

Niles v Wilshire Inv. Group, LLC

2010 NY Slip Op 31001(U)

April 6, 2010

Supreme Court, Suffolk County

Docket Number: 34663/2009

Judge: Joseph Farneti

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SHORT FORM ORDER

INDEX NO. 34663/2009

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

 ROSARIA NILES and SALVATORE A.
 BONO,

Plaintiffs,

-against-

WILSHIRE INVESTMENT GROUP, LLC,
 AMERICAN KEY, INC., TIERONE BANK, and
 LAURA J. NILES FOUNDATION, INC.,

Defendants.

ORIG. RETURN DATE: SEPTEMBER 17, 2009
 FINAL SUBMISSION DATE: SEPTEMBER 24, 2009
 MTN. SEQ. #: 001
 MOTION: MD

ORIG. RETURN DATE: SEPTEMBER 17, 2009
 FINAL SUBMISSION DATE: SEPTEMBER 24, 2009
 MTN. SEQ. #: 002
 MOTION: MD

ORIG. RETURN DATE: SEPTEMBER 17, 2009
 FINAL SUBMISSION DATE: SEPTEMBER 24, 2009
 MTN. SEQ. #: 003
 CROSS-MOTION: XMG

ORIG. RETURN DATE: SEPTEMBER 17, 2009
 FINAL SUBMISSION DATE: SEPTEMBER 24, 2009
 MTN. SEQ. #: 004
 MOTION: MD

SELF-REPRESENTED PLAINTIFFS:

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Upon the following papers numbered 1 to 15 read on these motions FOR PRELIMINARY INJUNCTION, RECUSAL, DISMISSAL AND TO VACATE TEMPORARY RESTRAINING ORDER.
Order to Show Cause and supporting papers 1-3; Notice of Motion and supporting papers 4-6;
Notice of Cross-motion and supporting papers 7-9; Memorandum of Law 10; Order to Show
Cause and supporting papers 11-13; Reply Affidavit and supporting papers 14, 15; it is,

ORDERED that this motion by plaintiffs ROSARIA NILES and SALVATORE A. BONO ("plaintiffs" or "Niles") for an Order staying and enjoining the defendants during the pendency of this action from evicting plaintiffs from the premises commonly known as 223 Lakeview Avenue West, Brightwaters, New York; vacating an eviction order dated August 6, 2009; and voiding a referee's deed dated May 26, 2009, is hereby **DENIED** as moot in light of the Court's ruling herein; and it is further

ORDERED that this motion by plaintiffs for an Order disqualifying and recusing the undersigned from the instant action; randomly reassigning this matter; and extending the temporary restraining order heretofore granted on September 2, 2009 (Pines, J.), is hereby **DENIED** as moot in light of the Court's ruling herein; and it is further

ORDERED that this cross-motion by defendants WILSHIRE INVESTMENT GROUP, LLC and AMERICAN KEY, INC. ("defendants") for an Order, pursuant to CPLR 3211 (a) (5) and (7), dismissing the complaint herein dated August 31, 2009 in its entirety; imposing sanctions against plaintiffs pursuant to 22 NYCRR 130-1.1; awarding defendants the costs of bringing this cross-motion, including attorneys' fees; and enjoining plaintiffs from filing any further actions in this Court without prior leave of Court, is hereby **GRANTED** to the extent set forth hereinafter; and it is further

ORDERED that this motion by defendants for an Order, pursuant to CPLR 6314, vacating the temporary restraining order heretofore granted on September 2, 2009 (Pines, J.), is hereby **DENIED** as moot, the Court having

vacated the temporary restraining order on September 8, 2009 (Pines, J.) after a hearing.

Plaintiffs commenced this action, and filed the instant motion for a preliminary injunction, seeking to stay their eviction from the premises commonly known as 223 Lakeview Avenue West, Brightwaters, New York, to vacate an eviction order dated August 6, 2009, and to void a referee's deed dated May 26, 2009, naming defendants WILSHIRE INVESTMENT GROUP, LLC and AMERICAN KEY, INC. as grantees, based upon alleged fraud and conspiracy.

In the underlying foreclosure action, an Order granting summary judgment to the plaintiff TIERONE BANK was issued on April 19, 2006 (Werner, J.); an Order denying reargument of that motion was issued on October 23, 2006 (Werner, J.); and a Judgment of Foreclosure and Sale was issued by this Court on November 2, 2007. Thereafter, by Orders dated January 25, 2008 and January 30, 2008, the Appellate Division, Second Department twice denied Niles' applications for a stay pending appeal. In addition, Niles attempted to stay the foreclosure sale by filing petitions in Bankruptcy Court, which stay was eventually lifted upon motion of WILSHIRE INVESTMENT GROUP, LLC, but was the subject of two more unsuccessful applications by Niles to reinstate the stay.

Niles subsequently filed another application in this Court, seeking, among other things, an Order staying the sale and vacating the Judgment of Foreclosure. By Order of this Court dated April 16, 2009, Niles' application was denied in its entirety. In the aforementioned Order, the Court held, among other things, that any allegations of fraud were raised, or could have been raised, in Niles' answer; in opposition to plaintiff's motion for summary judgment; or in the motion by Niles to reargue and renew. The Court noted that the Appellate Division, Second Department, upon its own motion, dismissed the appeal from the Order of October 23, 2006 granting summary judgment to plaintiff. In the interim, the premises were sold at foreclosure sale on April 8, 2009 to WILSHIRE INVESTMENT GROUP, LLC and AMERICAN KEY, INC.

After a trial held in Suffolk County District Court on July 30, 2009 (Flanagan, J.), WILSHIRE INVESTMENT GROUP, LLC and AMERICAN KEY, INC. were awarded a judgment of possession of the premises and a warrant of eviction against plaintiffs. Subsequently, plaintiffs filed an action in the United States District Court, Eastern District of New York, seeking the same relief as in the instant action. By Order dated August 25, 2009 (Bianco, J.), the Court denied plaintiffs' application for a preliminary injunction after a hearing.

Plaintiffs have now filed the instant motions for a preliminary injunction and for recusal of the undersigned. Defendants have filed the instant cross-motion to dismiss and motion to vacate the temporary restraining order heretofore granted on September 2, 2009 (Pines, J.). As discussed, the Court vacated the temporary restraining order on September 8, 2009 (Pines, J.). Thus, defendants' motion to vacate is **DENIED** as moot.

With respect to defendants' cross-motion to dismiss, defendants argue that plaintiffs' complaint must be dismissed in its entirety, as plaintiffs have yet again raised the same arguments of fraud and conspiracy that were raised and decided in multiple actions, and upon multiple applications by Niles in the underlying foreclosure action, in the Appellate Division, Second Department, and in at least two different federal courts. As such, defendants argue that this action is barred by principles of *res judicata* and collateral estoppel. This Court agrees. In New York, *res judicata*, or claim preclusion, bars successive litigation based upon the same transaction or series of connected transactions if (i) there is a judgment on the merits rendered by a court of competent jurisdiction; and (ii) the party against whom the doctrine is invoked was a party to the previous action or in privity with a party who was (*Matter of People of the State of New York, by Eliot Spitzer, as Attorney Gen. v Applied Card Sys., Inc.*, 11 NY3d 105 [2008]; *Sainval v City of New York*, 57 AD3d 508 [2008]). In order to invoke the doctrine of collateral estoppel, two well-settled requirements must be satisfied: "First, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination" (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449 [1985]). The policies underlying its application are avoiding relitigation of a decided issue and the possibility of an inconsistent result (*see Buechel v Bain*, 97 NY2d 295 [2001]; *Altegra Credit Co. v. Tin Chu*, 2006 NY Slip Op 3826 [2006]).

The Court finds that both actions concern the foreclosure of the same mortgage transaction secured by the same real property and the issues attendant thereto, and that determinations on the merits were made by numerous courts that TIERONE BANK was entitled to foreclose the mortgage executed by Niles, that the Judgment of Foreclosure should not be vacated, that no stay of the sale was warranted, and that no stay of the warrant of eviction or judgment of possession was appropriate. As such, the Court finds that the instant action is barred by the doctrines of *res judicata* and collateral estoppel.

Accordingly, that branch of defendants' cross-motion to dismiss the complaint herein is **GRANTED**. However, the Court, in its discretion, declines to grant defendants any of the remaining relief sought in their cross-motion.

In view of the foregoing, plaintiffs' motions for a preliminary injunction and for recusal are both **DENIED** as moot.

The foregoing constitutes the decision and Order of the Court.

Dated: April 6, 2010



HON. JOSEPH FARNETI
Acting Justice Supreme Court