

<b>Citimortgage, Inc. v Scott</b>
2015 NY Slip Op 31745(U)
April 24, 2015
Supreme Court, New York County
Docket Number: 106760/2008
Judge: Eileen A. Rakower
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER  
Justice

PART 15

INDEX NO. 106760/108

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 104

CIT MORTGAGE INC  
-v-  
MKONGE SCOTT

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**FILED**  
APR 28 2015  
NEW YORK  
COUNTY CLERK'S OFFICE

**RECEIVED**  
APR 28 2015  
GENERAL CLERK'S OFFICE  
NYS SUPREME COURT - CIVIL

Dated: 4/24/15  
**APR 24 2015**

HON. EILEEN A. RAKOWER

J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☒ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
CITIMORTGAGE, INC.,

Plaintiffs,

Index No.  
106760/2008

**DECISION and  
ORDER**

- against -

NKENGE SCOTT; MS. SCOTT; ELIZABETH  
NGENE; JEFFERSON BROUGHER; TERESA  
BRANCH; AHMEDUR RAHMAN,

Defendants.

Mot. Seq. #004

**FILED**

APR 28 2015

**NEW YORK  
COUNTY CLERKS OFFICE**

-----  
HON. EILEEN A. RAKOWER, J.S.C.

This foreclosure action is based on a note (the "Note") and mortgage (the "Mortgage") encumbering the premises located at 69 West 119th Street, New York, New York (the "Premises"). Plaintiff, Citimortgage, Inc. ("Plaintiff" or "Citimortgage"), claims that defendant, Nkenge Scott ("Defendant" or "Scott"), executed the Note and Mortgage on or about January 12, 2007, and that Defendant failed to comply with the terms and conditions of the Note and Mortgage by failing to make monthly payments due thereon from January 1, 2008, and for each and every month due thereafter.

Plaintiff commenced this action on May 15, 2008. An order of reference was granted on September 30, 2008. A judgment of Foreclosure and Sale was granted on July 6, 2009, and filed of record on July 7, 2009. Plaintiff's Judgment of Foreclosure and Sale was served upon Defendant with Notice of Entry on April 18, 2014, which Notice of Entry was filed of record on May 1, 2014.

On June 20, 2014, Defendant moved to vacate the Judgment of Foreclosure and Sale. Plaintiff opposed. On August 14, 2014, Defendant's motion to vacate the Judgment of Foreclosure and Sale was marked withdrawn.

Defendant now moves, by Order to Show Cause, for an Order, pursuant to CPLR § 5015, vacating the Default Judgment upon the grounds of lack of jurisdiction and dismissing Plaintiff's complaint.

In support, Defendant submits: the attorney affirmation of Jaime Lathrop, Esq.; the affidavit of Scott; a power of attorney for Scott's grandmother; Notarized letter regarding grandmother sent by the Defendant from 509 West 150th Street; power of attorney, authorization, and utility bills indicating arrangement with landlord at 509 West 150th Street; physician letters; photographs of Defendant; Summons and Complaint; Affidavit of Service; Order of Reference; Judgment of Foreclosure and Sale; Notice of Appearance; and, Order granting Defendant leave to withdraw prior motion.

Plaintiff opposes. In support, Plaintiff submits: copies of the affidavit of Plaintiff's process server, Harry Torres ("Torres"), attesting to personal service of plaintiff's summons and complaint; Order of Reference; affidavit of additional service pursuant to CPLR § 3215(g)(3); Judgment of Foreclosure and Sale with Notice of Entry; Plaintiff's affidavit of service of papers in opposition to Defendant's prior motion to dismiss; Notice of Appearance; Order granting withdrawal of Defendant's prior motion; Notice of Sale.

CPLR § 5015 provides that, "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just . . . upon the ground of . . . lack of jurisdiction to render the judgment or order". (CPLR § 5015[a][4]). A motion predicated upon lack of jurisdiction need not assert a meritorious defense; a default judgment entered without obtaining either jurisdiction over the person of the defendant or a waiver of the issue of personal jurisdiction is ineffective. (*Boorman v. Deutsch*, 152 A.D.2d 48, 51 [1st Dep't 1989]). Absent proper service of the summons and complaint, or waiver of the same, the court fails to acquire personal jurisdiction over the defendant. (*Prudence v. Wright*, 94 A.D.3d 1073, 1074 [2d Dep't 2012]; *Adames v. New York City Transit Authority*, 510 N.Y.S.2d 610, 611 [1st Dep't 1987]).

A process server's sworn affidavit of service ordinarily constitutes prima facie evidence of proper service. (*NYCTL 1998-1 Trust v. Rabinowitz*, 7 A.D.3d 459, 460 [1st Dep't 2004]). A defendant's "mere denial" of service is insufficient, without more, to rebut the presumption of proper service. By contrast, a defendant's "sworn non-conclusory denial" of service is sufficient to dispute the veracity or content of a process server's affidavit. (*NYCTL 1998-1 Trust v. Rabinowitz*, 7 A.D.3d 459, 460 [1st Dep't 2004]; *Hinds v. 2461 Realty Corp.*, 169 AD2d 629 [1st Dep't 1991]).

Where the affidavit of service is rebutted, the plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing. (*Skyline Agency v. Ambrose Coppotelli*, 117 A.D.2d 135, 139 [2d Dep't 1986]).

