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| Judelson v Abdurahman |
| 2018 NY Slip Op 32342(U) |
| September 17, 2018 |
| Supreme Court, Kings County |
| Docket Number: 506754/2015 |
| Judge: Paul Wooten |
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**SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY**

PRESENT: HON. PAUL WOOTEN
Justice

PART 97

**IRA JUDELSON AS ATTORNEY- IN-FACT of
INTERNATIONAL FIDELITY INSURANCE COMPANY,**

Plaintiff,

- against -

SAYEEDA ABDURAHMAN,

Defendant.

INDEX NO. 506754/2015

Seq. No. 2, 3

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

1, 2

3

4, 5

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KINGS COUNTY CLERK
FILED

Motions sequence numbers 2 and 3 are consolidated for disposition.

This is an action commenced by plaintiff Ira Judelson (Judelson or plaintiff), as attorney-in-fact of International Fidelity Insurance Company (International), pursuant to RPAPL Article 15, to determine the right, title and interest to the real property allegedly owned by defendant Sayeeda Abdurahman (Abdurahman or defendant). Now before the Court is a motion by plaintiff for an Order granting him summary judgment, pursuant to CPLR 3212, (1) declaring Abdurahman to be the legal owner of not less than a fifty percent interest in the real property located at 929 Hopkinson Avenue in Brooklyn (Block 3612, Lot 108) (the Property), and (2) declaring plaintiff to be entitled to execution against Abdurahman's interest in the Property, pursuant to the judgment entered in the Kings County Clerk's office on June 2, 2011 under Index No. 12532/2011 (motion sequence 2).

Defendant Abdurahman cross-moves for an Order, pursuant to CPLR 3212, (1) dismissing Judelson's claim as mortgagee; (2) directing judgment in her favor declaring that the

mortgage on the Property is null and void *ab initio*; and, (3) denying Judelson's claimed status as a mortgagee to execute against defendant's interest in the Property (motion sequence 3).

BACKGROUND

In June 2010, Abdurahman's son, Mansar Abdurahman (Mansar), was arrested and his bail was set at \$75,000. On June 22, 2010, Judelson, the principal of Ira Judelson Bail Bonds, issued a \$75,000 bail bond to Abdurahman to secure Mansar's release from custody. As security for the bail bond, Abdurahman executed a June 22, 2010 Affidavit and Confession of Judgment in favor of Judelson, as attorney-in-fact of International, for \$75,000 (First Confession of Judgment).

While released on bail, Mansar was arrested again on new criminal charges. On September 21, 2010, Judelson issued another \$75,000 bail bond to Abdurahman to secure Mansar's release from custody. As security for the second bail bond, Abdurahman executed the September 21, 2010 Affidavit and Confession of Judgment in favor of Judelson as attorney-in-fact of International for another \$75,000 (Second Confession of Judgment).

As additional security, on September 21, 2010, Abdurahman executed a \$150,000 mortgage on the Property in favor of Judelson, as attorney-in-fact of International, to secure the payment of an indebtedness in the sum of \$150,000 to be paid in the event of a forfeiture of bail (the Mortgage Agreement). On December 16, 2010, Mansar's bail was forfeited because he violated its terms. Consequently, on June 2, 2011, Judelson filed the Second Confession of Judgment in the Kings County Clerk's office and obtained a \$75,000 money judgment against Abdurahman under Kings County Index No. 12532/11 (June 2011 Judgment).

On July 22, 2011, Judelson, as attorney-in-fact of International, commenced an action, against Abdurahman, pursuant to RPAPL Article 15, under Kings County Index No. 16643/2011 (July 2011 Action). In the July 2011 Action, Judelson sought an Order (1) declaring that Abdurahman is the owner of a 50% interest in the Property, and (2) issuing a warrant of

execution of judgment against Abdurahman's interest in the Property. After issue was joined in the July 2011 Action, Judelson moved for summary judgment.

