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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 12

X

LINDA SCIALO,

Plaintiff,

Index No.: 011390/13
Motion Sequence...01, 02
Motion Date...10/08/15
XXX

-against-

SHERIDAN ELECTRIC, LTD., ANTHONY DiNOTA and VINCENT GIACOMAZZA,

Defendants.

X

Papers Submitted:
Order to Show Cause.....x
Notice of Cross-Motion.....x
Affirmation in Opposition.....x

Upon the foregoing papers, the Order to Show Cause by the Plaintiff, LINDA SCIALO, seeking an order, *inter alia*, holding the Defendants, SHERIDAN ELECTRIC, LTD., ANTHONY DINOTA AND VINCENT GIACOMAZZA in civil contempt of certain subpoenas *duces tecum* and the Cross-motion by the Defendants, SHERIDAN ELECTRIC, LTD. and ANTHONY DINOTA, seeking an order, *inter alia*, vacating certain confessions of judgment and/or alternatively, *inter alia*, staying the instant proceedings, are determined as hereinafter provided.

In January of 2012, for the recited sum of $650,000.00, the Defendants,

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Anthony DiNota (hereafter "DiNota") and Vincent Giacomazza (hereafter "Giacomazza"), pursuant to a Contract of Sale, purchased from the Plaintiff certain commercial real property located in Manhasset, New York (See copy of the Contract of Sale attached to the Defendants' Cross-motion as Exhibit "B"). The contract of sale was subsequently assigned to the Defendant, Sheridan Electric, Ltd., (hereafter "Sheridan") a corporate entity then wholly owned by the Defendants, DiNota and Giacomazza, who were partners at the time. Pursuant to the parties' contract, the Defendants were to pay $30,000.00 at closing and would receive a set-off of $109,499.26 for then outstanding tax arrears, the payment of which was allegedly to be the Defendants' responsibility.

The Plaintiff agreed to take back from the Defendant, Sheridan, a $600,000.00 note secured by a purchase money mortgage, which was personally guaranteed by the Defendants, DiNota and Giacomazza. In order to further securitize the repayment debt, the Defendants each agreed to execute confessions of judgment, portions of which, including the amount of judgment, were left blank. (*See* copies of the Confessions of Judgment attached to the Plaintiff's Order to Show Cause as Exhibit "A") In relevant part, paragraph 26 of the rider to the contract of sale provides that if the Defendant, Sheridan, fell behind in payments for a period of six months or more, the Plaintiff, as seller, would then "have the right to Foreclose on the Purchase Money Mortgage and order an immediate foreclosure sale of the premises * * * ". Paragraph 26 further provides that, "[s]imultaneous to the Closing the following documents will be drafted in order to effectuate the above-referenced, immediate

foreclosure: (i) Confession of Judgment of Foreclosure, (ii) Escrow Agreement; (iii) Corporate resolutions, (iv) Consents by the Guarantors, and (v) all other required documents". Relatedly, and as an additional security device, the Defendant, Sheridan, also executed a deed, to be held in escrow, conveying the subject property back to the Plaintiff in the event that the Defendants defaulted on their payment obligation.

Thereafter, the Defendants made payments on the note until September of 2012, but defaulted in October of 2012. In response, the Plaintiff filed the deed which the Defendant, Sheridan, had executed at the closing and thereby recovered title to the subject premises as a result. No foreclosure action, however, was ever commenced. Counsel for the Defendants, Sheridan and DiNota, asserts that it was not until January of 2013, when the Plaintiff first informed the Defendants that she had filed the foregoing deed. (*See* Affirmation of Michael L. Macklowitz, at ¶ 27) At approximately the same time, the Defendants and the Plaintiff received a notice to redeem in connection with liens and the then over due taxes, which existed at the time the property was originally conveyed to the Defendants.

According the Defendants' counsel, some ten months later, in September of 2013, the Plaintiff filled in the otherwise blank portions of the Confessions of Judgment by entering the entire amount of the original debt owed and "other missing details" not contained in the original documents, and then filed those documents. (*Id.* at ¶ 29) The Plaintiff contends that despite agreeing to do so, the Defendants never paid the tax arrears, even though they had been given a credit against the purchase price based upon the existing

liens. As a result, the property was lost to a non-party entity known as T11 Funding, which acquired title to the premises through related tax lien proceedings. At this juncture, the Plaintiff contends that the principal amount due and owing is approximately $490,500.00. Notably, the Plaintiff has advised that she has commenced a legal malpractice action against her former attorney arising out of the contract of sale.

