

Decided on July 29, 2008

Supreme Court, Queens County

**JP Morgan Chase Bank, AS TRUSTEE FOR THE
REGISTERED HOLDER OF THE HOME EQUITY
LOAN ASSET-BACKED CERTIFICATES, SERIES
2003-2, Plaintiff,**

against

**Nancy Ohw a/k/a HYANG S.O., and SUNG OHW a/k/a
SUNG CHAN O, DR. SEUNG OH, J. CARASQUILLO,
LIN CHAN, Defendants.**

26418/04

Jaime A. Rios, J.

Upon the foregoing papers it is ordered that the Order to Show Cause is resolved as follows.

On or about November 15, 2004, plaintiff commenced this action to foreclose on a mortgage on property located at 74-33 44th Avenue, Elmhurst, New York in the principal sum of \$380,000.00^[FN1]. Plaintiff alleged that defendants failed to make the monthly payments beginning April 1, 2004. Affidavits of "substituted" service on the movants Nancy Ohw a/k/a Hyang S.O. and Sung Ohw a/k/a Sung Chan O (defendants) were filed with the court on or about December 15, 2004. The affidavits of service allege that the person served at the subject premises was a female of suitable age and discretion. The female is described as approximately 80 years old, 5 feet and 140 pounds, with yellow skin and black hair. According to the process server, the woman served identified herself as Lin Chan and claimed to be the mother of defendant Nancy Ohw and a

relative of the defendant Sung Ohw. The process server also averred that he mailed the summons and complaint to the defendants' home within 24 hours.

Defendants failed to timely interpose an answer or appear and plaintiff thereafter moved, ex parte, for an order of reference. By order dated April 26, 2005, this Court (Rios, J.) appointed a [*2]referee to ascertain and compute the amount due to plaintiff. By order dated July 19, 2005, this Court (Rios, J.) granted the plaintiff's motion for a judgment of foreclosure and sale. Pursuant to the judgment of foreclosure and sale, a public sale was conducted on January 11, 2008, at which time, Razib Haq and Mortoza Siddiqui (purchasers) purchased the premises for \$451,000.00.

The defendants currently move to vacate the judgment of foreclosure and sale, and subsequent sale, on the grounds that service of the summonses and complaints were defective and thus, there is a lack of personal jurisdiction pursuant to CPLR 5015[a][4]. In their affidavits in support, they claim that they were never served with the summonses and complaints despite the fact that the affidavits of service indicate they were personally served pursuant to CPLR 308[2] by delivery to Lin Chan. They aver that they have no knowledge of a person named Lin Chan, who is identified as Nancy Ohw's mother and Sung Ohw's relative. Moreover, Nancy Ohw's mother is named Sun Won Kim and she does not speak or understand English and does not fit the description in the affidavit of service since she is 3 inches shorter and 35 pounds lighter. The defendants also submit the affidavit of Wan Hau Huang, who is the 50 year old caretaker of Sun Won Kim. Huang states that Sun Won Kim is a 96 year old woman who is unable to speak or understand English and that there are neighbors immediately adjacent to defendants who are named Chan and an 80 year old grandmother resides there. Also submitted in support is an affidavit of Sun Won Kim who states that she was never served with the summons and complaint ^[FN2].

In opposition, plaintiff argues, *inter alia*, that the affidavits of service filed with the court on or about December 13, 2004 constitute prima facie evidence that, pursuant to CPLR 308[2], service was proper. Moreover, plaintiff notes that in the forbearance agreement dated March 2, 2007, after the judgment of foreclosure and sale had been entered, it was agreed that any filed affirmative defenses or counterclaims with respect to any pending foreclosure litigation would be withdrawn with prejudice.

Also in opposition, the special counsel for the purchasers argue that service was proper and that the sale should not be vacated as the sale constitutes a bona fide purchase pursuant to this Court's order. Counsel, relying on *Halali v Gabbay* (223 AD2d 623 [2d Dept. 1996]), *Simmons First National Bank v Mandracchia* (248 AD2d 375[2d Dept., 1998]), and *Peacock v Kalikow* (239 AD2d 188 [1st Dept., 1989]) further contends that defendants failed to demonstrate a meritorious defense to the foreclosure action in order to succeed on a motion to vacate a default.

In his affidavit in opposition, Mohammed Haq, one of the purchasers, states, *inter alia*, that he and Mortoza Siddiqui are bona fide purchasers and that the sale should not be vacated.

