

**NYCTL 1998-2 Trust v Russian Orthodox  
Greek-Catholic Church in the Name of the Holy  
Fathers of the Seven Ecumenical**

2018 NY Slip Op 30099(U)

January 17, 2018

Supreme Court, New York County

Docket Number: 653185/2017

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED

PART 2

Justice

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NYCTL 1998-2 TRUST, THE BANK OF NEW YORK MELLON
AS COLLATERAL AGENT AND CUSTODIAN FOR THE NYCTL
1998-2 TRUST,

INDEX NO. 653185/2017

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001

- v -

THE RUSSIAN ORTHODOX GREEK-CATHOLIC CHURCH IN
THE NAME OF THE HOLY FATHERS OF THE SEVEN
ECUMENICAL, NEW YORK CITY DEPARTMENT OF FINANCE,
NEW YORK STATE DEPARTMENT OF TAXATION AND
FINANCE, NEW YORK CITY ENVIRONMENTAL CONTROL
BOARD, JOHN DOE NO. 1 THROUGH JOHN DOE NO. 100
INCLUSIVE, THE NAMES OF THE LAST 100 DEFENDANTS
BEING FICTITIOUS, THE TRUE NAMES OF SAID
DEFENDANTS BEING UNKNOWN TO PLAINTIFF, IT BEING
INTENDED TO DESIGNATE FEE OWNERS, TENANTS OR
OCCUPANTS OF THE LIENED PREMISES AND/OR OR
PARTIES HAVING OR CLAIMING AN INTEREST IN OR A LIEN
UPON THE LIENED PREMISES,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number 12, 13, 14, 15, 16, 17, 18, 19,
20, 21, 22, 23

were read on this motion to/for APPOINT REFEREE

Upon the foregoing documents, it is ordered that the motion is decided as set forth below.

This action seeking to foreclose a tax lien was commenced by plaintiffs NYCTL 1998-2
Trust and The Bank of New York Mellon, as Collateral Agent and Custodian for the NYCTL
1998-2 Trust ("plaintiffs") against The Russian Orthodox Greek-Catholic Church in the Name of
the Holy Fathers of the Seven Ecumenical Councils, Inc. ("the Church"), New York City
Department of Finance ("DOF"), New York State Department of Taxation and Finance ("DTF"),
New York City Environmental Control Board ("ECB"), and John Doe No. 1 through John Doe

No. 100 inclusive, the names of the last 100 defendants being fictitious, the true names of said defendants being unknown to plaintiff, it being intended to designate fee owners, tenants or occupants of the liened premises and/or parties having or claiming an interest in or a lien upon the liened premises (“the John Doe defendants”) (collectively “defendants”). Plaintiffs move for an order: 1) pursuant to RPAPL § 1321, appointing a Referee and directing the Referee to ascertain and compute the amounts due plaintiffs upon the tax lien being foreclosed in this action, and to examine and report whether the liened property can be sold in one or more parcels; 2) amending the caption to excise therefrom defendants John Doe No. 1 through John Doe. No. 100 and discontinuing the action as against them, all without prejudice to any of the proceedings heretofore had herein; 3) deeming service upon the Church timely nunc pro tunc; and 4) for such other and further relief as this Court deems just and proper. After a review of plaintiffs’ motion papers, as well as consideration of the relevant statutes and case law, the motion is decided as follows.

#### **FACTUAL AND PROCEDURAL BACKGROUND:**

This action was commenced by plaintiffs on June 11, 2017 to foreclose on a tax lien on real property located in New York County known as Block 2084, Lot 48, also known as 526 West 153<sup>rd</sup> Street, New York, New York. Doc. 14.<sup>1</sup> On June 11, 2017, plaintiffs also filed a notice of pendency with the Clerk of this Court. Doc. 15. Plaintiffs thereafter served DOF, DTF, and ECB with process. Docs. 6, 7, 9.<sup>2</sup> Plaintiffs purported to serve the Church with process by affix and mail on July 10, 2017. Doc. 10. On October 28, 2017, plaintiffs purported to personally serve Alexander Botschagow, Arch Priest, and an agent of the Church, with process. Doc. 11.

