

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D55946
M/htr

_____AD3d_____

Argued - March 5, 2018

JOHN M. LEVENTHAL, J.P.
JEFFREY A. COHEN
SYLVIA O. HINDS-RADIX
FRANCESCA E. CONNOLLY, JJ.

2015-11902

DECISION & ORDER

Arthur Gluck, respondent, v Jacob Hirsch, et al.,
appellants, et al., defendants.

(Index No. 15005/10)

Lonuzzi & Woodland, LLP, Brooklyn, NY (John Lonuzzi of counsel), for appellants.

Borenstein McConnell & Calpin, P.C., Brooklyn, NY (Abraham Borenstein of
counsel), for respondent.

In an action to foreclose a mortgage, the defendants Jacob Hirsch and Blime Hirsch appeal, by permission, from an order of the Supreme Court, Kings County (Carolyn E. Wade, J.), dated December 3, 2015. In the order, the Supreme Court declined to sign the appellants' proposed order to show cause.

ORDERED that the order is reversed, on the law, with costs, and the matter is remitted to the Supreme Court, Kings County, for further proceedings in accordance herewith.

The defendants Jacob Hirsch and Blime Hirsch (hereinafter together the Hirsches) defaulted by failing to appear in this action to foreclose a mortgage on real property they owned. A judgment of foreclosure and sale dated December 12, 2014, was entered in favor of the plaintiff and against, among others, the Hirsches. On December 3, 2015, the Hirsches presented a proposed order to show cause to the Supreme Court, seeking to vacate the judgment pursuant to CPLR 5015(a)(1), (3), and (4), to dismiss the complaint insofar as asserted against them pursuant to CPLR 3211(a)(8), to disqualify the plaintiff's counsel based upon an alleged conflict of interest, and to cancel the notice of pendency. The proposed order to show cause also sought a temporary restraining order staying the foreclosure sale of the property scheduled for later that day, December 3, 2015, at 2:30 p.m., pending the hearing and determination of their proposed motion. After oral argument, the court

August 22, 2018

Page 1.

GLUCK v HIRSCH

declined to sign the proposed order to show cause, with a handwritten notation that the Hirsches failed to demonstrate a meritorious defense to the action and that the Hirsches failed to submit proof of misconduct by the plaintiff's attorney.


By decision and order on motion dated December 22, 2015, this Court granted the Hirsches leave to appeal from the Supreme Court's order declining to sign the proposed order to show cause and stayed the foreclosure sale of the subject premises pending the hearing and determination of the appeal (*see Gluck v Hirsch*, 2015 NY Slip Op 94403[U]).

"The court in a proper case may grant an order to show cause, to be served in lieu of a notice of motion, at a time and in a manner specified therein" (CPLR 2214[d]). Whether the circumstances constitute a "proper case" for the use of an order to show cause instead of a notice of motion is a matter within the discretion of the court to which the proposed order is presented (*see Siegel*, NY Prac § 248 [5th ed, 2011]). Here, under the particular circumstances of this case, this was a proper case for the use of an order to show cause, and the Supreme Court improvidently exercised its discretion in declining to sign the proposed order to show cause (*see Matter of Georghakis v Matarazzo*, 123 AD3d 711, 711).

Accordingly, we remit the matter to the Supreme Court, Kings County, to set a return date for the Hirsches' order to show cause.

LEVENTHAL, J.P., COHEN, HINDS-RADIX and CONNOLLY, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court