

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS V. POLIZZI IA Part 14  
Justice

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MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC.,

Plaintiff,

-against-

CARRITHA DAVIS, individually and as  
Administrator of the Estate of  
ADAM DAVIS, LATOYA SUMPTER, BARRY  
SUMPTER, DOMINIQUE SUMPTER, VALERIE  
SUMPTER, CITY OF NEW YORK ENVIRONMENTAL  
CONTROL BOARD, NEW YORK CITY TRANSIT  
ADJUDICATION BOARD, CITY OF NEW YORK  
DEPARTMENT OF TRANSPORTATION PARKING  
VIOLATIONS BUREAU, UNITED STATES OF  
AMERICA, NEW YORK STATE DEPARTMENT  
OF TAXATION AND FINANCE, "JOHN DOE  
NO. 1" TO "JOHN DOE NO. 10," inclusive,  
the last ten names being fictitious  
and unknown to Plaintiff, the persons  
'and parties intended being the tenants,  
occupants, persons or corporations, if  
any, having or claiming an interest in,  
or lien upon the premises described in  
the complaint,

Defendants.

x Index  
Number 8444 2004  
Motion  
Date September 20, 2005

Motion  
Cal. Number 19

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x

The following papers numbered 1 to 10 read on this motion by  
defendant Catherine Davis (1) to stay the foreclosure sale or,  
alternatively, to set aside the foreclosure sale, (2) to vacate the  
judgment of foreclosure and sale, (3) for leave to serve and file  
a proposed answer, and (4) to transfer the matter to the  
Surrogate's Court, Queens County.

Papers  
Numbered

Order to Show Cause - Affidavits - Exhibits .... 1-7  
Answering Affidavits - Exhibits ..... 8-10

Upon the foregoing papers it is ordered that the motion is determined as follows:

In this foreclosure action, plaintiff originally named Adam Davis, the mortgagor and alleged record owner of the subject property, as a defendant. Plaintiff, thereafter, discovered that Adam Davis had died prior to the commencement of the action. Plaintiff served a supplemental summons and amended complaint deleting Adam Davis as a named defendant and adding Carritha Davis, individually and as the alleged Administrator of the Estate of Adam Davis, Barry Sumpter, Dominique Sumpter and Valerie Sumpter as party defendants.

Defendant Carritha Davis defaulted in answering the amended complaint, and plaintiff obtained a judgment of foreclosure and sale against her. Defendant Carritha Davis obtained the order to show cause dated August 12, 2005, seeking (1) to stay the foreclosure sale or, alternatively, to set aside the foreclosure sale, (2) to vacate the judgment of foreclosure and sale, (3) for leave to serve and file a proposed answer, and (4) to transfer the matter to the Surrogate's Court, Queens County. The order to show cause did not stay the sale, but stayed the Referee from transferring the deed, and included a direction that the Referee inform all bidders of the stay of the transference of the deed.

That branch of the motion seeking to stay the foreclosure sale is denied as moot. The foreclosure sale was held on August 12, 2005, prior to the adjourned return date of this motion. The memorandum of sale indicates that Radha P. Lachman, a third party, was the successful bidder, having bid the amount of \$425,000.00. According to plaintiff, a surplus remains following the sale.

Defendant Carritha Davis seeks to set aside the sale and vacate the judgment of foreclosure and sale. She asserts that she and defendants Dominique Latasha Sumpter, Valerie Lakeesha Sumpter and Barry Sumpter, and Bonnie Davis, Diane Davis, Alazia Sumpter and LaJay Sumpter are "heirs" of Adam Davis, and that she has petitioned the Surrogate's Court of Queens County to be issued letters of administration for the Estate of Adam Davis. Defendant Carritha Davis further asserts that plaintiff failed to serve properly defendants Dominique Latasha Sumpter s/h/a Dominique Sumpter and Valerie Lakeesha Sumpter s/h/a Valerie Sumpter, and failed to name or join Bonnie Davis, Diane Davis, Alazia Sumpter

and LaJay Sumpster, as necessary party defendants to this action. In addition, defendant Carritha Davis alleges that defendant Barry Sumpster is "now" deceased, and that Alazia Sumpster is a mentally incompetent adult. Defendant Carritha Davis also asserts that plaintiff is not a foreign corporation authorized to do business within the State of New York, and that the affidavit of merits presented by plaintiff, in support of its motion for a default judgment, was not properly notarized.

With respect to that branch of the motion by defendant Carritha Davis seeking to vacate the judgment of foreclosure and sale obtained against her in either her personal capacity or any alleged representative capacity on behalf of the Estate of Adam Davis, it is well settled that the proponent of a motion to vacate a default judgment must demonstrate she has a reasonable excuse for the default and a meritorious defense (see CPLR 5015[a][1]; Halali v Gabbay, 223 AD2d 623 [1996]; Schiavetta v McKeon, 190 AD2d 724 [1993]). Defendant Carritha Davis has failed to offer any reasonable excuse for her default in failing to answer plaintiff's amended complaint in this action (see CPLR 5015[a]; Chase Manhattan Mortg. Corp. v Murphy, 2 AD3d 559 [2003]; Credit-Based Asset Servicing and Securitization, LLC. v Chaudry, 304 AD2d 708 [2003], lv to appeal dismissed 100 NY2d 615 [2003]; Security Pacific Nat. Trust Co. v Adams, 276 AD2d 688 [2000]). Under such circumstances, the issue of whether defendant Carritha Davis has an arguable meritorious defense need not be addressed by this court.

Nevertheless, to the extent defendant Carritha Davis asserts that plaintiff failed to join Bonnie Davis, Diane Davis, Alazia Sumpster and LaJay Sumpster, as necessary party defendants, the court notes that in an action to foreclose a mortgage, all parties having an interest, including persons holding title to the subject premises, must be made a "party defendant to the action" (RPAPL 1311[1]; see Polish Nat. Alliance of Brooklyn, U.S.A. v White Eagle Hall Co., 98 AD2d 400, 404 [1983]). The absence of a necessary party in a mortgage foreclosure action leaves such party's rights unaffected by the judgment of foreclosure and sale and the foreclosure sale may be considered void as to the omitted party (see 6820 Ridge Realty v Goldman, 263 AD2d 22 [1999]; Polish Nat. Alliance of Brooklyn, U.S.A. v White Eagle Hall Co., supra at 404).

Defendant Carritha Davis asserts that plaintiff improperly served defendants Dominique Latasha Sumpster and Valerie Lakeesha Sumpster. Generally, a defendant lacks standing to challenge whether a codefendant was properly served with process since such claim is personal in nature and the objection may be waived (see Home Savings of America, F.A. v Gkanios, 233 AD2d 422 [1996]; Matter of Staiano, 160 Misc 2d 494, 497-498 [1994]). However, where a codefendant is an infant and the defendant raising the objection is the codefendant's parent and natural guardian, an

exception may be noted, and the parent and natural guardian may be considered to have standing to raise such a defense (cf. Matter of Staiano, 160 Misc 2d 494, supra). Thus, in this instance, defendant Carritha Davis, the parent and natural guardian of defendants Dominique Latasha Sumpter and Valerie Lakeesha Sumpter, has standing to appear in that capacity, to seek vacatur of the judgment of foreclosure and sale obtained against defendants Dominique Latasha Sumpter and Valerie Lakeesha Sumpter on default, based upon improper service of process.

Nevertheless, defendant Carritha Davis is estopped from raising the defense of lack of personal jurisdiction on behalf of defendants Dominique Latasha Sumpter and Valerie Lakeesha Sumpter. Her counsel previously obtained a stipulation dated June 10, 2005, allegedly on behalf of defendant "Carritha Davis, individually and as Administrator of the Estate of Adam Davis, Latoya Sumpter, Barry Sumpter (now deceased), Dominique Sumpter, Valerie Sumpter and Alazia Sumpter (not a named defendant herein)," pursuant to which plaintiff agreed to postpone the foreclosure sale for a period of 90 days to allow the voluntary sale of the property, subject to the approval of the Surrogate's Court, Queens County. The stipulation included an admission that defendant Carritha Davis is the natural parent and guardian of Latoya Sumpter, Barry Sumpter, Dominique Sumpter, Valerie Sumpter and Alazia Sumpter, and "in acting in that capacity waives any and all defenses they might have relative to this foreclosure action whether relating to personal or subject matter jurisdiction of this Court, including, but not limited to, defenses related to service and/or Plaintiff's capacity to sue." The stipulation provided that Carritha Davis, Latoya Sumpter, Barry Sumpter, Dominique Sumpter, Valerie Sumpter and Alazia Sumpter pay all of plaintiff's costs and fees related to this matter at the time of any closing on the property, and \$1,586.24 as costs of publication and the Referee's statutory fee. The stipulation also provided that the monies be applied to amounts outstanding at the time of any closing of the sale of the property, or future sale of the property.

