

**Truman Capital Holdings, LLC v Ostrove**

2024 NY Slip Op 31034(U)

March 19, 2024

Supreme Court, Suffolk County

Docket Number: Index No. 616248/2022

Judge: Thomas F. Whelan

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This opinion is uncorrected and not selected for official publication.

MEMO DECISION & ORDER

INDEX No. 616248/2022

SUPREME COURT - STATE OF NEW YORK  
IAS PART 33 - SUFFOLK COUNTY

***PRESENT:***

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 2/28/23  
SUBMIT DATE 10/28/23  
Mot. Seq. # 001 - MD  
Mot. Seq. # 002 - MD (moot)  
**Conf. Date: 5/9/24 at 9:30AM**  
CDISP Y\_\_\_ N x

-----	X
TRUMAN CAPITAL HOLDINGS, LLC,	: FRIEDMAN VARTOLO, LLP
	: Attys. For Plaintiff
Plaintiff,	: 1325 Franklin Avenue, Suite 160
	: Garden City, NY 11530
-against-	:
	:
DAVID S. OSTROVE A/K/A DAVID OSTROVE;	: PM LAW PC
TERESE OSTROVE A/K/A TERESE BARONE;	: Attys for Defs David & Terese Ostrove
RAYMOND A. TIERNEY, AS DISTRICT	: 14 Penn Plaza
ATTORNEY FOR SUFFOLK COUNTY; WELLS	: 225 West 34th Street - 9th Floor
FARGO BANK, N.A.; "JOHN DOE" AND "JANE	: New York, NY 10122
DOE" said names being fictitious, it being the	:
intention of Plaintiff to designate any and all	:
occupants of premises being foreclosed herein,	:
	:
Defendants.	:
-----	X

Upon the following papers read on this motion to dismiss among other things and cross motion  
\_\_\_\_\_; Notice of Motion/Order to Show Cause and supporting papers NYSCEF Doc. 29 - 37; Notice of Cross  
Motion and supporting papers: NYSCEF Doc. 41 - 46; Opposing papers: 51 - 56; Reply papers:   
NYSCEF Doc. 57; Other Supp filings NYSCEF Doc 63-64, 68-69; (and after hearing counsel in  
support and opposed to the motion) it is,

**ORDERED** that this motion (#001) by defendants, David Ostrove and Terese Ostrove for  
dismissal, is denied; and it is further:

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**ORDERED** that the cross-motion (#002) by the plaintiff seeking an extension of time to serve is denied as moot; and it is further

**ORDERED** that pursuant to CPLR 3211(f), defendants David Ostrove and Terese Ostrove shall file an answer to this complaint within ten (10) days of the date of entry of this Order; and it is further

**ORDERED** that movant is directed to file a notice of entry within five days of receipt of this Order pursuant to 22 NYCRR §202.5-b(h)(2).

This is an action for foreclosure on residential property situated in West Islip. In essence, on March 23, 2007, defendants David Ostrove and Terese Ostrove (hereinafter, the Defendants) borrowed \$720,000.00 from plaintiff's predecessor in interest and executed a construction loan agreement, note and mortgage. The loan was thereafter modified by agreement dated April 1, 2008, in which the defendants agreed to repay \$640,000.00. On May 1, 2008 – over fourteen years ago – the defendants stopped making the payments due and owing, and the plaintiff began bearing the costs of the property taxes and insurance. An action for foreclosure was therefore commenced on September 4, 2013 at Suffolk County Index Number 23736/2013. The Defendants filed an answer, through counsel, and motion practice followed. The action was ultimately dismissed by Order dated February 24, 2022 (Rouse, A.J.S.C.), wherein the Court granted the Defendants' motion for summary judgment on the basis that plaintiff failed to demonstrate compliance with RPAPL 1304.

Relying on the "savings provision" contained in CPLR 205(a) in effect at that time, the plaintiff commenced this action on August 17, 2022. On September 15, 2022, the Defendants, through counsel, filed the instant motion (#001) seeking dismissal of the complaint pursuant to CPLR 3211(a)(8) or 3211(a)(5) or, alternatively, a traverse hearing, or additional time to file an answer. The plaintiff opposed the application and filed a cross motion (#002) seeking an extension of time to serve the defendants in the event the Court finds in favor of the Defendants on the issue of service. On December 30, 2022, while the motion was pending decision, the Foreclosure Abuse Prevention Act ("FAPA," L 2022, ch 821) went into effect. The parties submitted supplemental briefs regarding its application to the instant case. The plaintiff addressed the timeliness of the action and its reliance on CPLR 205(a), and noted that application of FAPA would constitute an unconstitutional and improper retroactive application. The Defendants contend that FAPA is to be applied retroactively, and that CPLR 205(a) as amended by FAPA require that the action be dismissed as untimely.

Subsequent to the submission of the instant motion, this Court issued a Memo Decision and Order in *US Bank National Assoc v Joerger* (2024 WL 1061542, 2024 Slip Op 24075 [Sup Ct. March 8, 2024]), which addressed FAPA at length and concluded that "the amendments, if applied retroactively, would impair rights a party possessed when it acted, increase the party's liability for past conduct, and impose new duties with respect to transactions already completed," contrary to the holdings in *Landgraf v USI Film Product*, 511 US 244 (1994) and *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 370 (2020). Thus,

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this Court's position is that FAPA and its amendments are to be applied prospectively to actions commenced on or after December 30, 2022, FAPA's effective date. This holding is in accord with that in *US Bank v Speller* (80 Misc 3d 1233(A), 2023 NY Slip Op 51153(U) [Sup Ct. October 31, 2023]) and *Wilmington Trust v Gawlowski* (201 NYS3d 605, 2023 NY Slip Op 23305 [Sup Ct. October 6, 2023]).

The Court thus reviews the Defendants' motion accordingly.

It is well settled that a "process server's affidavit of service constitutes prima facie evidence of proper service" (*Duran v Milord*, 126 AD3d 932, 7 NYS3d 176 [2d Dept 2015], citing *Youngstown Tube Co. v Russo*, 120 AD3d 1409, 1409, 993 NYS2d 146 [2d Dept 2014]; see *Deutsche Bank Natl. Trust Co. v Jagroop*, 104 AD3d 723, 960 NYS2d 488 [2d Dept 2013]; *U.S. Bank N.A. v Hossain*, 94 AD3d 979, 979, 943 NYS2d 140 [2d Dept 2012]). "Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavits" (*Deutsche Bank Natl. Trust Co. v Quinones*, 114 AD3d 719, 719, 981 NYS2d 107 [2d Dept 2014]; see *City of New York v Miller*, 72 AD3d 726, 727, 898 NYS2d 643 [2d Dept 2014]; *Emigrant Mtge. Co., Inc. v Westervelt*, 105 AD3d 896, 897, 964 NYS2d 543 [2d Dept 2013]; *US Natl. Bank Assn. v Melton*, 90 AD3d 742, 743, 934 NYS2d 352 [2d Dept 2011]). A defendant's bare and unsubstantiated denial of receipt is insufficient to rebut the presumption of proper service (see *US Bank Natl. Assn. v Tate*, 102 AD3d 859, 859-60, 958 NYS2d 722 [2d Dept 2013], citing *Bank of NY v Espejo*, 92 AD3d 707, 708, 939 NYS2d 105 [2d Dept 2012]; *Aurora Loan Servs., LLC v Weisblum*, 85 AD3d 95, 103, 923 NYS2d 609 [2d Dept 2011]).

The plaintiff has submitted affidavits of service which demonstrate that on August 18, 2022, Defendant David Ostrove was personally served at his West Islip residence pursuant to CPLR 308(1) (Affidavit [NYSCEF Doc. No. 14]). Service upon co-defendant Terese Ostrove also took place at that place and time, via substitute service upon Defendant David Ostrove, pursuant to CPLR 308(2) (Affidavit [NYSCEF Doc. No. 16]). In seeking dismissal of the complaint as against them pursuant to CPLR 3211(a)(8), the Defendants together allege that they "spent the week of August 18, 2022 vacationing at [their] rental property on Fire Island" (Affidavit, para. 1 [NYSCEF Doc. No. 31]), therefore service upon each of them could not have been accomplished as indicated. The Defendants further note that Defendant David Ostrove could not have been at the premises at that date and time, as he appeared on that date at Ocean Beach Village on Fire Island, as demonstrated by an email purportedly from personnel of the Ocean Beach Village Justice Court stating that he "appeared at the court on Thursday August 18, 2022 to discuss [his] case regarding [his] pending appearance on Saturday August 20, 2022" (Exhibit D [NYSCEF Doc. No. 36]).

The Court finds these assertions to be wholly conclusory. Notably lacking from the Defendants' submission is any affidavit or sworn statement from personnel of the Ocean Beach Village Justice Court confirming that defendant David Ostrove was at Court at the time of service on August 18, 2022. The Defendants also have not challenged the respective sworn allegations that a

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person fitting defendant David Ostrove's physical description was present at the residence at the time and accepted service (*see Nationstar Mtge., LLC v Cohen*, 185 AD3d 1039, 1041, 128 NYS3d 574 [2d Dept 2020], citing *Washington Mut. Bank v Huggins*, 140 AD3d 858, 35 NYS3d 127 [2d Dept 2016]). Additionally, neither Defendant has denied receiving the papers in the mail and thus have not "overcome the inference of proper mailing that arose from the affidavit of service" (*see id.*).

In sum, "[t]he averments contained in the [respective defendants'] affidavit did not constitute a "detailed and specific contradiction" of the allegations in the process server's affidavit (*Aurora Loan Services, LLC v Simon*, 216 AD3d 716, 717, 189 NYS3d 535 [2d Dept 2023] citing *Deutsche Bank Natl. Trust Co. v Kenol*, 205 AD3d 1004, 1005, 166 NYS3d 881 [2d Dept 2022][internal quotations omitted]). As such, these branches of the motion are denied.

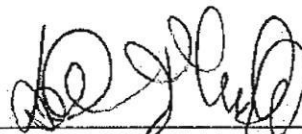
The branch of Defendants' motion seeking dismissal pursuant to CPLR 3211(a)(5) is also denied. The Defendants contend that the mortgage loan was accelerated in 2013, and that the statute of limitations therefore expired in 2019. The plaintiff notes in response its reliance on the version of CPLR 205(a) in effect when plaintiff commenced the instant action. A party may rely on CPLR 205(a) "provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period" (CPLR 205[a]). The provisions "provides an additional six months in which to recommence a prior action that has been dismissed on grounds other than voluntary discontinuance, lack of personal jurisdiction, neglect to prosecute, or a final judgment on the merits" (*Wells Fargo Bank, N.A. v Eitani*, 148 AD3d 193, 195, 47 NYS3d 80 [2d Dept 2017]).

The Defendants contend that because they each were not properly served during the six-month extension, plaintiff is estopped from relying on the savings provision of CPLR 205(a). As noted above, however, the Defendants have not demonstrated that they were not properly served. The Defendants' motion is, therefore, denied. The plaintiff's cross-motion (#002) seeking an extension of time to serve is thus denied as moot.

Defendants David Ostrove and Terese Ostrove shall file an answer to this complaint within ten (10) days of the date of entry of this Order.

DATED:

*3/19/24*



THOMAS F. WHELAN, J.S.C.