

Solomon Holding Corp. v Stephenson

2015 NY Slip Op 30943(U)

June 1, 2015

Supreme Court, New York County

Docket Number: 159433/2014

Judge: Joan B. Lobis

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

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SOLOMON HOLDING CORP., and MICHAEL
ZIMMERMAN,

Petitioner,

Index No. 159433/2014

-against-

Decision and Order

HUMPHREY STEPHENSON, and ELAINE CERATA-
DAVIS STEPHENSON

Respondent.

-----X
JOAN B. LOBIS, J.S.C.:

By this special proceeding two unrelated judgment creditors, petitioners Solomon Holding Corporation and Michael Zimmerman, seek to force a sale of the homestead of Humphrey Stephenson and Elaine Cerata Davis-Stephenson sued herein as Elaine Cerata-Davis Stephenson. The property is located at 141 W. 119th Street, New York, New York. It was purchased by the respondents as husband and wife, creating a tenancy by the entirety. It has been their marital residence. Stephenson is currently residing in a rehabilitation center due to a series of illnesses. Elaine Cerata Davis-Stephenson resides at the premises. Although the parties were involved in a matrimonial action, there does not appear to be a judgment of divorce.

Solomon Holding Corporation is the assignee of a judgment of De Lage Landen Financial Services. The judgment arose out of a lawsuit against Exodus Offset Printing, Inc. and Humphrey Stephenson in the court of Common Pleas of Chester County, Pennsylvania. A judgment was entered against them in New York County for \$41,820.21 on August 29, 2001, and renewed against Humphrey Stephenson on August 15, 2014. The final judgment amount was increased by \$48,805.78, representing accrued interest, for a total judgment of \$90,625.99. There was an earlier proceeding entitled Solomon Holdings v. Humphrey Stephenson, Index No.

116303/2010. In this proceeding the Honorable Emily Jane Goodman denied the application for a sheriff's sale of the property on the basis, *inter alia*, that because the property was held by tenants by the entirety a sale is not available as an enforcement mechanism since each spouse has a right to occupy the entire premises.

The second petitioner, Michael Zimmerman, acquired his judgment following an award of legal fees in a decision granting him legal fees on consent on September 18, 2007. The petitioner had represented Ms. Davis-Stephenson. The decision was converted to a judgment for \$54,835.71, representing \$31,800 in fees plus \$20,245.71 in accrued interest. The judgment was signed by the Honorable Matthew Cooper and entered on April 27, 2012.

In the prior proceeding for similar relief under Index No. 103120/2012, the respondents did not dispute the debts and repeatedly advised the Court that they were on the verge of securing refinancing to enable them to pay off their debts to petitioners. I issued an order allowing the sale to proceed if refinancing had not been obtained by March 12, 2013. This decision was reversed by the Appellate Division on the basis that Solomon Holding failed to renew its judgment at the time they commenced the petition in 2012. Therefore, it had no valid lien on the property. The court did not reach the issue of the validity of the Zimmerman judgment, but noted that a sale "would have the unnecessarily drastic result of depriving" the other spouse of his rights as a tenant by the entirety. Solomon Holding Corp. v. Stephenson, 118 A.D.3d 613, 614 (1st Dep't 2014).

In this proceeding the petitioners are again seeking to force a sale of the marital premises. In a pre-answer motion respondents seek to dismiss the proceeding on ten separate grounds both procedural and substantive. The respondents also served and filed an answer. The respondents are unrepresented. While respondent Elaine Cerata Davis-Stephenson may represent herself she does not have the capacity to represent her husband without a power of attorney or other legal authority that she has the capacity to act for him. But given the undisputed assertion that he is in a rehabilitation facility it would be appropriate to allow Ms. Davis-Stephenson time to move for an appointment of a guardian ad litem for her husband before there is determination that could lead to a sale of the marital property.

Respondent Davis-Stephenson raises several arguments asserting that the petitioners have not obtained personal jurisdiction over her husband and her. She does this in both her pro se pre-answer motion to dismiss and her answer.¹ As noted above, she does not have the standing to dispute service on Humphrey Stephenson. But only one affidavit of service of the petition is on file. Because of this, when the Court considers the issue with respect to Davis-Stephenson it necessarily will determine the adequacy of the service on Humphrey Stephenson as well. The affidavit of service does not establish the necessary due diligence to allow nail and mail service pursuant to Section 308(4) of the civil Practice Law and Rules. There were only 2 attempts at personal service on October 2, 2014, at 1:39 pm and October 3, 2014, at 12:43 pm. The attempts at personal service were made at roughly the same time, in the early afternoon on consecutive days. This does not qualify as due diligence. Spath v. Zack, 36 a.D.3d 410 (1st Dep't 2007);

¹ The petitioners object to the timeliness of the pre-answer motion. But the issue of personal jurisdiction has been raised in both the motion and answer and is properly before the court.

O'Connell v. Post, 27 A.D.3d 630 (2d Dep't 2006). The affidavit of service also refers to a single copy being served. This is another fatal defect to obtaining personal jurisdiction over both defendants. McCormack v. Gomez, 137 A.D.2d 504 (2d Dep't 1988). I need not consider the issue of Humphrey Stephenson's current occupancy in a rehabilitation center.

I need not reach the other issues raised by respondent Davis-Stephenson. Even if I were to hold that personal jurisdiction was acquired over both defendants, however, the fundamental problem of severing a tenancy by the entirety to force a sale is still a barrier to the remedy that the two judgment creditors seek. The petitioners are not related. No order of joinder or consolidation has been granted. Aggregating the two judgments should not be a basis to allow the forced sale that neither individual judgment debtor would be able to compel.

The petition is dismissed and the clerk of court is directed to enter judgment accordingly.

Dated: June 1, 2015

ENTER:



JOAN B. LOBIS, J.S.C.