

Cao v Nasser Zar, Inc.
2016 NY Slip Op 30638(U)
March 23, 2016
Supreme Court, Bronx County
Docket Number: 304911/14
Judge: Howard H. Sherman
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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 4

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SHELLY CAO, 18 M.S. REALTY, INC.
HUI JUN WANG,

Plaintiff,

-against-

NASSER ZAR, INC., CYRUS NIKNAMFARD
and CYRUS REALTY CORP., STOUT STREET
FUND I, LP, BRADDOCK FINANCIAL CORPORATION,
a/k/a STOUT STREET FUND I GP, LLC and HARRY
ZUBLI, ESQ., LEONARD C. ALOI,

Defendants
-----X

Index No.: 304911/14

DECISION/ORDER

Present:

Hon. Howard H. Sherman
J.S.C.

Defendants move by counsel, Harry Zubli, Esq., who is also named as a defendant, to dismiss the above captioned action, to vacate the Notice of Pendency and to award defendants costs, fees and expenses.

The history of this action and of a related foreclosure action is as follows:

On or about April of 2011 defendant Stout LP commenced a foreclosure action against plaintiff 18 MS Realty Inc. after a default by 18 MS Realty Inc. on payments due under a mortgage agreement and note entered into between Stout Street Funding LLC and 18 MS Realty Inc. in May of 2010. The first default in payment was in August of 2010.

On May 13, 2013 a decision and Judgment of Foreclosure and Sale was rendered by Justice Brigantti-Hughes of this court.

Sometime between May of 2010 and May of 2013 the Mortgage and Note were assigned to

Stout Street LP from Stout Street Funding Inc. On or about November of 2013 a sale of the property was held at which time defendant Nasser Zar Inc. purchased, by bid, the subject property.

Apparently unbeknownst to Stout, the Referee and Nasser Inc., plaintiff Hui Jun Wong, had on the same day filed for bankruptcy in the United States Southern District Bankruptcy Court. It is not entirely clear what exactly his relationship was to the property other than possibly an officer and/or shareholder of 18 MS Realty. In any event, on motion of Stout, the bankruptcy stay was eventually lifted allowing the sale and closing to proceed.

It did not however proceed since Mr. Wong filed an Order to Show Cause in this court seeking to vacate the judgment and Order of Sale before Justice Brigantti-Hughes. This Order to Show Cause was denied for failure to serve and appear.

Approximately one month later Wong obtained another Order to Show Cause returnable before Justice Brigantti-Hughes. On March 17, 2014 this Order to Show Cause was denied for non appearance by movant.

The closing of title to Nasser was then scheduled. It was at this time that defendant found out that an action had been commenced against them by Wong and Shelly Cao when Nasser 's title company advised him that a lis pendens had been filed against the property. The complaint in that action contained allegations and claims similar to the instant pending action most of which, as here, stemmed from the foreclosure action in which plaintiff herein repeatedly failed to appear.

By an order dated March 11, 2015, Justice Allison Tuitt dismissed that action, vacated the Notice of Pendency and awarded defendants costs and fees totaling \$3,507.00 for commencing and maintaining a frivolous lawsuit. Thereafter, the closing was again scheduled only to be further delayed by the institution of this action which in sum and substance raises the same issues which were raised in the defaulted foreclosure motions.

Defendants by and with counsel Harry Zubli on their and his own behalf move to dismiss this

action on several grounds including, 1) lack of personal jurisdiction; 2) several improper parties as defendants and 3) pursuant to 3211(a), (1), (4), (7) and (8).

Plaintiffs Cao, pro-se and Wong and 18 MS Realty by counsel, oppose the motion and defend the summons and complaint by arguing in the first instance that the moving papers were not properly served. Additionally, plaintiffs argue that they were not properly served in the underlying foreclosure action. Finally, plaintiffs raise numerous claims stemming from the foreclosure action and their relationship to the property and defendants herein.

As concerns the claim that the instant Order to Show Cause was not properly served the court held a hearing on November 30, 2015 at which time the credible testimony of the defendant witness as opposed to the less than credible statements of plaintiff Shelly Cao, along with the affidavit of service indicate that service was made in accordance with the court's order of July 4, 2015.

As to the service of the underlying summons and complaint in this action there is no need for a hearing. There has not been any affidavit of service filed in this case. The one annexed as Exhibit G to the opposition papers is curious at best. It indicates service on an attorney of one copy by serving someone at an attorney's office. It names no party defendant as being served, there was no mailing and there is no indication of who this attorney is and why it only refers to one copy. Service was not properly made on any of the defendants. Plaintiff's own "affidavit" demonstrates on its face that service was not made at all.

While this, in and of itself would require the granting of this motion, this court, after reviewing all of the papers submitted and prior foreclosure actions and motions and the prior decisions and order of Justice Brigantti-Hughes and Justice Tuitt would be remiss in not commenting on the 3211 basis for this motion and the opposition. Quite simply, there are a number of reasons to dismiss this case on the merits. Indeed the opposition to this motion is replete with arguments that have either already been made in the prior action before Justice Tuitt and further argument that could

have been, should have been and were made in the foreclosure action and companion motions before Justice Brigantti-Hughes.

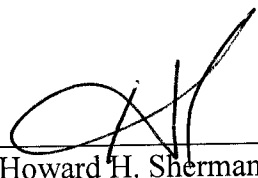
The only conclusion that this court can reach at this time is that the only possible reason for this action being commenced was either as an act of desperation or an attempt to harass and thwart defendants in exercising their lawful rights.

Based upon the above the motion is granted in all respects. The action is dismissed with prejudice as to any claims raised in this action. The lis pendens is cancelled and vacated. Any further application of any kind should be referred to this court (J. Sherman).

Defendants' application for costs and fees is granted. Counsel shall submit an affirmation of costs and fees within thirty (30) days of service of a copy of this decision and order.

This constitutes the decision and order of this court.

Dated: March 23, 2016
Bronx, New York



Howard H. Sherman
J.S.C.