

NYCTL 2011-A Trust v James
2015 NY Slip Op 32948(U)
September 23, 2015
Supreme Court, Kings County
Docket Number: 501463/2012
Judge: Larry D. Martin
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At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 23rd day of September 2015

P R E S E N T:

HON. LARRY D. MARTIN, J.S.C.

NYCTL 2011-A TRUST, et ano,

MOTION SEQ. # 2

Plaintiffs,

-against-

INDEX NO.:

JOHN JAMES, if living and if he/she be dead, etc., et al,

501463/2012

Defendants.

The following papers numbered 1 to 5 read on this motion

Papers Numbered

Notice of Motion, Affirmations, and Affidavits _____

1-5

HON. LARRY D. MARTIN, J.S.C.:

Upon the foregoing papers, plaintiffs move this Court for an order granting them default judgment, appointing a referee, and amending the caption. By short-form order dated May 27, 2014, the motion was granted subject to review by the Foreclosure Department. Upon such review, plaintiffs' motion is granted solely to the extent that that branch of plaintiffs' motion seeking to amend the caption is granted in part as follows: With respect to the plaintiffs, the caption shall read "NYCTL 1998-2 TRUST, and THE BANK OF NEW YORK as Collateral Agent and Custodian for the NYCTL 1998-2 Trust"; and concerning the defendants, the action against "JOHN DOE No. 1" through "JOHN DOE No. 100" shall be discontinued, and those defendants shall be stricken from the caption. The remainder of plaintiffs' motion is denied.

By order dated July 8, 2013 and entered in the Kings County Clerk's Office on July 29, 2014, the Court granted plaintiffs' motion (the "underlying motion") to extend time to serve defendant John James ("defendant"), leave to serve defendant by publication, amended the caption, and appointed Yvonne Eze Agbontaen, Esq. Guardian ad Litem for the defendant (the "Guardian"). Upon further

review of the instant motion papers and papers previously filed with the Court, the Court hereby vacates the previous order dated July 8, 2013 in its entirety as the Court was without jurisdiction to entertain the underlying motion, and that motion is denied.

Plaintiffs did not serve the underlying motion in accordance with CPLR Rule 1202 (b). “Absence of proper service of a motion is a sufficient and complete excuse for a default on a motion and deprives the court of jurisdiction to entertain the motion” (*Zaidi v New York Bldg. Contrs., Ltd.*, 61 AD3d 747, 748 [2d Dept 2009]). Thus, the July 8, 2013 order and any subsequent orders are considered as nullities (*Financial Servs. Veh. Trust v Law Offs. of Dustin J. Dente*, 86 AD3d 532, 533 [2d Dept 2011]).

Furthermore, because service had not yet been effected upon the defendant, the Court had not obtained jurisdiction over him and, consequently, the Court was without jurisdiction to appoint the Guardian (*Ingersoll v Mangam*, 84 NY 622 [1881]). Such defect would render any future judgment of foreclosure and sale as unenforceable (*id.*). To be sure, any argument that the defect was cured since the defendant was later served with process via publication would be unavailing, and could not correct the jurisdictional defect (*see Ward v Ward*, 136 Misc 234, 235–36 [Sup Ct Sullivan County 1930] [rejecting plaintiff’s argument that the appointment of the guardian ad litem should stand nunc pro tunc because defendant had later been served with process, thereby curing the defect]). Thus, the Court vacates the July 8, 2013 order in its entirety.

Assuming, *arguendo*, that part of the prior order which granted leave to serve defendant by publication could stand as enforceable (as such motion is not required to be made on notice),¹ the service by publication made here is defective. The affidavit of publication from Ariana Perez, a representative of the Daily Challenge newspaper (Reiser aff, exhibit D), was acknowledged before a

¹ In fact, plaintiffs’ prior motion was made pursuant to CPLR § 308 (5) and, in the alternative, CPLR § 315 — both of which specifically mandate that the motion be made “without notice,” i.e., *ex parte*.

Commissioner of Deeds, but it is not accompanied by an authentication of the Clerk of Kings County, which is the county where this Commissioner filed his/her Certificate (RPL § 310; *see* CPLR 2309 [a]). The Court also notes that both affidavits of service by publication were not filed within 120 days in accordance with the Court's July 8, 2013 order. These defects mandate denial of the instant motion (*see Cordero v Barreiro-Cordero*, 129 AD3d 899 [2d Dept 2015] ["Adequate proof that a defendant was properly served with process is a prerequisite to the entry of a default judgment against that defendant"], citing CPLR 3215 [f]).

Also assuming that part of the July 8, 2013 order which granted plaintiffs leave to amend the caption with respect to defendant James could stand as a motion made without proper notice, the Court may not have had jurisdiction to grant such relief. In their motion papers, plaintiffs did not provide any basis for amending the caption to state the named defendant followed by "if living and if he/she be dead . . ." as there is no evidence that the defendant is deceased. If he is dead and passed away prior to commencement, the action against him "from its inception was a nullity" (*Marte v Graber*, 58 AD3d 1, 3 [1st Dept 2008]) and the Court would not have "jurisdiction to grant the requested relief" (i.e., amendment or substitution) against him (*Rivera v Bruchim*, 103 AD3d 700, 700-01 [2d Dept 2013]; *see Wendover Fin. Servs. v Ridgeway*, 93 AD3d 1156 [4th Dept 2012]).

In this regard, the issue to be resolved going forward centers around defendant James. Therefore, the plaintiffs may, if they so choose, dismiss the action against defendant James. If not, plaintiffs must submit proof as to whether defendant James is alive or deceased. If alive, plaintiffs are granted leave to renew its motion for alternate service of process upon such defendant pursuant to CPLR §§ 308 (5) and 315; such motion shall be made without notice in accordance with the statutes. If defendant is deceased, and passed away prior to commencement of this action, then proof of his death

must be provided with any future motion. Additionally, plaintiffs are hereby granted leave to join any necessary parties (e.g., the current owner) (see CPLR 1018; CPLR 1021).

Accordingly, plaintiffs' motion is granted solely to the extent as set forth in the first paragraph in this order, and the remainder of the motion is denied. Additionally, upon vacatur of the Court's July 8, 2013 order; it is hereby

ORDERED that Yvonne Eze Agbontaen, Esq. is discharged and released as Guardian ad Litem; and it is further

ORDERED that the caption shall read as follows:

NYCTL 1998-2 TRUST, and THE BANK OF NEW YORK as Collateral Agent and Custodian for the NYCTL 1998-2 Trust,

Plaintiffs,

-against-

INDEX No.:
501463/2012

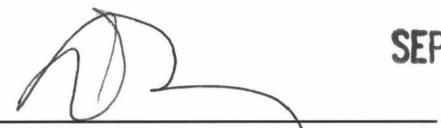
JOHN JAMES, ROCKAWAY ACQUISITIONS LLC, CADLE ROCK JOINT VENTURE, L.P., CRIMINAL COURT OF THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT, THE EDUCATION RESOURCES INSTITUTE, ASSET ACCEPTANCE LLC, WORKERS COMPENSATION BOARD OF THE STATE OF NEW YORK, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, UNITED STATES OF AMERICA - INTERNAL REVENUE SERVICE, GMAC MORTGAGE, LLC, and WORLDWIDE ASSET PURCHASING II,

Defendants.

The foregoing constitutes the decision and order of the Court.

For Clerks use only
MG ___
MD ___
Motion Seq. # ___

ENTER,



SEP 23 2015

HON. LARRY D. MARTIN
J.S.C.

2015 NOV 23 AM 8:58
KINGS COUNTY CLERK
FILED