By a Decision and Order, dated February 15, 2013, Justice Partnow, JSC, denied Judelson's summary judgment motion on the ground that Judelson, who admitted that he was a judgment creditor, lacked standing to maintain an action pursuant to RPAPL article 15 against defendant because he did not demonstrate that he has a claim to an estate or interest in the Property (see Justice Partnow's February 15, 2013 Order).

Thereafter, on June 2, 2015, Judelson commenced this action as attorney-in-fact of International by filing a Summons and Complaint, under RPAPL Article 15, seeking declarations that (1) Abdurahman is the owner of a 50% interest in the Property, and (2) plaintiff is entitled to execute the June 2011 Judgment against Abdurahman's interest in the Property. Notably, the Complaint alleges that:

"Plaintiff maintains standing to bring this proceeding under Article 15 of the Real Property Actions and Proceedings Law by reason of his being a mortgagee of Sayeeda Abdurahman's interest in the subject real property pursuant to a mortgage dated September 21, 2010"

(Complaint ¶ 14). According to Judelson, this action is necessary because the Property is not held in defendant's name, and a Court Order is required to permit execution against the Property, pursuant to CPLR 5206. On or about August 18, 2015, Abdurahman filed a *pro-se* Answer in which she denied every allegation in the Complaint and asserted two affirmative defenses alleging that (1) the case was tried in 2011 and Judgment was rendered in her favor under Index No. 16643/2011, and, (2) the herein action is HARASSMENT of a disabled senior.

SUMMARY JUDGMENT STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Winegrad v NY Univ.*

Medical Cntr., 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie case showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (see *Alvarez*, 68 NY2d at 324; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Qlisanr, LLC v Hollis Park Manor Nursing Home, Inc.*, 51 AD3d 651, 652 [2d Dept 2008]; *Greenberg v Manlon Realty*, 43 AD2d 968, 969 [2d Dept 1974]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]; *Boyd v Rome Realty Leasing Ltd. Partnership*, 21 AD3d 920, 921 [2d Dept 2005]; *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY 2d 223, 231 [1978]; CPLR 3212[b]).

DISCUSSION

In support of his motion, Judelson submits an affidavit attesting that Abdurahman agreed to serve as indemnitor and provide collateral to ensure her son's compliance with the terms of his bail (see Notice of Motion, Aff in Supp ¶ 12). In addition to the pleadings, Judelson

submits (1) the First and Second Confessions of Judgment; (2) the Mortgage Agreement; (3) a printout from the New York State Unified Court System reflecting that a warrant was issued against Mansar due to his violation and forfeiture of bail; (4) the June 2011 Judgment; (5) the March 18, 1994 Deed to the Property reflecting that Abdurahman's mother, Uldine Hickson, owned a 50% interest in the Property; (6) Uldine Hickson's Last Will and Testament, in which she bequests everything she owns to her daughter, Abdurahman; and (7) the Justice Partnow's Decision and Order denying Judelson's summary judgment motion in the Prior Action for lack of standing.

Judelson asserts, upon information and belief, that (1) Abdurahman is the sole heir of Uldine Hickson who is deceased and died intestate; (2) Abdurahman is purposefully refusing to probate her mother's will because she does not want the Property in her name, and (3) Abdurahman could probate this will, but she is choosing not to do so as she may avoid the reach of creditors. Judelson argues that upon death, title to real property never lapses, but instead immediately vests in someone by operation of law.

Relying on *ABN AMRO Mortgage Group, Inc. v Stephens* (91 AD3d 801 [2d Dept 2012]), Judelson further contends that as a mortgagee of defendant's interest in the Property he has standing to bring this action. Judelson also argues that he commenced the Prior Action solely upon the judgment of record and that the denial of his summary judgment motion in the Prior Action was based solely on the issue of standing and did not address the merits.

In opposition and in support of her summary judgment cross-motion, Abdurahman submits only a memorandum of law and an attorney's affirmation, both of which admit that Abdurahman executed the First and Second Confessions of Judgment and the Mortgage. Abdurahman admits that a Last Will and Testament of Ms. Hickson does grant defendant the one half interest of the subject property owned by Ms. Hickson at her death; however, defendant simultaneously argues that she has a mere possessory, beneficial interest in the

Property and does not hold legal title to the Property because her mother's will was never probated.

Abdurahman further contends that plaintiff is not a mortgagee but a mere judgment creditor, and thus, plaintiff has no standing because he has no interest or estate in the Property to execute against Abdurahman's interest in the Property. Specifically, Abdurahman argues, without citing any legal authority, that the Mortgage is not valid because there is no separate promissory note setting forth the terms of the mortgage typical of a residential mortgage. Defendant also contends that the Mortgage is invalid, defective and unenforceable because it was never recorded. Abdurahman asserts that, at most, the Mortgage is a contract between plaintiff as bail bondsman and defendant as home owner for payment of \$150,000 in satisfaction of an alleged outstanding obligation of Abdurahman to secure release of her son from custody.

Judelson, in opposition to Abdurahman's cross-motion and in further support of his motion, argues that Abdurahman's opposition fails to create any issues of fact concerning the underlying issues before the Court and serves only to confirm them. Judelson contends that Abdurahman's submission of an attorney's affirmation is insufficient because it lacks evidentiary value. Judelson further argues that Abdurahman does not hold a mere possessory interest in the Property because title to real property devised under the will of a decedent vests in the beneficiary at the moment of the testator's death. Regarding the Mortgage, Judelson argues that an unrecorded mortgage is a valid lien against the mortgagor and against the whole world except if transferred to a good faith purchaser without notice of the encumbrance and that the absence of a note or bond is not fatal. Judelson further contends that Abdurahman has waived the right to challenge plaintiff's standing by failing to have raised it in her answer or in a pre-answer motion to dismiss.

As an initial matter, the Court notes that the herein motion by Judelson is not affected by the doctrine of *res judicata*. The Court notes that Justice Partnow previously addressed this

same issue and denied Judelson's motion for summary judgment on the grounds that, Judelson as a judgment creditor, lacked standing under RPAPL Article 15, to commence an action against defendant (see February 15, 2013 Order). Justice Partnow reasoned that as Judelson asserted that he was a judgment creditor, he had an enforceable lien against defendant's Property (*id.*). Thus, Justice Partnow opined that "a lien on property is not a claim to an estate or interest in real property . . . since plaintiff's lien is 'insufficient to create an interest or estate' in defendant's real property, plaintiff has no standing to maintain an action pursuant to RPAPL [A]rticle 15" (*id.*).

However, here, Judelson commenced the herein proceeding seeking declaratory relief as to his rights as a mortgagee of defendant's Property. Therefore, this Court finds that Judelson has standing to maintain this action, pursuant to RPAPL Article 15 (see *e.g. Bayview Loan Servicing, LLC v White*, 134 AD3d 755, 757 [2d Dept 2015]).

Nevertheless, upon review of the record, the Court finds that Judelson's motion for summary judgment must be denied. The Court finds that while Judelson correctly avers that "title to real property devised under the will of a decedent vests in the beneficiary at the moment of the testator's death and not at the time of probate" (*In re Raccioppi*, 128 AD3d 838, 840 [2d Dept 2015]; see also *Corley v McElmeel*, 149 NY 228 [1896]), Judelson submits no evidence -- i.e., a death certificate, to show that defendant's mother is in fact deceased. Moreover, upon reviewing the Mortgage, the Court finds that the Mortgage Agreement is completely devoid of any legal description of the Property, i.e., lot and block number, and/or property address. The Court notes that the Mortgage Agreement states that the Property encumbered by the mortgage is described in schedule A of the Mortgage Agreement, however, the Court found no such document. Thus, the Court finds that there are issues of fact as to whether (1) the Property is in fact the property mortgaged under the Mortgage Agreement, and (2) Abdurahman

has a vested title to the Property. Therefore, Judelson's motion for summary judgment is denied.

