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252 MAIN NM, LLC,

Plaintiff,

v.

JOHN R. HEYWANG, LAURA
HEYWANG, and AMERICAN
EXPRESS CENTURION BANK,

Defendants.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: BERGEN COUNTY
DOCKET NO. F-005512-19

OPINION

Decided: February 12, 2020

Glenn R. Reiser, for plaintiff (LoFaro & Reiser, L.L.P., attorneys)

BEDRIN MURRAY, J.T.C. (temporarily assigned)

Before the court is a motion filed by 252 Main NM, LLC (“plaintiff”), seeking an order authorizing substituted service of the summons and complaint on John R. Heywang (“defendant”) by Facebook Messenger, email, and text messaging in lieu of service by publication, and allowing service of all subsequent pleadings in the same manner. Also, plaintiff asks the court to deem defendant served with the summons and complaint on the dates they were purportedly transmitted to defendant by these three modes. This motion is unopposed. For the reasons set forth below, plaintiff’s motion is granted in part and denied in part.

I. Findings of Fact

On March 21, 2019, plaintiff filed a complaint to foreclose a tax sale certificate affecting commercial property commonly known as 252 Main Street, New Milford, New Jersey. The property is jointly owned by defendant and co-defendant Laura Heywang.¹ Ms. Heywang's contesting answer was stricken on December 9, 2019.

Plaintiff's counsel, Glenn R. Reiser, made a number of inquiries to ascertain defendant's residence in order to effect service of process, as outlined with specificity in his affidavit. In brief, an internet search indicated that defendant resided at 328 Ogden Avenue, Teaneck, New Jersey, but service at this address was unsuccessful. The process server reported defendant had moved and left no forwarding information. A skip trace search was ordered, again citing the Teaneck address.

An Open Public Records Act request submitted to the County of Bergen for disclosure of defendant's voter registration records indicated defendant resided at the Teaneck address. An inquiry to the New Jersey Motor Vehicle Commission yielded the same result. It is noteworthy that defendant's Abstract of Driver History Record indicates he paid a restoration fee on June 11, 2019, thereby restoring his New Jersey driving privileges. Nevertheless, plaintiff's counsel at some point discovered the Teaneck property once owned by defendant was sold at a foreclosure sale on June 29, 2018. Defendant was evicted from the premises on or about January 2019.

Plaintiff retained the services of another process server to serve defendant at an alternate address in Cliffside Park, New Jersey. The record does not indicate defendant's connection with this address. In any event, the process server reported defendant did not reside at this address, nor did he own the property.

¹ According to plaintiff, Ms. Heywang is believed to be defendant's estranged spouse.

In addition, plaintiff's counsel sought the assistance of the Division of Veterans Services in Bergen County to determine if defendant, a veteran, was receiving local services. The Division responded defendant was not a client.

Having exhausted traditional modes to locate defendant, plaintiff's counsel resorted to Facebook and discovered an account for a John Heywang. The photographs on the Facebook page depict the same individual as one featured in a recent news article regarding defendant. Further, the page notes he lives in Cancun and is from Teaneck, New Jersey. Undoubtedly, the Facebook account belongs to defendant. His only post, however, is dated February 6, 2016.² On September 10, 2019, plaintiff uploaded the summons and complaint through Facebook's instant messaging system. The message was not rejected but no response followed.

In addition, plaintiff provided his counsel with defendant's cell phone number. A voicemail message at that number asked that a message be left for John R. Heywang. Plaintiff's counsel provided his telephone number, advising defendant that he needed his current address in order to send him a foreclosure complaint. The telephone call was not returned. Plaintiff's counsel also texted a copy of the summons and complaint to defendant's cell phone number, receiving no response. Finally, plaintiff obtained three email addresses for defendant from Spokeo.com, and emailed the summons and complaint to all three. One email was rejected. There was no response to the other two emails.

Plaintiff also offers that the subject property is currently being marketed for rent through a Dumont, New Jersey realtor. Plaintiff's counsel asked the listing broker for a copy of the listing agreement, hoping it would reveal defendant's current address. The broker agreed to provide same

² It is unknown if defendant's Facebook page contains more recent posts. Plaintiff's submission contains only the 2016 post.

but failed to follow through or respond to a subsequent email sent on October 4, 2019. The record is silent as to whether an effort was made to obtain defendant's current address from Ms. Heywang.

Plaintiff now asks the court to deem service of the summons and complaint by Facebook, email, and text messaging effective as of the dates of transmission by these modes, as well as to permit service of all other pleadings in the same manner.

II. Conclusions of Law

R. 4:4-4(a) provides “[t]he primary method of obtaining in personam jurisdiction over a defendant in this State” is by personal service of the summons and complaint as set forth in R. 4:4-3. In the event personal service cannot be made pursuant to R. 4:4-4(a), in personam jurisdiction may be obtained by substituted or constructive service as set forth in R. 4:4-4(b), namely (1) by mail or personal service outside the State; (2) as provided by law; or (3) if service cannot be made by any of the other modes, by court order, consistent with due process of law. R. 4:4-4(c) provides for optional mailed service.

In addition, “in actions affecting specific property, or any interest therein, or any res within the jurisdiction of the court”, where service cannot be made within the State despite diligent inquiry, then other modes of service may be used. R. 4:4-5. The permissible modes are by personal service outside the State, by mail, by publication of a notice once in a newspaper published in the county in which venue is laid,³ or as provided by court order. Id. at subsection (a).

Here, the court is satisfied plaintiff's counsel exercised all reasonable means to determine defendant's whereabouts, thereby satisfying the “diligent inquiry” standard for service by

³ The required content of the notice is set forth in R. 4:4-5(a)(3)(A), (B), (C), and (D). The Rule further requires within seven days of publication, a copy of the notice and complaint must be mailed “to the defendant's residence or the place where the defendant usually receives mail, unless it shall appear by affidavit that such residence or place is unknown, and cannot be ascertained after inquiry as herein provided. . . .” Id. at subsection (a)(3).

publication enunciated in Modan v. Modan, 327 N.J. Super. 44 (App. Div. 2000). Judge Kimmelman, writing for the court, surveyed other jurisdictions to determine the “outer limits of what constitutes due diligence” in deciding whether to allow service by publication. Id. at 48 (citing Carson v. Northstar Development Co., 62 Wn. App. 310, 814 P.2d 217, 221 (1991) (“a plaintiff need not exhaust all conceivable means of personal service before service by publication is authorized. A plaintiff need only follow up on that information possessed by plaintiff which might reasonably assist in determining defendant’s whereabouts.”)); (Abreu v. Gilmer, 115 Nev. 308, 985 P.2d 746, 749 (Nev. 1999) (“due diligence is measured by the qualitative efforts of a specific plaintiff seeking to locate and serve a specific defendant.”))).

Having concluded service by publication is appropriate in this matter, the court turns to the gravamen of plaintiff’s argument--that service by Facebook, email, and text messaging as opposed to publication will ensure defendant receives due notice of the pending action. Plaintiff relies on Modan v. Modan, supra, 327 N.J. Super. 44 in support of its request for service of process by email. There, the plaintiff submitted an affidavit of diligent inquiry in an effort to obtain a court order for service by publication. He failed to note, however, the defendant was living in Pakistan and regularly emailed him. In reversing the trial court’s denial of the defendant’s motion to vacate default, the court held had the plaintiff revealed in his affidavit of diligent inquiry that he knew an email address where the defendant could be reached, “then it would have been apparent that a method was available to plaintiff for reasonably effecting actual notice to [her] in addition to the jurisdictional requirement of service by publication.” (Emphasis supplied). Id. at 49.

In K.A. v. J.L., 450 N.J. Super. 247 (Ch. Div. 2016) the court held service by Facebook without resorting to publication was appropriate where the parents of a minor child sought to enjoin the defendant, a stranger, from communicating with them and their son by Facebook and

Instagram. In short, the defendant persistently posted that the minor child was adopted and he was the biological father. He repeatedly posted the child's photograph on his Facebook page, holding him out as his son, and made friend requests to the plaintiff's family members. Certified mailings to the defendant in Pennsylvania were returned undelivered, while regular mailings were not returned. The court concluded "the nature of the relief sought, an injunction to prohibit contact, makes newspaper publication futile" citing R. 4:4-5(a)(3). Id. at 253. In holding that service by Facebook was consistent with due process, the court noted "the Facebook and Instagram accounts are the sole conduits of the purported harm" (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("[A] fundamental requirement of due process . . . is notice, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.")). Further, the defendant's recent activity on Facebook evidenced the account was active, making it likely the documents would be received.

These cases are distinguishable from the instant matter. Here, the only post on defendant's Facebook page is dated February 6, 2016. Unlike the defendant in K.A. v. J.L., supra, 450 N.J. Super. 247, there is no recent activity to suggest that service by this mode alone would be effective. Although the summons and complaint uploaded through Facebook's Instant Messenger system on September 10, 2019 were not rejected, neither did they elicit a response. Also, in K.A. the alleged harm was inflicted solely through the defendant's active Facebook and Instagram accounts. The court concluded that as injunctive relief was warranted, service by publication would be ineffective as opposed to service by Facebook, which was certain.

Likewise, in Modan v. Modan, supra, 327 N.J. Super. 44, service by email was guaranteed to be effective, as the plaintiff had received a number of emails from the defendant at the time the

complaint was filed. Even so, the court concluded service by email should have been made in addition to service by publication. Id. at 49. There is no such guarantee of service in this case. As with plaintiff's attempts to serve the documents by Facebook Messenger, communication by email and text was a one-way street. Of note is the absence in the record of an email or text from defendant to a third party other than plaintiff that would serve to validate any of these accounts.

In addition, the record suggests defendant visits or resides, or otherwise maintains contacts in the State of New Jersey. He resided in his Teaneck, New Jersey residence as recently as January 2019, at which time he was evicted as a result of an earlier foreclosure action. On June 11, 2019, defendant paid a restoration fee to the New Jersey Motor Vehicle Commission to restore his driving privileges. It follows that a notice placed in a Bergen County newspaper may come to defendant's attention.

In sum, it is almost certain that secondary service of process by social media will, in the near future, be the norm rather than the exception. Yet, it is equally certain due process will require such service to comport with the "reasonably calculated, under all the circumstances, to apprise" standard in Mullane, supra, 339 U.S. at 314. Given the facts in this matter, the court cannot conclude plaintiff's service of the summons and complaint through social media alone satisfies defendant's due process rights. As an aside, the court notes plaintiff did not apply for a court order pursuant to R. 4:4-4(b)(3) allowing service of process by social media before resorting to these modes. Rather, plaintiff asks the court to approve such service retroactively.

Based on the foregoing, plaintiff's request to deem service of process on defendant effective as of September 10, 2019 and September 11, 2019 is denied. Service of process shall be made by publication. As the court is satisfied that defendant's residence is unknown, and that the Facebook account belongs to him, a copy of the required notice and complaint shall also be sent

to defendant through Facebook Messenger. In addition, unless and until defendant acknowledges service and provides a mailing address, subsequent pleadings and documents shall be served by Facebook Messenger. An order accompanies this opinion.