Additionally, actual receipt of process does not cure a failure to comply with specific statutory requirements for effective service. (*Boorman*, 152 A.D.2d 48, 51 [1st Dep't 1989]). However, a defendant may, by his or her actions, waive the issue of in personam jurisdiction. (*Boorman*, 152 A.D.2d 48, 51 [1st Dep't 1989]). Pursuant to CPLR § 320, “[t]he defendant appears by serving an answer or a notice of appearance, or by making a motion which has the effect of extending the time to answer.” (CPLR § 320[a]). CPLR § further provides:

When appearance confers personal jurisdiction, generally. Subject to the provisions of subdivision (c), an appearance of the defendant is equivalent to personal service of the summons upon him, unless an objection to jurisdiction under paragraph eight of subdivision (a) of rule 3211 is asserted by motion or in the answer as provided in rule 3211.

(CPLR § 320[b]).

Defendant argues that Defendant was not properly served with Plaintiff's summons and complaint, and that Plaintiff therefore failed to establish personal jurisdiction over Defendant in this action. In the affidavit of Scott, Scott denies receiving service of process. (Scott Aff. ¶ 2). In addition, Scott avers that she does not match the physical description of the individual served with process according to Plaintiff's affidavit of service. (Scott Aff. ¶ 2). Scott avers that this affidavit describes Scott as approximately 50 years old, five feet, five inches tall, and weighing approximately 200 pounds, when, at the time of the alleged service, Scott was in fact 34 years old, five feet, nine inches tall, and approximately 120 pounds. (Scott Aff. ¶¶ 11-12).

Scott further avers that the Premises was not her dwelling place or usual place of abode at the time of the alleged service, in May 2008. Scott avers that she lived at 509 West 150th Street from approximately 2005 to 2010. (Scott Aff. ¶ 2). With respect to the Premises, Scott avers: “[i]nitially, I moved to 509 West 150th Street in order to live somewhere else while major emergency repairs were being done to my property at 69 West 119th Street.” (Scott Aff. ¶ 4). Scott further avers: “My house at 69 West 119th Street was empty in 2008. In 2005, the tenants who had

been living in 69 West 119th Street left as per a Housing Court stipulation of settlement that mandated all tenants vacate the premises.” (Scott Aff. ¶ 9).

Plaintiff, in turn, argues that Defendant was properly served with process by delivery to a person of suitable age and discretion at Defendant’s dwelling place or place of usual abode and subsequent mailing, pursuant to CPLR § 308(2). In the affidavit of Torres, Torres attests to personal service of Plaintiff’s summons and complaint by delivery to “MS. SCOTT FEMALE RELATIVE” on May 22, 2008 at 6:03 p.m. (Torres Aff. ¶ 4). The Torres Affidavit further states: “That person was also asked by deponent whether said premises was the defendant’s dwelling house and the reply was affirmative.” (*Id.*). The Torres Affidavit states that additional notice was mailed in an envelope marked personal and confidential on May 27, 2008. (Torres Aff. ¶ 6).

Plaintiff also argues that Defendant has waived the issue of personal jurisdiction by filing a Notice of Appearance in this action. Plaintiff argues that Defendant filed a Notice of Appearance in connection with Defendant’s previous motion to dismiss, and that this Notice of Appearance confers personal jurisdiction over Defendant pursuant to CPLR § 320(b). Plaintiff argues that Defendant’s appearance is “equivalent to personal service of the summons” on the Defendant because Defendant, having withdrawn her initial motion to dismiss, does not assert a proper “objection to jurisdiction paragraph eight of subdivision (a) of rule 3211 . . . by motion or in the answer as provided in rule 3211”. (CPLR § 320[b]).

Here, Defendant’s statement that she did not reside at the Premises during the relevant time period is sufficient to dispute the veracity or content of Plaintiff’s affidavit of service. As far as Defendant’s Notice of Appearance<sup>1</sup> is concerned, under the circumstances of this case, the defense of lack of in personam jurisdiction “must at this present juncture be allowed to stand.” (*see Powsner v. Mills*, 56 Misc. 2d 411, 411-12 [Sup. Ct. 1968] [allowing defense of lack of in personam jurisdiction to stand where defendant raised jurisdictional defense in motion, withdrew motion, then pled jurisdictional defense affirmatively instead; observing that, “[n]othing in CPLR 3211(e), which sets forth in specific detail all of the instances in which defenses are waived, mandates a waiver of the defense of lack of in personam jurisdiction in the circumstances presented.”]). That Defendant “chose in the first instance to proceed by way of motion which was thereafter withdrawn does not constitute a waiver of the defense” of lack of personal jurisdiction. (*Id.*).

---

<sup>1</sup> Defendant filed the Notice of Appearance, dated August 13, 2014, after Plaintiff’s Judgment of Foreclosure and Sale was granted.

Accordingly, Plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing.

Wherefore it is hereby,

ORDERED that the matter is referred to a Special Referee to hold a traverse hearing and to hear and report with recommendations; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Reference Part (Room 119A) to arrange for a date for the reference to a Special Referee and the Clerk shall notify all parties of the date of the hearing.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: April 24, 2015



Eileen A. Rakower, J.S.C.