For the same reasons articulated above, the Court finds that defendant's motion for summary judgment for an Order (1) dismissing Judelson's claim as mortgagee; (2) directing judgment in her favor declaring that the mortgage on the Property is null and void, *ab initio*, and (3) denying Judelson's claimed status as mortgagee to execute against defendant's interest, must also be denied. The Mortgage Agreement between Judelson and Abdurahman contains a covenant wherein Abdurahman agrees "to pay the indebtedness as hereinbefore provided" (see Notice of Motion, exhibit J). Abdurahman argues that the Mortgage Agreement is void since it is unaccompanied by a promissory note. The Court disagrees. "A covenant in [a] mortgage, in which the mortgagor agreed to pay the debt, binds the mortgagor so that the mortgagee or his assigns may have recourse against the mortgagor personally" (*Neidich v Petilli*, 71 AD2d 999, 1000 [2d Dept 1979]). Moreover, section 249 of the Real Property Law provides:

"A mortgage of real property does not imply a covenant for the payment of the sum intended to be secured; and where such covenant is not expressed in the mortgage, or a bond or other separate instrument to secure such payment has not been given, the remedies of the mortgagee are confined to the property mentioned in the mortgage"

(RPL 249; see generally, *Neidich*, 71 AD2d at 1000). Additionally, Section 254 of the Real Property Law provides, in pertinent part that:

"3. Covenant to pay indebtedness. In default of payment, mortgagee to have power to sell. A covenant 'that the mortgagor will pay the indebtedness, as hereinbefore provided,' must be construed as meaning that the mortgagor for himself, his heirs, executors and administrators or successors, doth covenant and agree to pay to the mortgagee, his executors, administrators, successors and assigns, the principal sum of money secured by said mortgage, and also the interest thereon as provided by said mortgage."

Therefore, the Court finds that this covenant to pay found in the Mortgage Agreement, the execution of which was premised upon the previously executed Confessions of Judgements between Judelson and Abdurahman, will personally obligate Abdurahman to satisfy the mortgage, even in the absence of a promissory note (*Neidich*, 71 AD2d at 1000; *Breslow v Solomon*, 105 AD2d 824, 824 [2d Dept 1984]). The Court also finds Abdurahman's arguments regarding the validity of the Mortgage Agreement unavailing. The failure of the mortgagee to record the mortgage does not affect its validity, in the sense that an unrecorded mortgage creates a valid lien as between the parties thereto (see *Ochenkowsky v Dunaj*, 137 Misc 674 [Sup Ct Montgomery Cnty 1930], *aff'd* on other grounds, 232 AD 441 [3d Dept 1931]). The mortgagee's lien is good as against the mortgagor, and indeed the whole world, except as to those persons, and under those circumstances, specified in the recording statutes (see *id.*). In light of the foregoing, the Court finds that Abdurahman's cross-motion must be denied.

CONCLUSION

Accordingly, it is hereby,

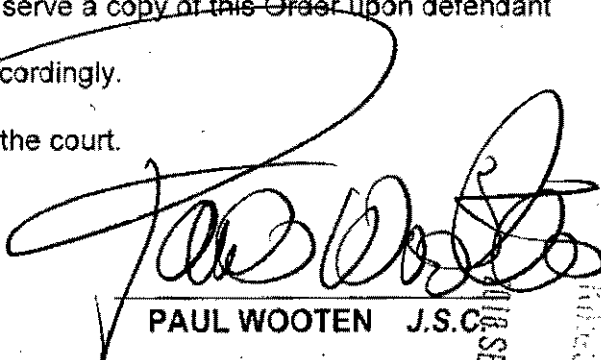
ORDERED that Judelson's summary judgment motion (MS 2) is denied; and, it is further,

ORDERED that Abdurahman's cross-motion for summary judgment (MS 3) is denied; and, it is further,

ORDERED that counsel for Judelson shall serve a copy of this Order upon defendant and the County Clerk who shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

Dated: 9-17-18



PAUL WOOTEN J.S.C.

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