

STATE OF MAINE
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT
Location: Portland ✓
Docket No.: BCD-CV-13-81

FARM CREDIT OF MAINE, ACA,
Plaintiff,

v.

JOSEPH W. BESSEY, RANGELEY
STATION, LLC, and VALLEY
ACQUISITIONS, INC.,

Defendants

Order
(Motion for Default)

JOSEPH W. BESSEY, VALLEY
ACQUISITIONS INC., and RANGELEY
STATION, LLC,

Plaintiffs,

v.

FARM CREDIT OF MAINE, ACA and
SCOTT G. KENNEY,

Defendants

Joseph Bessey, Valley Acquisitions, Inc., and Rangeley Station, LLC (collectively, the "Bessey parties") move for default and default judgment against Defendants Farm Credit of Maine, ACA and Scott G. Kenney (collectively, Farm Credit) in this consolidated matter.¹

The Court took the motion under advisement on February 7, 2014, pursuant to the Case Management Conference Order issued that date.²

¹ Pursuant to the Order on Motion to Consolidate dated February 26, 2014, BCD-CV-13-81 and BCD-CV-14-09 were consolidated.

The Bessey parties initiated this matter in Aroostook County Superior Court on August 28, 2013, by filing a complaint and motion for temporary restraining order (TRO) to enjoin a pending power of sale foreclosure scheduled for September 5, 2013. *See* M.R. Civ. P. 3. The complaint was not verified and the motion did not include an affidavit as required by M.R. Civ. P. 65(a). Justice Cuddy initiated a telephonic conference of counsel on August 29, 2013. During the call, Justice Cuddy noted the inadequacies of the complaint and motion. The matter was continued for a hearing on September 3, 2013.

Farm Credit and Kenney filed an opposition to the TRO, supported by the affidavit of Julianne Ray, on September 2, 2013. Prior to the hearing on September 3, 2013, the Bessey parties filed an amended and verified complaint signed by Mr. Bessey. Justice Cuddy denied the TRO by order dated September 4, 2013. On September 5, 2013, the Bessey parties filed a notice of appeal of the denial of the TRO and motion to stay the matter pending appeal. After a phone conference with counsel,³ Justice Cuddy denied the motion by order dated September 10, 2013.

Justice Hunter issued a scheduling order on October 18, 2013. The Bessey parties filed a second amended complaint on October 28, 2013. On December 18, 2013, Farm Credit and Kenney filed their motion to dismiss, but did not otherwise answer any of the filed complaints. *See* M.R. Civ. P. 12(b). On January 6, 2014, the Bessey parties moved for default and default judgment. No return of service has ever been filed with the court following the filing of the original complaint, the amended complaint, or the second amended complaint.

² Farm Credit has moved to dismiss this matter for failure to file a return of service and insufficient service of process. *See* M.R. Civ. P. 3, 12(b)(5). Counsel for Farm Credit informed the Court at the Case Management Conference, in the presence of Counsel for the Plaintiffs in this matter, that it would be withdrawing this motion should the Court deny the motion for default and default judgment. Accordingly, the Court does not address the merits of the motion to dismiss at this time.

³ During the phone conference with Justice Cuddy, counsel advised that the auction sale had been rescheduled until October 8, 2013.

The Bessey parties assert that because Farm Credit has defended through the temporary restraining order and motion for stay and has not answered the complaint, Farm Credit has failed to respond and the Bessey parties are entitled to default judgment. The Bessey parties also assert that the same facts constitute waiver of the defect in the return of service.

A default is only appropriate “[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise.” M.R. Civ. P. 55(a). Nevertheless, “[b]ecause a party has no duty to plead until properly served, sufficient service of process is a prerequisite to entry of default.” *Adams v. Howe*, 2:10-CV-13529, 2011 WL 1743428, at *2 (E.D. Mich. Apr. 13, 2011); *accord* *Silver v. Brown*, 678 F. Supp. 2d 1187, 1199 (D.N.M. 2009) (“A motion for default judgment is meritless, however, when the defendants were never properly served.”) *rev’d in part on other grounds*, 382 F. App’x 723 (10th Cir. 2010). *See also* M.R. Civ. P. 12(a) (“A defendant shall serve that defendant’s answer within 20 days *after the service of the summons and complaint . . .*” (emphasis added)).

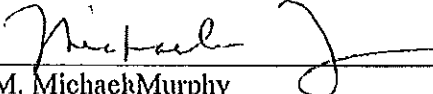
In this case, the Court is not entirely clear upon which form of service the Bessey parties rely. The motion for default, which was attested to by Attorney Chute, states that the Bessey parties “simultaneously with the filing with this Court, served in hand the defendants, Farm Credit of Maine and Scott Kenney, through counsel, with the Complaint together with its Motion for Temporary Restraining Order and Preliminary Injunction. (A true copy of the receipt for service upon UPS delivery appended hereto).”⁴ (M. Default 1.) The service could thus be pursuant to M.R. Civ. P. 4(d)(9) or pursuant to M.R. Civ. P. 4(c)(1). In either case, however, the Bessey parties were required to file a return of service with the court pursuant to M.R. Civ. P.

⁴ It is not clear if “through counsel” means that the complaint was handed from counsel to counsel, or that the Bessey parties handed the complaint to Farm Credit’s counsel. The Court further notes that service of process requires service of both summons and complaint, not just a complaint. M.R. Civ. P. 4(c), (d).

4(h). See *Brown v. Thaler*, 2005 ME 75, ¶¶ 4-5, 880 A.2d 1113. No return of service has been filed. Having failed to show proper service that would require Farm Credit or Kenney to answer pursuant to M.R. Civ. P. 12(a), the Bessey parties are not entitled to default or default judgment against Farm Credit or Kenney.

Based on the foregoing, the motion of Joseph Bessey, Valley Acquisitions, Inc., and Rangeley Station, LLC for default and default judgment is DENIED. The Clerk shall note this Order on the docket pursuant to Rule 79(a) of the Maine Rules of Civil Procedure.

Date: 3/20/14


M. Michael Murphy
Business and Consumer Court

Entered on the Docket: 3/20/14
Copies sent via Mail Electronically