

**L & L Assoc. Holding Corp. v Rosemond**

2011 NY Slip Op 31972(U)

July 5, 2011

Sup Ct, Nassau County

Docket Number: 004268-10

Judge: Vito M. DeStefano

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,  
Justice

\_\_\_\_\_  
L & L ASSOCIATES HOLDING CORP.,

Plaintiff,

-against-

SEYMOUR ROSEMOND and BEATRICE ROSEMOND, if they, be living, if they be dead, their respective heirs-at-law, next of kin, distributees, executors, administrators, trustees, devisees, legatees, assignees, lienors, creditors, and successors in interest, and generally all persons having or claiming under, by, or through SEYMOUR ROSEMOND and BEATRICE ROSEMOND, if they be dead, whether by purchase, inheritance, lien or otherwise, including any right, title or interest in and to the real property described in the complaint herein, all of who and whose names and places of residence are unknown to the plaintiff,

UNITED STATES OF AMERICA, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, JEAN CLAUDE BONNEAU,

"JOHN DOE # 1" through "JOHN DOE #12", the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint,

Defendants.  
\_\_\_\_\_

TRIAL/IAS, PART 19  
NASSAU COUNTY

Decision and Order

MOTION SUBMITTED:  
February 9, 2011  
MOTION SEQUENCE:01,  
& 02  
INDEX NO. 004268-10

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

Notice of Motion	1
Notice of Cross Motion and Opposition to Summary Judgment Motion	2
Affirmation in Further Support of Motion and in Opposition to Cross Motion	3
Supplemental Affirmation	4
Supplemental Memorandum <sup>1</sup>	5

On February 20, 2007 a tax sale was held in which Plaintiff purchased a tax lien for unpaid taxes on certain property located at 10 Marguerite Avenue in Elmont, NY (the "Property"). Through this purchase, the Plaintiff obtained a certificate of sale of tax lien dated March 22, 2007. By summons and complaint filed March 4, 2010, the Plaintiff commenced the instant tax lien foreclosure action against Defendants Seymour Rosemond ("Mr. Rosemond"), Beatrice Rosemond ("Mrs. Rosemond"), United States of America, New York State Department of Taxation and Finance, Jean Claude Bonneau, and John Doe #1 through John Doe #12. After the complaint was filed, the Plaintiff discovered that the Property was rented to a tenant named Edith Bonneau (the "Tenant"). A summons and complaint was thereafter served upon the Tenant on March 20, 2010 (Ex. "B" to Plaintiff's Motion). The summons and complaint were served upon Mr. Rosemond on March 26, 2010 pursuant to CPLR 308(4) at the address of the subject property in Elmont, and, on March 31, 2010, pursuant to CPLR 308(2), at a Florida address (Ex. "B" to Plaintiff's Motion).

Mr. Rosemond served an answer on or about May 24, 2010 (Ex. "C" to Plaintiff's Motion). Counsel for Tenant filed a Notice of Appearance on October 19, 2010 (Ex. "D" to Plaintiff's Supplemental Affirmation).<sup>2</sup> According to the Plaintiff, Defendants Beatrice Rosemond, United States of America, New York State Department of Taxation and Finance, and Jean Claude Bonneau are not necessary parties and thus were not served with the summons and

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<sup>1</sup> Pursuant to the court's interlocutory order dated April 11, 2011, Mr. Rosemond was given seven days from service of Plaintiff's supplemental memorandum (April 15, 2011) to serve and file his supplemental memorandum. Mr. Rosemond's supplemental memorandum was dated June 5, 2011 and received by the court on June 17, 2011. Notwithstanding Mr. Rosemond untimely submission of supplemental papers, the arguments raised therein have been considered and are without merit.

<sup>2</sup> While the attorney affirmation on behalf of Mr. Rosemond indicates that Edith Bonneau is a tenant of the subject property, and raises legal arguments in support of that contention, the Notice of Appearance filed on behalf of Edith Bonneau asserts that she is the "fee owner of the premises" (Ex. "D" to Plaintiff's Supplemental Memorandum).

complaint. As such, the Plaintiff requests “the deletion of said party defendants from the caption of the action” (Plaintiff’s Supplemental Affirmation p. 2).

The Plaintiff moves this court for an order granting summary judgment, striking Mr. Rosemond’s answer, appointing a referee to determine the amount due Plaintiff and whether the subject property should be sold as one parcel, and amending the caption. Mr. Rosemond opposes Plaintiff’s motion and cross-moves for dismissal of the complaint based on Plaintiff’s alleged failure to provide notice pursuant to CPLR 1303.

For the reasons that follow, the Plaintiff’s motion is granted and Mr. Rosemond’s cross motion is denied.

### Analysis

In this action to foreclose a tax lien, the Plaintiff established its *prima facie* entitlement to summary judgment by demonstrating that the Defendants did not pay the outstanding balance due under the lien (*NYCTL 1998-2 Trustee v 2388 Nostrand Corp.*, 69 AD3d 594 [2d Dept 2010]; *NYCTL 1996-1 Trust v Railroad Maintenance Corp.*, 266 AD2d 39 [1<sup>st</sup> Dept 1999]). In this regard, on this motion the Plaintiff submitted, *inter alia*, the certificate of sale of tax lien, the tax lien redemption bill, and the affidavit of Wayne Lieberman, the party responsible for the Plaintiff’s books and record keeping. The Lieberman affidavit demonstrated that Plaintiff is the current holder of the tax lien, that Plaintiff bought the tax lien from the County of Nassau at a foreclosure sale on February 20, 2007 and that the tax lien has not been paid since the date of the foreclosure sale.

In opposition, Mr. Rosemond failed to meet his burden of demonstrating the existence of a triable issue of fact as to any *bona fide* defense to Plaintiff’s foreclosure action. In his answer, Mr. Rosemond asserts one affirmative defense, namely lack of personal jurisdiction. However, Mr. Rosemond failed to timely move for dismissal on that basis, and thus, the defense has been waived (CPLR 3211[e]).

Moreover, the cross motion is, in any event, defective and without merit. In this regard, Mr. Rosemond failed to annex an affidavit of a person with knowledge of the allegations contained therein. Furthermore, contrary to Mr. Rosemond’s contention, notice pursuant to RPAPL 1303 was not required to be served upon him. Specifically, RPAPL 1303 provides that “[t]he foreclosing party in a mortgage foreclosure action, involving residential real property shall provide notice to: (a) any mortgagor if the action relates to an *owner-occupied* one-to-four family dwelling; and (b) any tenant of a dwelling unit in accordance with the provisions of this section” (RPAPL 1303) (emphasis added). Here, counsel for Mr. Rosemond indicated in her Affirmation that “Edith Bonneau is defendant Rosemond’s tenant in the subject property” (Affirmation in

Support of Cross Motion at ¶ 2). Because the subject property is not owner-occupied, RPAPL 1303 notice was not required.<sup>3</sup>

The court similarly rejects Mr. Rosemond's assertion that dismissal is warranted because the Plaintiff failed to serve the requisite RPAPL 1303 notice on the tenant. Assuming, without deciding, that Mr. Rosemond has standing to raise the purported lack of RPAPL 1303 notice on behalf of the Tenant, the motion papers demonstrate that the Tenant was served with the summons and complaint on March 20, 2010, and served with notice pursuant to RPAPL 1303 on March 22, 2011 (Exs. "D" and "E" to Plaintiff's Affirmation in Further Support and in Opposition to Defendant's Cross Motion).<sup>4</sup> Accordingly, Mr. Rosemond's cross motion for an order dismissing the complaint based on Plaintiff's failure to serve notice pursuant to RPAPL 1303 is without merit.

It is hereby ordered that the Plaintiff's motion is granted in its entirety: Plaintiff is thus awarded summary judgment against Defendants Seymour Rosemond and the Tenant, Edith Bonneau; in addition, the branches of Plaintiff's motion seeking the appointment of a referee (*Neighborhood Housing Serv. of New York City, Inc. v Meltzer*, 67 AD3d 872, 874 [2d Dept 2009]), the striking of Mr. Rosemond's answer (*First Nationwide Bank, FSB v Goodman*, 272 AD2d 433 [2d Dept 2000]) and deletion from the caption of Defendants Beatrice Rosemond, United States of America, New York State Department of Taxation and Finance, and Jean Claude Bonneau, as well as those sued as John Doe #1 through John Doe #12 and amendment of the caption to include Edith Bonneau as a Defendant, are likewise granted (*Neighborhood Housing Serv. Of New York City, Inc. v Meltzer*, 67 AD3d at 874, *supra*; *Empire State Bank, N.A. v DiMattina*, 26 Misc3d 1210 (A) [Sup Ct Richmond County 2010]; *Deutsche Bank National Trust Co. v Campbell*, 26 Misc3d 1206 (A) [Sup Ct Kings County 2009]; *NYCTL 2005 - A Trust v Theodoropoulos*, 15 Misc3d 1102(A) [Sup Ct Queens County 2007]).

It is further ordered that the cross motion is denied.

Submit proposed order in accordance herewith.

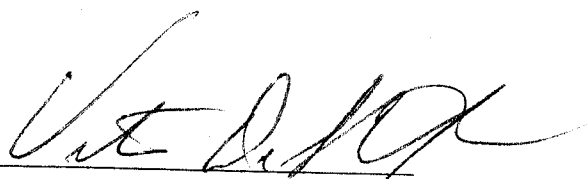
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<sup>3</sup> Notwithstanding that the subject property falls outside the purview of RPAPL 1303, the affidavit of service indicates that Mr. Rosemond was nevertheless served with RPAPL 1303 notice along with the summons and complaint on March 31, 2010.

<sup>4</sup> RPAPL 1303 provides that the "foreclosing party in a mortgage foreclosure action, involving residential real property shall provide notice to . . . any tenant of a dwelling unit in accordance with the provisions of this section" and that notice to the tenant "shall be delivered with ten days of the service of the summons and complaint."

This constitutes the decision and order of the court.

Dated: July 5, 2011



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

**ENTERED**  
JUL 08 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE