

**Kennedy v Estate of Kennedy**

2008 NY Slip Op 30846(U)

March 18, 2008

Supreme Court, Suffolk County

Docket Number: 0029798/2003

Judge: Thomas F. Whelan

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 33 - SUFFOLK COUNTY

**PRESENT:**

Hon. THOMAS F. WHELAN  
Justice of the Supreme Court

MOTION DATE 5/31/07  
ADJ. DATES 12/14/07  
Mot. Seq. # 007 - MD  
Mot. Seq. # 008 - XMG

-----X		
DONALD KENNEDY,	:	BRUCE A. ROGERS, PC
	:	Atty. For Plaintiff
	:	60 Dutch Hill Rd.
	:	Orangeburg, NY 10962
	:	
	:	ACKERMAN & O'BRIEN, LLP
	:	Attys. For Defs. P. Kennedy, MJ Kennedy &
	:	Estate of Kennedy
	:	34 Pantigo Rd.
	:	East Hampton, NY 11937
	:	
	:	KATHLEEN KENNEDY
	:	Defendant Pro Se
	:	1 St. Regis Ct.
	:	East Hampton, NY 11937
-----X		

Upon the following papers numbered 1 to 12 read on this motion to vacate order and cross motion to dismiss \_\_\_\_\_; Notice of Motion/Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers 5-10; Answering Affidavits and supporting papers 11-12; Replying Affidavits and supporting papers \_\_\_\_\_; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this order to show cause dated May 17, 2007 (Whelan, J.S.C.) by self represented defendant, Kathleen Kennedy, seeking an order vacating the judgment entered against said defendant which awarded plaintiff an interest in real property and vacating the deed filed therewith is denied; and it is further

**ORDERED** that the cross motion by plaintiff seeking an order dismissing the order to show cause of defendant, Kathleen Kennedy, permitting the original affidavit of service upon defendant Mary Jo Kennedy to be amended and permitting the late filing of proof of service, and entry of a judgment against defendant, Kathleen Kennedy, is granted; and it is further

**ORDERED** that an amended affidavit of service upon defendant Mary Jo Kennedy is directed to be filed with the Suffolk County Clerk, within twenty (20) days from the date of this order; and it is further

**ORDERED** that the Short Form Judgment and Order dated December 9, 2005 and recorded on December 19, 2005 is amended to reflect that the third decretal paragraph contained on page 2 shall read

as follows:

**ORDERED AND ADJUDGED** that the Deed dated July 2, 1996 and recorded on July 25, 1996 in Liber 11784, Page 223 having a Suffolk County Tax Map designation as District 0300; Section 072.00; Block 01.00 and Lot(s) 003.031 from John W. Kennedy conveying a 20% interest in the premises to each of the following individuals as tenants in common: John J. Kennedy, Paul Kennedy, Peter Kennedy, Kathleen Kennedy, and Mary Jo Kennedy, shall be reformed to note that Donald Kennedy has a one-tenth (1/10) interest in said property and further that the Clerk of the County of Suffolk, upon presentation of a certified copy of this Order, shall make a notation on the margin of said Deed referencing this Order and shall attach the certified copy of this Order to said deed; and it is further

and it is further

**ORDERED** that the Short Form Judgment and Order dated December 9, 2005 and recorded on December 19, 2005 is amended to reflect that the fourth decretal paragraph contained on page 2 shall read as follows:

**ORDERED AND ADJUDGED** that the correction Deed dated May 21, 1997 and recorded on June 17, 1997 in Liber 11836, Page 72 having a Suffolk County Tax Map designation as District 0300; Section 072.00; Block 01.00 and Lot(s) 003.031 by which Peter Kennedy conveys his interest in the premises to Paul Kennedy shall be reformed to note that Donald Kennedy has a one-tenth (1/10) interest in said property and further that the Clerk of the County of Suffolk, upon presentation of an additional certified copy of this Order, shall make a notation on the margin of said Deed referencing this Order and shall attach the certified copy of this Order to said deed; and it is further

and it is further

**ORDERED** that the Short Form Judgment and Order dated December 9, 2005 and recorded on December 19, 2005 is amended to reflect that the fifth decretal paragraph contained on page 2 shall read as follows:

**ORDERED AND ADJUDGED** that a correction Deed dated April 5, 2001 and recorded on June 26, 2001 in Liber 12126, Page 316 having a Suffolk County Tax Map designation as District 0300; Section 072.00; Block 01.00 and Lot(s) 003.031 by which Paul Kennedy conveys 20% of his interest in the premises to Peter Kennedy shall be reformed to note that Donald Kennedy has a one-tenth (1/10) interest in said property and further that the Clerk of the County of Suffolk, upon presentation of an additional certified copy of this Order, shall make a notation on said Deed referencing this Order and shall attach the certified copy of this Order to said deed; and it is further

and it is further

**ORDERED** that the Short Form Judgment and Order dated December 9, 2005 and recorded on December 19, 2005 is amended to reflect that the fifth paragraph contained on page 3 shall read as follows:

The Court notes for the record that in reading the transcript of the settlement agreement reached in open Court between the plaintiff and his father wherein he was given an interest in the Property, the interest in the Property is one-tenth (1/10) as the plaintiff's moving papers claim (*see* transcript, p. 12, lines 19-25; p. 13, lines 1-6).

and it is further

**ORDERED** that the remainder of the Short Form Judgment and Order dated December 9, 2005 and recorded on December 19, 2005 is unchanged and remains in full force and effect; and it is further

**ORDERED** that the Amended Short Form Judgment and Order dated December 30, 2005 and recorded on January 10, 2006 is vacated in its entirety; and it is further

**ORDERED** that the cross movant shall serve a copy of this Order with Notice of Entry upon the self represented litigant and other defendants within twenty (20) days of the date herein by first class mail and thereafter file the affidavit of service with the Clerk of the Court.

Defendant, Kathleen Kennedy, who is now self represented, seeks to vacate the default entered against her and vacate the deed that was filed in conjunction with said judgment. That judgment was dated December 9, 2005 and recorded on December 19, 2005. An amended judgement, which corrected typographical errors, was dated December 30, 2005 and recorded on January 10, 2006. That judgment reformed certain deeds to reflect plaintiff's interest in the Property, known as 1 St. Regis Court, East Hampton. No appeal was ever taken from the judgment.

Now, a year and a half after entry of judgment and more than three years after service of process, defendant, Kathleen Kennedy, who defaulted in the underlying action, seeks to vacate her default. In the meantime, plaintiff commenced a new action under Suffolk County Index No. 06-09124, seeking a partition of the Property.

It is well settled that a party seeking to vacate a judgment entered upon a default must demonstrate a reasonable excuse for its default (*see Jefferson v Netusil*, 44 AD3d 621, 843 NYS2d 158 [2d Dept 2007]; *Phillips v Goord*, 16 AD3d 422, 790 NYS2d 709 [2d Dept 2005]; *Schiller v Sun Rock Bldg. Corp.*, 260 AD2d 566, 688 NYS2d 646 [2d Dept 1999]), a meritorious defense to the action (*see Finkelstein v Sunshine*, 47 AD3d 882, \_\_\_ NYS2d \_\_\_ [2d Dept 2008]) and must proffer supporting facts in evidentiary form (*see Kumar v Yonkers Contr. Co., Inc.*, 14 AD3d 493, 788 NYS2d 408 [2d Dept 2005]).

Here, the affidavit of the process server constituted prima facie evidence of proper service pursuant to CPLR 308(4) (*see Wells Fargo Bank, N.A. v McGloster*, \_\_\_ AD3d \_\_\_, 849 NYS2d 784 [2d Dept 2008]; *Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d 343, 756 NYS2d 92 [2d Dept 2003]). Defendant failed to address the process server's claim that "[t]he subject's name is on the stone in the driveway." Additionally, the claim set forth in the affirmation of defendant's then counsel that the affixing to the door "was not done, or at best it was not done until well after the date set forth in the Affidavit of Service," is too equivocal to create an issue of fact, particularly after such a delay in time. Defendant does not deny service of the notice of pendency and summons on September 8, 2005. Moreover, the underlying action was defended by the Estate of John J. Kennedy and service was also effectuated upon another family member at the same residence, that is, Paul Kennedy. Under such circumstances, involving such close family relationships, the prolonged delay in seeking to vacate the default is inexcusable.

The Court finds that defendant's affidavit is nothing more than a feigned attempt to create a false issue of fact regarding service of process in order to create a lack of jurisdiction issue (*see Payne v 100 Motor Parkway Assoc., LLC*, 45 AD3d 550, 846 NYS2d 211 [2d Dept 2007]; *Koyenov v Twin-D Transp.*,

*Inc.*, 33 AD3d 967, 824 NYS2d 338 [2d Dept 2006]; *McGuire v Quinnonez*, 280 AD2d 587, 720 NYS2d 812 [2d Dept 2001]; *Nazarian v Monaco Imports, Ltd.*, 255 AD2d 265, 680 NYS2d 252 [1<sup>st</sup> Dept 1998]).

Defendant has failed to demonstrate a reasonable excuse for her default (*see Francis v Long Island College Hosp.*, 45 AD3d 529, 844 NYS2d 721 [2d Dept 2007]; *NYCTL 1996-1 Trust v Jellerette*, \_\_\_ AD3d \_\_\_, \_\_\_ NYS2d \_\_\_ [2d Dept 2008]; *Westchester Cty. Med. Ctr. v Allstate Ins. Co.*, 283 AD2d 488, 724 NYS2d 879 [2d Dept 2001]; *Siu Lung Cheng v Leader Jewelry*, 246 AD2d 526, 666 NYS2d 930 [2d Dept 1998]; *Roussodimou v Zafiriadis*, 238 AD2d 568, 657 NYS2d 66 [2d Dept 1997], *app after rem* 267 AD2d 294, 700 NYS2d 717 [2d Dept 1999]).

Since the record before the Court demonstrates a pattern of neglect, same should be considered intentional and not excusable (*see Village of Hempstead v Jablonsky*, 283 AD2d 553, 725 NYS2d 76 [2d Dept 2001]). Defendant's failure to establish a reasonable excuse renders her claim of a meritorious defense moot (*see Crespo v ADA Mgt.*, 292 AD2d 5, 739 NYS2d 49 [1<sup>st</sup> Dept 2002]; *Ortiz v Medina*, 273 AD2d 9, 709 NYS2d 401 [1<sup>st</sup> Dept 2000]). The application to vacate pursuant to CPLR §5015(a)(1) is denied.

Likewise, under CPLR 317, defendant failed to establish that she did not receive notice of the summons in time to defend the action (*see Jefferson v Netusil*, 44 AD3d 621, *supra*; *CLE Associates, Inc. v Greene*, 43 AD3d 382, 840 NYS2d 436 [2d Dept 2007]). In any event, defendant has failed to establish a meritorious defense (*see Jefferson v Netusil*, 44 AD3d 621, *supra*; *Westchester Cty. Med. Ctr. v Allstate Ins. Co.*, 283 AD2d 488, *supra*). The issues are identical to those set forth in the underlying action by Cynthia Leather Kennedy, the Administratrix of the Estate of John J. Kennedy and the wife of the decedent. Mere conclusions, expressions of hope or unsubstantiated assertions are insufficient to establish a meritorious defense. The affidavit of defendant Kathleen Kennedy failed to raise any potentially meritorious defense that had not previously been considered by the Court. Therefore, even if the motion is deemed to be a motion under CPLR §317, it is without merit.

The additional allegations raised by defendant, Kathleen Kennedy, as to lack of additional notice pursuant to CPLR §3215, is without merit. CPLR §3215(g)(3)(iii) expressly states that the requirement of additional notice is not applicable to actions affecting title to real property (*see also Mauro v 1896 Stillwell Ave., Inc.*, 39 AD3d 506, 833 NYS2d 206 [2d Dept 2007]). Having failed to demonstrate entitlement to relief under CPLR §5015(a)(1) and CPLR §317, the motion is denied.

Concerning that branch of the cross motion which seeks to amend the affidavit of service upon defendant Mary Jo Kennedy, this Court is not convinced that defendant Kathleen Kennedy has standing to contest a defect in the affidavit of service of another party, particularly where the defendant who was served fails to raise any challenge to the jurisdiction of the Court. Here, defendant Mary Jo Kennedy has not questioned the misnaming in the affidavit of service, which claimed substituted service upon "Donald Kennedy brother" instead of "George Kennedy brother." No prejudice being shown, the Court grants the application to amend the original affidavit of service to state the correct person served with process and plaintiff is directed to file, with the County Clerk, an amended affidavit of service (*see CPLR §2001 and §2004*).

Finally, the Court, in once again reviewing the settlement agreement reached on or about August 22, 1990 in an unrelated matter, notes that it clearly states that plaintiff and his father agreed as part of the settlement that plaintiff would be given a one-tenth (1/10) ownership in the Property in question. The Court notes that an initial error in the transcript of the settlement was corrected thereafter, on the record. Without question plaintiff was entitled to a one-tenth (1/10) ownership and not the one-ninth (1/9) interest that the Court mistakenly relied upon in its December 9, 2005 short form judgment and its December 30, 2005 amended short form judgment. Since the correction of the prior judgment and order does not affect a substantial right of a party, pursuant to CPLR §§2001, 2002, and 5019(a), this Court cures the mistake by amending the judgment to reflect the actual status as set forth in the open court settlement (*see generally*

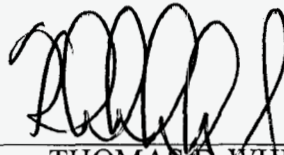
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*McCall v McCall*, 258 AD 1036, 16 NYS2d 955 [4<sup>th</sup> Dept 1940], *lv app den* 259 AD 791, 18 NYS2d 1013 [4<sup>th</sup> Dept 1940]). Consequently, plaintiff should amend his partition action under Suffolk County Index No. 06-09124, to reflect the accurate ownership rights.

Accordingly, the motion is denied and the cross motion is granted. This constitutes the Order and decision of this Court.

DATED: \_\_\_\_\_

3/18/08



\_\_\_\_\_  
THOMAS F. WHELAN, J.S.C.