

**132 W. 130th LLC v Marie Holdings, Inc.**

2017 NY Slip Op 32367(U)

November 9, 2017

Supreme Court, New York County

Docket Number: 153409/2017

Judge: Arlene P. Bluth

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 32**

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132 WEST 130<sup>th</sup> LLC,

**Plaintiff**

**Index No. 153409/2017**

**Motion Seq: 001**

**-against-**

**DECISION**

**ARLENE P. BLUTH, JSC**

**MARIE HOLDINGS, INC.,**

**Defendant.**

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The motion by plaintiff to restrain defendant from transferring the property (132 West 130<sup>th</sup> Street, New York, New York) and to cancel the judicial sale is denied. The cross-motion by defendant to *inter alia* dismiss plaintiff's complaint is granted in part and this proceeding is dismissed.

**Background**

This action arises out of a related foreclosure matter for premises located at 132 West 130<sup>th</sup> Street, New York, New York. In that other matter (Index No. 810052/2011), Justice Ling-Cohan granted defendant Marie Holdings, Inc. (hereinafter, "Marie") a judgment of foreclosure and sale against Biclyn Corp. (the former owner of the property).

Plaintiff purportedly bought the property from Biclyn for \$20,000 after the judgment of foreclosure and sale was entered. Plaintiff claims that there was no valid lis pendens on the property when the judgment of foreclosure and sale was signed by Justice Ling-Cohan and, therefore, the judicial sale of the property cannot proceed. Plaintiff claims that it attempted to intervene in the 2011 foreclosure case, but its motion was denied. Plaintiff argues that it has standing to bring the instant action because it is the current owner of the property.

In opposition to the order to show cause and in support of its cross-motion to dismiss, Marie claims that plaintiff is not entitled to its requested relief because plaintiff took title to the property after the judgment of foreclosure and sale was entered in the 2011 case. Marie claims that plaintiff took the property subject to the mortgage and the existing liens.

### Discussion

“On a motion to dismiss under CPLR 3211, the pleading is to be given a liberal construction, the allegations contained within it are assumed to be true and the plaintiff is to be afforded every favorable inference” (*Simkin v Blank*, 19 NY3d 46, 52, 945 NYS2d 222 [2012]).

“A court of coordinate jurisdiction has no authority to rule on a matter already reviewed by another judge of equal authority” (*Belcher Co. of New York, Inc. v City of New York*, 157 AD2d 585, 586, 550 NYS2d 331 [1st Dept 1990]).

Here, plaintiff attempts to raise issues already rejected by Justice Ling-Cohan and, therefore, this Court must dismiss the complaint. In her decision denying plaintiff’s motion to intervene in the 2011 foreclosure action, Justice Ling-Cohan noted that Biclyn had not opposed the motion for a judgment of foreclosure and sale and that it was “disingenuous for a non-party . . . to now seek to vacate such judgment and award by the Referee upon grounds, which allegedly existed at such time (such as errors by the Referee and *expiration of a Notice of Pendency*), and which could have been previously asserted by defendants (the actual parties to this lawsuit)” (NYSCEF Doc. No. 34 at 3 [emphasis added]).

The First Department rejected plaintiff’s appeal of this decision (NYSCEF Doc. No. 36). Plaintiff’s motion before Justice Ling-Cohan to renew or reargue was also rejected (NYSCEF

Doc. No. 38). Justice Ling-Cohan found that plaintiff's principal, David DeRosa, "admits that it took title to the subject property 'subject to liens on the [p]roperty' and was aware of the 'mortgage recorded against the property,' as well as the within foreclosure action" (*id.* at 4).

The litigation history described above demonstrates that plaintiff exhausted its remedies to vacate the judgment of foreclosure and sale on the ground that the *lis pendens* was not valid at the time the judgment of foreclosure and sale was granted. Plaintiff is barred by the doctrine of *res judicata* from raising these claims again. Even though plaintiff brings the instant action under the guise of a different matter— a declaratory judgment action— the fact is that the requested relief is the same. That relief that was denied twice by Justice Ling-Cohan and by the Appellate Division, First Department.

This Court also observes that it has no authority to rule on arguments rejected by another Supreme Court justice (a court of coordinate jurisdiction). This Court cannot function as an appellate court for a Supreme Court decision plaintiff does not like. Even if plaintiff were correct that the lack of a valid *lis pendens* justifies vacating a judgment of foreclosure and sale, it is beyond the scope of this Court's decision to evaluate the merits of that argument. Plaintiff had three opportunities to intervene and vacate the judgment of foreclosure and sale and it failed each time.

#### **Other Requested Relief in the Cross-Motion**

Defendant also seeks other relief in its cross-motion (parts b-f in its notice of cross-motion). The branch of the cross-motion marked "b" is granted— the deed from Biclyn to plaintiff is subordinate to the mortgage and the amended judgment of foreclosure and sale. The mortgage

was recorded and the amendment judgment of foreclosure and sale was entered *before* the property was transferred.

The second declaration sought (part “c”) is denied as duplicative and unnecessary because the Court is dismissing the instant action. There is no reason to have a declaration stating that all persons taking title to the property will take it free and clear of any and all claims by plaintiff regarding the premises. And this Court will not issue a blanket prohibition against any and all future claims by plaintiff– the Court can only address the claims presented in this motion.

The branch of the cross-motion (part “d”) seeking to cancel the notice of pendency filed by the plaintiff in this case is granted.

Part e of the cross motion is denied. This requested relief includes transferring the \$100,000 deposited by plaintiff to defendant’s counsel and authorizing \$3,624.20 to be released to defendant (relating to the Appellate Division’s decision). Marie has provided no basis to demonstrate that it is entitled to the \$100,000 deposited by plaintiff. There is no indication that this condition, imposed by the Court as part of the order to show cause, was intended to serve as security or to compensate Marie if plaintiff lost the case. The portion of this part relating to the Appellate Division’s decision is denied because it arose under the 2011 index number. If sums are owed in that case, then plaintiff should bring a motion under that index number.

The branch of Marie’s cross-motion to dismiss seeking attorneys’ fees and costs from plaintiff (part “f”) is denied. Clearly, the notice of pendency was not valid when the judgment of foreclosure and sale was entered. If Marie had timely renewed the notice of pendency, then it would not have faced additional litigation costs stemming from this mistake. While that error did not entitle plaintiff to its requested relief, it does not mean that plaintiff’s claims were frivolous.

**Summary**

Plaintiff's motion is denied. Defendant's cross-motion to dismiss is granted to the extent described above. Defendant is directed to settle an order on notice with the order clerk within 45 days relating to the portions of the cross-motion the Court has granted: parts a, b, and d.

All stays are hereby vacated.

**Dated: November 9, 2017**  
**New York, New York**



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ARLENE P. BLUTH, JSC

**HON. ARLENE P. BLUTH**