

425 East 26th St. Owners Corp. v Beaton

2014 NY Slip Op 33524(U)

November 18, 2014

Sup Ct, Kings County

Docket Number: 20291/2005

Judge: Donald Scott Kurtz

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At Part 26 of the Supreme Court of the State of
New York, Kings County on the 18th day of
November, 2014

Present: HON. DONALD SCOTT KURTZ
Justice, Supreme Court

Index No.: 20291/2005
Motion Calendar No.: 8,10,11

425 East 26th Street Owners Corp.,

Plaintiff,

DECISION/ORDER

~~-against-~~

Laurel Beaton, Ruth Jones, et. al.,
Defendant(s).

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	<u>1-3</u>
Answering Affidavits/Affirmations.....	<u>4-7</u>
Reply Affidavits/Affirmations.....	<u>8</u>
Memoranda of Law.....	_____
Other.....	_____

Upon the foregoing cited papers, defendant Laurel Beaton (hereinafter "defendant")'s motion to vacate the Final Judgment of Foreclosure and Sale dated June 26, 2013; plaintiff's cross-motion to impose sanctions on defendant and her attorney and to prevent her from filing any further motions in this action; and the referee's motion to set and award the referee's fees are decided as follows:

Plaintiff commenced this foreclosure action by the filing of a summons and verified complaint on July 1, 2005. Defendant failed to answer said complaint and on March 31, 2006, the Court granted plaintiff a default judgment and signed an *ex parte* order appointing a referee to compute. Thereafter, defendant moved to vacate her default and by order dated January 22, 2007, the Court granted the motion provided that defendant serve an answer within thirty days thereof. Defendant failed to serve an answer and plaintiff moved for a Final Judgment of Foreclosure and Sale. By order dated May 31, 2007, the Court granted plaintiff's motion based upon defendant's failure to timely serve and file an answer. Defendant then moved to vacate the foreclosure proceedings; to vacate the Final Judgment of Foreclosure and Sale submitted for signature; to dismiss the foreclosure action pursuant to CPLR §3215(c); and for an order modifying or nullifying the Court's order dated May 31, 2007. By order dated November 19, 2007, said motion was denied in its entirety. Defendant appealed from the orders dated May 31, 2007 and November 19, 2007. By order dated April 15, 2008, the Appellate Division Second Department dismissed the appeal from the order dated May 31, 2007 and affirmed this Court's order dated November 19, 2007.

On February 7, 2008, the Court referred this matter to a Judicial Hearing Officer to determine the reasonable attorneys fees with respect to this foreclosure action. Thereafter, plaintiff submitted another Judgment of Foreclosure and Sale and on May 27, 2010, the Court issued an order appointing a new referee to compute and provide an amended updated report. At that point, plaintiff moved for an order, in essence, clarifying the order dated May 27, 2010 and defendant again cross-moved to dismiss the action. By order dated August 17, 2012, the Court amended the May 27, 2010 order and denied the cross-motion to dismiss for the reasons set forth in the Appellate Division decision dated April 15, 2008. The referee issued an updated report and plaintiff then moved to confirm the report and for a Final Judgment of Foreclosure and Sale. Defendant once again cross-moved to dismiss the action or in the alternative, to set aside the referees' reports. By order dated March 22, 2013, the Court confirmed the referee's report and again denied defendant's cross-motion to dismiss for the reasons set forth in this Court's decisions dated May 31, 2007, November 19, 2007, and August 17, 2012 and the decision of the Appellate Division dated April 15, 2008. On March 22, 2013, the Court issued a Final Judgment of Foreclosure and Sale. On June 26, 2013, the Court issued an order amending the Final Judgment to reflect the correct amount due plaintiff pursuant to the referee's affirmation. On October 3, 2013, the shares of stock appurtenant to the subject cooperative apartment and the proprietary lease were sold at auction and subsequently, sold to a bona fide, good faith purchaser for value.

Although it is not entirely clear as to which orders or Judgments defendant's current motion is addressed, the Court will presume that defendant now moves to vacate the order of March 22, 2013 which confirmed the referee's report and denied defendant's cross-motion to dismiss the proceeding; to vacate the Final Judgment of Foreclosure and Sale, also dated March 22, 2013; and to vacate the order of June 26, 2013, which amended the Final Judgment of Foreclosure and Sale. Plaintiff cross-moves for sanctions and to preclude defendant from filing any further motions without leave of the Court. The referee moves to set his fee.

Defendant argues that the Final Judgment of Foreclosure and Sale should be vacated due to fraud, pursuant to CPLR §5015(a)(3). Defendant alleges that plaintiff misled the Court into thinking it possessed original stock certificates. Additionally, defendant alleges that plaintiff had innumerable *ex parte* communications with the Court and the referee. Finally, defendant argues that the referee applied the wrong standard when calculating plaintiff's attorney's fees.

Plaintiff argues that this matter is moot since the stock appurtenant to the subject premises has been sold to a bona fide, good faith purchaser for value. Plaintiff also maintains that the arguments made herein were already made by defendant and decided by this Court or could have been raised by defendant in the previous, underlying motions. Finally, plaintiff argues that the assertion of fraud or misconduct by defendant is unsubstantiated since defendant mistakenly relies on plaintiff's billing entries which reflect routine communications with administrative staff for case management and scheduling purposes.

The Rules of the Chief Administrator of the Courts entitled "Judicial Conduct", 22 NYCRR §100.3(B)(6) provides that:

A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding, except: (a) *Ex parte* communications that are made for scheduling or administrative purposes and that do not affect a substantial right of any party are authorized, provided the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and the judge, insofar as practical and appropriate, makes provision for prompt notification of other parties or their lawyers of the substance of the *ex parte* communication and allows an opportunity to respond.

Neither in the moving papers nor at oral argument, could defendant substantiate the allegation of improper *ex parte* communications between plaintiff's representatives and the Court. Plaintiff's attorney maintained that she called the Court several times regarding ministerial tasks such as locating an order that had been signed. Defendant's attorney merely alleges that he did not know what conversations took place and that the Court should have called him every time it received a phone call from plaintiff's counsel. However, all *ex parte* communications between the Court and plaintiff's counsel were clearly for administrative purposes only and the Court determined that it was impractical and inappropriate to notify defendant or her attorney of the substance of those communications. Therefore, the Court finds that defendant's allegation of inappropriate *ex parte* communications is unfounded.


The reports of the referees were confirmed in the order dated March 22, 2013. Defendant failed to timely move to reargue that order as prescribed by CPLR §2221(d)(3). Therefore, any challenge to the referee's application of the standard used to calculate the attorney's fee awarded to plaintiff's attorney is untimely. The remainder of defendant's arguments are, in essence, attempts to reargue the issues previously decided, or to present arguments different from those originally presented. See *McGill v. Goldman*, 261 AD2d 593, 594 (2d Dept 1999); *Amato v. Lord & Taylor, Inc.*, 10 AD3d 374, 375 (2d Dept 2004).

"A matter is moot when a determination is sought on a matter which, if rendered, could not have any practical effect on the existing controversy (citation omitted)." *Lighting Horizons, Inc. v. E.A. Kahn & Co., Inc.*, 120 AD2d 648, 649 (2d Dept 1986). Here, all arguments made by defendant are moot and academic as the remedy sought, to vacate the Final Judgment of Foreclosure and Sale, will not directly affect the parties, as the shares appurtenant to the subject premises have already been sold. See *Matter of Huntington Hebrew Congregation of Huntington v Tanenbaum*, 62 AD3d 704, *lv dismissed in part, lv denied in part*, 13 NY3d 854 (2009) (wherein the Appellate Division Second Department held that "since the property which is the subject of this proceeding has been sold to a bona fide purchaser for value during the pendency of this appeal, and since the appellant failed to obtain a stay pursuant to CPLR 5519 to prevent the property from being sold, the relief sought by the appellant is no longer available and the rights of the parties will not be directly affected by the


resolution of this appeal.”); *Equicredit Corp. of America v. Cabrero*, 17 AD3d 520 (2d Dept 2005).

In view of the foregoing, the motion to vacate the order of this Court dated March 22, 2013; to vacate the Final Judgment of Foreclosure and Sale also dated March 22, 2013; and to vacate the order dated June 26, 2013 is denied in its entirety. Plaintiff’s cross-motion to impose sanctions on defendant and her agency and to prevent them from filing any further motions in this action is granted to the extent that defendant and her attorney are prohibited from filing any further motions in this proceeding without permission of the Court which application shall be on notice to plaintiff’s counsel. Finally, the referee’s motion for fees is hereby granted to the extent that the referee, Richard A. Klass, Esq., is hereby awarded the amount of \$8,470.00 as his fee, inclusive of disbursements, to be paid by plaintiff.

The foregoing shall constitute the Decision and Order of the Court.



DONALD SCOTT KURTZ
Justice, Supreme Court


FILED
NOV 24 AM 9:33
KINGS COUNTY CLERK