

HSBC Bank USA, N.A. v Perry
2016 NY Slip Op 32563(U)
December 5, 2016
Supreme Court, Suffolk County
Docket Number: 14771/2013
Judge: Howard H. Heckman, Jr.
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SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

PRESENT:

HON. HOWARD H. HECKMAN JR., J.S.C.

INDEX NO.: 14771/2013

MOTION DATE: 04/04/2016

MOTION SEQ. NO.: 003 MD

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HSBC BANK USA, N.A.,

004 MG
005 MD

Plaintiffs,

-against-

LEONARD PERRY A/K/A LEONARD R. PERRY,
LISA PERRY A/K/A LISA A. PERRY,

Defendants.
-----X

PLAINTIFFS' ATTORNEY:

SHAPIRO, DICARO & BARAK, LLC
175 MILE CROSSING BLVD.
ROCHESTER, NY 14624

DEFENDANTS' ATTORNEYS:

THE RANALLI LAW GROUP, PLLC
742 VETERANS MEMORIAL HWY.
HAUPPAUGE, NY 11788

Upon the following papers numbered 1 to 83 read on this motion; Notice of Motion/ Order to Show Cause and supporting papers 1-33; Notice of Cross Motion and supporting papers 34-46; Answering Affidavits and supporting papers 47-71; Replying Affidavits and supporting papers 72-83; Other; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that these motions by defendant Lisa Perry brought on by Order to Show Cause (Reilly, J.) dated October 12, 2016 seeking an order staying a warrant of eviction issued by the Sixth District Court of Suffolk County until determination of defendant's original motion and for an order pursuant to CPLR5015(a)(2); 5015(a)(3) & 5015(a)(4); CPLR 2003; CPLR 1015 & 1021 CPLR; 3211(a)(8) 3211(a)(7) 3211(a)(1); 1) vacating the Judgment of Foreclosure and Sale (Crecca, J.), dated August 5, 2015; 2) vacating the foreclosure sale conducted on December 16, 2015; 3) staying all proceedings until a personal representative of the defendant Leonard Perry a/k/a Leonard R. Perry is appointed; 4) dismissing this action based upon plaintiff's alleged failure to obtain personal jurisdiction over defendants Leonard Perry and Lisa Perry a/k/a Lisa A. Perry; 5) dismissing this action based plaintiff's alleged failure to serve defendants with notices pursuant to RPAPL 1303, 1304 & 1306; 6) vacating the referee's deed conveying title to the mortgaged premises as a result of the foreclosure sale; and 7) cancelling the notice of pendency filed by the plaintiff is denied; and it is further

ORDERED that the cross motion by plaintiff dated May 2, 2016 seeking an order 1) amending the Judgment of Foreclose (Crecca, J.), dated August 5, 2015 *nunc pro tunc* to remove defendant/decedent Leonard Perry as a named party defendant; 2) discontinuing the action against defendant Leonard Perry; 3) amending the caption to reflect the discontinuance against defendant Leonard Perry is granted; and it is further

ORDERED that plaintiff is directed to serve a copy of this order with notice of entry upon all parties who have appeared and not waived further notice pursuant to CPLR 2103(b)(1),(2) or (3)

within thirty days of the date of this order and to promptly file the affidavits of service with the Clerk of the Court; and it is further

ORDERED that the stay imposed by the prior Order to Show Cause (Reilly, J.) dated October 12, 2016 enjoining the warrant of eviction granted to the plaintiff in the Sixth District Court of Suffolk County is hereby vacated. The Plaintiff is directed to forthwith notify the Suffolk County Sheriff that the eviction proceedings shall proceed immediately in accordance with the Sixth District Court Warrant of Eviction for the premises located at 111 Liberty Avenue, Port Jefferson, New York 11777.

Plaintiff's action seeks to foreclose a mortgage in the sum of \$397,800.00 executed by defendants Lisa Perry and Leonard Perry on April 10, 2007 in favor of PIII Mortgage Corporation. On the same date defendant Leonard Perry executed a promissory note promising to re-pay the entire amount of the indebtedness to PHH Mortgage Corporation. Defendants defaulted in making timely payments due under the terms of the mortgage and have been in default in making any payments since August, 2012. Plaintiff commenced this action by filing a summons and complaint on June 5, 2013. The summons and complaint and RPAPL 1303 notice were served on defendant Lisa Perry by personal service pursuant to CPLR 308(1) and on defendant Leonard Perry by substituted service pursuant to CPLR 308(2) on June 15, 2013. Both defendants defaulted by failing to timely serve an answer. By Order (Kent, J.) dated December 9, 2014 plaintiff's unopposed default judgment motion was granted and a referee was appointed to compute the sums due and owing to the plaintiff. A Judgment of Foreclosure and Sale (Crecca, J.), was granted without opposition on September 22, 2015. The property was sold at public auction on December 16, 2015.

