

STATE OF VERMONT

SUPERIOR COURT
Orange Unit

CIVIL DIVISION
Docket No. 180-9-11 Oecv

EverBank
Plaintiff

v.

Nancy Pye, Martha Stuart,
and Occupants Residing at 87 Hutchinson Road, Corinth, Vt.
Defendants

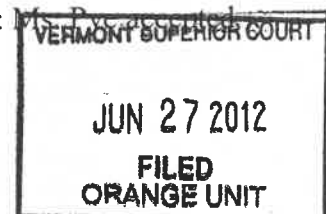
Decision on Defendant Stuart's Motion to Dismiss for Insufficient Service of Process,
Plaintiff's Motion for an Enlargement of Time,
and Defendant Pye's Motion to Continue Mediation

Defendants Nancy Pye and Martha Stuart are co-owners of a property located at 87 Hutchinson Road in Corinth, Vermont. Both co-signed a note and mortgage deed on the property in 2002 in connection with a construction loan. Nothing in the note or the mortgage documents indicates that the defendants were not both residing at the subject property; the mortgage application is not in evidence.

After the property went into foreclosure, plaintiff attempted service of the complaint and summons on both defendants at the subject property. Lieutenant Eggum of the Orange County Sheriff's Department went to the home on September 14, 2011 and made personal service on Ms. Pye. Believing the home to also be the usual place of abode for Ms. Stuart, he left a copy of her complaint and summons with Ms. Pye. Ms. Pye apparently said nothing that would have caused Lt. Eggum to believe that Ms. Stuart was not then residing at the property.

Now, nine months later, and on the eve of the already-twice-rescheduled mediation, Ms. Stuart has asserted for the first time that she has not yet been served with the complaint and summons in this action because she was not residing at 87 Hutchinson Road at the time the complaint and summons were served there. In fact, she says, she is merely friends with Ms. Pye and has at all times lived in White River Junction. She now seeks dismissal of the foreclosure complaint on the basis of insufficient service of process under Rule 12(b)(5). See 5B Wright, Miller, Kane & Marcus, Federal Practice and Procedure: Civil 3d § 1353 (explaining that Rule 12(b)(5) is the appropriate rule when challenge is made to the mode of delivery or the lack of delivery of the summons and complaint).

Plaintiff has opposed the motion to dismiss and has requested an enlargement of time for service of the complaint and summons, on the grounds that it did not know that 87 Hutchinson Road was not Ms. Stuart's usual place of abode. Indeed, the available evidence does not show that plaintiff had any reason to believe that service had not been effective:



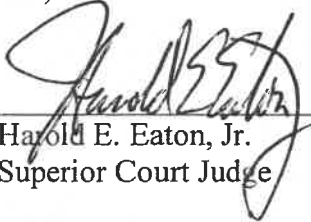
service on behalf of Ms. Stuart, and Lt. Eggum filed a return of service showing that service had been made. As such, plaintiff's motion for an enlargement of time is granted. See 4B Federal Practice and Procedure, *supra*, at § 1137 (extension of time for service will usually be granted where "failure of service" is not attributable to plaintiff). Ms. Stuart may, of course, agree to waive service in order to avoid having the costs of service taxed against her in the event of a foreclosure judgment in favor of plaintiff.

Ms. Pye has moved for a continuation of the mediation on the ground that Ms. Stuart is "arguably a necessary party to the foreclosure mediation." The motion is denied because Ms. Pye is the only applicant for HAMP modification at this time, and because the mediation has already been delayed twice. Moreover, it is unlikely that news of the foreclosure did not reach Ms. Stuart until now. Ms. Pye has known for nine months that the foreclosure has been pending and, if more information from her friend and co-owner is needed for her HAMP application, Ms. Pye has known for some time that she needed that information. Moreover, there is nothing that prevents Ms. Stuart from participating in the mediation if the parties so wish. She is on notice that it is scheduled for Friday, June 29, 2012.

ORDER

Defendant Stuart's Motion to Dismiss (MPR #2), filed June 20, 2012, is *denied*.
Plaintiff's Motion for Enlargement of Time to Serve (MPR #3), filed June 25, 2012, is *granted*.
Defendant Pye's Motion to Continue Mediation (MPR #4), filed June 26, 2012, is *denied*.

Dated at Chelsea, Vermont this 27th day of June, 2012.



Harold E. Eaton, Jr.
Superior Court Judge

VERMONT SUPERIOR COURT
JUN 27 2012
FILED
ORANGE UNIT