

Matter of Pinnock v Thomas

2007 NY Slip Op 30228(U)

March 14, 2007

Supreme Court, Queens County

Docket Number: 0003675

Judge: David Elliot

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Short Form Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA Part 14
Justice

<p>In the Matter of the Application of</p> <p>DIANE PINNOCK and MARTHA ADAMS LEWIS SNELLING,</p> <p style="text-align: center;">Petitioners,</p> <p style="text-align: center;">- against -</p> <p>ROY THOMAS,</p> <p style="text-align: center;">Respondent.</p>	<p>x</p> <p>x</p>	<p>Index Number <u>3675</u> 2006</p> <p>Motion Date <u>October 31, 2006</u></p> <p>Motion Cal. Numbers <u>22, 23</u></p> <p>Motion Sequence Nos. <u>3, 4</u></p>
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The following papers numbered 1 to 24 read on this petition to vacate all sales, evictions and transfers of the property known as 114-50 149th Street, Queens, New York; this motion by respondent REO Management 2004, Inc. s/h/a Reo Management (Reo Management) to dismiss the petition pursuant to CPLR 404(a).

	<u>Papers Numbered</u>
Notice of Petition - Affidavits - Exhibits.....	1-10
Notice of Motion - Affidavits - Exhibits.....	11-16
Answering Affidavits - Exhibits.....	17-21
Reply Affidavits.....	22-24

Upon the foregoing papers it is ordered that the application and motion numbered 22 and 23 on the motion calendar for October 31, 2006 are joined together for determination as follows:

Petitioner Diane Pinnock, appearing pro se, originally commenced a proceeding under the instant index number, on behalf of herself and Martha Adams Lewis Snelling, her aunt, seeking to "[r]eturn [Pinnock's] home to Pinnock in the value it is in," and to stay all "action" relative to the property known as 114-40 149th Street, Jamaica, New York. Petitioners previously sought to stay all "action" relative to the subject property, and to "

return" the property to petitioner Pinnock. By short form judgment dated July 3, 2006, however, the petition was dismissed. In dismissing the petition, the court found that the case should have been brought as an action to quiet title to the property, which petitioners, in effect, recognized by their having sought leave to convert the proceeding to a plenary action and serve and file a proposed summons and complaint. The court determined, however, that jurisdiction had not been obtained over respondents, and in the absence of such jurisdiction, the special proceeding could not be converted into an ordinary plenary action to quiet title and for declaratory and injunctive relief.

Petitioners thereafter filed another notice of petition and petition dated July 17, 2006, under the same index number. The second petition forms the basis for petitioners' present claims.¹ On August 9, 2006, respondent Reo Management served an answer dated August 8, 2006, to the second petition asserting, among other things, an affirmative defense based upon improper service of the notice of petition and petition. It is unclear from these submissions whether the other respondents have appeared or answered the complaint.

Respondent Reo Management opposes the application, and moves to dismiss the second petition on various grounds, including lack of personal jurisdiction due to improper service of the notice of petition and petition.

It is well established that the burden of proving personal jurisdiction rests upon the party asserting jurisdiction (see generally Skyline Agency, Inc. v Ambrose Coppotelli, Inc., 117 AD2d 135, 139 [1986]; 3 Weinstein-Korn-Miller, NY Civ Prac ~ 403.01). In this instance, petitioners offer affidavits of service dated August 16, 2006 and August 24, 2006. The affidavit of service dated August 16, 2006 is defective, insofar as it purports to specify more than one person who was served (see CPLR 306[a]). The affidavit dated August 24, 2006 indicates service upon respondent Reo Management by in-hand delivery of a copy of the second notice of petition and petition upon an unnamed woman at the Law Office of Steven J. Baum, at 900 Merchant Concourse, 4th Floor, Westbury, New York.

