

Matter of Solomon Holding Corp. v Stephenson

2016 NY Slip Op 30576(U)

April 1, 2016

Supreme Court, New York County

Docket Number: 157000/2015

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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In the Matter of the Application of

SOLOMON HOLDING CORP. and MICHAEL
ZIMMERMAN,

Petitioners,

Index No. 157000/2015

for a Judgment pursuant to CPLR § 5206 for Sale
of Homestead Exceeding Fifty Thousand Dollars
-against-

**Decision, Order, and
Judgment**

HUMPHREY STEPHENSON and ELAINE CERATA-
DAVIS STEPHENSON,

Respondents.

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

By this special proceeding, two unrelated judgment creditors seek yet again to force a judicial sale of the respondents' matrimonial residence located at 141 West 119th Street, New York, New York. Respondent Ms. Elaine Cereta Davis-Stephenson, sued herein as Elaine Cerata-Davis Stephenson, answered the petition and by a separate motion (sequence three) seeks to dismiss. A prior motion to dismiss (sequence two) was withdrawn by Ms. Davis-Stephenson. Motion sequences one and three are consolidated for disposition. For the reasons stated below, the proceeding is dismissed and a protective order pursuant to CPLR § 5240 is reinstated.

Respondents own the property in a tenancy by the entirety. It is the primary residence of Davis-Stephenson. While it is undisputed that Humphrey Stephenson is currently residing in a rehabilitation center as a result of a series of strokes, he still maintains the premises as his home. The petitioners, judgment creditors, seek to enforce two distinct money judgments arising out of different lawsuits. In neither lawsuit were both respondents sued jointly.

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. In an earlier proceeding entitled Solomon Holdings v. Humphrey Stephenson, Index No. 116303/2010. In that 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 against Ms. Davis-Stephenson in a decision granting him legal fees on consent on September 18, 2007. The petitioner had represented Ms. Davis-Stephenson in a divorce action. The decision was converted to a judgment for \$54,835.71. The judgment was signed by the Honorable Matthew Cooper and entered on April 27, 2012.

In 2012, petitioners instituted a proceeding in this Court to enforce their judgments against respondents. As in the current proceeding, they sought an order compelling a sale of the residence. 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. That decision was modified 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).

The petitioners again sought a judicial sale under a new petition, Index Number 159433/2014. That proceeding was dismissed because of a failure to acquire personal jurisdiction over the respondents. In that decision, albeit in dicta, I alluded to some of the barriers to the ultimate remedy the petitioners seek, that is the judicial sale and probable ejection of respondents from their marital home. Subsequently they commenced this proceeding.

In the motion to dismiss, Ms. Davis-Stephenson challenges the service of process on her, the personal jurisdiction of Mr. Stephenson. She argues the liens of Solomon and Zimmerman are unenforceable. She seeks sanctions against both petitioners and a protective order preventing petitioners from bringing future proceedings to enforce a sale.

There is only one affidavit of service on file purporting to show personal service on both respondents. The method utilized was personal service under CPLR § 308(a), leaving “true copy/copies” by delivery to someone named “Pauline” at the address of the premises. Ms. Davis-Stephenson denies knowledge of anyone of that name residing with her. She implies that there may be more than one apartment at 141 West 119th Street, but service on someone in a separate

apartment would not constitute service at Ms. Davis-Stephenson's "dwelling place or usual place of abode." She argues that her husband could not be properly served at that address, in any event, since he is still at a residential rehabilitation center, and that petitioners have known this fact since June 4, 2014. She argues that even if personal jurisdiction was obtained over him, Mr. Stephenson's physical condition would make it improper for any default judgment to be entered against, citing CPLR §§ 1203 and 3211(5).

Turning to the substantive arguments, Ms. Davis-Stephenson argues that the lien asserted by Solomon is void ab initio and therefore unenforceable. The basis for the argument is that the renewal judgment signed by the clerk on August 15, 2014 was improperly issued because the judgment creditor failed to commence a plenary action as required by the Appellate Division in Solomon Holding Corp. v. Stephenson, *supra*. See Gletzer v. Harris, 51 A.D.3d 196 (1st Dep't 2008), *aff'd*, 12 N.Y.3d 468 (2009). She argues that without a valid renewal judgment there is no lien and no right to force a sale.

As to the Zimmerman lien, Ms. Davis-Stephenson argues it also is unenforceable, because Mr. Zimmerman did not satisfy the requirement of 22 NYCRR 1400.5(a). This rule requires consent of Ms. Davis-Stephenson before a lien on the matrimonial residence can be acquired to secure payment for legal fees. This issue was mentioned by the Appellate Division in Solomon Holding Corp. v. Stephenson but never reached since the Solomon lien was declared unenforceable. In addition, respondent argues that the lien is void ab initio. The money judgment Mr. Zimmerman was granted on April 27, 2012 was issued in the matrimonial case under Index

Number 304903/03.¹ The matrimonial action was discontinued on March 1, 2012. Because there no longer was a case, she argues, the court that entered the money judgment did not have subject matter jurisdiction to do so. For the foregoing reasons, Ms. Davis-Stephenson seeks dismissal of the petition with prejudice.

In opposition to the motion to dismiss, petitioners' attorney argues that service was proper since the address where process was served is the primary residence of both respondents. In addition petitioners argue that the renewal judgment cannot be collaterally challenged in this proceeding and that my decision of December 19, 2012 allowing a judicial sale is law of the case, notwithstanding the Appellate Division's reversal of the petitioners' right to force a sale. They do not address the other arguments raised by respondent.

In reply respondent restates her arguments for dismissal, a protective order against future applications to force a sale of the property, and sanctions. In addition to the legal arguments, respondent argues the equities, i.e., the incapacity of Mr. Stephenson, and the small percentage of the market value that the aggregate judgments represent.

The motion to dismiss and a protective order are granted. While the issue of personal service on Ms. Davis-Stephenson cannot be resolved without a traverse hearing, the petition must fail because of the invalidity of the Solomon lien. Similar to the holding of the Appellate Division in Solomon Holding Corp. v. Stephenson that an expired lien cannot be

¹ I awarded Mr. Zimmerman legal fees for representing Ms. Davis-Stephenson by decision dated September 18, 2007, but the award was not reduced to a money judgment.

enforced notwithstanding the respondents' failure to raise statute of limitations, the invalid renewal judgment is not immune from collateral attack. It is void ab initio because a new proceeding was not commenced as required to renew the lien after ten years had elapsed. As the Appellate Division ruled, with the invalidity of the Solomon lien, the Zimmerman lien need not be addressed. A protective order is required preventing any forced sale as long as Humphrey Stephenson remains incapacitated, in order to prevent undue hardship on the judgment debtor. Furthermore, as respondent pointed out, the market value of the premises far exceeds the debts to petitioners. As long as the petitioners have a valid lien, they will most likely be able to be fully compensated after the residence is no longer the marital property of respondents. Sanctions will not be granted at this time since the petition is not clearly frivolous as defined in the Rules of Chief Administrator § 130-1.1(c). Accordingly, it is

ORDERED that the petition is dismissed with prejudice, and the Clerk of the Court shall enter judgment of dismissal, and it is further

ORDERED that petitioners are precluded from seeking a judicial sale of the marital premises pursuant to CPLR § 5240.

Dated: *April 1*, 2016

ENTER:



JOAN B. LOBIS, J.S.C.