

NYCTL 1999-1 Trust v 244 Fifth Ave. Corp.
2011 NY Slip Op 30922(U)
March 21, 2011
Supreme Court, New York County
Docket Number: 108677/03
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

NYCTL 1999-1 TRUST AND THE BANK OF NEW YORK, AS COLLATERAL AGENT AND CUSTODIAN FOR THE NYCTL 1999-1 TRUST,

Plaintiff,

- v -

244 FIFTH AVENUE CORP., NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE, and "JOHN DOE NO. 1" THROUGH "JOHN DOE NO. 100",

Defendants.

Index No.: 108677/03

Motion Date: 05/28/10

Motion Seq. No.: 02

Motion Cal. No.: 93

The following papers, numbered 1 to 7 were read on this motion to restore.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits

Answering Affidavits - Exhibits

Replying Affidavits - Exhibits

PAPERS NUMBERED

1 - 4

5

6, 7

FILED

MAR 24 2011

Cross-Motion: Yes No

Upon the foregoing papers,

NEW YORK COUNTY CLERK'S OFFICE

The court shall grant defendant 244 Fifth Avenue Corporation's motion to (1) restore this action to the court's pre-note of issue active calendar and (2) extend movant's time to serve an answer pursuant to CPLR 3012 (d).

This is the curious case where the defendant seeks to restore the case to the court's calendar and the plaintiff seeks to keep the case off the calendar. Plaintiff is a tax lien trust

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):

that commenced this tax lien foreclosure action on May 12, 2003. By Order to Show Cause dated April 18, 2006, plaintiff sought to extend the duration of the Notice of Pendency. By Order dated May 4, 2006 (Acosta, J.) this court denied the motion because of "no appearance by the parties" and marked the Order "Final Disposition."

It is clear that the dispositional marking was merely a clerical error because there is no basis for a court to mark a case off the pre-note of issue calendar without notice to the parties merely because the parties fail to attend an oral argument on a pre-answer motion and nothing in the body of the Order indicates that the court had any intention of dismissing the action. In any event, there was no motion or other application for dismissal of this action pending before this court, nor was any judgment of dismissal or otherwise entered. Therefore, the court shall restore this action to the pre-note of issue calendar without further application. See Johnson v Sam Minskoff & Sons, Inc., 287 AD2d 233, 236 (1st Dept 2001) ("marking a case off before a note of issue is filed is not consistent with the purpose of the IAS"); Stonehill Pub. Inc. v Clancy-Cullen Storage Co. 251 AD2d 25 (1st Dept 1998) ("trial court improperly invoked the 'inherent powers' doctrine to sua sponte dismiss the instant action").

The court shall also grant the movant's application pursuant to CPLR 3012 (d) to serve an answer in the form annexed to the moving papers.

As stated above, plaintiff commenced this action in 2003. The only action that plaintiff has taken in this action was the subsequently withdrawn motion to extend the notice of pendency in April 2006. Therefore, pursuant to CPLR 3215 (c) this action is subject to dismissal as plaintiff has failed to move for a default judgment based upon defendants' failure to answer and plaintiff proffers no reasonable excuse why the court should not dismiss the action. Apparently, the plaintiff is under the mistaken impression that judgment was rendered in its favor because the case was marked off the active docket.

As stated by 244 Fifth Avenue, plaintiff's affirmation in support of its withdrawn Order to Show Cause states that

On or about June 12, 2003, defendant 244 Fifth Avenue Corp. appeared in this action by its attorney Edward P. Nolan of Windels Marx Lane & Mittendorf, LLP. Defendant 244 Fifth Avenue Corp. has alleged that the water charges which comprise the subject tax lien were paid prior to the issuance of the lien by the New York City Department of Environmental Protection ("DEP") and furnished plaintiff's prior counsel with copies of cancelled checks purportedly evidencing same. An investigation into defendant's claims is currently pending before DEP.
(emphasis added)

Contrary to plaintiff's arguments, its own affirmation establishes that it acknowledged the movant's appearance in this action and was fully aware of the defenses raised. Plaintiff in

seeking to withdraw its 2006 motion never indicated that it felt 244 Fifth was in default thus providing support for the movant's position that the parties had agreed to suspend the litigation pending DEP's investigation.

Plaintiff has been unable to cite any prejudice resulting from the restoration of this action to the calendar and resolution of this matter on the merits. Therefore, the court shall also grant that portion of 244 Fifth's motion pursuant to CPLR 3012 (d). See Wiesel v. Friends Exhaust Sys., Inc., 71 AD3d 1006, 1007 (2d Dept 2010).

Accordingly, it is

ORDERED that the motion is GRANTED and the Clerk is directed to RESTORE this action to the court's pre-note of issue calendar; and it is further

ORDERED that pursuant to CPLR 3012 (d) defendant 244 FIFTH AVENUE CORP.'s time to serve an answer, in the form annexed to the moving papers, is hereby extended to 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the parties are directed to attend a preliminary conference on June 14, 2011 in IAS Part 59, Room 103, 71 Thomas Street, New York, NY 10013 at 9:30 A.M.

This is the decision and order of the court.

Dated: MAR 21 2011

ENTER:

Debra A. James

DEBRA A. JAMES

J.S.C.

FILED

MAR 24 2011

NEW YORK
COUNTY CLERK'S OFFICE