

Professional Offshore Opportunity Fund, Ltd. v Braider
2015 NY Slip Op 31657(U)
August 20, 2015
Supreme Court, Suffolk County
Docket Number: 8296-11
Judge: Thomas F. Whelan
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

P R E S E N T:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

Matter referred back to
Hearing Part by App. Div.
Hearing Date: 6/5/15
Conf. Scheduled: 9/11/15

-----X	
PROFESSIONAL OFFSHORE OPPORTUNITY	:
FUND, LTD.,	:
	:
Plaintiff,	:
	:
-against-	:
	:
LLOYD J. BRAIDER, LAURA L. BRAIDER,	:
THE FIRST NATIONAL BANK OF LONG	:
ISLAND, JEANNE L. YANDOLINO, PASTA	:
ITALIANA, INC., COMMACK, TOWN OF	:
SMITHTOWN, NEW YORK STATE	:
DEPARTMENT OF FINANCE,	:
	:
Defendants.	:
-----X	

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Upon review of the court's computerized records, the various prior orders of the court and the Appellate Division, Second Department decision dated October 8, 2014 wherein the denial of defendant Laura Braider's various motions were appealed, and this matter having been referred back to the Suffolk County Supreme Court for a hearing to determine the validity of service of process upon defendant, Laura Braider, it is

ORDERED that based upon the order of the Appellate Division, Second Department dated October 8, 2014, and upon a traverse hearing held on June 5, 2015 and the subsequent submission of a transcript of that hearing, the September 14, 2011 order of reference and the judgment of foreclosure and sale entered on April 26, 2012 are vacated solely as against defendant, Laura Braider, due to the lack of personal jurisdiction over the said moving defendant; and it is further

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ORDERED that a status conference will be held with the remaining parties to this action on **September 11, 2015**, in Part 33 at 9:30 a.m. at the courthouse located at 1 Court Street - Annex, Riverhead, New York; and it is further

ORDERED that the transcript of this hearing is hereby immediately forwarded to the Suffolk County District Attorney's Office for review for possible criminal prosecution.

The plaintiff commenced this action to foreclose a June 15, 2007 mortgage given by the moving defendant, Laura L. Braider, and her co-defendant husband, Lloyd J. Braider, on residential real property situated in Commack, New York. An order of reference entered upon the defaults in answering of all defendants issued on September 14, 2011 upon application of the plaintiff. By notice of motion served upon the moving defendant on March 13, 2012, and others, the plaintiff applied for a judgment of foreclosure and sale. The unopposed motion was granted by the court on April 26, 2012.

In May of 2012, defendant Laura Braider, moved (#003) to be relieved from her default in answering and for an order vacating the fixation of such default by the court in the March 13, 2012 order of reference and vacating the judgment entered thereon. The application was brought on by an Order to Show Cause and supporting papers which did not recite any of the statutory provisions governing applications to be relieved from judgments or orders that are set forth in CPLR 5015. Instead, the supporting papers of counsel and the moving defendant alleged that the court lacked jurisdiction over her since service of the summons and complaint was effected not in a jurisdictionally proficient manner as required by CPLR 308, but by e-mail to an e-mail address of the moving defendant's husband, Lloyd J. Braider, in accordance with a waiver and service Agreement purportedly bearing a signature of the moving defendant. In addition, the moving defendant claimed that she was entitled to a vacatur of her default in answering and the judgment by reason of her possession of a reasonable excuse for not appearing in this action and a meritorious defense. The opposing papers submitted by the plaintiff characterized the motion to vacate as one pursuant to CPLR 5015(4) (lack of personal jurisdiction), and/or CPLR 5015(a)(1)(excusable default), and/or CPLR 317 (excusable default based upon a lack of personal receipt of process in time to defend).

By order dated June 11, 2012, the court denied Ms. Braider's application for vacatur. It separately considered and addressed the three above cited, statutory grounds under which her motion was construed to have been made. That order was reversed in part and remitted for a traverse hearing by the Appellate Division's order dated October 8, 2014.

By notice of motion returnable August 27, 2012, defendant Braider moved (#004) for an order granting her leave to reargue or renew her prior motion (#003) to vacate her default and the other relief outlined above. In support thereof, the moving defendant argued that the court improperly rejected her claim that a vacatur of the judgment and underlying order of reference was required due to lack of personal jurisdiction over such defendant and that no showing of a meritorious defense was necessary nor was a reasonable excuse required to be made with respect thereto. She further argued, among other things, that the court improperly rejected her claims of a meritorious defense to the plaintiff's claims for foreclosure that were premised upon claims that she

did not sign the note, mortgage or guaranty sued upon in this action. Defendant Braider did not, however, claim that the court erred in considering her motion as one made under CPLR 317 as well as CPLR 5015(a)(1) and (a)(4). In an order dated October 12, 2012, defendant Braider's application for reargument and/or renewal was denied and the plaintiff's cross application for leave to enter an amended judgment (#005) was granted, subject to the settlement of such amended judgment. That order was affirmed by the Appellate Division's order dated October 8, 2014.

Thereafter, by motion (#006), defendant Braider moved for an order "pursuant to CPLR 317 allowing Defendant Laura Braider to defend this action and vacating the judgment of foreclosure and sale entered May 1, 2012 or in the alternative, vacating the judgment pursuant to CPLR 5015(a)(3)". For the reasons stated in the Court's order of March 1, 2013, this third application for relief under CPLR 5015 and/or 317 was denied in its entirety and that order was affirmed by the Appellate Division's order dated October 8, 2014.

At the traverse hearing held on June 5, 2015, the court heard deposition testimony from Gretchen Silver, a former associate of the law firm representing the plaintiff. She explained that a notice of default (*see* Pl. Ex. 1) was sent by Federal Express to the defendant, Laura Braider, at her home address. She further explained that an agreement to consent to service of process of the summons and complaint was entered into (*see* Pl. Ex. 2). This agreement was reached with co-defendant, Lloyd Braider, after a process server attempted service at the home and encountered the defendants' son. The agreement was returned to the associate, with signatures from both defendants, including Laura Braider (*see* Pl. Ex. 3). Additional documentation was offered to show that service of the summons, complaint and foreclosure notices were e-mailed to the co-defendant, Lloyd Braider, in keeping with the service agreement (*see* Pl. Ex. 5 and 6). The court found the testimony of Ms. Silver to be credible.

The court also heard from co-defendant, Lloyd Braider. On direct examination from plaintiff's counsel, Mr. Braider claimed to be legally separated, but a review of the court's computerization system for matrimonial matters reveals no judicial intervention for such purposes, contrary to his testimony (*see* transcript pp. 47-8). He agreed that he had conversations with Gretchen Silver seeking to avoid the reappearance of the process server at the home. He also acknowledged receipt of the summons and complaint. On cross examination, Mr. Braider stated that he did not want a process server to come to the home because he did not want his wife to find out that his business was failing and that he used his children as an excuse. He then stated that he never showed the consent to service agreement to Ms. Braider and claimed, after appropriate fifth amendment warnings, that he signed his wife's signature to the service agreement and that the signature was not authorized by Ms. Braider. Mr. Braider also claimed that he intercepted the Fed Ex mailing addressed to Ms. Braider, aside from various other mailings, and never gave them to her. Mr. Braider also claimed that he never spoke to his wife about the foreclosure action. Mr. Braider did admit that he and his wife were served with foreclosure papers regarding a Vermont home in September of 2010, a few months before signing the consent to service agreement set forth above. The Vermont foreclosure action was related to the instant underlying loan obligation. The court finds Mr. Braider's testimony to be completely lacking in truthfulness and simply incredible. The court invokes the doctrine of *Falsus in Uno* and discredits all of the testimony offered, aside from the fact that Mr. Braider induced the above described consent to service agreement from Ms. Silver.

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After Mr. Braider's testimony, plaintiff rested. The court finds the plaintiff satisfied its prima facie burden of service of process upon Ms. Braider, based upon the documentation and testimony offered.

The defendant, Laura Braider testified on her own behalf, along with a forensic documents examiner, Joseph Lubner. Ms. Braider testified that based upon her work schedule, she rarely got to see the mail that was delivered and that she only learned of this foreclosure action in March of 2012. She denied ever seeing any of the documents offered into evidence by the plaintiff at the hearing. She also claimed to have never read the foreclosure papers personally served on her concerning the Vermont property. It is noted that she defaulted on that foreclosure action, which culminated in a June 7, 2011 judgment in favor of the plaintiff. She did maintain that she never authorized her husband to sign her name to the consent to service agreement. Testimony was elicited that in her first submission to the court to vacate her default, her affidavit did not state that her husband signed her signature on the consent to service agreement. The same is true with regard to the July 2012 affidavit of Mr. Braider. However, considering the fact that Ms. Braider did not waive under cross examination from her position that she did not sign the consent to service agreement, the court finds that portion of her testimony to be credible.

The forensic documents examiner, Joseph Lubner, was asked to review Defendant Exs. B through H as documents that contained genuine signatures exemplars of Ms. Braider. These signatures were all from 2003, with one from 2009. They were compared with the signature on the consent to service agreement (*see* Pl. Ex. 3; Def. Ex. A) and it was the expert's conclusion that Ms. Braider did not sign her name on the consent to service agreement. Photographic enlargements were used for comparison purposes and while the signatures varied somewhat, the signature on the consent to process agreement varied significantly, in the expert's opinion. While the credibility of the expert was strongly challenged, based upon an Appellate Division opinion in 2012 in a prior, unrelated Election Law proceeding and, additionally, by the fact that the after-the-fact signature exemplar submitted for the sole purpose of the expert's analysis is often considered suspect, the court finds that, for the most part, this testimony remains unchallenged. Therefore, the testimony stands to refute the prima facie showing by the plaintiff.

In light of the entire testimony offered at the hearing, the court concludes that defendant Laura Braider did not sign the consent to service agreement. Proof is lacking as to the genuineness of the signature on that document. The moving defendant has refuted the plaintiff's prima facie evidence. Without jurisdiction over Laura Braider, the order of reference and the judgment of foreclosure and sale must be vacated as against her. The order and judgment stands as against all remaining defendants.

The court is deeply troubled by the actions of co-defendant, Lloyd Braider. The testimony reveals that he forged a signature on documentation that was filed with governmental bodies, that is, the Suffolk and Nassau County Clerk's Offices, admitted to intercepting the U.S. mail without the individual's consent, and participated in possible mortgage fraud. When faced with evidence of a possible criminal act, the court is obligated to forward the matter to the appropriate authority. Therefore, a copy of the hearing transcript, with a copy of this decision will be forwarded to the Suffolk County District Attorney's Office.

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In light of the holding of this short form order, the remaining parties to the action are directed to appear at a conference to be held on **September 11, 2015** at 9:30 a.m. as directed above to inform the court as to whether this action will proceed to sale or whether a strict foreclosure or reforeclosure action may be maintained (*see generally, Bass v D. Ragno Realty Corp.*, 111 AD3d 863, 976 NYS2d 118 [2d Dept 2013]), or whether the relation back doctrine is applicable (*see generally, U.S. Bank v Murillo*, 48 Misc3d 1216[A], 2015 WL 4643739 [Sup Ct Nassau County, 2015, Winslow, J]).

This constitutes the decision and order of the court.

DATED: 8/20/15



THOMAS F. WHELAN, J.S.C.