

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. PETER B. SKELOS,
Justice.

TRIAL/IAS PART 26
NASSAU COUNTY

CUC MORTGAGE CORPORATION,
Plaintiff,

-against-

MOTION # 01
INDEX #7674/98
MOTION SUBMITTED:
JUNE 5, 2001

JOHN J. LABECK, KATHRYN A. LABECK,
PHILIP S. STEINFELD, M.D.,
Defendants.

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....1
Cross Motions/Answering Affidavits.....2
Reply Affidavits.....3

Motion by defendant John Labeck for an order vacating the judgment of foreclosure and sale herein dated November 10, 1998 and entered November 25, 1998, and/or allowing him to serve an answer, is denied.

This is the second mortgage foreclosure action by this plaintiff against the Labecks. The first action was commenced in 1994 under index #26562/94. A judgment of foreclosure and sale in the first action was vacated by order dated February 24, 1998, after a traverse established lack of proper service on the Labecks.

This second action was commenced in March 1998 under index #7674/98. The judgment of foreclosure and sale in this action is dated October 10, 1998 and entered October

25, 1998. A foreclosure sale scheduled for March 5, 1999 was aborted when defendant Katherine Labeck filed a petition in bankruptcy under case #81748/99 and obtained the benefit of an automatic stay. (For the record, two earlier petitions in bankruptcy, one by the Labecks jointly under case #81590/96 and one by John Labeck under case #80066/97, had stalled the first action for years.) After the third bankruptcy petition was dismissed in August 2000, a second foreclosure sale was scheduled for October 5, 2000. John Labeck filed a fourth petition in bankruptcy under case #86518/00, which was ultimately dismissed.

On this motion, John Labeck seeks to vacate his default in answering and/or vacate the judgment of foreclosure and sale herein on the grounds of various alleged irregularities. On the issue of personal jurisdiction, Mr. Labeck states in his moving affidavit nothing more than that he was never properly served with the original summons and complaint herein. Such a bare and conclusory allegation is insufficient to create an issue of fact (*see, Remington Investments, Inc. v Seiden*, 240 AD2d 647).

Improperly set forth for the first time in his reply papers (*Azzopardi v American Blower Corporation*, 192 AD2d 453), Mr. Labeck complains that the requisite mailing pursuant to CPLR 308(2) violated statutory requirements because the envelope did not bear the legend “personal and confidential” and did bear the return address of Interboro Attorney Service. However, because the mailing address was Mr. Labeck’s last known residence, Mr. Labeck’s complaints are unfounded (CPLR 308(2); *Ridgeway v St. John’s Queens Hospital*, 199 AD2d 490). The process server’s affidavit of service constitutes *prima facie* evidence of proper

service, and Mr. Labeck's conclusory denial of receipt is insufficient to warrant a hearing on the issue of service (*Manhattan Savings Bank v Kohen*, 231 AD2d 499, lv app den 91 NY2d 802; *Dolec Consultants, Inc. v Lancer Litho Packaging Corp.*, 245 AD2d 415; *Sando Realty Corp. v Aris*, 209 AD2d 682).

Mr. Labeck's challenge to the filing of the affidavit of service likewise fails as the official stamp of the Nassau County Clerk's Office is plainly visible on the affidavit of service and indicates receipt within the time frame mandated by CPLR 308(2) by the appropriate official (County Law §525[1]).

Plaintiff's failure to serve defendants with a copy of the amended complaint pursuant to CPLR 3012(a) does not warrant vacatur of defendants' default. The amended complaint simply adds a judgment creditor as a party defendant and does not assert any "new or additional claims for relief" against the judgment debtor (CPLR 3012[a]). Accordingly, the Court finds that service of the amended complaint upon the Labecks was not required (*Brandenberg v Tirino*, 59 Misc2d 630, aff'd 34 AD2d 737, appeal dismissed 29 NY2d 792).

The Notice of Pendency in the County Clerk's file is dated March 12, 1998 and contains the information required by Real Property and Proceedings Law §1331. Furthermore, a notice of pendency is effective for three years (CPLR 6513), and the judgment of foreclosure and sale is dated well within that period. Consequently, no violation of Real Property and Proceedings Law §1331 has been established.

Finally, plaintiff's letter of August 19, 1994 (Exhibit F to the opposition papers)

complies with paragraph 21 of the mortgage. Once again defendant Labeck's conclusory denials of receipt, standing alone, are unavailing, especially in view of the numerous documents in the first action that are now public records, wherein mailing of the letter of August 19, 1994 was specifically alleged and such mailing was verified by Mary Barker, plaintiff's Director of Servicing, and averred by Edward Kovalefsky, plaintiff's chief financial officer (*see generally, Sansone v Cavallero*, ___ AD2d ___, 727 NYS2d 516).

The fact that the judgment of foreclosure and sale in the first action was vacated in no way invalidates the notice of default and acceleration. Dismissal of a prior foreclosure action does not, without more, revoke a lender's election to accelerate (*Federal National Mortgage Association v Mebane*, 208 AD2d 892). Therefore, no further notice of default and acceleration was required.

Defendant argues that the complaint and amended complaint in this action are fatally flawed because they do not contain allegations of compliance with paragraph 21 of the mortgage. The failure to allege compliance with a condition precedent may render a pleading defective and warrant dismissal where the condition was never met (*Westchester Federal Savings and Loan Association v Secor Lake Camp, Inc.*, 37 AD2d 615). However, where, as here, the condition was met and the defect is only technical, dismissal is not warranted, especially since the Labecks never demonstrate that they had the ability to cure the original default. Pursuant to CPLR 2001 and this Court's power to correct non-jurisdictional defects and omissions, this Court hereby deems the amended complaint herein to contain, *nunc pro*

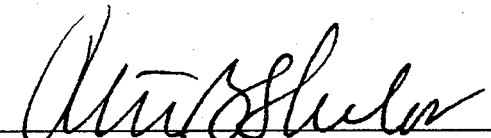
tunc, allegations of compliance with paragraph 21 of the mortgage (*see generally, Copeland v Salomon*, 56 NY2d 222, 226-227).

For the record, in the interest of laying this case to final rest, this Court has individually addressed the numerous arguments of defendant Labeck. Suffice it to say that none of these arguments demonstrate any basis for vacating the judgment of foreclosure and sale, nor do they establish lack of personal jurisdiction, a reasonable excuse for the default or any meritorious defense whatsoever to plaintiff's action herein.

Based on the foregoing, defendant Labeck's motion is denied in its entirety. The temporary stay, enjoining delivery of the deed from the foreclosure sale pending this determination, is hereby vacated.

This constitutes the decision and order of the Court.

Dated: September 25, 2001


PETER B. SKELOS, J.S.C.

ENTERED
SEP 27 2001
NASSAU COUNTY
COUNTY CLERKS OFFICE