

Komarov v Leybson

2011 NY Slip Op 30543(U)

March 2, 2011

Supreme Court, New York County

Docket Number: 114631/10

Judge: Judith J. Gische

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

PRESENT: GISCHE
HON. JUDITH J. GISCHE Justice

PART 10

Com ARO, B
Relator
- v -
COYBSON, L
Respondent

INDEX NO. 114631/10
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

FILED

MAR 04 2011

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MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

*And pre-hearing conference scheduled
for June 16, 2011 at 9:30 AM in Part 10 Rm 232
60 Centre St*

Dated: March 2, 2011

J. GISCHE
HON. JUDITH J. GISCHE 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 10

-----X
Boris Komarov and
Bokom International, Ltd.,

Petitioners,

Decision/Order
Index # 114631/10
Mot. Seq.#001

-against-

Lia L. Leybson,

Respondent.

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-----X
Hon. Gische J.:

Pursuant to CPLR 2219(A) the following numbered papers were considered by the court on this motion:

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PAPERS

NUMBERED

OSC, petition, exhibits.....	1
Notice of Cross-Motion, JMS affirm., LL affd., exhibits.....	2
BK affd., exhibits.....	3

Upon the foregoing papers the decision and order of the court is as follows:

Petitioners are judgment creditors of the respondent. They have a joint and several judgment, filed on September 15, 2009, against respondent individually and Russian Black Pearl, Inc., in the amount of \$833,634.55. They bring this petition, pursuant to CPLR § 5206 (e), seeking to compel the sale of condominium unit R20C ("condominium"), located at 120 East 87th Street in Manhattan ("building"), so that after reserving the sum of \$50,000 for the respondent, the surplus can be applied in satisfaction of their judgment. The condominium is owned by respondent and is her personal residence.

Respondent has cross-moved to dismiss the petition. She claims that she was not correctly served and, therefore, the court has no jurisdiction over her. In addition,

* 3]

respondent argues that since the petitioner has failed to prove, through admissible evidence, that the value of the condominium exceeds \$50,000, the petition should be dismissed. Alternatively, she argues, the matter should be set down for a hearing. Finally, the respondent asks the court to exercise its equity and allow her to remain in her apartment.

Lack of Jurisdiction

Respondent admits that she received a copy of the Order to Show Cause and Petition from her doorman. She denies that she later received an additional copy of those papers in the mail. CPLR §308. The original affidavit of service, filed with the court, asserts that on 11/17/10 the Order to Show Cause and papers upon which it was based (i.e. Petition and exhibits) were served upon respondent by delivery to the doorman at the building. Thereafter, and on the same date, the papers were mailed to respondent, at the condominium. Attached to the affidavit of service is an original certificate of mailing, stamped by the United States Post Office in Mineola, New York. The affidavit of service constitutes *prima facie* evidence of appropriate service of process and proves that the court has jurisdiction over respondent. 425 East 26th Street Owners Corp. v. Beaton, 50 AD3d 845 (2nd dept. 2008); Johnson v. Deas, 32 AD3d 253 (1st dept. 2006).

In opposition respondent claims in summary fashion "that I did not receive a follow up copy [of process] in the mail." This bare boned denial of receipt is not sufficient to rebut the affidavit of service with the certificate of mailing attached, so as to raise any issue of fact requiring a hearing on the issue of jurisdiction. General Motors Acceptance Corp. v. Grade A Auto Body, Inc., 21 AD3d 447 (2nd dept. 2005).

The court, therefore, denies the cross-motion to the extent it seek dismissal based on lack of jurisdiction.

Sufficiency of the Petition

Respondent argues that the petition should be dismissed because petitioner has not put in proof of the value of the condominium and, *a fortiori*, has not proven that the value exceeds the \$50,000 exemption. Moreover, she claims, without any back up documents, that the condominium is subject to liens. At bar, the only proof of value is an unsworn letter from a real estate broker that the apartment exceeds \$1,328,500.00, based upon the sale of comparable apartments at the building.

CPLR §5206(e) permits a judgment creditor to commence a special proceeding against a judgment debtor to compel a sale of his/her homestead where the homestead otherwise exceeds \$50,000 in value. In determining "value" for meeting the threshold, the court should look to value of the judgment debtors equity in the asset. Reda v. Voges, 192 AD2d 611 (2nd dept. 1993); McKinney's Practice Commentaries, C5206:2.

At bar, the petitioner has alleged that the condominium has a substantial value, based upon a real estate broker's assessment. Respondent correctly points out that the letter is not evidence in admissible form. Failure to include evidence in admissible form in the petition, however, does not warrant a denial of the petition altogether, but rather indicates that a hearing is required. Likewise, respondents claims of liens warrants a hearing, not an outright dismissal of the petition. Reda v. Voges, *supra*.

The court, therefore, denies the motion to dismiss the petition and otherwise directs that there be a hearing on the disputed issues.

Since petitioner will have the burden of proof at the hearing, and the facts

regarding liens are certainly within respondent's knowledge, the court grants leave to permit petitioner discovery in the form of interrogatories and demands for documents, limited to the issue of liens. CPLR § 408. The demands for discovery shall be served within 15 days after receipt of an answer to the petition. Discovery shall be completed no later than 45 days after service of the discovery demands.

Equity

Respondent has not set forth any authority by which the court can simply deny an otherwise valid sale of a homestead under CPLR §5206(e) based on equity. In any event, the fact that the condominium is her home would not be a basis to deny the sale because every sale under this statute is of someone's home.

Conclusion

In accordance herewith, it is hereby:

ORDERED that the cross-motion to dismiss the petition is denied in its entirety, and it is further

ORDERED that the respondent is given 10 days from service of this decision with notice of entry to answer the petition, and it is further

ORDERED that petitioner is given leave to serve demands for discovery, as set forth herein, shall be served within 15 days after receipt of an answer to the petition. Discovery shall be completed no later than 45 days after service of the discovery demands, and it is further

ORDERED that respondent's motion for a hearing on the petition is granted, and it is further

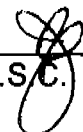
ORDERED that there shall be a pre-hearing conference before the court on June

16, 2011 at 9:30 a.m. and it is further

ORDERED that any requested relief not otherwise expressly granted herein is denied and this constitutes the decision and order of the court.

Dated: New York, NY
March 2, 2011

So Ordered:



J.G. J.S.C.

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