A notice of petition must be served in the same manner as a summons in an action (CPLR 403[c]). Service upon a corporation may not be made in accordance with the substitute methods of service authorized for the personal service of process upon individuals (see Lakeside Concrete Corp. v Pine Hollow Bldg. Corp., 104 AD2d 551 [1984], affd 65 NY2d 865 [1985]). Rather, to acquire personal jurisdiction over a domestic or foreign corporation by personal service, service must be effectuated

pursuant to CPLR 311(1). That subdivision provides that personal service upon a domestic or foreign corporation shall be made by delivering process to any one of several listed corporate representatives (see McDonald v. Ames Supply Co., 22 NY2d 111, 114-115 [1968]; Faravelli v Bankers Trust Co., 85 AD2d 335, 339-340, affd 59 NY2d 615; Lakeside Concrete Corp. v Pine Hollow Bldg. Corp., 104 AD2d at 552).

The affidavit dated August 24, 2006 offered by petitioners contains no averments indicating that the unnamed woman was an officer, director, managing agent or general agent, cashier or assistant cashier of respondent Reo Management or agent authorized by appointment or law to receive service on behalf of Reo Management (CPLR 311[a][1]). Thus, without more, the affidavits are insufficient to demonstrate proper service upon respondent Reo Management in accordance with the methods of service set forth in CPLR 311(a)(1).

The motion by respondent Reo Management, seeking to dismiss the second petition asserted against it, is granted, and the portion of the petition seeking relief with respect to respondent Reo Management is dismissed.

To the extent petitioners seek relief as against respondent Joseph Baum, they have failed to establish personal jurisdiction over him. The affidavit of service dated August 24, 2006 indicates service of a copy of the notice of petition and petition upon respondent Baum by delivery to an unidentified woman at 137-11 Northern Boulevard, Queens, New York on July 19, 2006. That affidavit of service, however, does not state that the address was the actual place of business, dwelling place or usual place of abode of Joseph Baum, and that a subsequent copy of the notice of petition and petition was mailed to him at his last known residence or actual place of business (CPLR 308[2]).

In addition, petitioners have failed to establish personal jurisdiction over respondents Utopia Real Estate and Unlimited Homes. The names "Utopia Real Estate" and "Unlimited Homes" are trade names, and petitioners have failed to show they are sole proprietorships or separate legal entities capable of being sued (see Provosty v Lydia E. Hall Hosp., 91 AD2d 658 [1982], affd 59 NY2d 812 [1983]; Little Shoppe Around Corner v Carl, 80 Misc 2d 717 [1975]).

To the extent petitioners seek relief as against respondent Shara Gilliard, they have failed to establish that the time for such respondent to answer or move with respect to the petition has expired, no answer or motion has been interposed or received, and her time to plead has not been extended and she is in default in answering.

In addition, petitioners have failed to establish entitlement to the relief sought as against respondents Baum, Utopia Real Estate, Unlimited Homes and Gilliard as a matter of law. Petitioners claim that Pinnock has paramount title to the subject property pursuant to a deed dated January 10, 1993, and that they have a present right of possession. They assert that the judgment of foreclosure and sale dated January 6, 2005 obtained against them in the foreclosure action entitled Washington Title Insurance Co. v Snelling, (Sup Ct, Queens County, Index No. 18977/1996), regarding a mortgage on the real property known as 114-40 149th Street, Queens, New York (Block 11979, Lot 25), has been vacated. Such assertion, however, is without merit. By order of the Appellate Division, Second Department, dated December 5, 2006, the order and judgment of foreclosure (one paper) of the Supreme Court dated January 6, 2005, and the order of the same court dated April 18, 2005, denying the motion by Snelling and Pinnock to vacate the January 6, 2005, were affirmed (Washington Title Insurance Co. v Snelling, 35 AD3d 457 [2006]). In addition, to the extent petitioners seek affirmative relief as against respondents Baum, Utopia Real Estate, Unlimited Homes and Gilliard, they have failed to obtain a second index number and pay a second filing fee (see Harris v Niagara Falls Bd of Educ., 6 NY3d 155 [2006]).

It is ordered and adjudged that the petition is dismissed with respect to respondent Reo Management and is denied with respect to the remaining respondents.

Dated: March 14, 2007

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It appears that at the time of the making of the instant motions, respondent Reo Management was unaware of the existence of the July 3, 2006 judgment. The judgment was not entered until September 13, 2006.