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<sup>1</sup> All references are to the documents filed with NYSCEF in this matter.

<sup>2</sup> Plaintiffs claim that these entities held or may have held liens on the premises. Doc. 14.

Plaintiffs now move for an order: 1) pursuant to RPAPL § 1321, appointing a Referee and directing the Referee to ascertain and compute the amounts due plaintiffs upon the tax lien being foreclosed in this action, and to examine and report whether the lien property can be sold in one or more parcels; 2) amending the caption to excise therefrom defendants John Doe No. 1 through John Doe. No. 100 and discontinuing the action as against them, all without prejudice to any of the proceedings heretofore had herein; 3) deeming service upon the Church timely *nunc pro tunc*; and 4) for such other and further relief as this Court deems just and proper.

In support of the motion, plaintiffs submit the attorney affirmation of Leonid Krechmer, Esq. of the firm of Windels Marx Lane & Mittendorf, LLP. Doc. 13. Krechmer's affirmation disregards the affix and mail service purportedly effectuated on the Church. Instead, Krechmer argues that service was not made on the Church until "after the expiration of [the] time limits set forth in CPLR § 306 due to difficulties encountered by the process server in locating [the Church] outside of the City of New York." Doc. 13, at par. 3. Mr. Krechmer asserts that, since the delay in serving the Church was not significant, the late service of the Church did not result in prejudice, and plaintiffs demonstrated good cause for the untimely service of the Church, they are entitled to an extension of time to serve the Church, *nunc pro tunc*, and should thus be permitted to foreclose on the lien. He also asserts, in effect, that plaintiffs are entitled to a default judgment against defendants based on their failure to answer or otherwise appear in this matter.<sup>3</sup>

Plaintiffs further submit, inter alia, the summons and complaint (Doc. 14); the notice of pendency (Doc. 15); affidavits of service (Doc. 16); the servicing agreement between plaintiffs (Doc. 17); a power of attorney executed by plaintiffs (Doc. 18); and an affidavit of Kurt Shadle, Managing Director of Tower Capital Management, LLC, servicing agent for plaintiffs, stating,

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<sup>3</sup> Krechmer concedes that the John Doe defendants were not served with process and asserts that the complaint should be dismissed as against those entities, without prejudice.

among other things, that the Church owes the original amount of the lien, \$42,381.03, plus interest, surcharges, penalties, attorneys' fees, and disbursements. Doc. 19.

### LEGAL CONCLUSIONS:

Although plaintiffs appear to be moving for a default judgment against the Church, DOF, DTF, and ECB, as evidenced by Krechmer's representation that none of the defendants served has answered or otherwise appeared in this matter, no such relief is sought in the notice of motion or the wherefore clause of his affirmation. Thus, this relief cannot be granted. See CPLR 2214 (a); *Arriaga v Michael Laub Co.*, 233 AD2d 244 (1<sup>st</sup> Dept 1996). Since no default, or judgment of any kind has been, or is being, entered against defendants, that branch of plaintiffs' motion seeking the appointment of a Referee to calculate their alleged damages is premature.

Further, service was not properly effectuated on the Church. Plaintiffs initially attempted to serve the Church pursuant to CPLR 308 (4). That section provides that, if service of process cannot be made with due diligence by personal delivery pursuant to CPLR 308(1) or by substituted service pursuant to CPLR 308(2), service can be effected, inter alia, "by affixing the summons to the door of ... the actual ... dwelling place or usual place of abode within the state of the person to be served and by ... mailing the summons to such person at his or her last known residence." This method of service was improper since the Church, a corporation, had to be served pursuant to CPLR 311 or Business Corporation Law 306. Even assuming that the Church could have been served pursuant to CPLR 308 (4), plaintiffs did not demonstrate that reasonable diligence was exercised in serving it since all of the attempts to serve it were on weekdays and none was during business hours. See *Spath v Zack*, 36 AD3d 410, 412-413 (1st Dept 2007).

Plaintiffs concede that personal service was not made on the Church until after the expiration of the 120-day period set forth “in CPLR § 306 due to difficulties encountered by the process server in locating [the Church] outside of the City of New York.” Doc. 13, at par. 3. However, the rule that service of process must be effectuated within 120 days after the filing of the summons and complaint is set forth in CPLR 306-b, not CPLR 306. CPLR 306-b provides, in pertinent part, that:

If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.

Here, plaintiffs have failed to set forth any good cause why the Church was not served within the 120-day period. Although they maintain that their process server had difficulty locating the Church since it was located outside of New York City, they submit no affidavit from that individual attesting to the specific reasons why he encountered such difficulties.

However, in the interest of justice, this Court deems the personal service of the Church on October 28, 2017 to be timely *nunc pro tunc*. In *Leader v Maroney, Ponzini & Spencer* (97 NY2d 95, 105-106 [2001]), the Court of Appeals stated:

The interest of justice standard [of CPLR 306-b] requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant.

As noted previously, this Court finds that plaintiffs did not exercise reasonably diligent efforts at serving the Church. However, plaintiffs have established, through the documents annexed to their motion, as well as Shadle's affidavit, that there is merit to their claim.<sup>4</sup> Additionally, the 120-day period in which to serve the Church expired on October 9, 2017 and the Church was personally served on October 28, 2017, only 19 days late. Further, the instant motion seeking to have this Court accept the late personal service on the Church was filed on December 6, 2017, a little over one month after the late personal service was effectuated. Moreover, since the instant motion is unopposed, no party has demonstrated how it would be prejudiced if this Court deemed plaintiff's service of the Church on October 28, 2017 timely *nunc pro tunc*. Upon considering the foregoing factors, this Court deems service of the Church on October 28, 2017 to be timely *nunc pro tunc*.

That branch of plaintiffs' motion seeking to amend the caption to delete the John Doe defendants is denied with leave to renew upon proper papers, since plaintiffs failed to annex a proposed amended pleading to their motion. CPLR 3025 (b) requires that a motion to amend be accompanied by a proposed pleading clearly showing the changes to be made thereto.

Finally, this Court expresses its dissatisfaction with the failure by plaintiffs' counsel to label each of the exhibits filed with NYSCEF in this matter and plaintiffs' counsel is directed to label such e-filed documents in the event this application is renewed.

Therefore, in light of the foregoing, it is hereby:

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<sup>4</sup> Although one moving for a default judgment must demonstrate the facts constituting the claim (see CPLR 3215[a]), this Court reiterates that plaintiffs failed to move for such relief.

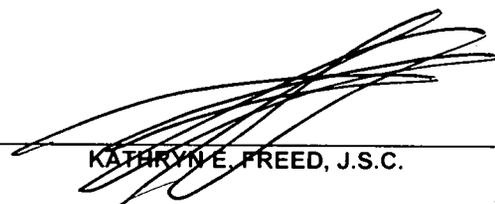
ORDERED that the branch of plaintiffs' motion pursuant to RPAPL § 1321, seeking to appoint a Referee and directing the Referee to ascertain and compute the amounts due plaintiffs upon the tax lien being foreclosed in this action, and to examine and report whether the liened property can be sold in one or more parcels, is denied, with leave to renew upon proper papers; and it is further

ORDERED that the branch of plaintiffs' motion seeking an order deeming service upon defendant The Russian Orthodox Greek-Catholic Church in the Name of the Holy Fathers of the Seven Ecumenical Councils, Inc. timely, *nunc pro tunc*, is granted, in the interest of justice; and it is further

ORDERED that the branch of plaintiffs' motion excising from the caption defendants John Doe No. 1 through John Doe. No. 100 and discontinuing the action as against them, all without prejudice to any of the proceedings heretofore had herein, is denied with leave to renew upon proper papers; and it is further

ORDERED that this constitutes the decision and order of the court.

1/17/2018  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: