

**4th Ave. Dev. II LLC v Richmond**

2018 NY Slip Op 32744(U)

September 18, 2018

Supreme Court, Kings County

Docket Number: 514769/2017

Judge: Devin P. Cohen

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This opinion is uncorrected and not selected for official publication.

Supreme Court of the State of New York  
County of Kings

Index Number 514769/2017

Seq# 009 & 010, 008

Part 91

**DECISION/ORDER**

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

4<sup>TH</sup> AVENUE DEVELOPMENT II LLC,

Plaintiff,

against

ERIC HAWKES RICHMOND AND 231 FOURTH AVENUE  
LYCEUM, LLC,

Defendants.

**Papers**

Numbered	
Notice of Motion and Affidavits Annexed.....	<u>1, 2, 3</u>
Order to Show Cause and Affidavits Annexed...	<u>          </u>
Answering Affidavits.....	<u>4</u>
Replying Affidavits.....	<u>          </u>
Exhibits.....	<u>          </u>
Other.....	<u>          </u>

Upon review of the foregoing papers, plaintiff's motion for default judgment, defendant Richmond's motion to stay this action, and plaintiff's cross-motion for default judgment<sup>1</sup>, are decided as follows:

Plaintiff brought this action against defendants for judgment declaring that plaintiff is the lawful owner of property located at 227 4th Avenue, Brooklyn, New York. In the complaint, plaintiff alleges that defendants were divested of title to the property by virtue of a foreclosure judgment, dated September 28, 2012. Defendants attempted to delay the foreclosure sale of the property by filing bankruptcy proceedings, but the bankruptcy court lifted the stay against the sale. Plaintiff further alleges that Greystone Property Development II Corp. ("Greystone"), purchased the property at the foreclosure auction. On February 2, 2015, Greystone transferred

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<sup>1</sup> In February of this year, plaintiff moved for default judgment against defendants (Mot. Seq. 008). While that motion was pending, defendant Richmond moved to stay this action (Mot. Seq. 009). Plaintiff opposed defendant's motion and cross-moved for default judgment against defendants (Mot. Seq. 010). Plaintiff's motion and cross-motion seek the same relief and are largely the same, but they are not identical. To the extent there are any relevant differences, the court will highlight them. Otherwise, the court will treat them as the same for the purposes of this Decision/Order.

the property to plaintiff. Plaintiff further alleges that defendants have wrongfully attempted to cloud title by filing a false deed transferring the property from defendant 231 Fourth Avenue Lyceum (“Lyceum”) to defendant Richmond, and have otherwise harassed plaintiff, plaintiff’s tenant and plaintiff’s title insurer. In addition to judgment seeking title, plaintiff also seeks judgment vacating defendants’ false deed and an injunction preventing defendant Richmond from communicating with plaintiff or its affiliates, coming near the property, or undermining plaintiff’s property rights.

Defendant Richmond moves to stay this case pursuant to CPLR 2201. However, defendant Richmond does not appear to seek a stay in the traditional sense. That is, he does not ask this court to temporarily halt the progress of this case in favor of another proceeding moving forward. Instead, defendant Richmond asks this court to review past motions and orders that defendant Richmond disputes, perhaps prior to ruling on plaintiff’s motion for default, to which Richmond also objects. Thus, the court will briefly recount the procedural history of this case.

Plaintiff commenced this action on July 31, 2017, by filing a summons and complaint. Although no motion papers are in the court’s records, it appears that defendants moved to strike the complaint (Mot. Seq. 001), and plaintiff opposed. However, on September 20, 2017, defendant Lyceum filed an Answer. Plaintiff filed a motion (Mot. Seq. 002) for injunctive relief to bar defendants from acting as owners of the property and from harassing plaintiff, plaintiff’s tenants and title insurer, among others. The court (Velasquez, J.) granted a temporary restraining order (the “TRO”) and set a hearing date for plaintiff’s motion. While the motions were pending, plaintiff filed another motion (Mot. Seq. 003) for contempt based on defendant Richmond’s purported violation of the TRO, and then yet another motion (Mot. Seq. 004) to enjoin Richmond

from engaging in further motion practice and from harassing plaintiff's counsel. By order, dated November 1, 2017, the court (Spodek, J.) granted this fourth motion and further directed defendant Richmond to answer the complaint.

Thereafter, it appears that defendant Richmond moved to dismiss the complaint (Mot. Seq. 005), although the only papers on this motion that are in the court's records are plaintiff's opposition. Plaintiff cross-moved for summary judgment (Mot. Seq. 006). These motions were marked withdrawn.

By order, dated January 23, 2018, the court (Spodek, J.) granted plaintiff's motion (Mot. Seq. 002) to enjoin defendants from acting as the property owner and from contacting it, its tenants and title insurer, among others. The order further directed plaintiff to serve an amended complaint.

On January 30, 2018, plaintiff filed an amended complaint. It appears that defendant Richmond rejected this amended complaint because he claimed it was not properly verified. Plaintiff also moved again for an injunction (Mot. Seq. 007) to, among other things, bar defendants from communicating with plaintiff, plaintiff's counsel, the former property owner Greystone, and plaintiff's tenants and title insurer. On February 22, 2018, plaintiff also moved for default judgment against defendants (Mot. Seq. 008).

By order, dated March 29, 2018, the court (Spodek, J.) largely granted plaintiff's motion for injunctive relief (Mot. Seq. 007) and advised that any further violation of court orders by defendant Richmond would be met with sanctions against him. Although defendants did not formally move to reject the amended complaint, the court also ruled that the verification in plaintiff's amended complaint was satisfactory and directed defendant Richmond to answer the

complaint.

Thereafter, defendant Richmond moved for a stay (Mot. Seq. 009) and plaintiff cross-moved for default judgment against defendants (Mot. Seq. 010). These motions, together with plaintiff's first motion for default judgment (Mot. Seq. 008) are before this court.

In his motion for a stay, defendant Richmond recites a litany of objections against the plaintiff's court filings, all of which have already been addressed by the court. First, Richmond argues that plaintiff's original complaint was improperly verified. In its order, dated November 1, 2017, the court already denied Richmond's objection and directed Richmond to answer the complaint. In any event, plaintiff has served an amended complaint, thereby rendering any objection to the original complaint moot (*Golia v Vieira*, 162 AD3d 863, 864 [2d Dept 2018] [noting that, once amended, the original complaint is no longer viable because the amended complaint takes the place of the original complaint]).

Defendant Richmond objects to the amended complaint because, he claims, plaintiff served it without leave of the court and was improperly verified. In fact, the court directed plaintiff to serve an amended complaint by order, dated January 23, 2018. Plaintiff timely did so on January 30, 2018. Additionally, the court held in its order, dated March 28, 2018, that plaintiff's amended complaint was properly verified.

The remainder of defendant Richmond's motion opposes plaintiff's motion for default judgment, and the court will treat it as such. As for the portion of the motion that requests a stay based on the above claimed errors, that portion is denied. CPLR 2201 states that "[e]xcept where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." Here, the court denied defendant

Richmond's objections, and the court's rulings are the law of the case (*Hall v Cucco*, 5 AD3d 631, 632 [2d Dept 2004]). This court has no authority (or inclination) to overturn those rulings.

Turning now to plaintiff's motion for default judgment, plaintiff must establish that defendant was properly served with process, that defendant failed to appear or answer the complaint, and that plaintiff has a viable cause of action (*Triangle Properties 2, LLC v Narang*, 73 AD3d 1030, 1032 [2d Dept 2010]). In order to establish that it has a viable cause of action, plaintiff must submit prima facie proof of its claim by someone with personal knowledge of the facts underlying that claim (*Citimortgage, Inc. v Chow Ming Tung*, 126 AD3d 841, 843 [2d Dept 2015]; *Triangle Properties 2*, 73 AD3d at 1032).

Pursuant to the affidavit of service for the amended complaint, plaintiff served defendants with the amended complaint on January 30, 2018, by delivering the documents to Eric Richmond, who is also the president of defendant Lyceum, by mail and federal express. The court originally obtained jurisdiction over defendants, as shown by the affidavits of service for the original complaint, when defendant Richmond was served personally and defendant Lyceum was served through the Secretary of State. Plaintiff's counsel states in his affirmation that defendants have not responded to the amended complaint. Accordingly, plaintiff has established that defendants have been served and that they defaulted.

As evidence of the merits of this action, plaintiff submitted an amended complaint, verified by Thomas Ryan, the Vice President of plaintiff. The amended complaint makes clear, as described above, that defendants were divested of title by virtue of the foreclosure judgment, that plaintiff is the lawful owner of the property, and that defendants wrongfully clouded title by filing a deed in which they transferred the property to themselves. Thus, plaintiff has established

the elements of a quiet title claim (*Acocella v Wells Fargo Bank, NA*, 139 AD3d 647, 649 [2d Dept 2016] [“To maintain an equitable quiet title claim, a plaintiff must allege actual or constructive possession of the property and the existence of a removable cloud on the property . . . such as a deed . . . that is actually invalid or inoperative”]).

In opposition, defendant Richmond raises another series of arguments that ultimately do not change the outcome of this action. First, Richmond argues that the court does not have jurisdiction to hear the motion for default because the notice of motion was defective. Specifically, Richmond argues that plaintiff did not provide enough time to respond to the motion. Richmond is simply incorrect. In any event, Richmond had more than enough time to serve opposition papers to plaintiff’s motion and cross-motion before the oral argument date of those motions, and so even if there were any technical defect, defendants have suffered no prejudice.

Defendant Richmond next argues that the January 23, 2018 order directing plaintiff to serve an amended complaint did not become effective until February 22, 2018, when plaintiff served it with notice of entry. Again, Richmond is simply wrong, and plaintiff’s service of the amended complaint before notice of entry of the order was permissible.

Richmond also argues that default is improper because defendant Lyceum answered and Richmond moved to dismiss. Both the answer and motion to dismiss are irrelevant because they addressed the original complaint, which has been superseded by the amended complaint (*Golia*, 162 AD3d at 864). Also, Lyceum’s answer is ineffective because Lyceum is not represented by counsel (*Michael Reilly Design, Inc. v Houraney*, 40 AD3d 592, 593 [2d Dept 2007] [holding that, pursuant to CPLR 321(a), a limited liability company must be represented by a licensed

attorney)).

Next, Richmond argues that the March 28, 2018 order grants relief not requested, namely a denial of defendant's objection to the verification. It appears that Richmond believes plaintiff must affirmatively ask the court to deny relief that plaintiff requests. Again, Richmond is wrong. The court may deny relief that Richmond requests without requiring plaintiff to cross-move for such a denial.

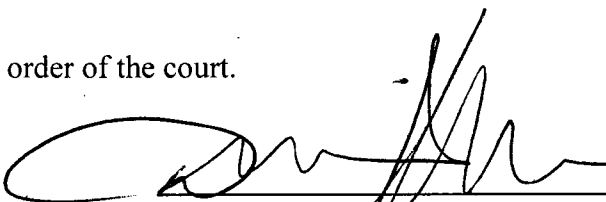
Defendant Richmond argues that the court did not have the authority to direct him to answer the complaint and that he did not have an opportunity to be heard on his objections to the amended complaint. On the contrary, as set forth in the March 28, 2018 order, the court heard Richmond's objections to the verification of the amended complaint and ruled against him, which was well within the court's authority.

Finally, defendant Richmond argues that he need not prove a reasonable excuse or a meritorious defense to vacate his default because this court lacks jurisdiction. As stated above, defendants were properly served with process, and this court has jurisdiction over them. Thus, Richmond's further argument that laches is not a defense to vacatur of a judgment based on lack of jurisdiction is inapplicable here. Defendants were properly served.

For the reasons stated above, plaintiff's motion and cross-motion for default judgment are granted, and defendant Richmond's motion to stay is denied. Plaintiff shall settle judgment on notice.

This constitutes the decision and order of the court.

September 18, 2018  
DATE

  
DEVIN P. COHEN  
Acting Justice, Supreme Court

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