

**Washington Mut. Bank v Phillips**

2010 NY Slip Op 32139(U)

July 28, 2010

Supreme Court, Richmond County

Docket Number: 103776/07

Judge: Anthony Giacobbe

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

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WASHINGTON MUTUAL BANK,

TP-9

Plaintiffs

Present:  
Hon. Anthony I. Giacobbe

-against-

DECISION AND ORDER

PATRICK PHILLIPS; MARILYN M. PHILLIPS  
a/k/a M.M. PHILLIPS; MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC., As Nominee for  
HOMECOMINGS FINANCIAL NETWORK, INC.;  
JOSE MARTINEZ; ARMANDO GARCIA; ANTHONY  
JOSEPH; KAREN WILSON; CURLENA BENNETT;  
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS  
INC., As Nominee for HOMECOMINGS FINANCIAL  
NETWORK, INC.; JOSE MARTINEZ; ARMANDO  
GARCIA; ANTHONY JOSEPH; KAREN WILSON;  
CURLENA BENNETT,

Index No. 103776/07  
Motion Nos. 001, 002, 003

Defendants.  
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The following papers numbered 1 to 6 were fully submitted on the 26<sup>th</sup> day of March, 2010:

Amended Notice of Motion (001) by Defendant Patrick Phillips with supporting papers (sworn to February 1, 2010)	1
Order To Show Cause (002) by Defendant Patrick Phillips with supporting papers (filed February 17, 2010)	2
Amended Notice of Motion (003) by Defendant Patrick Phillips with supporting papers (sworn to February 1, 2010)	3
Affirmation in Opposition by Plaintiff Washington Mutual Bank with supporting papers (dated March 3, 2010)	4
Affirmation in Opposition by Plaintiff Washington Mutual Bank with supporting papers (dated March 10, 2010)	5
Reply Affirmation with supporting papers (dated March 25, 2010)	6

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Upon the foregoing papers, the applications (001, 003) of defendant Patrick Phillips in which he seeks to vacate (1) the Judgment of Foreclosure and Sale entered on March 20, 2008, and (2) the subsequent foreclosure sale held on October 1, 2009, are denied, as is his Order To Show Cause (002)

in which he seeks a temporary restraining order of eviction proceedings in Landlord-Tenant Court.<sup>1</sup>

Plaintiff commenced this action to foreclose a mortgage in the amount of \$340,000.00 given to defendants Patrick Phillips and Marilyn Phillips in connection with property located at 27 Bond Street on Staten Island. It appears that none of the defendants answered or appeared in the action, and a default judgment was entered against them on March 20, 2008. The foreclosure sale originally scheduled for May 8, 2008 was cancelled due to the filing of a Bankruptcy Petition by defendant Patrick Phillips on May 7, 2008. That case was dismissed on September 29, 2008, whereupon another foreclosure sale was scheduled on November 10, 2008. This sale was also cancelled due to defendant Patrick Phillips' filing of a second bankruptcy petition on November 6, 2008. Insofar as it appears, his bankruptcy case was again dismissed, and the foreclosure sale was rescheduled for January 12, 2009. However, on January 9, 2009, codefendant Marilyn Phillips filed her own petition for bankruptcy. That petition was dismissed on April 27, 2009, but the subsequently-scheduled foreclosure sale was again cancelled after codefendant Marilyn Phillips filed a second bankruptcy petition on July 24, 2009. Following the dismissal of this fourth bankruptcy case, the foreclosure sale was rescheduled for October 1, 2009, but on July 1, 2009, defendant Patrick Phillips allegedly quit-claimed the property to a third individual, Hartley Phillips, a non-party and fellow family member, who filed his own bankruptcy petition on September 29, 2009. Nevertheless, the sale did proceed on October 1, 2009, at which plaintiff bank was the highest bidder.

In two separate and virtually identical applications (001, 003), defendant Patrick Phillips moves to vacate both the judgment of foreclosure and the ensuing sale, and by Order To Show Cause (002) seeks a temporary restraining order staying all eviction proceedings pending in Landlord-Tenant Court until this Court renders a decision regarding the pending applications to vacate the foreclosure sale held on October 1, 2009. According to defendant, he will be irreparably harmed and

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<sup>1</sup> Parenthetically, it does not appear that the "Affidavit Of Service By Mail" sworn to March 2, 2010 and submitted by defendant-movant, complies with the service provisions directed in the Order To Show Cause. Upon the instant motions, defendant-movant initially appeared *pro se*, and was subsequently represented by counsel.

his due process rights will be violated if the eviction proceedings are allowed to proceed. More particularly, defendant contends that he will be deprived of the right to adjudicate his case on the merits, since any favorable decision in the foreclosure action will affect the outcome of the eviction proceedings. In the two separate applications to vacate the judgment and sale, defendant contends that an automatic stay was in effect on October 1, 2009 owing to the bankruptcy filing by the “new owner,” Hartley Phillips, on September 29, 2009, thereby rendering same null and void.

In opposition, plaintiff contends that there was no bankruptcy stay in effect at the time that the foreclosure sale was held. Plaintiff contends that defendant has abused the judicial system by his numerous attempts to file for bankruptcy, and that his attempted transfer of ownership of the property immediately prior to the sale was but another attempt to perpetrate a fraud upon itself and the Court. According to plaintiff, it was contacted by Marilyn Phillips on September 30, 2009 and told (1) that the property had been quit-claimed to Hartley Phillips, and (2) that said Hartley Phillips had filed a bankruptcy petition on September 29, 2009. Although defendants then demanded that the October 1, 2009 foreclosure sale should be cancelled, plaintiff purportedly took the position that non-party Hartley Phillips was not a fee title owner of the property, and that any bankruptcy filing by him would not affect the foreclosure sale. In support of its position, plaintiff has submitted copies of the Judgment of Foreclosure and Sale, the Notices of Sale, and the orders of the Bankruptcy Court dismissing the various bankruptcy filings. Plaintiff has also submitted copies of the letters sent by Hartley Phillips regarding the putative transfer of title from defendant Patrick Phillips, a copy of a handwritten quit-claim deed, and the accompanying tax documents intended to demonstrate that the deed had been recorded in the County Clerk’s office on September 30, 2009.

In his reply, defendant contends that plaintiff failed to cite any law supporting its position that a bankruptcy stay was not in effect at the time of the foreclosure sale. Rather, defendant contends that title to the property had been transferred to a third party, Hartley Phillips, and that the latter had filed for bankruptcy prior to the foreclosure sale, thereby staying the sale in accordance with the provisions of the United States Bankruptcy Code (11 U.S.C. §362[a]). Finally, defendant contends that it was incumbent upon plaintiff to exercise due diligence to discover that the deed transferring title to Hartley Phillips already had been recorded (*i.e.*, on or about 3:53:19 pm on September 30,

2009), and that it should not have proceeded with the foreclosure sale on October 1, 2009 based on the documented transfer and filing.

It is well settled that upon the filing of a debtor's bankruptcy petition, an automatic stay is triggered preventing the commencement or continuance of any lawsuit or other proceeding to recover claims against the debtor (11 U.S.C. §362[a][1]). This automatic stay is one of the fundamental protections provided for debtors by the bankruptcy code (*id*; *Sunshine Development, Inc. v. FDIC*, 33 F3d 106 [1<sup>st</sup> Cir. 1994]). Moreover, the stay is mandatory in nature, applicable to all entities including state and federal courts, and is intended to give the debtor some "breathing room" by putting a stop to all collection efforts, whether by harassment, dunning lawsuit or foreclosure (*see, Soars v. Brockton Credit Union*, 107 F3d 969 [1<sup>st</sup> Cir. 1997]).

Here, an automatic stay was triggered upon the filing of defendant Patrick Phillips' first bankruptcy petition on May 7, 2008. Once that bankruptcy case was dismissed, however, the stay was lifted by operation of law (*see* 11 USC §362[c][2]), and any further bankruptcy filing by the same defendant within one year of the first filing, here, on November 6, 2008, operates as a stay of proceedings for only 30 additional days (*see* 11 USC §362[c][3][A]). Moreover, had defendant Patrick Phillips filed a third bankruptcy petition within twelve months from the second filing, he would not have been entitled to any further stay (11 U.S.C. §362[c][4][A][I]; *see, Fremont Investment & Loan v. Hernandez*, 19 Misc3d 1115[A] [S. Ct. Orange Co. 2008]). Thus, it was codefendant Marilyn Phillips who filed the "third" and "fourth" bankruptcy petitions on January 9, 2009 and July 24, 2009, respectively, and the putative transferee, Hartley Phillips, who filed the "fifth" on September 29, 2009. It is not without significance that although three of these five bankruptcy petitions were filed by separate individuals, they were all made within a single, sixteen-month period by members of the same family, all of whom appear to reside at 27 Bond Street, *i.e.*, the premises in foreclosure.

It should be self-evident that federal laws enacted to shield bona fide bankrupts were never intended to be employed as a sword to skewer creditors attempting to enforce their property rights under arms-length agreements devoid of fraud, deception, collusion, misrepresentation or other misconduct, and that it was in order to prevent this type of abuse that bankruptcy courts have often

imputed the actions of one family member to another where there is a “unity of interest” and “conceited]... action” among them to avoid their just debts (*see, In re Aversion*, 79 BR 830, 833 [US Bank. Ct. N.D. Iowa 1987]). Here, there is no question that defendant Patrick Phillips, defendant Marilyn Phillips and non-party Hartley Phillips<sup>2</sup> are united in interest with regard to the subject property. Thus, it was properly determined that the purported automatic stay was of no force or effect to stay the foreclosure sale of the subject premises on October 1, 2009 (*see, In re Wong*, 30 BR. 87, 89 [US Bank. Ct. C.D. Cal. 1983]; *In re Thirtieth Place, Inc.*, 30 BR 503 [U.S. Bank. A.P. 9<sup>th</sup> Cir. 1983]; *see also, In re Kinney*, 51 BR 840 [U.S. Bank. Ct. C.D. Cal 1985]).

In light of all of the foregoing, the motions are denied.<sup>3</sup>

The Court has examined defendant’s remaining contentions and finds them to be without merit.

Accordingly, it is

ORDERED that the motions are denied and all temporary restraints presently in effect are hereby vacated.

E N T E R,

Dated: July 28, 2010

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J.S.C.

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<sup>2</sup> Even though defendant transferred title to the property by quit-claim deed to Hartley Phillips on July 1, 2009, the deed only transferred such title as defendants had in the property, which was by then encumbered by the judgment of foreclosure (*see, Bradt v. Church*, 110 NY 537 [1888]).

<sup>3</sup> Although not raised by either party, it could be argued that defendants had no continuing interest in the property following the execution of the quit-claim deed by defendant Patrick Phillips to non-party Hartley Phillips.