

Hartford Fire Ins. Co. v Smith

2008 NY Slip Op 31354(U)

April 16, 2008

Supreme Court, Suffolk County

Docket Number: 0002245/2007

Judge: Paul J. Baisley

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

SOFL

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

INDEX NO.: 2245/2007
MOTION DATE: 11/15/2008
MOTION NO.: 001 MD
002 MOT D

-----X
THE HARTFORD FIRE INSURANCE
COMPANY,

Plaintiff,

-against-

FREDERICK L. SMITH, MARIA G. SMITH, PHH
MORTGAGE CORPORATION and JP MORGAN
CHASE BANK, N.A.

Defendants.

PLAINTIFF'S ATTORNEY:
LAMBERT & WEISS, ESQS.
61 Broadway
New York, New York 10006

DEFENDANTS' ATTORNEY:
STEIN, WIENER & ROTH, LLP
One Old Country Road, Suite 113
Carle Place, New York 11514

-----X
Upon the following papers numbered 1 to 76 read on this motion to cancel notice of pendency and cross-motion to dismiss counterclaim and for default judgment: Notice of Motion/ Order to Show Cause and supporting papers 1- 13; Notice of Cross Motion and supporting papers 42-49 ; Answering Affidavits and supporting papers 14-41 ; Replying Affidavits and supporting papers 50-61; 62-76 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (motion sequence no. 001) of defendant PHH MORTGAGE CORPORATION f/k/a CENDANT MORTGAGE CORPORATION, brought on by order to show cause (MAYER, J.) dated August 24, 2007, for an order directing the County Clerk of Suffolk County to cancel, vacate and remove of record the notice of pendency filed by plaintiff herein on February 13, 2007 and dismissing the complaint herein or, in the alternative, compelling plaintiff to post a bond in the amount of \$303,000.00 pending the resolution of this matter; and enjoining plaintiff from any future filing of a notice of pendency against the property located at 174 Gainsborough Road, Holbrook, NY, is denied; and it is further

ORDERED that the cross-motion (motion sequence no. 002) of plaintiff HARTFORD FIRE INSURANCE COMPANY for an order/judgment dismissing the counterclaim of defendant PHH MORTGAGE CORPORATION, deeming the filing of the affidavit of service of the summons and complaint on defendant FREDERICK L. SMITH to be timely *nunc pro tunc*, granting a default judgment against defendant FREDERICK L. SMITH, adjudicating the June 3, 2002 conveyance as fraudulent and declaring such conveyance to be null and void, directing the partition and sale of the former marital property with plaintiff/judgment creditor to receive the monies from such sale to the extent necessary to satisfy its judgment; and for related relief, is determined as set forth herein.

The submissions reflect that on June 3, 2002, MARIA G. SMITH and her husband, FREDERICK L. SMITH, conveyed their jointly owned marital residence to FREDERICK SMITH alone. At the time of the transfer, criminal proceedings were pending against MARIA SMITH for embezzling approximately \$700,000.00 from her employer, plaintiff's insured. MARIA SMITH was convicted, sentenced, and eventually deported to Italy. Plaintiff, which paid out on the employer's theft-loss claim, obtained an assignment of its insured's claims against MARIA SMITH and ultimately obtained a judgment against her in the amount of \$815,162.02, which was

docketed in the Suffolk County Clerk's office on September 15, 2003. On January 18, 2007, plaintiff commenced this action against FREDERICK SMITH to set aside the allegedly fraudulent conveyance of the real property, alleging that the transfer was made for no consideration at a time when MARIA SMITH was insolvent, with actual intent to hinder, delay or defraud plaintiff as creditor. On February 13, 2007, plaintiff filed a notice of pendency of this action. The submissions reflect that within 30 days thereafter as required by CPLR §6512, on March 9, 2007, plaintiff served FREDERICK SMITH with the summons and complaint pursuant to CPLR §308(4) ("nail and mail" service), but failed to file the affidavit of service within 20 days thereafter as required by CPLR §308(4). On August 29, 2007, plaintiff filed the affidavit of service without, however, obtaining an order of the Court permitting such late filing.

On April 11, 2006, plaintiff purported to amend the complaint to assert additional causes of action and to add MARIA SMITH, PHH MORTGAGE CORPORATION ("PHH MORTGAGE"), and J.P. MORGAN CHASE BANK, N.A. ("JP MORGAN") as defendants. Plaintiff did not seek leave of court to amend the complaint, as required by CPLR §3025(b) and §1003; did not serve FREDERICK SMITH with the amended complaint as required pursuant to CPLR §3012(a); did not attempt to serve MARIA SMITH with the supplemental summons and amended complaint; did not file the amended complaint with the Court until after it had served the supplemental summons and amended complaint on JP MORGAN and PHH MORTGAGE; and did not timely file affidavits of service of the supplemental summons and amended complaint on the additional defendants. (The submissions reflect that the amended complaint and affidavits of service thereof were not filed until August 29, 2007, after plaintiff was served with the order to show cause herein.)

PHH MORTGAGE is the holder by assignment of a mortgage given by FREDERICK SMITH on the SMITH's former marital residence which was recorded prior to plaintiff's judgment (but after the conveyance that is at issue in this action). PHH MORTGAGE had commenced foreclosure proceedings against FREDERICK SMITH in 2005, in accordance with which a foreclosure sale was held on February 7, 2007 – six days before plaintiff filed the notice of pendency herein. Defendant now moves to vacate the notice of pendency, which defendant alleges was filed in bad faith in order to frustrate its foreclosure action; for injunctive relief preventing plaintiff from filing a notice of pendency in the future; and for the dismissal of plaintiff's complaint on the basis of various procedural and technical irregularities.

Plaintiff opposes defendant's motion, and cross-moves to dismiss defendant's counterclaim for vacatur of the notice of pendency and for punitive damages; to correct the various technical and procedural defects in its pleadings and filings to date; and for a default judgment against FREDERICK SMITH.

It is well established that an action under the Debtor and Creditor Law to set aside an assertedly fraudulent conveyance of real property is one that affects "the title to, or the possession, use or enjoyment of, real property," and is thus an appropriate subject for a notice of pendency pursuant to CPLR §6501. *Ford Motor Credit Co. v. Shayovitz*, 36 A.D.3d 754, 828 N.Y.S.2d 530 (2d Dept. 2007); *Winston Resources, Inc. v. Glehan*, 274 A.D.2d 475, 710 N.Y.S.2d 635 (2d Dept. 2000). The submissions reflect that plaintiff properly commenced an action pursuant to the Debtor and Creditor Law, and the facts pleaded in the complaint and in the further submissions of plaintiff establish that plaintiff has a potentially meritorious fraudulent conveyance claim. Accordingly, its filing of a notice of pendency, though inconvenient to defendant, is not in bad faith and does not give rise to a cause of action against plaintiff for "tortious interference with

contract” or for punitive damages. In light of the foregoing, the motion of defendant PHH MORTGAGE to vacate the notice of pendency and for related relief is denied, and the cross-motion of plaintiff to dismiss defendant’s counterclaim in its entirety is granted.

Plaintiff has also moved for “ancillary relief with respect to filings.” It is well established that the Court has discretion to excuse the late filing of proof of service, since the untimely filing constitutes a “mere irregularity.” CPLR §2004; *Weininger v. Sassower*, 204 A.D.2d 715, 612 N.Y.S.2d 249 (2d Dept. 1994). Accordingly, the affidavit of service of the original summons and complaint on defendant FREDERICK SMITH is deemed timely filed as of August 29, 2007. The late filing of the affidavit of service does not invalidate the notice of pendency, the filing of which was otherwise timely pursuant to CPLR §6512. *Varon v. Annino*, 170 A.D.2d 445, 565 N.Y.S.2d 540 (2d Dept.1991).

Plaintiff also seeks an order validating the filing and service of the amended complaint on PHH MORTGAGE and JP MORGAN CHASE, *nunc pro tunc*, in accordance with the Court’s discretion under CPLR §2001 and §2005. It is well established that failure to obtain court permission prior to adding additional parties constitutes a jurisdictional defect that warrants dismissal of the amended complaint as against the new parties, unless the defect is waived. *Crair v. Brookdale Hosp. Med. Ctr.*, 259 A.D.2d 586, 259 N.Y.S.2d 586 (2d Dept. 1999). Here, PHH MORTGAGE failed to object to the unauthorized service of the amended complaint, served an answer to the amended complaint which did not raise a jurisdictional objection, interposed a counterclaim, and moved the Court for affirmative relief. The purported amended complaint has now been filed with the Court. In these circumstances, PHH MORTGAGE must be deemed to have waived the defects and to have consented to the jurisdiction of the Court. *Chiulli v. Coyne*, 210 A.D.2d 450, 620 N.Y.S.2d 998 (2d Dept.1994). No such waiver may be said to have occurred with respect to the purported service upon JP MORGAN, however, which has not yet appeared in the action, and such service must be deemed to be a nullity.

In light of the foregoing, the cross-motion for relief with respect to the amended complaint is granted to the extent that plaintiff is granted leave to serve a supplemental summons and amended complaint, in the form annexed to plaintiff’s cross-motion papers as Exhibit C, which process and pleadings shall be deemed to have been properly filed with the Court as of the date of their service on PHH MORTGAGE. Plaintiff is directed to serve the supplemental summons and amended complaint on all other defendants named therein by personal service. Contrary to plaintiff’s assertion, and as reflected by her inclusion in the caption of the amended complaint, MARIA SMITH is a necessary party to this action and must be served with process. Moreover, the fact that defendant FREDERICK SMITH has not appeared in this action does not relieve plaintiff of the necessity of serving him with the amended complaint. Pursuant to CPLR §3012(a), “[a] subsequent pleading asserting new or additional claims for relief shall be served upon a party who has not appeared in the manner provided for service of a summons. In any other case, a pleading shall be served in the manner provided for service of papers generally” [*i.e.*, pursuant to CPLR R. 2103].

Moreover, an amended complaint supersedes the original pleading and becomes the only complaint in the action. *Hummingbird Assocs. v. Dix Auto Serv.*, 273 A.D.2d 58, 709 N.Y.S.2d 51 (1st Dept. 2000); *Felder v. Wank*, 227 A.D.2d 442, 642 N.Y.S.2d 695 (2d Dept. 1996). In light of the relief sought and granted herein with respect to validating plaintiff’s amended complaint, plaintiff’s request for a default judgment against FREDERICK SMITH predicated on the original

complaint is improper and is denied, subject, of course, to renewal should such defendant default in answering the amended complaint.

Plaintiff has demonstrated no factual or legal basis for the balance of the relief sought in its cross-motion, and its request for such further relief is denied.

The parties are directed to appear for a preliminary conference at the Courthouse located at One Court Street, Riverhead, New York, Courtroom A362, on June 5, 2008 at 9:30 a.m.

Plaintiff is directed to serve a copy of this order, with notice of entry thereof, on all other named parties.

Dated: April 16, 2008

HON. PAUL J. BAISLEY, JR.
J.S.C.