

**Johnson v Tiu**

2009 NY Slip Op 33226(U)

December 2, 2009

Supreme Court, Queens County

Docket Number: 14781/07

Judge: Patricia P. Satterfield

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Short Form Order

**NEW YORK STATE SUPREME COURT - QUEENS COUNTY**

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

-----X  
THEREETHA JOHNSON,

Plaintiff,

-against-

Index No: 14781/07  
Motion Date: 8/19/09  
Motion Cal. No: 11, 12  
Motion Seq. No: 3

JOYCE TIU, MARS ASSOCIATES, STEPHANIE  
CINTRON, MICHAEL RESILARD, PAUL BOGLE  
and MAKESH BALSARA,

Defendants.

-----X

The following papers numbered 1 to 22 read on this pro se motion by plaintiff for an order staying and enjoining defendants from selling or altering the premises located at 109-42 177<sup>th</sup> Street, Jamaica, New York, 11433, and restoring plaintiff's occupancy in the premises [Motion Cal. No 11]; and upon this motion by defendants Joyce Tiu and Mukesh Balsara for an order, pursuant to CPLR 306-b and 1003, dismissing the complaint [Motion Cal. No. 12].

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<sup>1</sup> Although plaintiff was initially represented by counsel in the commencement of this action, plaintiff's instant order to show cause was made as a pro se application, as she indicates in the prayer for relief that she is dissatisfied with the representation that she has received thus far. However, during the pendency of the motion, plaintiff apparently retained new counsel, who interposed a reply to the opposition submitted by defendants.

Upon the foregoing papers, it is hereby ordered that the motions are disposed of as follows:

This is a action by plaintiff Theretha Johnson (“plaintiff”) against defendants for a judgment declaring that defendants Joyce Tiu (“Tiu”), Makesh Balsara (“Balsara”), and Stephanie Cintron (“Cintron”) are not title holders of property located at 109-42 177<sup>th</sup> Street, Jamaica, New York, and that any deed recorded referencing defendant Cintron, who purported to transfer title to the property to defendants Tiu and Balsara, is without force and effect.

### ***Relevant Facts***

Plaintiff allegedly purchased the subject premises on December 16, 1998, and took title as a joint tenant with the right of survivorship with her mother, Annette Shipp. In April 2004, she closed on a loan facilitated by defendant Michael Resilard, the principal of defendant Mars Associates, a mortgage brokerage firm. Plaintiff asserts that under defendant Resilard’s advisement, she made all of the mortgage payments to him in order to insure that after one year, she could refinance the property at a more favorable mortgage rate and term. Subsequent thereto, title to the property was conveyed to defendants Tiu and Balsara (collectively “defendants”) by deed dated January 18, 2006, from defendant Cintron, and contemporaneously, mortgages in the amount of \$320,000.00 were placed upon the property. Thereafter, defendant Tiu sent a letter to plaintiff informing her that defendants had purchased the property and in order to continue her occupancy of the premises, the parties would need to enter into a lease agreement, which was executed on February 15, 2006. The lease agreement was for a one year term and provided that plaintiff, as the tenant, remit monthly rental payments of \$2500.00 to defendants, as the landlords. In addition, the parties executed a rider to the lease on the same day that gave plaintiff the right of first refusal and option to purchase the premises “not sooner than one year after the execution of this lease and not later than eighteen months after [such] execution.” Further, the rider provided that election of this option by plaintiff was contingent upon plaintiff not having an uncured default pursuant to the lease agreement.

Upon plaintiff’s default in making the rental payments as set forth in the lease agreement, defendant Tiu commenced a summary proceeding to recover possession, in response to which plaintiff commenced this action on May 18, 2007, seeking, inter alia, cancellation and vacatur of defendants’ January 18, 2006 deed, and a stay of the Civil Court eviction proceeding. Plaintiff also seeks compensatory and punitive damages against defendants Michael Resilard and Mars Associates for fraud, as well as compensatory and punitive damages against defendant Paul Bogel, who notarized the underlying conveyance transactions.

