

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
VENTURES TRUST 2013-1-H-R BY MCM CAPITAL  
PARTNERS, LLC, ITS TRUSTEE,

Plaintiff,

-against-

ARTHUR E. DIMELLA, JR. a/k/a ARTHUR DIMELLA,  
JR., BOARD OF MANAGERS OF THE RESIDENCES  
CONDOMINIUM 1, et al.,

Defendants.  
-----X

DECISION and ORDER  
Index No. 58777/2015

Present: Hon. Terry Jane Ruderman

Upon the traverse hearing conducted May 16, 2017, the Court finds as follows:

Plaintiff commenced this action on May 15, 2015, to foreclose a mortgage executed by defendants on premises located at 1 Renaissance Square, Unit 14E a/k/a 221 Main Street, 14E, White Plains, New York. By Order dated March 1, 2017, Hon. Charles D. Wood directed that a traverse hearing be held, and that the motion by defendant to dismiss "shall be held in abeyance pending the traverse hearing."

The affidavit of service indicates that the defendant mortgagor was served on July 1, 2015, by delivering a copy of the summons and complaint to John Doe, a person of suitable age and discretion, at POE: Maverick Funding Corp., 300 Martine Ave, White Plains NY, and by subsequent mailing on July 10, 2015. The affidavit of service describes John Doe as a white male with brown hair, 40 years old, height 5'10", and weighing 240 pounds.

Plaintiff's process server, Brian McEnery, who was employed by ProVest, LLC, testified that he has an independent recollection of the events surrounding the service of process. He specifically recalled going to Maverick Funding, defendant Arthur E. Dimella's place of employment, and questioning two people as to whether he worked there. One individual responded that defendant was

the Branch Manager, though he was not in at the time. After offering this confirmation of employment, the individual refused to provide his name or accept service. McEnery described the unidentified person as a white male with brown hair, 40 years old, 5 feet 10 inches tall and weighing 240 pounds. McEnery left the legal papers on a desk and later mailed a copy of them to defendant at the same address. His field sheet reflecting the information prepared on the affidavit of service was received into evidence (Exhibit 1).

Defendant Arthur E. DiMella, Jr. testified in his own behalf. According to DeMella, there were only two people that worked with him at 300 Martine Avenue, a woman and a man named John Giordano. DiMella maintained that Giordano was younger, shorter (5'8") and thinner (190 pounds) than the man described by McEnery. Giordano, who still works with DiMella, did not testify.

On June 10, 2015, attorneys for defendant Board of Managers of the Residences Condominium filed a notice of appearance in the foreclosure action, a copy of which was sent to DiMella at his home at 1 Renaissance Square, Unit 14E, White Plains, NY (NYCEF Doc. 14). Nonetheless, DiMella asserts that he never received the Summons and Complaint and first became aware of the foreclosure when he received a notice, dated November 17, 2015 of a foreclosure settlement conference scheduled for December 18, 2015 (NYCEF Doc. 37). He did acknowledge that he had not made payments on his mortgage since 2007, with the exception of three payments three years ago, and was "checking" as to what was happening. DiMella has worked in the mortgage business for 26 years and has previously been involved in foreclosure litigation, both as a defendant and as a plaintiff, in multiple counties, including Westchester.

Where, as here, there is a sworn denial of receipt of process, and a hearing is ordered, plaintiff has the burden of establishing jurisdiction by a preponderance of the evidence (*see Wells Fargo Bank, N.A. v. Chaplin*, 65 AD3d 588 [2d Dept 2009]). The plaintiff sustained this burden of proof. The

Court finds that plaintiff presented credible evidence in the form of the process server's testimony, which the Court finds to be credible. In contrast, the Court does not find the defendant's testimony to be credible.

Upon consideration of all of the evidence, including listening to the witnesses testify and observing their demeanor as they did so, the Court finds that service was made in accordance with the requirements of the CPLR and is valid.

The matter is referred back to Justice Wood for final determination of the motion herein.

This constitutes the decision and order of the Court.

Dated: White Plains, New York  
May 17, 2017

  
HON. TERRY JANE RUDERMAN, J.S.C.