

**Bayview Loan Servicing, LLC v Allysa Leigh Corp.**

2011 NY Slip Op 31858(U)

June 29, 2011

Supreme Court, Nassau County

Docket Number: 20936/07

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 15 NASSAU COUNTY**

**PRESENT:**

**Honorable Karen V. Murphy**  
**Justice of the Supreme Court**

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**BAYVIEW LOAN SERVICING, LLC,**

**Plaintiff(s),**

**-against-**

Index No. 20936/07

Motion Submitted: 4/25/10  
Motion Sequence: 004

**ALLYSA LEIGH CORP;  
TERRY BIVONA;  
2851 OCEAN AVENUE REALTY, INC.;;  
STILL WATERS REST, INC.;;  
PEOPLE OF THE STATE OF NEW YORK BY  
THE DEPARTMENT OF TAXATION AND  
FINANCE, AND 'JOHN DOE' (SAID NAME  
BEING FICTITIOUS, IT BEING THE INTENTION  
OF THE PLAINTIFF TO DESIGNATE ANY AND  
ALL OCCUPANTS,, TENANTS, PERSONS OR  
CORPORATIONS, IF ANY, HAVING OR  
CLAIMING AN INTEREST IN OR LIEN UPON  
THE PREMISES BEING FORECLOSED HEREIN),**

**Defendant(s).**

\_\_\_\_\_ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....X
- Defendant's/Respondent's.....

Plaintiff, for the third time, moves this Court for an Order granting summary judgment in its favor. Defendants oppose the requested relief. The instant motion was originally

submitted in December 2010, but was thereafter adjourned by the Court to March 17, 2011 in an attempt to bring this matter to a constructive conclusion. In the ensuing months, it is apparent that the defendants and their counsel have failed to submit a written proposal of settlement to plaintiff. Thus, this Court has marked the instant motion submitted.

This matter has endured a long history. A Preliminary Conference Order was signed by the Court on December 16, 2008, directing that all discovery be completed by April 26, 2009. According to that Order, the certification conference was to take place on January 27, 2009. According to the Pre-Note Milestone Deadline Chart for complex cases, this matter was to be certified for trial on April 26, 2009, and the Note of Issue was due to be filed on July 25, 2009. None of these events has occurred to date.

It was not until June 25, 2009 that defendants' (Alyssa Leigh Corp and Terry Bivona) present counsel commenced her representation. Defendants' prior counsel ultimately resigned from the practice of law for disciplinary reasons in February 2010.

Plaintiff's first motion for summary judgment, filed in 2008, was denied with leave to renew upon plaintiff's submission of a certificate of conformity pursuant to CPLR § 2309 [c].

Plaintiff's second motion for summary judgment, filed in late 2009, was denied as premature, with leave to renew upon the completion of discovery. In that March 23, 2010 Order, the Court directed that all discovery was to be completed by May 31, 2010.

In this third attempt to obtain summary judgment, plaintiff states that it has not received any discovery demands from defendant since the March 2010 decision, and requests that the Court decide the instant motion. Defendants assert, *inter alia*, that they were not served with a copy of the Court's March 23, 2010 Order and Notice of Entry, and that the Court's previous decision is abandoned. Defendants further claim that the case is in the same position as it was at the time of the Court's March 23, 2010 decision. Defendants also assert that a fraud has been perpetrated upon defendants with respect to the underlying purchase of the restaurant and accompanying mortgage, which is the subject of this commercial foreclosure action.

"Where the rights of a party are or may be affected by an order, the successful moving party, in order to give validity to the order, is required to serve it on the adverse party" (*McCormick v. Mars Associates, Inc.*, 25 A.D.2d 433, 265 N.Y.S.2d 1004 (2d Dept. 1966); *see CPLR § 2220*).

In this case, plaintiff's second summary judgment motion was denied by this Court's March 23, 2010 Decision and Order. Although plaintiff derived some benefit from this

Court's Order in that it was permitted to renew its motion upon the completion of discovery, this Court did not grant the requested relief to plaintiffs upon compliance with a condition (See *Lyons v. Butler*, 134 A.D.2d 576, 521 N.Y.S.2d 477 [2d Dept 1987]). Moreover, defendants also derived a great benefit from this Court's Order in that summary judgment was not granted against them, and they were permitted further opportunity to complete discovery in order to potentially defeat plaintiff's future summary judgment motion. Based on the foregoing, this Court concludes that plaintiff was not "the successful moving party," and was, therefore, not required to serve the March 23, 2010 Order with Notice of Entry upon defendants Alyssa Leigh Corp. and Terry Bivona.

Having opposed the second summary judgment motion resulting in this Court's March 23, 2010 Decision and Order, defendants should have taken appropriate steps to ascertain the Court's determination of the motion in an effort to protect their rights in this action.<sup>1</sup> In view of the discovery deadline of May 31, 2010, the Court deems the discovery process complete, and all further discovery (e.g., depositions, discovery and inspection demands, etc.) is hereby waived.

The Court will now consider the merits of plaintiff's motion for summary judgment. This Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (*Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (*Cauthers v. Brite Ideas, LLC*, 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the defendants. (*Makaj v. Metropolitan Transportation Authority*, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

In support of its motion, plaintiff has submitted, *inter alia*, the complaint, which seeks, under the second cause of action, to reform the deed to the subject property. According to plaintiff, the subject property was granted by deed, dated June 27, 2006, from 2851 Ocean Avenue Realty, Inc. to Alyssa Leigh, LLC.

It is undisputed that plaintiff is not a party to the deed, nor has plaintiff been designated as an assignee of the deed. As such, plaintiff has not, and cannot, provide any evidence as to the clear intention of the contracting parties as to the correct grantee (see *Miller v. Seibt*, 13 A.D.3d 496, 788 N.Y.S.2d 126 (2d Dept. 2004); *Carla Realty Co., v. County of Rockland*, 222 A.D.2d 480, 635 N.Y.S.2d 67 [2d Dept. 1995]).

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<sup>1</sup>As a practical matter, the parties have appeared before the Court on at least two occasions to discuss the merits of this action, on March 17, 2011, and on May 23, 2011.

Plaintiff's request to reform the deed does, however, bring to light a significant factual issue as to the correct owner of subject property. The Note, Mortgage, Guaranty, and Assignment of Leases and Rents are all in the name of Allysa Leigh Corp. Moreover, plaintiff seeks to sell the mortgaged premises, deeded to Allyssa Leigh, LLC, by foreclosing on the Note and Mortgage issued in the name of Allyssa Leigh, Corp. This issue, now raised by plaintiff's own submissions to this Court, precludes the granting of summary judgment.<sup>2</sup>

Since the plaintiff has failed to meet its *prima facie* burden, it is unnecessary to determine whether the defendants' papers submitted in opposition were sufficient to raise a triable issue of fact (See *Levin v. Khan*, 73 A.D.3d 991, 904 N.Y.S.2d 73 [2d Dept. 2010]; *Kjono v. Fenning*, 69 A.D.3d 581, 893 N.Y.S.2d 157 [2d Dept. 2010]).

The plaintiff's motion for summary judgment is denied.

Accordingly, plaintiff's requests to strike defendants' Answer, and appoint a Referee are denied.

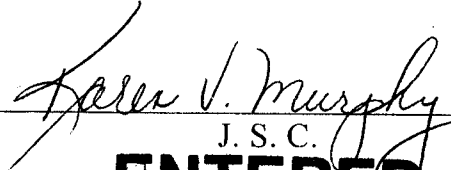
Plaintiff's motion to amend the caption of this action to delete the name of John Doe is granted.

This matter is hereby certified for trial and plaintiff is directed to file a note of issue within 90 days. If plaintiff does not file a note of issue within 90 days, this action is deemed dismissed without further order of this Court (CPLR § 3216).

A copy of this Order must accompany the note of issue.

The foregoing constitutes the Order of this Court.

Dated: June 29, 2011  
Mineola, N.Y.

  
J. S. C.  
**ENTERED**  
JUN 30 2011  
**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**

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<sup>2</sup>Plaintiff's Exhibit E contains a certificate of conformity, in compliance with CPLR § 2309 (c), pertaining to plaintiff's vice president's Affidavit of Merit and Amount Due, thereby resolving the issue raised by this Court's denial of plaintiff's first summary judgment motion.