Thereafter, based upon the Confessions of Judgment she had filed, the Plaintiff commenced proceedings pursuant to CPLR Article 52 to enforce the judgments and later served subpoenas *duces tecum* with restraining notices dated March 25, 2015. The subpoenas demanded the production of documents and scheduled the Defendants' depositions for a date certain, *i.e.*, April 28, 2015. (See Exhibit "B" attached to the Plaintiff's Order to Show Cause)

According to the Plaintiff's counsel, on or about April 27, 2015, Michael L. Macklowitz, Esq., counsel for the Defendants, Sheridan and DiNota, called him and requested an adjournment of the depositions. The request was granted and the depositions were adjourned to May 21, 2015, albeit with the understanding that the Defendants would produce certain documents three days prior to the adjourned date for the depositions on May 18, 2015. However, the Plaintiff's counsel asserts that despite the parties' agreement, no documents were ever produced and the Defendants never appeared for the scheduled depositions on the May 21 adjourned date.

According to counsel for the Defendants, Sheridan and DiNota, who is a solo

practitioner, shortly before the scheduled depositions, a chronic medical condition reoccurred, causing him significant, debilitating pain, and ultimately requiring surgery in May of 2015, leaving him bedridden and incapacitated until mid-August, 2015. Mr. Macklowitz, who claims he is still partially disabled from the surgery, contends that he did not "anticipate that * * * [his] condition and surgery would have had [such] a materially adverse impact on * * * [his] health or [law] practice" (*See* Macklowitz Affirmation at ¶ 13). Mr. Macklowitz argues that the default was wholly attributable to his unanticipated health crisis and his own failure to act on scheduled dates while ill, not any willful misconduct by the Defendants.

By Order to Show Cause, the Plaintiff made the within application to hold the Defendants in contempt of the March 2015 subpoenas. The Defendants, Sheridan and DiNota, still represented by Mr. Macklowitz[1], have opposed the contempt application and Cross-moved for relief, *inter alia*, vacating the underlying Confessions of Judgment. In support of their Cross-motion, the Defendants claims that: (1) the Plaintiff "elected" her remedy by recording the pre-executed deed and recovering title to the property; (*See*, RPAPL § 1301) and (2) that by express contractual agreement, the Confessions of Judgment were to be used exclusively and only within the context of an existing foreclosure action, which was never commenced at bar, thereby establishing that the Judgments were unlawfully filed.

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[1]The Defendant, Vincent Giacomazza, has not submitted any opposition to the Plaintiff's Order to Show Cause although Mr. Macklowitz indicates that he joins in the requested relief. Without any further explanation, the Court cannot simply allow Mr. Giacomazza be treated as beneficiary of the other Defendants' application.

Pursuant to RPAPL § 1301, the holder of a note and mortgage may proceed at law to recover on the note or proceed in equity to foreclose on the mortgage, but must only elect one of these alternate remedies (*Central Trust Co. v. Dann*, 85 N.Y.2d 767, 772 [1995]; *VNB N.Y. Corp. v. Paskesz*, 131 A.D.3d 1235, 1236; *Old Republic Natl. Tit. Ins. Co. v. Conlin,* 129 A.D.3d 804, 805; *Hometown Bank of Hudson Val. v. Belardinelli*, 127 A.D.3d 700, 701). "Stated another way, an action for foreclosure cannot be maintained where the plaintiff has previously pursued a separate action on the note and recovered a money judgment against the defendant which has not been satisfied". (*VNB N.Y. Corp. v. Paskesz, supra*) The purpose of the statute is to avoid multiple lawsuits to recover the same mortgage debt. (*Central Trust Co. v. Dann, supra*, 85 N.Y.2d 767, 772)

Relatedly, and in accord with Real Property Law § 320, a deed conveying real property, although absolute on its face, will be considered to be a mortgage when the instrument is executed as security for a debt. (*See, Bouffard v. Befese, LLC,* 111 A.D.3d 866, 867; *DeMaio v. Capozello*, 74 A.D.3d 864, 865; *Henley v. Foreclosure Sales, Inc.*, 39 A.D.3d 470; *Patmos Fifth Real Estate Inc. v. Mazl Bldg.*, LLC, 124 A.D.3d 422, 424) "The holder of a deed given as security must proceed in the same manner as any other mortgagee – by foreclosure and sale—to extinguish the mortgagor's interest" and "[t]his conclusion holds true because the mortgagor has the right of redemption, and that right cannot be waived or abandoned by any stipulation of the parties, even if the waiver is embodied in the mortgage". (*Patmos Fifth Real Estate Inc. v. Mazl Bldg., LLC, supra,* 124 A.D.3d 422; *Gioia*

v. Gioia, 234 A.D.2d 588, 589; *Basile v. Erhal Holding Corp.*, 148 A.D.2d 484, 485-486)

Here, the record establishes, and neither party disputes, that the deed was intended solely as security for the payment of the Defendants' debt. Accordingly, the Plaintiff's available remedy with respect to the deed was governed by the dictates of RPL § 320, *i.e.*, she was required by law to proceed "in the same manner as any other mortgagee, by foreclosure and sale, to extinguish the [defendants'] * * * interest" in the property. (*Patmos Fifth Real Estate Inc. v. Mazl Bldg., LLC, supra,* 124 A.D.3d 422) She did no do so, but rather, simply filed the deed as if it were an instrument intended to convey title separate and apart from its intended function as a security device. Under these circumstances, the alleged filing of the deed was ineffective as a means of transferring title to the Plaintiff and therefore, no election of remedies occurred. (*See, Patmos Fifth Real Estate Inc. v. Mazl Bldg., LLC, supra,* 124 A.D.3d 422; *Bouffard v. Befese, LLC*, 111 A.D.3d 866, 868)

The branch of the Defendants' motion which seeks to, *inter alia*, vacate the Confessions of Judgment should be denied. Although the contract of sale makes reference to foreclosure proceedings in the event of a default, and mentions the Confessions of Judgment as a means of effectuating such a proceeding, the contract does not expressly limit or preclude the Plaintiff from utilizing the executed Judgments in a non-foreclosure context. Nor do the Judgments themselves contain any express or relevant limiting language.

With respect to the Plaintiff's underlying, civil contempt motion, the Court agrees that the evidence fails to establish the Plaintiff's entitlement to the relief sought.

"To prevail on a motion to punish a party for civil contempt, the movant must demonstrate that the party charged with contempt willfully violated a clear and unequivocal mandate of a court's order, with knowledge of that order's terms, thereby prejudicing the movant's rights" (*Rubin v. Rubin*, 78 A.D.3d 812, 813; Judiciary Law § 753 [A] [3]; *see*, *Korea Chosun Daily Times, Inc. v. Dough Boy Donuts Corp.*, 129 A.D.3d 918; *Penavic v. Penavic,* 109 A.D.3d 648, 649; *see also, McCain v. Dinkins*, 84 N.Y.2d 216, 229 [1994]). "Any penalty imposed is designed not to punish but, rather, to compensate the injured party (*Matter of Department of Envtl. Protection of City of N.Y. v. Department of Envtl. Conservation of State of N.Y.*, 70 N.Y.2d 233, 239 [1987]), and the burden of proof is on the proponent of the motion to establish the contempt by clear and convincing evidence". (*Gomes v. Gomes,* 106 A.D.3d 868, 869; *Bennet v. Liberty Lines Transit, Inc.*, 106 A.D.3d 1038, 1040) "A motion to punish a party for civil contempt is addressed to the sound discretion of the motion court". (*Chambers v. Old Stone Hill Rd. Assoc.*, 66 A.D.3d 944, 946 *see, Penavic v. Penavic, supra,* 109 A.D.3d at 649-650; *Bennet v. Liberty Lines Transit, Inc.*, 106 A.D.3d 1038, 1040)

Here, and in light of, *inter alia*, the Defendants' counsel's explanatory assertions, the Court finds in its discretion that the Plaintiff has failed to establish through clear and convincing evidence that the Defendants willfully flouted the subpoenas by refusing to appear for the scheduled depositions and/or produce the documents requested (*Korea Chosun Daily Times, Inc. v. Dough Boy Donuts Corp., supra,* 129 A.D3d 918).

Nevertheless, although the Court has denied the Plaintiff's contempt application, the parties are forewarned that the failure to timely and properly discharge future obligations in good faith may result in the imposition of sanctions. As such, compliance with the subpoenas *duces tecum* must be made within thirty (30) days of the service of this Order upon the Defendants, Sheridan and DiNota's counsel and upon the Defendant, VINCENT GIACOMAZZA.

Accordingly, it is hereby

ORDERED, that the Order to Show Cause by the Plaintiff, Linda Scialo, seeking an order, *inter alia*, holding the Defendants, Sheridan Electric, Ltd., Anthony DiNota and Vincent Giacomazza, in civil contempt of certain subpoenas *duces tecum*, is **DENIED**; and it is further

ORDERED, that the Cross-motion by the Defendants, Sheridan Electric, Ltd. and Anthony DiNota, seeking an order, *inter alia*, vacating certain confessions of judgment, is **DENIED**; and it is further

ORDERED, that the Plaintiff's counsel shall serve a copy of this Order, pursuant to CPLR § 2103 (b) 1, 2 or 3, upon counsel for the Defendants, Sheridan and DiNota and by **CERTIFIED MAIL, RETURN RECEIPT REQUESTED AND REGULAR MAIL** upon the Defendant, VINCENT GIACOMAZZA, within fourteen (14) days of the date of this Order; and it is further

ORDERED, that upon proof of the Defendants non-compliance with this

Order, together with proof of service of a copy of this Order, further sanctions may issue upon further notice.

All applications not specifically addressed are Denied.

This constitutes the decision and order of the Court.

DATED: Mineola, New York
November 25, 2015

Hon. Randy Sue Marber, J.S.C.
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HON. RANDY SUE MARBER

ENTERED

NOV 25 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE