

Jopseh v Express Auction N.E., LLC
2015 NY Slip Op 32461(U)
December 23, 2015
Supreme Court, Kings County
Docket Number: 507129/13
Judge: Johnny Lee Baynes
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At a(n) IAS Part 68 of the Supreme Court of the State of New York, held in and for the County of Kings at the Courthouse thereof, at 360 Adams Street, Brooklyn, NY 11201, on the 23rd day of December, 2015.

PRESENT:

HON. JOHNNY L. BAYNES,

JSC.

Index No. 507129/13

OLUWAFEMI JOSEPH,

Plaintiff,

-against-

DECISION AND ORDER

EXPRESS AUCTION NORTH EAST, LLC, and if they be dissolved then to their legal representatives or heirs-at-law, next of kin, distributees, legatees, devisees, their husbands, widowers, assignee, mortgagees, creditors, lienors and successors in interest, and generally all parties having or claiming to have an interest in or lien upon the premises described in the complaint herein, either vested or contingent, by through, under or against any of the Defendants herein specially named or named as a Class, all of who and whose places or residences are Unknown to Plaintiff and cannot after diligent inquiry be ascertained, OREN KLEIN, THE NEW YORK CITY REGISTER, KINGS COUNTY, FIFTH AVENUE TITLE,

Defendants,

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Defendants, Express Auction North East, LLC, and Oren Klein (hereinafter collectively referred to as "Defendants") move by Notice of Motion dated June 22, 2015, for an Order pursuant to CPLR § 3211(a)(1), (3), (7), and (8) dismissing Plaintiff's Second Amended Complaint.

Plaintiff herein brings suit alleging that the mortgage forming the basis of the instant

Action should be discharged from the Kings County Register and for the return of escrow funds held by Defendant Fifth Avenue Title. All claims have been discontinued as against the New York City Register's Office, Kings County, and Defendant Express Auction Northeast has waived any claims to the mortgage sub judice. The sole remaining Defendants are Oren Klein (hereinafter "Klein"), who holds the mortgage at issue, personally, and Fifth Avenue Title (hereinafter "Fifth Avenue").

It should be noted that on April 23, 2015, this Court issued an Order denying defendants' Motion to Dismiss and granting Plaintiff's Motion for leave to file and serve a Second Amended Complaint. That Order was entered on April 27, 2015.

Plaintiff alleges that Plaintiff signed an Auction Agreement with Express Auction North East, LLC (hereinafter "Express"), permitting Express to auction his home (hereinafter "the Agreement"). The Agreement required that Plaintiff execute a promissory note with the Agreement. Plaintiff never did so and canceled the Agreement. Thereafter, a mortgage lien was placed on the property in Klein's name despite there being no agreement between plaintiff and Klein.

Defendants contend that the Second Amended Complaint herein does not comport with that which was proposed in Plaintiff's prior Motion. Plaintiff asserts that the Second Amended Complaint simply fleshes out all causes of action described in Plaintiff's earlier moving papers and any differences are purely stylistic. Defendants further assert that service upon them was improper. Plaintiff is correct in noting that this issue was fully adjudicated before the Court prior to issuance of the April 23, 2015, Order and is *res judicata*.

The doctrine of *res judicata* "operates to preclude the renewal of issues actually litigated and resolved in a prior proceeding as well as claims for different relief which arise out of the

same factual grouping or transaction and which should have or could have been resolved in the prior proceeding". See, *Luscher v Arrua*, 21 AD3d 1005, 1006-07 [2d Dept 2005], quoting *Koether v Generalow*, 231 AD2d 379 [2d Dept 1995]. In this instance, plaintiff has the burden of proving that res judicata applies.

The party seeking to invoke the doctrine of res judicata must demonstrate that the critical issue in the instant action was decided in the prior action and that the party against whom estoppel is sought was afforded a full and fair opportunity to contest such issue.

21 AD2d at 1007.

As plaintiff points out, in their previous Motion to Dismiss, defendants raised the issue of improper service. This Court did, in fact, deny defendants' motion making that claim on April 23, 2015, and will not relitigate that issue.

Defendants further claim that plaintiff has no standing to bring the instant action. That, too, was litigated by this Court when it issued its prior Order.

Defendants, however, are correct in pointing out that plaintiff is not a party to the mortgage at issue and, therefore, has no standing to move to dismiss same. *Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 812 [2003], wherefore plaintiff's cause of action to dismiss the subject mortgage is dismissed.

Defendants additionally complain that the plaintiff never specifically asked that he be allowed to raise his purported causes of action against defendants for forgery, usury and fraud. Plaintiff responds by saying that the facts related to said causes of action were fully plead and put defendants on notice of same. While the Court believes that plaintiff did, in fact, fully set out facts, due to the complexity of the issues which will be litigated and the seriousness of the allegations contained in this action, the Court believes it would be prudent for plaintiff to serve

and file a Third Amended Complaint containing the causes of action for forgery, usury and fraud already factually described in the existing amended complaint.

WHEREFORE, it is hereby

ORDERED and ADJUDGED that Defendants' Motion to Dismiss is granted to the extent that plaintiff's cause of action for dismissal of the subject mortgage is granted; and it is further

ORDERED and ADJUDGED that Defendants' Motion to Dismiss all claims as to defendant Express Auction North East, LLC, with prejudice per Plaintiff's voluntary discontinuance of said claims is granted; and it is further

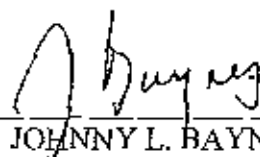
ORDERED and ADJUDGED that defendants' Motion is denied in all other respects; and it is further

ORDERED and ADJUDGED that plaintiff is to file and serve a Third Amended Complaint containing causes of action for forgery, usury and fraud within forty-five (45) days of the date of this Order; and it is further

ORDERED that Fifth Avenue Title Company shall continue to hold the escrowed funds herein in accordance with the escrow agreement.

The foregoing constitutes the Decision and Order of the Court.

ENTER



JOHNNY L. BAYNES, JSC

HON. JOHNNY LEE BAYNES

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CLERK OF COURT