

Astoria Fed. Sav. and Loan Fid. N.Y. FSB v Lane
2008 NY Slip Op 33290(U)
December 4, 2008
Supreme Court, New York County
Docket Number: 133779/94
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

PART 16 **LA Part 16**

ASTORIA FEDERAL
SAVINGS & LOANS
ET AL.
-v-
Marilyn Lane

INDEX NO. 133779 | 94
MOTION DATE _____
MOTION SEQ. NO. 7
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is determined
in accordance with the accompanying
memorandum decision.

FILED
DEC 09 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: DEC 11 2008

Alice Schlesinger
ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER

PART 16 **IA Part 16**

Justice

Astoria Federal Savings
& Loan Assoc., Et Al.

INDEX NO.

133781/94

MOTION DATE

MOTION SEQ. NO.

7

MOTION CAL. NO.

Marilyn Lane

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

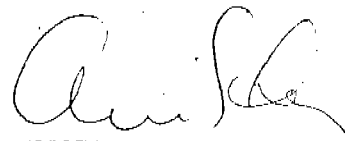
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*and cross-motion
are determined in accordance with
the memorandum decision issued
in the related case by the same name
but assigned index number 133779/94
(motion sequence #007) dated December 4, 2008.*

Dated: _____

DEC 04 2008



ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

-----X
ASTORIA FEDERAL SAVINGS AND LOAN
FIDELITY NEW YORK FSB, et al.,

Plaintiff,

Index No. 133779/94
Motion Seq. 007

- against -

MARILYN LANE,

Defendant

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NEW YORK

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SCHLESINGER, J:

This decision consolidates for dispositional purposes only two motions made by the defendant Marilyn Lane in two related foreclosure actions. The first proceeding, entitled *Astoria Federal Savings & Loan, et al., v. Lane*, Index No. 133779/94, involves condominium Unit 7B at 220 East 60th Street in Manhattan. The second action, bearing the same name under Index No. 133781/94, involves condominium Unit 3A at the same premises.

In both cases Justice Carol Arber granted a motion to strike defendant's answer and issued a judgment of foreclosure and sale in the summer of 1997. In both cases the units were subsequently sold to bona fide purchasers. Ms. Lane has now moved in both cases to vacate the judgment of foreclosure and sale. In the earlier case, this Court granted the current owner Frances Turner leave to intervene by decision and order dated November 17, 2008. In the second case, the current owners Antoninus and Mercedes Marchena have cross-moved to intervene. The Marchenas are clearly interested parties, and Ms. Lane has not opposed intervention. Therefore, they are hereby granted leave to intervene and their papers will be considered on the merits.

The issue presented in Ms. Lane's motions is whether the New York State Supreme Court lacked jurisdiction to enter the judgment of foreclosure and sale because Ms. Lane had filed in the Southern District a petition to have the case removed to federal court. To determine that question, one must review the timeline of events.

Astoria commenced the first action regarding Unit 7B in December of 2004. Ms. Lane served an answer, which was stricken by the court on February 6, 1996. On May 9, 1997, Ms. Lane filed in the Southern District a Petition for Removal to federal court, asserting that the action involved questions of federal law. On July 10, 1997, Justice Carol Arber signed a judgment of foreclosure.

On July 23, 1997, Astoria filed a motion in federal court to dismiss Ms. Lane's Petition for Removal. U.S. District Judge Louis Stanton granted that motion and issued an Order of Remand on July 25, 1997 denying Ms. Lane's Petition for Removal and remanding the action to the Supreme Court, New York County. Some months later, the referee in foreclosure transferred title following the court-ordered sale.

The timeline and events regarding the second action are comparable. The key fact, which is undisputed in both cases, is that Ms. Lane's Petition for Removal had been filed in federal court and was still pending when Justice Arber signed the judgment of foreclosure and sale in state court.

Discussion

Ms. Lane asserts that the filing of her Petition for Removal in federal court divested the state court of jurisdiction to issue a judgment of foreclosure until Justice Stanton issued his Order of Remand. In support of that assertion, Ms. Lane cites 28 USC §1446, subd.(d) [formerly subd. (e)] which provides in relevant part that:

Promptly after the filing of such notice of removal of a civil action the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the notice with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

Here, Ms. Lane has presented evidence which suggests that she did file a copy of her petition with the County Clerk of the Supreme Court, and she asserts that she did mail a copy to her adversaries as well, though there is some issue as to whether the mailing was properly completed and received. It does not appear, however, that Ms. Lane sent a copy of the petition to Justice Arber. Certainly, neither the state nor the federal court issued a stay of the state court proceedings.

The real question, however, is the effect of the filing of the Petition for Removal on the state court action. The United States Supreme Court discussed the issue in *Madisonville Traction Company v. St. Bernard Mining Company*, 196 US 239, 245 (1905), stating that:

It is well settled that if, upon the face of the record, including the petition for removal, a suit does not appear to be a removable one, then the State Court is not bound to surrender its jurisdiction and may proceed as if no application for removal had been made (citations omitted).

Ms. Lane argues that the case is a removable one, citing *Beneficial National Bank v. Anderson*, 539 U.S. 1 (2003). She also submits a document indicating that Judge Stanton wrote a notation to the clerk in the Southern District indicating that the *pro se* filing by Ms. Lane could be accepted. However, allowing papers to be filed does not constitute a finding that the action is removable. What is more, *Beneficial* is readily distinguishable

as it involves the issue of usury. In any event, this Court need not analyze the issue whether a state court foreclosure action is removable to federal court, because such an analysis would not resolve the dispute in this case.

The key to the resolution of this dispute may be found in Judge Harold Baer's discussion in *City of New York v. New York Jets Football Club, Inc., et al.*, 90 Misc.2d 311 (Sup. Ct., N.Y. Co. 1977). The issue presented was whether the filing of a petition to remove a state court action to federal court nullified a state court order issued before the petition was filed. The Court answered with a resounding "No," explaining (at p. 314) that:

To hold otherwise would be ludicrous. It would mean that a defendant could unilaterally void a State court order and, by merely filing a petition, oust the State court of jurisdiction. The statute does not so provide. Rather, until removal is finally determined, the State court's jurisdiction is not terminated but held in abeyance by the statute's direction that the State court refrain from action (US Code, tit 28, § 1446, subd [e]). The cases uniformly hold that upon remand, the action resumes its position "as though no removal had ever been attempted" *Railroad Co. v Koontz*, 104 U.S. 5, 16; *Leslie v Floyd Gas Co.*, 11 F Supp 401; *Doerr v Warner*, 247 Minn 98, 106.

In the case at bar Justice Arber issued the judgment after the removal petition had been filed but before it had been determined. As Judge Baer explained, the result is the same whether the state court acted before or after the petition for removal was filed.

The Supreme Court has recognized this basic rule even to the extent of finding valid after remand a default judgment entered by the State court after the filing of the petition for removal (*Roberts v Chicago, St. Paul & Minneapolis Omaha Ry. Co.*, 48 Minn 521, affd 164 U.S. 703). As characterized by the Supreme Court in the *Railroad Co.* case, (*supra*) the filing of the petition is merely an "attempt" to transfer jurisdiction. A defendant's unilateral action does not accomplish that transfer.

These principles directly apply here to compel the denial of Ms. Lane's motions. By order dated July 25, 1997, Judge Stanton summarily dismissed Ms. Lane's removal petition, stating that:

The petition for removal failing to comply with 28 U.S.C. §1446(a) which requires "a short and plain statement of the grounds for removal," and showing no non-frivolous basis for jurisdiction in this court or for this court's interference with pending proceedings in the Supreme Court of the State of New York, County of New York, it clearly appears on the face of the papers submitted that removal should not be permitted and that this court should accordingly make an order for summary remand. 28 U.S.C. §1446(c)(4).

Accordingly, this action is remanded to the Supreme Court of the State of New York, County of New York.

Thus, while the state court's July 10, 1997 foreclosure judgment may not have been enforceable immediately upon issuance, all barriers to enforcement were lifted when Judge Stanton issued his remand order and revived the state court's jurisdiction in full. As a result, plaintiff was entitled to proceed with the foreclosure sales some months later, and no basis has been stated by Ms. Lane for vacating the judgments. Further, the equities militate against vacating the judgments more than ten years after their entry, particularly considering that bona fide purchasers have been in possession for several years.

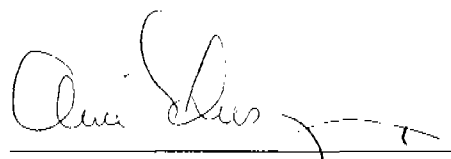
Accordingly, it is hereby

ORDERED that the defendant's motions are in all respects denied, without costs.

This constitutes the decision and order of this Court.

Dated: December 4, 2008

DEC 04 2008



ALICE SCHLESINGER

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DEC 09 2008
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