### ***Procedural History***

By order of this Court dated September 24, 2007, plaintiff’s motion for an order vacating a deed dated January 18, 2006, purportedly transferring the premises located at 109-42 177<sup>th</sup> Street, Jamaica, New York, from defendant Cintron to herself, and then to defendant Tiu, and further vacating a deed dated January 18, 2006, transferring the same premises from Annette Shipp and

plaintiff, to defendant Cintron, was denied without prejudice to renew after answers had been interposed and discovery was complete. Thereafter, plaintiff moved for an order staying and enjoining defendant Tiu from proceeding to evict her from the property at issue and from executing under a judgment obtained in connection with such eviction, or from restraining any of plaintiff asset's and personal property. By order of this Court dated January 29, 2008, the motion was granted to the extent that the matter was set down for a hearing on February 27, 2008, at which time testimony was to be taken to establish the identities and relationships of all of the parties. On that date, the parties entered into an agreement, and a stipulation was so-ordered by this Court on April 21, 2008, which provided, in pertinent part, the following:

Stipulated, Consented and Agreed, that [plaintiff] shall pay to Tiu and Balsara the sum of One Thousand Eight Hundred (\$1800.00) Dollars per month, representing the monthly charge for Johnson's continued use and occupancy of the Premises during the pendency of the instant litigation (the "Monthly Payment"), and it is further

Stipulated, Consented and Agreed, that [plaintiff's] Monthly Payment shall be made so that it is received by Tiu and Balsara no later than the first day of each month, commencing on March 1, 2008 and continuing on the first day of each consecutive month thereafter during the pendency of this litigation, and it is further

Stipulated, Consented and Agreed, that Tiu and Balsara are stayed from evicting [plaintiff] from the Premises so long as she makes the Monthly Payment to Tiu and Balsara as set forth herein.

The stipulation further provided that if plaintiff failed to remit payment as provided, defendants shall send a Notice of Default to plaintiff advising her to cure such default within twenty (20) days of the issuance of the notice. In the event that plaintiff failed to cure, she agreed to "immediately vacate and surrender possession of the Premises, to remove herself and her personal belongings from the Premises and to immediately provide all keys to the Premises to [defendants]." Additionally the stipulation stated:

Should [plaintiff] fail to surrender possession of the Premises to Tiu and Balsara based on her default in performing the terms of this stipulation, Tiu and Balsara may execute on the Judgment of Possession of the Premises and Money Judgment in the sum of \$12,500.00 issued by the Queens County Civil Court dated May 31, 2007, in favor of Tiu and against [plaintiff], including but not limited to the forcible lockout of [plaintiff] from the Premises.

Thereafter, upon plaintiff's failure to make the December 2008, and the subsequent payments pursuant to the terms of the stipulation, and her additional failures to cure the default or surrender

possession of the premises as stated in the aforementioned stipulation, defendants executed upon the Warrant of Eviction and the City Marshall removed plaintiff from the premises.

Thereafter, plaintiff filed a motion, inter alia, to restore her possession to the premises in both the Civil Court and this Court. By Decision and Order of the Civil Court, Queens County, dated March 4, 2009, plaintiff's motion was denied on the basis that she must seek such relief before the Court which issued the So-Ordered Stipulation. It is upon the foregoing that plaintiff seeks an order staying and enjoining defendants from selling or altering the premises located at 109-42 177<sup>th</sup> Street, Jamaica, New York, 11433, and restoring plaintiff's occupancy in the premises. Defendants Tiu and Balsara move for an order, pursuant to CPLR 306-b and 1003, dismissing the complaint.

Here, as defendants seek dismissal of the action, this Court will consider their application first. Defendants Balsara and Tiu seek dismissal of the complaint pursuant to CPLR §§ 306-b and 1003, on the ground that plaintiff failed to serve the other named defendants, who have not appeared, and are not represented by counsel. They state, inter alia, that "plaintiff cannot dispute that she has failed to serve party defendants Michael Resilard, Paul Bogle or Mars Associates, Inc., with her summons and complaint, despite the fact that it was initially filed in Queens County Supreme Court on or about June 12, 2007, more than a year and a half ago." Defendants further contend that plaintiff has failed to join Accredited Home Lenders, Inc., which allegedly holds the first and second mortgages on the premises. They assert that at the conclusion of the February 27, 2008 hearing, former counsel for plaintiff admitted to this Court that he failed to serve the pleadings on defendants Mars, Resilard and Bogle. As a result, defendants state that this Court directed plaintiff's former counsel to "immediately file a motion seeking leave to amend plaintiff's complaint to add the mortgagee as a party defendant, and request an extension in the time in which to serve the remaining defendants with process, or seek to serve process by alternate means." Defendants further state that plaintiff has failed to move for an extension of time to serve despite the directives of this Court "issued at the conclusion of the hearing held on plaintiff's second order to show cause held [before this Court] on February 27, 2008." As such, defendants assert that despite these directives, as plaintiff has not made any attempts to cure these defects, "plaintiff simply cannot maintain the instant action without securing jurisdiction over the named defendants Michael Resilard, Paul Bogle or Mars Associates, Inc;" nor can this action proceed in the absence of these necessary parties, necessitating dismissal of this action.

In response, counsel for plaintiff asserts that plaintiff's action was handled ineffectively by previous counsel and as the new counsel, although he reviewed the record, it is difficult for him "to tell what directives or orders were previously made by this Court in this case." He further asserts that defendant Stephanie Cintron, the defendant who purported to convey the property to defendants, was served and proffers the affidavit of service. Counsel contends that although defendants allege that according to the February 28 hearing, plaintiff was directed by this Court to join Accredited Home Lenders, Inc., the transcript reveals that this company is no longer in business. Further, counsel states the following:

I do not know what actually was ordered by the Court after the hearing on February 27, 2008. The transcript ended abruptly with the Court stating that there would be a five minute recess. The transcript did not continue after that. I spoke with the court reporter, Nancy Elder, to confirm that she had sent the complete transcript. She told me that there was nothing further on the record of the proceeding. She mentioned to me that she had noticed the seemingly abrupt ending when she prepared the transcript and double-checked to make sure that the entire proceeding was properly transcribed. The “conclusion” of the hearing [] is not reflected in the transcript of the hearing.”

CPLR § 306-b, entitled, “Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause,” states the following:

Service of the summons and complaint, summons with notice, third-party summons and complaint, or petition with a notice of petition or order to show cause shall be made within one hundred twenty days after the filing of the summons and complaint, summons with notice, third-party summons and complaint, or petition, provided that in an action or proceeding, except a proceeding commenced under the election law, where the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires. If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.

Further, CPLR § 1003, entitled, “Nonjoinder and misjoinder of parties,” states the following:

Nonjoinder of a party who should be joined under section 1001 is a ground for dismissal of an action without prejudice unless the court allows the action to proceed without that party under the provisions of that section. Misjoinder of parties is not a ground for dismissal of an action. Parties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared, or once without leave of court within twenty days after service of the original summons or at anytime before the period for responding to that summons expires or within twenty days after service of a pleading responding to it. Parties may be dropped by the court, on motion of any party or on its own initiative, at any stage of the action and upon

such terms as may be just. The court may order any claim against a party severed and proceeded with separately.

From the outset, it is noted by this Court that defendants Balsara and Tiu lack standing to make the argument of defective service on behalf of the other defendants, who are not represented by counsel and have not made appearances in this action, thus their application for relief pursuant CPLR § 306-b, is denied. Nevertheless, in response thereto, plaintiff's counsel rests on the facts, as he perceives them, that previous counsel woefully represented plaintiff, current counsel is new to the case and does not know what was previously ordered by this Court in this action, and there was a grave injustice perpetrated against plaintiff. Counsel correctly asserts that the hearing on February 27, 2008 ended abruptly. Indeed, the transcript indicates that the Court took a five minute recess in order for plaintiff's prior counsel to review documents to which defendant Balsara was referring during his cross-examination. The next indication as to what occurred thereafter is found in the April 21, 2008 So-Ordered Stipulation, whereby it is stated that an interim agreement was reached by the parties at the subject hearing, resulting in the aforementioned stipulation. Notwithstanding, plaintiff was not precluded from seeking the amelioration of these alleged defects on this instant action, now that he has been put on notice of the possible jurisdictional issues.

Based upon the record, it is clear that the mortgagee of the subject property, whether it be the purportedly defunct Accredited Home Lenders, Inc., or its successor, has not been served with process of this action. This Court determines that the mortgagee is a necessary party to this action in which there are issues regarding title and allegations of fraudulent conveyance. In light of this, the action hereby is dismissed without prejudice to recommencement, pursuant to CPLR § 1003. Consequently, the motion by plaintiff for an order staying and enjoining defendants from selling or altering the premises located at 109-42 177<sup>th</sup> Street, Jamaica, New York, 11433, and restoring plaintiff's occupancy in the premises, is denied as moot.

Dated: December 2, 2009

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J.S.C.