Defendant Lisa Perry is the daughter of defendant Leonard Perry. The deed conveying title to the Perry defendants dated April 9, 2007 conveys title to "Lisa A. Perry, and Leonard R. Perry, as joint tenants with right of survivorship". Leonard Perry died on August 11, 2013. Plaintiff claims that notice of Leonard Perry's death was never communicated to the mortgagee during the prosecution of this foreclosure action. Defense counsel served a notice of appearance on behalf of defendant Lisa Perry dated December 31, 2015. The notice of appearance requested production of documents related to the Judgment of Foreclosure and Sale, and records concerning the identity of other defendants who appeared in the action. The notice of appearance did not assert any defenses or counterclaims on behalf of the defendant. Although not attached as an exhibit to the defendant's second motion, the defendant claims that a warrant of eviction was issued by the Sixth District Court of Suffolk County. Defendant's motions seek a permanent stay of the eviction proceedings and a temporary stay pending substitution for the defendant/decedent and dismissal of the underlying foreclosure complaint. Plaintiff's cross motion seeks an order discontinuing the action against defendant Leonard Perry.

In support of both motions the defendant submits two affidavits and three affirmations of counsel. Defendant claims that the plaintiff did not comply with the statutory requirements set forth pursuant to RPAPL 1304 & 1306 by failing to serve the 1304 notice to defendant Leonard Perry at the address where he resided (not the mortgaged premises) and by failing to serve the 1304 notice individually to defendant Lisa Perry. Defendant also claims that the 1304 notice served to the property address was defective since it did not contain written information in at least "fourteen-point" type. Defendant claims neither defendant was properly served with a summons and complaint

and an RPAPL 1303 notice, and therefore the action must be dismissed. Defendant claims that substantial issues of fact exist concerning service of process upon her which requires a traverse hearing since the physical description set forth in the process server's affidavit does not resemble her appearance and since she was not home on the date the process server claims service was made. Defendant also claims that since Leonard Perry did not reside in the premises where service was made such service upon him was defective. Defendant claims that the RPAPL 1303 notice was deficient since the written information contained in its heading did not comply with the "twenty point type" font size required by statute and therefore the action must be dismissed. Defendant also contends that the death of a party divests the court of jurisdiction and argues that all actions taken after August 11, 2013 (the date of Leonard Perry's death) were void and must be vacated pending substitution of a personal representative. Defendant claims that under the circumstances the warrant of eviction must be permanently stayed and that she should be granted a court conference to negotiate a loan modification.

In opposition and in support of its cross motion, the plaintiff submits three attorney affirmations and argues that no basis exists to stay the eviction proceedings or to dismiss the complaint. Plaintiff asserts that upon the death of Leonard Perry, title to the foreclosed premises became vested in his daughter/defendant Lisa Perry, as the joint tenant with the right of survivorship. Plaintiff therefore seeks to discontinue the action against the decedent/defendant Leonard Perry since no claim for a deficiency judgment has been asserted against him or the estate representative and since any such claim is time barred. It is plaintiff's position that the decedent/defendant is no longer a necessary party as a result of the divestment of his ownership interest in the premises resulting from his death. Plaintiff also contends that defendant Lisa Perry waived her right to contest jurisdiction pursuant to CPLR 320(b) & 3211(e) when her attorney filed a notice of appearance on her behalf dated December 31, 2015 thereby consenting to the court's jurisdiction. Plaintiff claims that counsel's filing such notice without raising any jurisdictional objections renders her claims of lack of personal jurisdiction moot. Plaintiff also contends that even were this court to entertain such claims, the relevant admissible evidence submitted in the form of the process server's affidavit of service provides sufficient evidence that jurisdiction was obtained by personal service of the summons and complaint on Lisa Perry at the property address on June 5, 2013. Plaintiff argues that defendant's affidavit provides no specific factual details which could justify scheduling a traverse hearing and that her conclusory statements concerning not being home that day and the process server's inaccurate description of her appearance, without elaborating further as to the precise reasons why the details of her appearance were inaccurate, and why she recalls not being home on that particular day, require no further inquiry by the court. Plaintiff claims that absent submission of any reasonable excuse for failing to timely serve an answer requires that defendant's application to vacate the default be denied. Plaintiff also claims that by failing to serve a timely answer the defendant waived her right to contest the mortgagee's alleged failure to comply with statutory notice requirements and that even if the court were to require proof of service of RPAPL 1303, 1304 & 1306 notice requirements, that plaintiff has submitted sufficient proof of such compliance. Plaintiff also contends that there is no evidence of newly discovered evidence or fraud sufficient to vacate defendant's default and therefore both motions must be denied.

