadings, the court lacked jurisdiction over Diez thus rendering the orders and judgment rendered in this matter a nullity.

Plaintiff's opposition states that Diez failed to proffer a meritorious defense to warrant vacating the prior order and judgment in this matter, citing that Diez's affidavit does not deny the existence of his loan obligation or his default thereunder. Counsel also argues that Diez's self-serving affidavit is insufficient to overcome the presumption of proper service. He claims that Diez's affidavit contains an admission that he resided at the subject property on the dates of attempted service. Furthermore, the professional process server made three attempts at personal service and Diez did not dispute subsequent mailings of the pleadings thus demonstrating due diligence and sufficient service upon Diez.

Decision:

CPLR 5015(a)(4) requires vacatur of a judgment where the court lacked jurisdiction to render such judgment. It is well-settled that a proper affidavit of service attesting to delivery of the summons and complaint upon the defendant constitutes prima facie proof of service. Such proof of service may be rebutted by a sworn denial of service with sufficient facts by the party allegedly served. Such conflicting evidence warrants a traverse hearing wherein plaintiff must establish jurisdiction by a preponderance of evidence (Dime Sav. Bank of New York v. Steinman, 206 AD2d 404 [2nd Dept. 1994]; Washington Mut. Bank v. Holt, 71 AD3d 670 [2nd

Dept. 2010]; Wachovia Bank v. Carcano, 106 AD3d 726 [2nd Dept. 2013]). The burden of proving jurisdiction is on the party asserting it, and when challenged, that party must sustain that burden by a preponderance of the credible evidence (Dime Sav. Bank of New York v. Steinman, *supra.*).


In the instant case, the plaintiff's affidavit of service attesting to 'nail and mail' service of the pleadings upon Diez pursuant to CPLR 308[4] after three prior attempts at personal service creates a presumption of service. Diez rebutted the presumption by submitting his sworn denial of service with sufficient specificity to raise an issue of fact as to whether plaintiff's process server exercised due diligence in the purported efforts at personal service to avail itself of 'nail and mail' method of service. On the basis of the foregoing, it is hereby

ORDERED that this matter is scheduled for a traverse hearing on January 4, 2016 at 10:00a.m. to resolve the factual issues raised regarding service upon the defendant Gildardo Diez.

The foregoing constitutes the decision and order of this court.

Dated: November 16, 2015
Poughkeepsie, New York

ENTER:


HON. JAMES V. BRANDS, J.S.C.

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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to Judge Brands' Chambers, please do not submit any copies. Submit only the original papers.

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