

Wells Fargo Bank, N.A. v Margolin
2011 NY Slip Op 31168(U)
May 3, 2011
Supreme Court, Queens County
Docket Number: 21837/2010
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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WELLS FARGO BANK, N.A. SUCCESSOR BY
MERGER TO WELLS FARGO HOME MORTGAGE,
INC.
3476 Stateview Boulevard
Ft. Mill, SC 29715

Index No.: 21837/2010
Motion Date: 02/17/11
Motion No.: 55
Motion Seq.: 1

Plaintiff,

- against -

LAURENCE S. MARGOLIN, SARA R.
MARGOLIN, BARROCAS & RIEGER, LLP,
BOARD OF MANAGERS AT BAYBRIDGE AT
BAYSIDE CONDOMINIUM III, NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD, NEW YORK
CITY PARKING VIOLATIONS BUREAU, NEW
YORK CITY TRANSIT ADJUDICATION BUREAU,
NEW YORK STATE DEPARTMENT OF TAXATION
AND FINANCE, UNITED STATES OF AMERICA
ACTING THROUGH THE IRS, JOHN DOE (Said
name being fictitious, it being the
intention of Plaintiff to designate
any and all occupants of premises
being foreclosed herein, and any
parties, corporations or entities, if
any, having or claiming an interest or
lien upon the mortgage premises),

Defendants.

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The following papers numbered 1 to 16 read on this motion by
defendant Laurence S. Margolin for an order pursuant to CPLR
3211(a)(8) dismissing the complaint on the ground of lack of
personal jurisdiction and for an order pursuant to CPLR
3211(a)(3) and (7) for failure to state of cause of action:

Papers
Numbered

Notice of Motion-Affirmation-	
Affidavits-Service-Exhibits- Memorandum of Law1 - 5
Affirmation in Opposition-Affidavits-Exhibits.....	6 - 9
Reply Affirmation.....	10 - 12
Sur-Reply Affirmation.....	13 - 16

This is a mortgage foreclosure commenced by the plaintiff by the filing of a lis pendens and summons and complaint on August 26, 2010. A second lis pendens was filed on November 5, 2010. The action concerns premises located at 13-25 Michael Place, Unit 137-A, Bayside NY 11360.

Laurence S. Margolin and his wife Sara R. Margolin executed a Note and Mortgage on June 29, 1995 in the amount of \$171,600.00 with interest. A second note and mortgage was executed by the defendants in April, 2002 in the amount of \$71,236.98. The two mortgages were consolidated in 2002 to form a single lien in the amount of \$230,000. This lien was assigned to the plaintiff Wells Fargo Bank, N.A. Successor by Merger to Wells Fargo Home Mortgage, Inc. ("Wells Fargo").

In its complaint, the plaintiff contends that the defendants defaulted on the loan on March 1, 2010 at which time there was a principal balance of \$205,693.18. As a result of the default, the plaintiff commenced the instant foreclosure action and served the

defendant Laurence Margolin, an attorney, on October 21, 2010 at the law offices of Smith, Buss & Jacobs, LLP, 733 Yonkers Avenue Suite 200, Yonkers, New York 10704, by delivering the summons and complaint to one Noeleen McGovern a co-worker. The affidavit of service sworn to by process server Aristedes Chavier states that the place of service was the defendant's place of business.

In lieu of filing an answer Mr. Margolin moves by notice of motion, dated November 22, 2010 for an order dismissing the complaint pursuant to CPLR 3211(a)(8) on the ground of lack of personal jurisdiction based upon improper service. In his affidavit defendant states that service was invalid as he was laid off from his position at Smith Buss on December 14, 2009, prior to the date of service. Defendant also submits the affidavit of Noleen McGovern dated November 18, 2010 attesting to the fact that defendant was not employed at Smith Buss at the time service was made.

In his motion defendant also contends that the complaint is invalid and fails to state a cause of action because 1) defendant did not receive a 90 day notice prior to filing the action pursuant to RPAPL § 1304; 2) the complaint was not verified; 3) the complaint does not allege that plaintiff holds the note executed on February 11, 2002; 4) plaintiff did not comply with Judge Lippman's rule requiring an attorney verification of the accuracy of the documents; 5) plaintiff did not deliver to

defendant the separate notice on colored paper pursuant to RPAPL § 1303; and 6) pursuant to CPLR § 6512 the notice of pendency is not effective as pleadings were not served on defendant within 30 days after filing the notice of pendency.

In opposition, Jennifer M. McCann, Esq., submits an affirmation on behalf of the plaintiff in which she states that after learning from defendant's affirmation that Smith Buss was not his place of business when service was made, she attempted to make service upon defendant at his home address at 213-50 34th Road, Bayside, New York. The affidavit of service indicates that service was made by nail and mail on December 2, 2010. Counsel also contends that the notice of pendency is valid as the second service was made on December 2, 2010 within the 30 day time frame required by CPLR § 6512.

Counsel also submits a copy of the 90 day notice required by RPAPL § 1304 which was mailed to the defendant's last known address at the premises subject to the mortgage pursuant to RPAPL § 1304(a)(2). With respect to the contention that the complaint is not verified, counsel contends that a verified complaint is not necessary in order to withstand a motion as to the sufficiency of the pleadings. In addition counsel contends that as this action was commenced prior to October 20, 2010, the OCA affirmation requirement is not required until the time of filing of the proposed order of reference or the proposed judgment of

foreclosure.

Counsel also contends that although the complaint does not specifically state that the plaintiff is the holder of the note executed on February 11, 2002, the complaint sufficiently pleads a cause of action for foreclosure as it states in the first paragraph that it is the owner and holder of the note and mortgage being foreclosed.

Upon review and consideration of the defendant's motion, plaintiff's affirmation in opposition and sur-reply and the defendant's reply this court finds as follows:

Defendant has moved prior to serving an answer to dismiss the complaint pursuant to CPLR § 3211(a)(3) based upon lack of capacity to sue and 3211(a)(7) for failure to state a cause of action. Defendant's motion to dismiss the complaint for failure to state a cause of action is denied. "On a motion to dismiss a complaint, the pleading is to be afforded a liberal construction. The court is to determine only whether the facts as alleged fit within any cognizable legal theory. The facts pleaded are presumed to be true and are to be accorded every favorable inference (see Lucia v Goldman, 68 AD3d 1064 [2d Dept. 2008]; Salvatore v Kumar, 45 AD3d 560 [2d Dept. 2007]).

Here, the complaint was sufficient to set forth a cause of action for foreclosure. The complaint sufficiently alleges that the plaintiff is the assignee of a note and mortgage for which

the defendants are in default (see Bancorp v Pompee, 918 NYS2d 574[2d Dept. 2011]; Wells Fargo Bank v Cohen, 80 AD3d 753 [2d Dept. 2011]). Likewise, the 90 day notice was sufficient pursuant to RPAPL § 1304 and was properly served upon the defendant's last known address pursuant to RPAPL § 1304(2). The certification as to the verification of the papers by an attorney as required by Judge Lippman does not arise until the time of filing of an order of reference or judgment of foreclosure as this action was commenced prior to October 10, 2010.

As to standing, the plaintiff has submitted documentary evidence showing that it is the holder of the mortgage, endorsed notes and Consolidation, Extension, and Modification Agreement (see plaintiff's sur-reply, exhibit A); also see Countrywide Home Loans, Inc. v Gress, 68 AD3d 709 [2d Dept. 2009][where the plaintiff is the assignee of the mortgage and the underlying note at the time the foreclosure action was commenced, the plaintiff has standing to maintain the action]; U.S. Bank, N.A. v Collymore, 68 AD3d 752 [2d Dept. 2009]; Fannie Mae v Youkelsone, 303 AD2d 546 [2d Dept. 2003]; First Trust Nat'l Ass'n v. Meisels, 234 AD2d 414 [2d Dept. 1996]).

With respect to personal jurisdiction, this court finds that the summons and complaint served on the defendant at his former place of business is invalid as there is no dispute that defendant was not employed at Smith Buss at the time service was

purportedly made. However, the action will not be dismissed at this time as the plaintiff subsequently re-served the defendant with the summons and complaint by nail and mail December 2, 2010 at his home address within 30 days of the filing of the lis pendens pursuant to CPLR 6512 (see Moffett v Gerard, 71 AD3d 845 [2d Dept. 2010])[although the plaintiff's first attempt to serve the summons and complaint upon the defendant was defective, the plaintiff was not prohibited from re-serving the summons and complaint properly]; Dashew v Cantor, 85 AD2d 619 [2d Dept. 1981]). The affidavit of service submitted by the plaintiff, dated December 3, 2010, constitutes prima facie evidence of proper service pursuant to CPLR 308(4) (see Cohen v Romanoff, 2011 NY Slip Op 3537 [2d Dept. 2011]; Matter of Nieto, 70 AD3d 831 [2d Dept. 2010]; Argent Mtge. Co., LLC v Vlahos, 66 AD3d 721 [2d Dept. 2009]; 425 E. 26th St. Owners Corp. v Beaton, 50 AD3d 845 [2d Dept. 2008]; Mauro v Mauro, 13 AD3d 345 [2d Dept. 2004])

However, as the instant motion was filed prior to the re-service of the summons and complaint, defendant is granted leave to move to contest the court's personal jurisdiction based upon the second service of process at his home address should he be so advised.

Dated: May 3, 2011
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.