As a general rule, if a cause of action survives the death of a party, such death divests the court of jurisdiction until a duly appointed personal representative is substituted for the decedent (CPLR 1015; *Giroux v. Dunlop Tire Corp.*, 16 AD3d 1068, 791 NYS2d 769 (4th Dept., 2005); *Gonzalez v. Ford Motor Company*, 295 AD2d 474, 744 NYS2d 468 (2nd Dept., 2002); *Matter of*

Einstoss, 26 NY2d 181, 309 NYS2d 184 (1970)). However, where a party's death does not affect the merits of a case, there is no need for strict adherence to the requirement that the proceedings be stayed pending substitution (*Bova v. Vinciguerra*, 139 AD2d 797, 526 NYS2d 671 (3rd Dept., 1988); *Alaska Seaboard Partners Ltd. Partnership v. Grant*, 20 AD3d 436, 799 NYS2d 117 (2nd Dept., 2002)).

In this case, the foreclosed premises were owned by the defendants as joint tenants with the right of survivorship. By operation of law, upon the demise of one joint tenant, the surviving tenant became seized of the entire ownership interest in the subject property (*see Paterno v. CYC, LLC*, 46 AD3d 788, 850 NYS2d 131 (2nd Dept., 2007); *Matter of Violi*, 65 NY2d 392, 492 NYS2d 550 (1985); *Squiciarino v. Squiciarino*, 35 AD3d 844, 830 NYS2d 163 (2nd Dept., 2006)). The rule is that a mortgagor who has made an absolute conveyance of all his interest in the mortgaged premises, including his equity of redemption, is not a necessary party to foreclosure, unless a deficiency judgment is sought (*FNMA v. Connelly*, 84 AD2d 805, 444 NYS2d 147 (2nd Dept., 1981); *Heidgerd v. Reis*, 135 AD 414, 119 NYS 921 (1st Dept., 1909); *Mutual Life Ins. Co. Of New York v. Ninety-Fifty Street & Lexington Avenue Corp.*, 60 NYS2d 450 (NYCty. Sup.Ct., 1946)). Since, upon his death, the defendant Leonard Perry retained no ownership interest in the premises, and in view of the fact that as part of the mortgagee's application, the bank seeks to discontinue this action against the decedent and thereby waive its right to seek a deficiency, there is no reason to stay this action since the defendant's demise does not affect the merits of this proceeding (*see HSBC Bank USA v. Ungar Family Realty Corp.*, 111 AD3d 673, 974 NYS2d 583 (2nd Dept., 2013); *DLJ Mortgage Capital, Inc. V. 44 Brushy Neck, Ltd.*, 51 AD3d 857, 859 NYS2d 221 (2nd Dept., 2008); *FNMA v. Connelly, supra.*; *Paterno v. CYC, LLC, supra.*; *Countrywide Home Loans v. Keys*, 27 AD3d 247, 811 NYS2d 362 (1st Dept., 2006); *see also Residential Credit Solutions, Inc. v. Lalji et al.*, 39 Misc 3rd 1218(A), 975 NYS2d 369 (Queens Cty Sup. Ct., 2013)). Plaintiff's cross motion seeking an order discontinuing this action against defendant Leonard Perry must therefore be granted.

With respect to defendant Lisa Perry's motion seeking either a stay of this action pending substitution for the decedent/defendant or outright dismissal of the complaint and vacatur of all prior orders, judgments and the referee's deed, the record reveals no legal basis to restore or to dismiss this foreclosure action on any of the grounds raised by the defaulting defendant. The undisputed facts show that the defendant defaulted in making timely monthly mortgage payments beginning in August, 2012 and defaulted in serving a timely answer to the plaintiff's foreclosure complaint eleven months later in June, 2013. An Order (Kent, J.) granting a default judgment and a Judgment of Foreclosure and Sale (Crecca, J.) were granted without opposition in December, 2014 and September, 2015, with a foreclosure sale completed on December 16, 2015.

Defendant Lisa Perry's first appearance in this action occurred when her present counsel filed a notice of appearance on her behalf on December 31, 2015. That notice of appearance did not set forth any defense to plaintiff's foreclosure action and, more specifically, did not object to the jurisdiction of the court. The law is clear that the filing of a notice of appearance by counsel constitutes the service of an answer with the concomitant effect of waiving objections to personal jurisdiction (CPLR 320(a)). Defendant's application to dismiss this action on jurisdictional grounds asserted for the first time by this motion must therefore be denied since the filing of the December 31, 2015 notice of appearance had the effect of submitting the defendant to the court's jurisdiction and waiving any claims related to service of process (*see Matter of Fry v. Village of Tarrytown*, 89 NY2d 714, 658 NYS2d 205 (1997)). (FN *1)

The remaining claims asserted by the defendant concern the plaintiff's alleged failure to comply with statutorily required notices pursuant to RPAPL 1303, 1304 & 1306 and seek dismissal of the complaint. While ordinarily a defendant's motion seeking to vacate a default in appearing (CPLR 5015) includes an application to serve a late answer, in this case the defendant has not sought such relief (although without referencing the attachment, counsel has submitted what appears to be a proposed late answer on behalf of his client attached as an exhibit (13) to the motion papers) in his motion papers.

While service of statutory notices required pursuant to RPAPL 1303 & 1304 are conditions precedent to a mortgage foreclosure action which may be raised at any time during the pendency of an action (*Aurora Loan Services, LLC v. Weissblum*, 85 AD3d 95, 923 NYS2d 609 (2nd Dept., 2011)), the failure to comply is not a jurisdictional defect sufficient to provide independent grounds for vacating a default judgment by a party who has otherwise defaulted in appearing in an action (*U.S. Bank, N.A. v. Carey*, 137 AD3d 894, 28 NYS3d 68 (2nd Dept., 2016); *Pritchard v. Curtis*, 101 AD3d 1502, 957 NYS2d 440 (3rd Dept., 2012)). Such a defaulting mortgagor/defendant may advance a statutory notice defense in support of an application seeking to vacate her default in answering the complaint pursuant to CPLR 5015. However, to be successful, the defaulting party is required to vacate her own default by providing evidence to demonstrate a reasonable excuse for her failure to timely answer the complaint and the mere showing of a possible meritorious defense (i.e. plaintiff's alleged failure to comply with RPAPL 1303) is insufficient to provide legal grounds to set aside a judgment or prior order of the court (*see Flagstar Bank, FSB v. Jambelli*, 140 AD3d 829, 32 NYS3d 625 (2nd Dept., 2016); *Wassertheil v. Elburg, LLC*, 94 AD3d 753, 941 NYS2d 679 (2nd Dept., 2012); *Hosten v. Oladapo*, 44 AD3d 1006, 844 NYS2d 417 (2nd Dept., 2007)).

In this action, the defendant defaulted in serving a timely answer and has provided no reasonable excuse for her default. Having defaulted in appearing, she cannot now assert as grounds for dismissal, the statutory conditions precedent defenses (RPAPL 1303 & 1304), since such defenses are not jurisdictional defects which could provide an independent basis to vacate the court's prior order and judgment. Moreover, a review of the evidence submitted by the plaintiff in support of the prior unopposed motion for a default judgment, reveals that sufficient proof has been submitted to support a finding that the RPAPL 1303 & 1304 notices (and to the extent required for filing with respect to RPAPL 1306) were properly served by the process server and the mortgage lender.

FN*1- Even were the Court to consider the issue of service of process in this case, the process server's affidavit of service provides a prima facie showing of personal service upon defendant Lisa Perry and the defendant's submission of conclusory claims that she was not at home on the date of service and that the description of her appearance was inaccurate without more fails to provide sufficient details to require either dismissal of the complaint or the scheduling of a traverse hearing (*see Wachovia Mortgage Corp. v. Toussaint*, 2016 NY Slip Op (2nd Dept., 2016)).