Pursuant to CPLR 5015[a][1] and the cases special counsel relies upon, a moving party seeking to vacate a default judgment must demonstrate both an excusable default and a meritorious

defense (see also *Kaufman & Satran LLP v Sidbern Estates, Inc.*, 4 AD3d 454 [2d Dept., 2004]). However, where the defendant asserts a lack of personal jurisdiction as the ground for vacatur [*3] pursuant to CPLR 5015[a][4], the defendant need not demonstrate a reasonable excuse for the default or a meritorious defense because where purported service pursuant to CPLR 308 is ineffective, dismissal of the action is mandated (see *Ben-Amram v Hershowitz*, 14 AD3d 638 [2d Dept., 2005]; *Steele v Hempstead Pub Taxi*, 305 AD2d 401 [2d Dept., 2003]; *European American Bank & Trust Co. v Serota*, 242 AD2d 363 [2d Dept., 1997]; *Laurenzano v Laurenzano*, 222 AD2d 560 [2d Dept., 1995]; *Community State Bank v Haakonson*, 94 AD2d 838 [3d Dept., 1983]).

Here, the defendants claim that they were not served pursuant to CPLR 308[2], which, *inter alia*, authorizes service by delivery of the summons within the state to a person of suitable age and discretion at the defendant's dwelling place, and mailing the summons to the defendant's last known residence. The plaintiff bears the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process (see *Frankel v Schilling*, 149 AD2d 657 [2d Dept., 1989]). A process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service pursuant to 308[2] (see *Wells Fargo Bank, N.A. v McGloster*, 48 AD3d 457 [2d Dept. 2008]; *Bankers Trust Co. of California, N.A. v Tsoukas*, 303 AD2d 343 [2d Dept., 2003]). Here, the process server asserted that the summons and complaint were delivered to a female "relative" of the defendants of suitable age and discretion, whose physical description was set forth in detail, at the address that the defendants' reside, followed by the required mailing. Accordingly, the process server's affidavit established that the defendants were properly served pursuant to 308[2]. Nevertheless, defendants' affidavits denying receipt by personal service and the affidavit of Sun Won Kim denying receipt of the summonses and complaints, rebutted the affidavit of service and plaintiff must establish jurisdiction by a preponderance of the evidence at a traverse hearing (see *Balancio v Santorelli*, 267 AD2d 189 [2d Dept., 1999]; *New Island Investors v Wynne*, 251 AD2d 560 [2d Dept., 1998]; *Long Island Sav Bank, FSB v Meliso*, 229 AD2d 478 [2d Dept., 1996]; *Greenpoint Sav. Bank v Mione*, 213 AD2d 375 [2d Dept., 1995]; *Frankel v Schilling, supra*). If it is determined that service has not been duly effected, the court would have no jurisdiction over defendants, and the default judgment would be a nullity and must be unconditionally vacated (see, *Government Employees Ins. Co. v Basedow*, 28 AD3d 766 [2d Dept., 2003]; *Steele v Hempstead Pub Taxi, supra*; *Cartier v County of Nassau*, 281 AD2d 477 [2d Dept., 2001]; *Citibank, N.A. v Keller*, 133 AD2d 63 [2d Dept., 1987]).

Moreover, the fact that the defendants had actual notice of the foreclosure action does not suffice to confer jurisdiction in the absence of the proper service of a summons and complaint (see *Macchia v Russo*, 67 NY2d 592 [1986]; *Bank of America Nat. Trust & Sav. Ass'n v Herrick*, 233 AD2d 351 [2d Dept., 1996]; *Long Island Sav. Bank, FSB v Meliso, supra*; *Martino v Rivera*, 148 AD2d 568 [2d Dept., 1989]).

Finally, while in appropriate circumstances a defendant may be deemed to have waived his or her jurisdictional objections (see *In the Matter of Parkside Limited Liability Company*, 294 AD2d 582 [2d Dept., 2002]; *Lomando v Duncan*, 257 AD2d 649 [2d Dept., 1999]; *Star Credit Corporation v Ingram*, 71 Misc 2d 787 [New York County Supreme Court, 1972]), such

circumstances are not present in this matter. The defendants, by their actions, did not either explicitly or implicitly participate in the action and/or acknowledge the validity of the judgment.
[*4]

Accordingly, as there is a dispute as to the efficacy of service, a hearing on the issue of personal jurisdiction shall be held in IA Part 8 at 9:30 a.m. on August 19, 2008. The remaining branches of the Order to Show Cause will be determined following the disposition of the traverse hearing. The temporary stay contained in the Order to Show Cause shall continue until further notice.

Dated: July 29, 2008 _____

J.S.C.

Footnotes

Footnote 1: The mortgage was transferred to plaintiff by Mortgage Electronic Registration Systems, Inc., as nominee for Delta Funding Corporation by assignment dated September 21, 2004.

Footnote 2: The affidavit was translated into English.