SCAN

SHORT FORM ORDER

SUPREME COURT – STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

WELLS FARGO BANK, NA,

Plaintiff,

INDEX NO.:019583/07

-against-

MOTION SEQ NO.: 001
RETURN DATE: 2/3/09

AINSLEY W. DALRYMPLE, ALEX SMITH; TISHURA SMITH,

TRAVERSE HEARING held on 9/2-3/09

Defendants.

The following papers read on this motion (1-2):

Order to Show Cause.....1
Written Summation by Plaintiff..... 2
Written Summation by Defendant..... 3

Pursuant to **CPLR §5015 (a) 4**, the defendant DALRYMPLE filed an Order to Show Cause on January 23, 2009 to vacate the default judgment in the prior foreclosure proceeding. DALRYMPLE asserted that the "nail and mail" service under **CPLR 308 (4)** was improper and the Court lacked personal jurisdiction. The Court ordered a traverse hearing before making its final determination on the Order to Show Cause. The traverse hearing was held on September 2 and 3, 2009 and this Court determines that the **service was not proper** and the Court lacked personal jurisdiction to render a binding judgment against the defendant DALRYMPLE for the reasons set forth herein.

CPLR §308(4) provides that, where service cannot be made pursuant to **CPLR §308 (1) or (2)** "with due diligence," the summons and complaint may be affixed to the door of either "the actual place of business, dwelling place or usual place of abode" of the defendant, followed by a subsequent mailing either to the defendant's last known residence or actual place of business. To determine the validity of this "nail and mail" service, the Court must consider two issues; (1)

whether the prior attempts for personal service under **CPLR §308 (1) or (2)** were made with due diligence and (2) whether the statutory requirements of **CPLR §308(4)** were fully satisfied.

The due diligence requirement must be strictly observed, given the reduced likelihood that the "nail and mail" service will actually be received. *See* **McSorley v. Spear**, 50 AD3d 652; **Gurevitch v. Goodman**, 269 AD2d 355; **County of Nassau v. Letosky**, 34 AD3d 414. Nonetheless, there is no rigid rule to determine whether the due diligence requirement has been satisfied or not. *See* **Sartor v. Utica Taxi Center, Inc.**, 260 F.Supp.2d 670, quoting **Barnes v. City of New York**, 51 NY2d 906. What constitutes due diligence is determined by the totality of the circumstances on a case by case basis, focusing not on the quantity of the attempts at personal delivery, but on their quality. *See* **McSorley v. Spear**, *supra*; **Estate of Waterman v. Jones**, 46 AD3d 63; **Barnes v. City of New York**, *supra*. The due diligence inquiry is guided by several pertinent considerations; whether the process server (1) attempted service during various days and times – before and after working hours, weekdays and weekends or holidays – when the defendant may be reasonably expected to be found at home, ... (2) had an opportunity to serve a person of suitable age and discretion pursuant to **CPLR §308 (2)** and failed to do so, ... (3) made adequate inquiry, upon receiving no response to reasonable efforts to gain access to defendant's residence, as to defendant's whereabouts, habits or schedule of times at home, or place of business, ... (4) made an effort to serve at defendant's workplace where the location of employment was readily apparent. *See* **Sartor v. Utica Taxi Center, Inc.**, *supra*; **Hanover New England v. MacDougall**, 202 AD2d 724. The fourth consideration has been afforded particular weight in the Second Department which held that three attempts to effect personal service at the defendant's residence were not sufficient where there was no showing that the process server attempted to ascertain the defendant's place of business or to serve the papers there. *See* **Gurevitch v. Goodman**, *supra*; **Pizzolo v. Monaco**, 186 AD2d 727; **Moran v. Harting**, 212 AD2d 517; **Fattarusso v. Levco Am. Improvement Corp.**. 144 AD2d 626; **Steltzer v. Eason**, 131 AD2d 833; **McNeely v. Harrison**, 208 AD2d 909; **Scott v. Knoblock**, 204 AD2d 299.

In this case, the subject property for the foreclosure action was located at 96 Meadowbrook Road, Hempstead, NY, 11550 ("96 Meadowbrook Road"). During the traverse hearing, the process server testified that, before attempting the service, he inquired about the defendant DALRYMPLE's address to US Post Office ("Post Office") and NYS Department of Motor Vehicle ("DMV") and received the reports confirming DALRYMPLE's address on the record to be 184 Beverly Road, Hempstead, NY, 11550-5247 ("184 Beverly Road"). On November 6, 2007, the process server served the defendant Alex Smith personally under **CPLR §308 (1)** and another defendant Tishura Smith by leave and mail under **CPLR §308 (2)** at 96 Meadowbrook Road. The process server also testified that he asked Alex Smith whether DALRYMPLE lived at that premise and that Alex smith replied "no."

Regarding the service on DALRYMPLE, the process server testified that he attempted the personal service at 184 Beverly Road, five times on different days of the week and different times of the day: Friday, 11/2/07 at 7:30 a.m.; Monday, 11/5/07 at 12:30 p.m.; Thursday, 11/8/07 at 6:15 p.m.; Saturday, 11/10/07 at 4:30 p.m.; and Tuesday, 11/13/07 at 7:50 p.m., the last being the date and time that the papers were affixed to the door. The process server also testified that,

before serving by nail and mail, he asked to an unidentified neighbor whether DALRYMPLE lived at 184 Beverly Road and that the answer was "yes."

During the traverse hearing, DALRYMPLE admitted that he was the owner of the premise at 184 Beverly Road when the service was made and that he still owns the premise. He also admitted that his address on the record of DMV and Post Office is still 184 Beverly Road. However, DALRYMPLE testified that he moved out of 184 Beverly Road and moved in to 96 Meadowbrook Road in August of 2006 after he purchased the premise at 96 Meadowbrook Road. DALRYMPLE asserted that, since August of 2006, he has been living at 96 Meadowbrook Road. Furthermore, DALRYMPLE testified that he notified WELLS FARGO many times that he was living at 96 Meadowbrook Road whenever WELLS FARGO contacted him since his first default in the mortgage payment in July 2006.

In terms of quantity, the five times of attempt to make personal service on DALRYMPLE at 184 Beverly Road seem to be sufficient to satisfy the due diligence requirement. The inquiry to Alex Smith whether DALRYMPLE lived at 96 Meadowbrook Road and the inquiry to the unidentified neighbor whether DALRYMPLE lived at 184 Beverly Road may sound to be a reasonable effort to find out the residence of DALRYMPLE. However, the Court finds that there was no genuine effort by the process server to obtain DALRYMPLE's whereabouts by inquiring about his habits, schedule of times at home or place of business. *See* **McSorley v. Spear**, *supra*; **Estate of Waterman v. Jones**, 46 AD3d 63; **Sanders v. Elie**, 29 AD3d 773; **Kurlander v. A Big Stam, Corp.**, 267 AD2d 209; **Owens v. Schief**, 2010 NY Slip Op 51125U. There was no testimony whether the process server ever tried to check the mortgage document which must have included detailed personal information of DALRYMPLE. There was no evidence showing sincere communication between the plaintiff and the process server to find out the actual dwelling place of DALRYMPLE who testified that he made numerous notifications to the plaintiff about his residence since his default in the mortgage payment. The process server did not testify about any effort to find out DALRYMPLE's place of employment and to serve him there. The inquiry by the process server to Alex Smith at 96 Meadowbrook Road or to an unidentified neighbor of 184 Beverly Road is no more than a check of DALRYMPLE's residence. The record in the DMV or Post Office should be the beginning of the search for the whereabout of defendant but not the final answer to the inquiry of the address for the purpose of the nail and mail service. The Court determines that the due diligence requirement to serve under **CPLR §308 (1) or (2)** is not satisfied.

The nail and mail service can be made by affixing the summons and complaint to the door of either "the actual place of business, dwelling place or usual place of abode" of the defendant. *See* **CPLR §308(4)**. The process server testified that he affixed the summons and complaint at the premise of 184 Beverly Road and mailed the same to the last known address of DALRYMPLE. However, DALRYMPLE testified that he did not live there but lived at 96 Meadowbrook Road at the time of service. Plaintiff did not offer any evidence or testimony showing that DALRYMPLE actually lived at 184 Beverly Road at the time of service. The alleged statement by an unidentified neighbor of 184 Beverly Road is hearsay and lacks credibility without any information for identification. The reports from DMV or Post Office can be useful as the last known residence but not as the address of actual place of business, dwelling

place or usual place of abode. The Court determines that the purported nail and mail service on DALRYMPLE did not satisfy the statutory requirement under **CPLR §308(4)**.

In the written summation, the plaintiff's counsel raised two issues. The first is whether DALRYMPLE waived personal jurisdiction defense when the defense counsel sent a letter to the plaintiff counsel regarding the Lis Pendens on the subject premise. Plaintiff's counsel argued that the letter was an appearance and that the defendant waived the jurisdictional defense by failing to raise the defense affirmatively in the letter. Under CPLR, the appearance can be either (1) serving an answer or a notice of appearance or (2) making a motion which has the effect of extending the time to answer. **CPLR §320 (a)**. The letter was not a motion but an expression of request or inquiry to the opposing counsel. The Court determines that the letter cannot be an appearance under CPLR and that there was no waiver of the jurisdictional defense.

The second issue is whether DALRYMPLE is estopped from denying the address on the records of DMV and Post Office as his actual place of dwelling when he didn't change the records at the time of service and still is keeping the same as his address on the records. The defendant can be estopped from denying the address on the public record as his actual dwelling for the purpose of service when there was fraud to avoid the service of process. *See* **Colagrosso v. Dean**, 99 AD2d 669. The defendant can also be estopped from denying the address after affirmatively representing it to be a proper one for the purpose of correspondence or the activities related to the cause of action and thereby inducing reliance on his representation. *See* **Sartor v. Utica Taxi Ctr., Inc.**, *supra*; **Gibson, Dunn & Crutcher LLP v. Global Nuclear Servs. & Supply, Ltd.**, 280 AD2d 360; **Velez v. Vassallo**, 203 FSupp2d 312. In this case, during the traverse hearing, there was neither an argument nor any evidence offered to show a fraud by the defendant DALRYMPLE. DALRYMPLE did not testify that he represented 184 Beverly Road as his address to the plaintiff. In fact, DALRYMPLE testified that he notified 96 Meadowbrook Road as his address to the plaintiff many times. The Court determines that estoppel is not applicable in these circumstances.

Accordingly, it is

ORDERED, that DALRYMPLE'S motion to vacate the default judgment is **granted.**

This constitutes the Order of the Court.

Dated: Dec 22, 2010

J.S.C.

ENTERED
FEB 01 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE