

Aurora Loan Servs., LLC v Revivo
2019 NY Slip Op 06210
Decided on August 21, 2019
Appellate Division, Second Department
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and subject to revision before publication in the Official Reports.

Decided on August 21, 2019 SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Second Judicial Department
WILLIAM F. MASTRO, J.P.
JOHN M. LEVENTHAL
JOSEPH J. MALTESE
VALERIE BRATHWAITE NELSON, JJ.

2017-04000
2017-04001
(Index No. 28695/09)

[*1]Aurora Loan Services, LLC, appellant,

v

Itzhak Revivo, respondent, et al., defendants.

Sandelands Eyet LLP, New York, NY (Margaret S. Stefandl of counsel), for appellant.

DECISION & ORDER

In an action to foreclose a mortgage, the plaintiff appeals from (1) a decision of the Supreme Court, Kings County (Derefim Neckles, Ct. Atty. Ref.), dated February 6, 2017, made after a hearing to determine the validity of service of process, and (2) an order of the

same court (Lawrence Knipel, J.) dated March 13, 2017. The order, upon the decision, denied the plaintiff's motion, inter alia, for an order of reference and directed the dismissal of the complaint on the ground that the defendant Itzhak Revivo was not properly served with process.

ORDERED that the appeal from the decision is dismissed, without costs or disbursements, as no appeal lies from a decision (*see Schicchi v J.A. Green Constr. Corp.*, 100 AD2d 509); and it is further,

ORDERED that the order is affirmed, without costs or disbursements.

In November 2009, the plaintiff commenced this action to foreclose a mortgage. None of the defendants appeared in the action. In April 2014, the plaintiff moved, inter alia, for an order of reference. The defendant mortgagor Itzhak Revivo opposed the motion, asserting, inter alia, that he had not been served with the summons and complaint and, therefore, that the complaint should be dismissed. The matter was referred to a Court Attorney Referee (hereinafter the Referee) for a hearing to determine the validity of service of process. At the hearing, a process server testified for the plaintiff that he served Revivo with a copy of the summons and complaint by leaving it with a woman at a particular address, who identified herself as Revivo's wife. He also testified that within 20 days, he mailed a copy of the summons and complaint to Revivo. Revivo and his wife testified that neither of them had received copies of the summons and complaint, and they noted discrepancies between the description of the person allegedly served and Revivo's wife. After the hearing, the Referee determined that Revivo had not been properly served. The Referee found that the plaintiff had failed to establish compliance with either the delivery or the mailing requirements of CPLR 308(2). As to the mailing requirement, the Referee found that the affidavit of service, which was affirmed by the process server who appeared at the hearing, did not indicate to what address the summons and complaint were mailed, and, therefore, the affidavit of service was deficient on its face. Upon the Referee's decision, the Supreme Court denied the plaintiff's motion and directed the dismissal of the complaint. The plaintiff appeals.

CPLR 308 sets forth the different ways by which service of process upon an individual can be effected in order for the court to obtain jurisdiction over that person. CPLR 308(2) provides, in pertinent part, that personal service upon a natural person may be made "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by . .

. mailing the summons to the person to be served at his or her last known residence." Service in this manner "is a two-step form of service in which a delivery and mailing are both essential" ([Washington Mut. Bank v Murphy](#), [127 AD3d 1167](#), 1174-1175 [internal quotation marks omitted]). Jurisdiction is not acquired pursuant to CPLR 308(2) unless there is strict compliance with both steps (*see* [HSBC Bank USA, N.A. v Daniels](#), [163 AD3d 639](#), 640; [Washington Mut. Bank v Murphy](#), 127 AD3d at 1174; [Emigrant Mtge. Co., Inc. v Westervelt](#), [105 AD3d 896](#); [Ludmer v Hasan](#), [33 AD3d 594](#)). "The plaintiff bears the ultimate burden of proving by a preponderance of the evidence that jurisdiction over the defendant was obtained by proper service of process" ([Bankers Trust Co. of Cal. v Tsoukas](#), 303 AD2d 343; *see* [Teitelbaum v North Shore-Long Is. Jewish Health Sys., Inc.](#), [160 AD3d 1009](#), 1011; [Santiago v Honcrat](#), [79 AD3d 847](#), 848; [Roberts v Anka](#), [45 AD3d 752](#), 753).

We agree with the Supreme Court's determination that the plaintiff failed to meet its burden of proving that jurisdiction over Revivo was obtained. The testimony of the process server and the only affidavit of service introduced into evidence at the hearing by the plaintiff, indicating that service of process was made pursuant to CPLR 308(2), failed to indicate the address to which the summons and the complaint were mailed. Inasmuch as the plaintiff did not proffer proof of service demonstrating that service of the summons and complaint had been properly effectuated in compliance with the statute, dismissal of the complaint was appropriate (*see* [Josephs v AACT Fast Collections Servs., Inc.](#), [155 AD3d 1010](#), 1012).

The plaintiff's remaining contentions are without merit.

MASTRO, J.P., LEVENTHAL, MALTESE and BRATHWAITE NELSON, JJ., concur.

ENTER:

Aprilanne Agostino

Clerk of the Court

[Return to Decision List](#)