

**101-19 37th Ave. LLC v R&L Equity Holding LLC**

2011 NY Slip Op 31663(U)

June 21, 2011

Supreme Court, Queens County

Docket Number: 7077/09

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS  
Justice

IA Part 2

101-19 37<sup>th</sup> AVENUE LLC,  
  
Plaintiff,  
-against-

Index Number 7077/09

Motion  
Date May 4, 2010

R&L EQUITY HOLDING LLC,  
Y&R CAPITAL NY LLC, 578 HOLDING CORP.,  
SHIMON BETESH, TAMAR AMBALU, DAVID  
BETESH, SUSAN BETESH, NEW YORK  
STATE COMMISSIONER OF TAXATION AND  
FINANCE, NEW YOUK CITY ENVIRONMENTAL  
CONTROL BOARD, RELIABLE REALTORS LLC,  
MANUEL GUERRA,

Motion  
Cal. Number 25  
Motion Seq. No. 3

Defendants.

The following papers numbered 1 to 17 read on this motion by defendant R&L Equity Holding LLC (R&L) for a preliminary injunction enjoining plaintiff from conveying, assigning or transferring the subject premises, or causing the property to be sold at a public auction, or transferred, and to vacate the judgment of foreclosure and sale pursuant to CPLR 5015(a)(1) and (4) and CPLR 317.

Papers  
Numbered

Order to Show Cause - Affidavits - Exhibits.....1-10  
Answering Affidavits - Exhibits.....11-13  
Reply Affidavits.....14-17

Upon the foregoing papers it is ordered that the motion is determined as follows:

Ponce De Leon Federal Bank commenced this foreclosure action against, among others, defendant Manuel Guerra after he defaulted

on a consolidated mortgage loan concerning real property commonly known as "101-17 37th Avenue," and "101-19 37th Avenue," Corona, New York. By default judgment of foreclosure and sale dated March 4, 2010, 101-19 37th Avenue LLC, the assignee of Ponce De Leon Federal, was substituted as party plaintiff and the caption was deemed amended. The parties herein, however, have improperly used the prior caption. Plaintiff, therefore, shall serve a copy of this order upon the County Clerk to reflect the deemed amended caption.

Defendant R&L contends that it acquired ownership of the real property known 101-15 37th Avenue, Corona, New York, by virtue of a deed from defendant Manuel Guerra, dated February 19, 2008, and recorded on February 28, 2008. According to defendant R&L, the judgment of foreclosure and sale purports to foreclose the real property encompassed by its deed, but that in fact, the subject mortgage lien does not cover such real property. Defendant R&L seeks to, among other things, vacate the judgment of foreclosure and sale, claiming improper service of process, and that its default in appearing and answering was excusable.

Plaintiff 101-19 37th Avenue LLC, opposes the motion, asserting that defendant R&L lacks standing to move to vacate the default judgment. Contrary to such argument, defendant R&L has standing to move to vacate the judgment of foreclosure and sale. Plaintiff joined R&L as a party defendant, claiming R&L's interest in the subject premises, if any, to be subject and subordinate to plaintiff's mortgage lien (see RPAPL 1311), and obtained a default judgment against R&L on that basis.

With respect to that branch of the motion pursuant to CPLR 5015(a)(1) and (4), the affidavit of service dated April 10, 2009, of a licensed process server, indicates service of process upon defendant R&L pursuant to Limited Liability Law § 303, by delivery of duplicate copies of the summons and complaint to the Secretary of State on April 8, 2009 and payment of the appropriate fee. Such affidavit of service constitutes prima facie evidence of proper service of process upon defendant R&L (see CPLR 311-a[a]; Limited Liability Company Law § 303 [a]; *Trini Realty Corp. v Fulton Center LLC*, 53 AD3d 479 [2008]). In opposition to this showing, defendant R&L claims that the address which it had on file with the Secretary of State (i.e., 199 Lee Avenue, Suite 119, Brooklyn, NY 11211) is an address of a business associate of Morris Lowy, its "principal," and that Lowy has not had dealings with the business associate "since 2008." Such claim, however, constitutes an admission that defendant R&L failed to comply with Limited Liability Company Law § 301(e), which requires limited liability companies to keep a current address on file with the Secretary of State. Failure to comply with Limited Liability Company Law

§ 301(e) does not constitute a “reasonable excuse” for a limited liability company seeking to vacate its default pursuant to CPLR 5015(a)(1) where, as in this case, there has been a passage of a significant amount of time during which defendant R&L’s address on file with the Secretary of State was not updated (see *On Assignment v Medasorb Technologies, LLC*, 50 AD3d 342 [2008]; see also *Peck v Dybo Realty Corp.*, 77 AD3d 640 [2010]; *Yellow Book of N.Y., Inc. v Weiss*, 44 AD3d 755, 756 [2007]; *Paul Conte Cadillac v C.A.R.S. Purch. Serv.*, 126 AD2d 621, 622 [1987]). In addition, the mere denial of receipt of notice of the action by Mr. Lowy, is insufficient to rebut the presumption of proper service upon defendant R&L created by service upon the Secretary of State (see CPLR 311-a[a]; *Trini Realty Corp. v Fulton Center LLC*, 53 AD3d 479 [2008], *supra*). That branch of the motion by defendant R&L to vacate the default judgment pursuant to CPLR 5015(a)(1) and (4) is denied.

As for CPLR 317, service on a limited liability company through delivery of process to the Secretary of State is not “personal delivery” to the limited liability company or an agent designated under CPLR 318 (see *Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co., Inc.*, 67 NY2d 138 [1986]); *Taieb v Hilton Hotels Corp.*, 60 NY2d 725 [1983]; *Cecelia v Colonial Sand & Stone Co.*, 85 AD2d 56, 57 [1982]). Thus, service upon the Secretary of State pursuant to Limited Liability Company Law § 303, does not constitute personal service so as to remove the case from being considered under CPLR 317 (see *Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co., Inc.*, 67 NY2d 138 [1986]; *393 Lefferts Partners, LLC v New York Ave. at Lefferts, LLC*, 68 AD3d 976 [2009]; see also *Sanchez v Avuben Realty LLC*, 78 AD3d 589 [2010]; *M.R. v 2526 Valentine LLC*, 58 AD3d 530 [2009]). The court, therefore, may exercise its discretion and consider whether defendant R&L is entitled to relief pursuant to CPLR 317.

CPLR 317 does not require a showing of reasonable excuse (see *Eugene Di Lorenzo, Inc. v. A.C. Dutton Lbr. Co.*, 67 NY2d 138, 141 [1986]). Defendant R&L, however, has failed to demonstrate that it did not receive personal notice of the summons in time to defend (see *Tribeca Lending Corp. v Crawford*, 79 AD3d 1018 [2010]). A limited liability company may be member-managed or manager-managed (see Limited Liability Company §§ 401[a], 418). To the extent that defendant R&L claims it first learned of the pendency of this action when Lowy inquired into the “status” of its property in early February 2011, it has failed to demonstrate that Lowy is a member or manager of the company (*cf.* *393 Lefferts Partners, LLC v New York Ave. at Lefferts, LLC*, 68 AD3d 976 [2009]; *Crespo v A.D.A. Management*, 292 AD2d 5 [2002]).

Defendant R&L additionally has failed to demonstrate a meritorious defense to the action (see *Guayara v First Rockaway Coast Corp.*, 35 AD3d 659 [2006]). Defendant R&L asserts that its property is not subject to plaintiff's mortgage lien, because the street address of its property is 101-15 37th Avenue, Corona, New York, and plaintiff obtained a judgment of foreclosure and sale with respect to the premises known as 101-17 37th Avenue, Corona, New York and 101-19 37th Avenue, Corona, New York.

The complaint contains, at "Schedule A," which is annexed to the complaint and made part of it, a legal description of the mortgaged premises, setting forth the "metes and bounds" of the premises sought to be foreclosed, and referencing the premises as "KNOWN AS: 101-19 and 101-17 37th Avenue Corona, NY." The metes and bounds description found in Schedule A encompasses the property described in the two separate metes and bounds descriptions found in the consolidated mortgage, dated August 3, 2007, and the consolidation, extension and modification agreement (consolidation agreement) of the same date. The notice of pendency, judgment of foreclosure and notice of sale each include a legal description of the property, which describes the metes and bounds in a manner identical to the metes and bounds description included in Schedule A of the complaint.

Although defendant R&L asserts that his property is not subject to the subject mortgage, the legal description contained in its deed sets forth metes and bounds which are identical to those metes and bounds contained in Schedule A of the complaint, the judgment of foreclosure, the notice of pendency and the notice of sale. In addition, to the extent the legal description in defendant R&L's deed makes reference to "Said Premises being known as 101-15 37<sup>th</sup> Ave Queens NY and Section: Block: 1742 Lot: 25," such reference follows the proviso "FOR INFORMATION ONLY." To the degree there is a discrepancy between the street address of the property which defendant R&L alleges it owns, and the street address reflected in the consolidated mortgage, complaint, judgment of foreclosure and sale, notice of pendency, and notice of sale, the legal description controls (see *Congregation Yetev Lev D'Satmar v 26 Adar N.B. Corp.*, 219 AD2d 186, 190 [1996] see also *American Mortg. Bank v Matovitz*, 208 AD2d 788 [1994]). The consolidated mortgage and consolidation agreement were recorded against "Block 1742, Lot 25 Entire Lot," as was defendant R&L's deed. Because defendant R&L's deed was recorded after the subject consolidated mortgage, defendant R&L took the property subject to plaintiff's mortgage lien and its interest is subordinate to plaintiff's rights (see Real Property Law § 291; see also *Andy Associates, Inc. v Bankers Trust Co.*, 49 NY2d 13 [1979]).

That branch of the motion by defendant R&L to vacate the judgment of foreclosure and sale pursuant to CPLR 317 is denied.

Furthermore, plaintiff's failure to submit an affidavit of the facts or a verified complaint in connection with the application for the default judgment<sup>1</sup> did not render the judgment a nullity under CPLR 3215(f), or warrant excusing defendant R&L's default in the absence of a reasonable excuse or a meritorious defense (see *Midfirst Bank v Al-Rahman*, 81 AD3d 797 [2011]; see also *Neuman v Zurich North America*, 36 AD3d 601 [2007]).

Under these circumstances, the branch of the motion for a stay or a preliminary injunction is denied. Plaintiff shall serve defendant R&L with a copy of a notice of any rescheduled sale, and all other papers and notices of all other proceedings subsequent to judgment (see *Home Sav. Bank v Chiola*, 203 AD2d 525 [1994]).

Dated: June 21, 2011  
LD

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J.S.C.

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1

The affidavit of Steven A. Tsavaris, dated May 12, 2009, attesting to defendant Gomez's default in payment of the installment of principal and interest on November 1, 2008, and thereafter, was submitted in support of the application for leave to appoint a referee to compute, but such affidavit was not presented in connection with its application for a default judgment.