

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXVII SUFFOLK COUNTY

PRESENT:

Honorable Ralph F. Costello

COUNTRYWIDE HOME LOANS, INC., x

Plaintiff,

-against-

DAVID BURLIUK; ANNE MARIE BURLIUK;
MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS, INC. AS NOMINEE AND
MORTGAGEE OF RECORD; COUNTRYWIDE
HOME LOANS, INC.; "JOHN DOES" and "JANE
DOES," said names being fictitious, parties
intended being possible tenants or occupants of
premises, and corporations, other entities or persons
who claim, or may claim, a lien against the
premises,

Defendants.

PLAINTIFF'S ATTORNEY
ROSICKI ROSICKI & ASSOC.
51 E. Bethpage Road
Plainview, NY 11803

DEFENDANT'S ATTORNEY

Upon reading and filing the following papers relative to this matter: Plaintiff's ex parte application for an Order Appointing Referee to Compute and the exhibits attached thereto submitted to this Part on January 22, 2008; and now it is

ORDERED that the plaintiff's ex parte application for an Order Appointing Referee to Compute is denied without prejudice to resubmit upon proper papers as discussed below; it is further

ORDERED that the case is dismissed against defendants David Burliuk and Anne Marie Burliuk, with leave to reserve these defendants within 120 days of the date of this decision and order; and, it is further

ORDERED that the plaintiff is directed to serve a copy of this decision and order upon all parties.

The plaintiff moves for the appointment of a Referee in this foreclosure action based upon the default by the defendants in answering the summons and complaint. In an application for a default judgment the applicant must file proof of service of the summons and complaint, and proof by affidavit made by the party of the facts constituting the claim, the default and the amount due (see CPLR § 3215[f]). Such proof of service is necessary to establish personal jurisdiction over the defendants. Here, the plaintiff has failed to obtain personal jurisdiction over defendants David Burliuk and Anne Marie Burliuk.

It is well settled that service pursuant to CPLR § 308(4) may only be used in those instances where service under CPLR § 308(1) and (2) cannot be made with due diligence (see CPLR § 308[1] & [2]). The due diligence requirement of CPLR § 308(4) must be strictly observed, given the reduced likelihood that a summons served pursuant to that section will be received (see Moran v. Harting, 212 A.D.2d 517 [2d Dept. 1995]; Walker v. Manning, 209 A.D.2d 691 [2d Dept. 1994]). The plaintiff failed to establish that the “due diligence” requirement of CPLR § 308(4) was met. The affidavit of the plaintiff’s process server showed that he made four attempts to personally serve the defendants at their home, and affixed a copy the documents on the door on the fourth try pursuant to CPLR § 308(4).¹ The process server made three of the four attempts to serve the defendants on weekdays during normal business hours or when it could reasonably have been expected that they were in transit to or from work (see Gurevitch v. Goodman, 269 A.D.2d 355, 356 [2d Dept. 2000]; Walker v. Manning, 209 A.D.2d 691).² Moreover, the plaintiff made no attempt to determine the defendants’ business addresses and to effectuate personal service at those locations pursuant to CPLR 308(1) and (2) (see Gurevitch v. Goodman, 269 AD2d at 356; Moran v. Harting, 212 A.D.2d at 518). Accordingly, under these circumstances, the attempted service of the summons and complaint pursuant to CPLR 308(4) was defective as a matter of law and the case is dismissed against defendants David Burliuk and Anne Marie Burliuk (see Earle v. Valente, 302 A.D.2d 353[2 Dept. 2003]; Gurevitch v. Goodman, 269 A.D.2d at 356; Moran v. Harting, 212 A.D.2d at 518; Walker v. Manning, 209 A.D.2d at 692).

In addition, the application for judgment against these two defendants, as well as the other defendants, is denied based upon the plaintiff’s failure to provide: (1) proof that the additional notice requirement of RPAPL § 1303 was complied with as there is no proof that the notice was served on a colored paper other than the color of the summons and complaint; (2) proof of the assignment by the lender Midfirst Bank to MERS who assigned the note and mortgage to the plaintiff; and, (3) proof that the plaintiff was the owner of the mortgage and holder of the note on the date that the action was commenced (see Katz v. East-Ville Realty Co., 249 AD2d 243 [1st Dept. 1988]; Kluge v. Fugazy, 145 AD2d 537 [2d Dept. 1988]). The

¹The attempts were made on Tuesday, July 3, 2007 at 6:11 pm; Wednesday, July 4, 2007 at 8:23 am; Thursday, July 5, 2007 at 3:48 pm; and, Friday, July 6, 2007 at 8:13am.

²Arguably, service on July 4, 2007 could have been adequate as it was a major holiday and as a result, many places of employment are closed.

submission of an assignment with an amorphous effective date “on or before” the commencement of the case that was actually signed after the date of commencement, without any additional admissible evidence of the actual transfer date of the instruments to the plaintiff, is insufficient to properly establish this plaintiff’s standing to bring suit. Accordingly, this application is denied without prejudice to resubmit upon proper papers.³

The Court notes that the action was timely commenced. Therefore, despite the dismissal of the complaint insofar as asserted against the two individual defendants on the ground of lack of personal jurisdiction, the plaintiff should be permitted, if it be so advised, to re-serve these defendants within 120 days of the date of this decision and order (see CPLR § 306-b).

The above constitutes the decision and order of the Court.

Dated: March 13, 2008

HON. RALPH F. COSTELLO

J.S.C.

³ The Court notes that any future application must comply with the additional notice requirements of CPLR §3215(g).