To the extent defendant Carritha Davis sought and obtained such stipulation and adjournment from plaintiff, she cannot now seek to vacate the judgment of foreclosure and sale obtained against defendants Dominique Latasha Sumpter and Valerie Lakeesha Sumpter based upon lack of personal jurisdiction. In reaching this conclusion, the court does not determine the issue of whether defendants Dominique Latasha Sumpter and Valerie Lakeesha Sumpter themselves are bound by the stipulation and waiver therein (cf. Cascone v Brennan, 134 Misc 2d 417 [1987] [plaintiff awarded judgment against parent individually and as guardian of 15-year-old child, for damages caused by the child's negligent operation of a motor vehicle, where only the defendant was served, but both the defendant and the child appeared at the trial with counsel and did

not object to lack of service]), or whether they can challenge the validity of judgment of foreclosure and sale (see Ingersoll v Mangam, 84 NY 622 [1881]; State Bank of Albany v Murray, 27 AD2d 627 [1966]).<sup>1</sup>

In view of the terms of the stipulation, that branch of the motion by defendant Carritha Davis, which seeks to set aside the sale and vacate the judgment of foreclosure and sale obtained against defendants Dominique Sumpter and Valerie Sumpter due to improper service is denied.

That branch of the motion by defendant Carritha Davis seeking to set aside the sale and vacate the judgment of foreclosure and sale based upon the death of defendant Barry Sumpter is denied. Although defendant Carritha Davis asserts that defendant Barry Sumpter is "now deceased," she has failed to offer evidence regarding the manner in which Adam Davis held title to the property at the time of Adam's death (see Waxson Realty Corp. v Rothschild, 255 NY 332 [1931]; Matter of Roberts, 214 NY 369 [1915]), and the date of defendant Barry Sumpter's death (see Matter of Einstoss, 26 NY2d 181, 189-190 [1970]; Nieves v 331 East 109<sup>th</sup> St. Corp., 112 AD2d 59 [1985] Thompson v. Raymond Kramer, Inc., 23 AD2d 746, 747

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CPLR 309(a) requires that personal service upon an infant must be made by personally serving a copy of the summons within the state upon a parent, guardian or any person having legal custody or, if the infant is married, upon an adult spouse with whom the infant resides, or, if none are within the state, upon any other person with whom the infant resides, or by whom the infant is employed. That section also provides that if the infant is 14 years of age or older, service must be made personally upon the infant. "CPLR 309 was designed to protect infants and incompetents by directing service in a manner that secures proper representation" (Gaul v Gaul v Richardson by Richardson, 117 Misc 2d 75 [1982]). Thus, service upon an infant alone, or where the infant is 14 years or over, upon only one of the parties specified, is not sufficient, and the court acquires no jurisdiction thereby (see Ingersoll v Mangam, 84 NY 622 [1881]; Kolodzinski v Ferreiras, 168 AD2d 431 [1990]; see generally Fox v 18-05 215th Street Owners, Inc., 143 AD2d 804 [1988]; Soto v Soto, 30 AD2d 651 [1968]; Leahy v Hardy, 225 App Div 323 [1929]). A party against whom a judgment is obtained upon default without first obtaining jurisdiction over him, or her, may appear and contest the validity of the judgment, or ignore the judgment and assert the invalidity whenever enforcement is attempted (see McMullen v Arnone, 79 AD2d 496, 499 [1981]).

[1965]).<sup>2</sup>

To the extent defendant Carritha Davis asserts that Alazia Sumpter is mentally incompetent, defendant Carritha Davis has failed to demonstrate that she is the legal guardian or conservator of the person or property of Alazia Sumpter. Thus, Carritha Davis has failed to show she has standing to intervene in this action on behalf of Alazia Sumpter. That branch of the motion by defendant Carritha Davis seeking to intervene in the action on behalf of Alazia Sumpter is denied.

That branch of the motion by defendant Carritha Davis seeking to set aside the foreclosure sale is denied. "It is well settled that a foreclosure sale may be set aside when "fraud, collusion, mistake or misconduct casts suspicion on the fairness of the sale" (Liberty Sav. Bank, FSB v Knab, 281 AD2d 602, 603 [2001] quoting Polish Natl. Alliance v White Eagle Hall Co., 98 AD2d 400, 407)" (Chase Manhattan Mortg. Corp. v Cobbs, 4 AD3d 383 [2004]). Defendant Carritha Davis has failed to establish that fraud, collusion, mistake or misconduct was involved relative to the sale.

That branch of the motion by defendant Carritha Davis seeking to transfer the action to Surrogate's Court, Queens County, is denied.

Dated: November 2, 2005

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J.S.C.

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Defendant Carritha Davis offers a copy of her petition for letters of administration dated March 3, 2005, wherein she listed Barry Sumpter as an alleged intestate distributee of Adam Davis. The judgment of foreclosure and sale is dated March 1, 2005 (see generally Campbell v Goldome Realty Credit Corp., 209 AD2d 991 [1994], citing Hays v Thomae, 56 NY 521, 522 [1867]; accord, Brovender v Williams, 3 AD2d 841 [1957], lv to appeal dismissed 3 NY2d 903 [1957]).