

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: Thomas A. Adams
Supreme Court Justice

U.S. BANK NATIONAL ASSOCIATION, AS
TRUSTEE ON BEHALF OF THE SARM 2006-10
TRUST FUND,

Plaintiff,

-against-

JOHN FARRAR, MELINDA STOSKI, et al.,

Defendants.

FORECLOSURE PART
NASSAU COUNTY

Index No.: 06127/10
Motion Date: 09/28/11
Motion Seq.: 01

The following paper read on these motions:

Notice of Motion, Affidavit, Affirmation and Exhibits.....	1
Affirmation in Opposition and Exhibits.....	2
Reply Affirmation.....	3

Upon the foregoing papers the motion by defendant, Melinda Stoski, to dismiss this action for lack of jurisdiction due to improper service or lack thereof, cannot be determined without a traverse hearing.

Plaintiff's opposition that the movant has waived her personal jurisdiction defense and that the motion is untimely as it was not made within sixty (60) days of her raising that defense is without merit.

As movant correctly points out the motion to dismiss was timely made on the sixty-second (62) day after the defense was raised, by operation of law, as the sixtieth (60th) day, July 4, 2010 was a Sunday and the sixty-first day (61st), Monday July 5, 2010, was a legal holiday.

Pursuant to the plaintiff's affidavit of service, the movant was purportedly served pursuant to CPLR § 308(2), substituted service by service on a person named "John" Stoski a purported relative of the movant's at her residence on April 13, 2010.

"A process server's affidavit of service constitutes prima facie proof of service

(see, Kaywood v. Cigpak, Inc. 258 AD2d 623; Manhattan Sav. Bank v. Kohen 231 AD2d 499). However, where there is a sworn denial of service by the party allegedly served, the affidavit of service is rebutted and jurisdiction must be established by a preponderance of evidence at a hearing (see, Matter of Griffin v. Griffin, 215 AD2d 386; D.H. Grosvenor, Inc. v. Fur Galleria, 202 AD 2d 548; Lexington Ins. Co. v. Schuyler Bumpers, 125 AD2d 554).” Rox Riv 83 Partners, Etc v. Ettinger, 276 AD2d 782.

Based upon the movant’s sworn denial of knowing a person named “John” Stoski and her assertion that no male, let alone one fitting the description of the person contained in the process server’s affidavit, resided or was present at her residence at the time of the alleged service, she has sufficiently raised an issue regarding service upon her.

Accordingly, subject to the approval of the Justice presiding in the Calendar Control Part (“CCP”), the Clerk of CCP shall place this matter on the CCP Trial Calendar of Nassau County Supreme Court, on the 10th day of January 2012, provided defendant files a Note of Issue at least 20 days prior thereto.

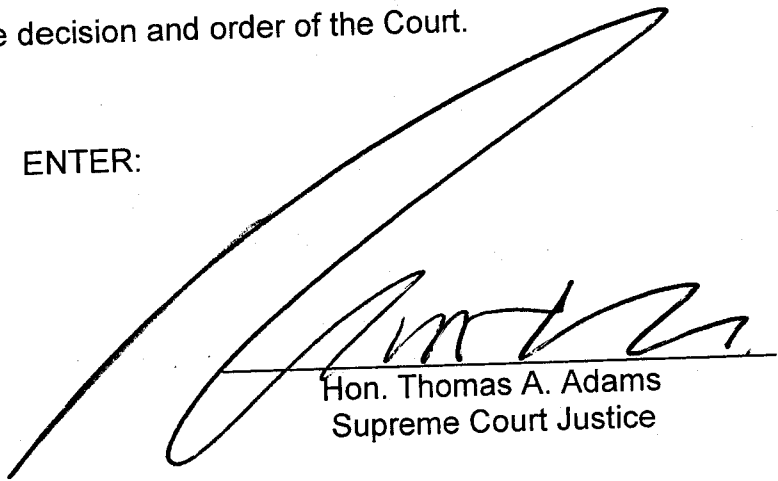
A copy of this Order shall accompany the Note of Issue when filed and be filed on the Clerk of CCP within five (5) days after entry.

The Justice presiding in CCP may refer this matter to a Justice, Special Referee or Judicial Hearing Officer he or she may determine to hear and determine the issues in the Traverse Hearing.

This constitutes the decision and order of the Court.

ENTER:

Dated: **NOV 14 2011**



Hon. Thomas A. Adams
Supreme Court Justice

ENTERED
NOV 18 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE