

L&L Assoc. Holding Corp. v Kern

2010 NY Slip Op 33579(U)

December 20, 2010

Sup Ct, Nassau County

Docket Number: 003937-09

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 21
NASSAU COUNTY

L & L ASSOCIATES HOLDING CORP.
d/b/a LLL PARTNERS,

Plaintiff,

-against-

BARBARA KERN, FEDERAL HOME LOAN
MORTGAGE CORPORATION; TAX REDUCTION
SERVICES INC., LAWRENCE & MEMORIAL
HOSPITAL, DISCOVER BANK, KMT GROUP,
LLC, JOHN GUIRRUDERI,

Defendants.

Decision and Order

MOTION SUBMITTED:
October 8, 2010
MOTION SEQUENCE:03
INDEX NO. 003937-09

The following papers and the attachments and exhibits thereto have been read on this motion:

Notice of Motion	1
Affidavit in Opposition	2
Reply Affirmation	3

Background

On February 21, 2006, a tax sale was held in which Plaintiff purchased a tax lien for unpaid taxes on certain property located at 86 Ripplewater Avenue, Massapequa, NY 11758 (Affirmation in Support of Plaintiff's Motion).¹ Through this purchase, the Plaintiff obtained a

¹ Town of Oyster Bay, Section 66, Block 85, Lots 9-12.

certificate of sale of tax lien dated March 23, 2006 (Ex. "B" to Plaintiff's Motion).² Thereafter, the Plaintiff commenced the instant tax lien foreclosure action against Defendants (Ex. "A" to Plaintiff's Motion). Defendant Barbara Kern answered the complaint. Defendant KMT Group, LLC appeared (Affirmation in Support of Motion at ¶ 3). No other Defendants appeared or filed answers to the complaint.

On September 15, 2009, the Plaintiff moved for an order granting summary judgment, striking Kern's answer, appointing a referee to compute the amount due and determine whether the parcels should be sold in one parcel, and amending the caption (Plaintiff's Motion for Summary Judgment).

The order was granted on January 28, 2010 (Spinola, J.) and a Notice of Referee's Hearing along with a Proposed Referee's Oath and Report of Amount Due was served upon Kern on June 8, 2010 (Exs. "A" and "B" to Plaintiff's Motion).³ The referee submitted his Report of Amount Due. In his report, wherein the referee acknowledged having received an Affidavit and Statement of Amount Due from the Plaintiff, the referee "computed and ascertained the amount due to Plaintiff, and find and report that the sum of \$40,600.58 is due and owing to the Plaintiff" (Ex. "B" to Plaintiff's Motion). The referee also indicated in his report that he had received no opposition prior to June 30, 2010, the date on which the referee signed his report (Ex. "B" to Plaintiff's Motion).

By Notice of Motion dated July 5, 2010, the Plaintiff now seeks a Judgment of Foreclosure and Sale. The Defendant Kern opposes the motion⁴ for various reasons which will be discussed below. For the reasons that follow, the Plaintiff's motion is granted.

Analysis

In support of its motion, the Plaintiff submitted an attorney affirmation, the certificate of tax lien, and copies of the Notice of Referee's Hearing, the Referee's Oath, the Referee's Report of Amount Due, and an affidavit of Wayne Lieberman in support of the referee's report of the

² The original tax lien sold on February 21, 2006 was in the amount of \$3,771.93 and related to an unpaid general tax in 2005. On August 15, 2007, the sum of \$23,128.46 was added to the lien representing amounts due, including penalties, for school taxes from 2005 through 2007 and general tax for the year 2006 (Ex. "B" to Plaintiff's Motion).

³ This was actually a second notice of referee's hearing. Prior to the instant motion by Plaintiff for a Judgment of Foreclosure and Sale, a previous motion had been filed with this court seeking the same relief. As will be discussed later in this decision, that motion was withdrawn on consent of the parties.

⁴It appears that Kern's opposition papers to Plaintiff's motion were served by John T. Guerriere, apparently a party defendant herein who defaulted and whose name has been misspelled in the caption. The court notes that service by a party is improper under CPLR 2103[a].

amount due (Ex. "B" to Plaintiff's Motion at ¶¶ 2, 5).

Notice to Redeem

In opposition to the Plaintiff's motion for a judgment of foreclosure and sale, Kern argues that she never received a notice to redeem and, on that basis, the motion should be denied (Defendant's Affidavit in Opposition at ¶¶ 18-20). Although the Plaintiff does not annex a notice to redeem to its motion papers, the affidavit of Wayne Lieberman indicates that "prior to the commencement of the action, \$250.00 was expended in connection with the preparation and service of the notice to redeem" (Ex. "B" to Plaintiff's Motion at ¶ 7).

Regardless, summary judgment to foreclose the tax lien was granted by Justice Spinola on January 28, 2010. Prior to issuance of Justice Spinola's order, Kern had the opportunity to oppose the motion and, in doing so, raised various objections to Plaintiff's motion for summary judgment, none of which included Plaintiff's failure to serve a notice to redeem.⁵

Moreover, under New York law, the absence of strict technical compliance with notification statutes in tax foreclosure proceedings is not a fatal defect if the interested persons receive actual notice (*In re Martyak*, 432 BR 25 [NDNY 2010], citing *Law v Benedict*, 197 AD2d 808 [3d Dept 1993]). As the Second Department stated, "[d]ue process does not require actual receipt of notice before issues concerning a person's property interests may be adjudicated; it is sufficient that the means selected for providing notice is 'reasonably calculated, under all the circumstances, to apprise interest parties of the pendency of the action'" (*Orra Realty Corp v Gillen*, 46 AD3d 649, 651 [2d Dept 2007]).

Here, Kern was not only aware, but actually had in her possession a Redemption Bill which she annexed as an exhibit to her opposition papers to the underlying motion for summary judgment before Justice Spinola. In this vein, Kern's argument in opposition to the instant motion that she was never served with notice to redeem is rejected by this court given her inconsistent position taken in opposition to the summary judgment motion before Justice Spinola (*Law v Benedict*, 197 AD2d 808 [3d Dept 1993] [plaintiff failed to rebut presumption of receipt under the circumstances]).

With respect to the order granting summary judgment, not presently at issue before the undersigned, this court takes judicial notice of the court file and proceedings of the entire action, including those proceedings before Justice Spinola. "In New York, courts may take judicial notice of a record in the same court of either the pending matter or of some other action" (*Matter of Allen v Strough*, 301 AD2d 11, 18 [2d Dept 2002] [under some circumstances, a court's discretion to take judicial notice of a record in related pending proceedings "becomes a virtual obligation"]; *RGH Liquidating v Deloitte*, 71 AD3d 198, 207 [1st Dept 2009] [it is a well

⁵ Kern opposed the motion on the ground that the tax redemption bill indicated that the taxes were paid.

established rule that a court may take judicial notice of undisputed court records and files]; *Pascarella v Goldberg, Cohn & Richter, LLP*, 2009 WL 3465982, 1 [Sup Ct New York County 2009] [court takes judicial notice of the contents of the court file in the matrimonial action to fill evidentiary gaps]; *People v Burnside*, 13 Misc3d 649, 652 n * [Sup Ct New York County 2006] [a court may take judicial notice of its own records in another action in the same court]).

Proceedings Before The Undersigned

Kern asserts that the instant motion should be denied because a prior application seeking the same relief was denied on the merits. Specifically, Kern argues:

Insofar as the Plaintiff's Motion for Judgment of Foreclosure and Sale, had been prepared, filed with the Court, served on the Defendant, the Defendant preparing her Affidavit in Opposition and timely serving and filing same, both parties appearing for a lengthy oral argument hearing, and the matter before the Judge for a decision on the merits its clear that the Plaintiff's attorney's withdrawal of the aforesaid was clearly untimely, and that infact, the merits were decided when the Judge told the attorney that he was going to 'deny same.'

(Defendant's Opposition at ¶ 12).

However, the actual colloquy before the court at the time the prior application was heard undermines any suggestion that the instant motion had, in essence, been decided on the merits.

THE COURT: In the event that a person defends an action but an Answer's stricken, okay, when a Court issues an Order * * * sending it out to a referee, * * * does the other side have a right to appear at a hearing and challenge whatever computations you have? If their Answer's been stricken * * * Not a default, do they not have a right to go to the hearing examiner, referee, and contest your computations? Yes or no.

MR. LEVY: In my legal opinion, and I'm not the judge, is that the Defendant has the right - -

* * *

MR. LEVY: The Defendant has a right to object to the proposed computation.

THE COURT: Okay. So notwithstanding the statement contained in Judge Spinola's Order that says without notice, you properly served notice, but then a hearing did not take place on the scheduled date because the referee in fact had signed the Order - - the report prior to the date that was set down for the hearing correct?

MR. LEVY: Okay. Yes

THE COURT: I don't mean to be - - look, I don't consider myself to be hyper-technical on the law, but fair is fair. You served the notice.

MR. LEVY: Right.

THE COURT: Served the notice, and then the hearing did not go forward. The Order was signed. I don't want to get hung up on nonsense here. I want to do the right thing.

MR. LEVY: I'm with you.

THE COURT: So what's our solution.

MR. LEVY: Our solution is that we allow Mrs. Kern to submit objections to the referee's report, maybe in the - -

THE COURT: Correct. I'm with you. We're on the same page.

MR. LEVY: Okay.

THE COURT: It seems to me that the solution would be to actually have the hearing and permit her to do what she should have done the first time. Whether or not at this point - - I'm assuming that she has now been served with copies of you - - of what was allegedly served, right?

MR. LEVY: Yes.

MS. KERN: Your Honor - -

THE COURT: I guess thinking it through it would be vacated, right? Actually, no, it's never been entered. She'd be permitted to go forward at the hearing and raise objections however she's supposed to raise them, however it's done. I don't know how it's done, but it seems to me that's the correct way.

MR. LEVY: Well, in practice what referees usually like, or request, is that objections be filed, and then the referee consider the need for an actual hearing on the matter. If her defense or her objection to the report is as it's been from day one, that she's paid the tax lien, that's already been resolved by this Court.

THE COURT: Right. That's a separate issue. That's under appeal. That's

nothing to do with me.

MR. LEVY: Right.

THE COURT: We're talking one finite issue here; one discrete issue, and that's whether or not she gets to contest the computation, or however it's going to go down - - whether or not she's entitled to go through the process. That already seems to me is required by law.

I just want to get to that point now in the easiest way possible. So how do I do this.

MR. LEVY: May - -

THE COURT: Perhaps you can do something on consent at this point. I don't really know. Perhaps something can be done that will save me the trouble of figuring out what you have to do next.

MR. LEVY: May I suggest that the Defendant submit - - we will set a new date for the Defendant to submit papers to the referee. The Defendant has, or not, I will send her another copy of the referee's report, an unsigned version, and per the original notice of hearing, that the Defendant submit, if she has something to say regarding the computation, that she submit papers to the referee, and then that will be - - when I make my motion for confirmation of the report the Court could reject the report or confirm it.

THE COURT: Okay. You now have to set up a new hearing date; is that what you would do?

MR. LEVY: I can do that.

THE COURT: I don't want to force you to do anything. I want you to do what is right. I want you to do what we're supposed to be doing here. Based on what I'm hearing now, all I would simply have to do is deny your motion. Boom, one sentence decision. Your motion is denied for whatever reasons. I want you to have a resolution when you leave here so the next time I see you is to confirm the report, not in between for anything else. Perhaps that can be worked out now.

MR. LEVY: That's fine.

THE COURT: You understand, ma'am? I haven't asked you a lot of questions here because to me all of this stuff you've placed in your papers.

MS. KERN: Sorry. I did raise my objections in writing, you're right, your Honor.

I will also object to them producing the referee's report. A referee's supposed to be doing his own report. He's getting paid for it. My understanding, they're producing the report for him.

THE COURT: I think that's - - I don't know how that works, but, generally speaking, it probably is a proposal.

MS. KERN: I will also, your Honor, check out further on the law on that, you know, when I have the time. My view is right now I believe the motion should be denied because he did not comply with the law, and this isn't the first time. As I said to your Honor, there are two previous appeals, and there's grounds for it.

THE COURT: I can't speak to that.

MR. LEVY: Your Honor, in light of - -

THE COURT: Seems to me I'll resolve this application quickly and then you'll do your next step, whatever it is you have to do, and you can do whatever it is you have to do, ma'am.

MR. LEVY: I can just withdraw the application and make it easy.

THE COURT: You have any problem with that?

MS. KERN: No, your Honor.

THE COURT: It's withdrawn on consent.

MS. KERN: Your Honor - -

MR. LEVY: I will notice a new hearing date with the referee.

MS. KERN: Your Honor, may I make one more statement please?

THE COURT: If you like.

MS. KERN: I would prefer Mr. Levy stops driving by my house all the time.

MR. LEVY: I've never been to your house, ma'am. I've never been to your house.

MS. KERN: Thank you, and I wish you would.

THE COURT: Let's all be very nice now. Withdrawn on consent.

Have a nice day.

MS. KERN: Have a good day.

MR. LEVY: Thank you.

THE COURT: Have a good day, counsel.

MR. LEVY: Thank you.

(Transcripts of June 4, 2010, DeStefano, J.)

Based on the above colloquy, it is clear that the court did not decide the prior application on the merits but, rather, allowed the Plaintiff to withdraw the motion to enable Kern the opportunity to submit her objections to the referee's report. Indeed, given Kern's consent to the withdrawal, she cannot now argue that the motion should never have been withdrawn. In any event, even had the application been denied because of an irregularity in the computation process, that would not forever bar the granting of a judgment of foreclosure.

Kern's Objections to the Referee's Report

Kern additionally argues that "the Plaintiff's attorney and the referee falsely claim the Defendant did not raise objections to proposed referee's report or proposed amount due" (Defendant's Opposition at ¶¶ 38-40). To support the claim that she sent her objections to the referee as well as Plaintiff's counsel, Kern annexes a copy of a certified mail receipt (Ex. "G" to Defendant's Opposition). The receipt indicates that on June 15, 2010 some unspecified document or thing may have been mailed to the following person at the following address:

John Andrew Kay
Levy & Levy c/o
1445 New York Ave
Huntington St. NY
11746

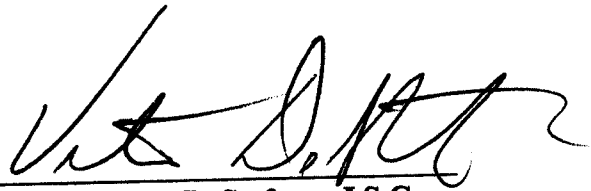
However, this certified mail receipt is insufficient to establish that Kern served the proposed objections. Initially, as per the Notice of Referee's Hearing, the objections to the proposed referee's report were to be served on the referee as well as Plaintiff's counsel at their Great Neck Office. No such mailing has been established, especially in view of Kern's failure to submit an affidavit of service that either the referee or Plaintiff's counsel were served with

objections to the proposed referee's report. In addition, the referee certified that "as of this date [June 30, 2010] I have not received any papers in opposition" (Ex. "B" to Plaintiff's Motion).

Based on the foregoing, it is hereby ordered that the Plaintiff's motion to confirm the referee's report and for a judgment of foreclosure and sale is granted. In addition, the Plaintiff is awarded reasonable attorneys' fees in the amount of \$3,000 based upon the nature of the services rendered and the reasonable time spent in relation to performing such services. The court shall separately issue an order in the form attached to the Plaintiff's motion papers implementing the foregoing.

This constitutes the decision and order of the court.

Dated: December 20, 2010



Hon. Vito M. DeStefano, J.S.C.

ENTERED
DEC 29 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE