

Thomasino v Estate of Thomasino
2019 NY Slip Op 30505(U)
February 27, 2019
Supreme Court, Kings County
Docket Number: 500157/18
Judge: Lawrence S. Knipel
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At an IAS Term, DJMP of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27th day of February, 2019.

PRESENT:

HON. LAWRENCE KNIPEL,
Justice.

-----X
CHRISTOPHER THOMASINO and
ANNE MARIE SKILLINS, f/k/a ANNE MARIE THOMASINO,

Plaintiffs,

- against -

ESTATE OF JAMES V. THOMASINO;
ESTATE OF ANNE THOMASINO;
EMIGRANT FUNDING CORPORATION;
ALVEERU INC.;
NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE;
ALL SEASONS DOOR & WINDOW, INC.;
UNITED STATES OF AMERICA INTERNAL REVENUE SERVICE;
and MASA REALTY LLC,

Defendants.

DECISION, ORDER,
AND JUDGMENT

Index No. 500157/18

Mot. Seq. No. 1-3

The following e-filed papers read herein:

Notice of Motion, Affirmations (Affidavits),
and Exhibits Annexed _____
Affirmations in Opposition and Exhibits Annexed _____
Reply Affirmations _____

NYSCEF#:

29-33, 36-47, 48-59; 75-94; 101-106
67-74; 107; 108-111
112-113

In this action under article 15 of the Real Property Actions and Proceedings Law to cancel the underlying deed and associated liens and judgments, the following motions have been consolidated for disposition:

In Seq. No. 2, the defendant Emigrant Funding Corporation (Emigrant) moves for an order, in effect pursuant to CPLR 3211 (a) (5) and 3212, granting it summary judgment on its first, fourth, and sixth affirmative defenses invoking the doctrine of, inter alia, collateral estoppel based on the entry of a judgment of foreclosure and sale in the action captioned *Emigrant Funding Corp. v James V. Thomasino, a/k/a James Thomasino, Individually and as Trustee of the James V. Thomasino Family Trust, et al.*, Index No. 540/13 (Sup Ct, Kings County) (the foreclosure action); or, in the alternative, for leave to enter a default judgment, pursuant to CPLR 3215, on its cross claims against the defendants Estate of James V. Thomasino and Estate of Anne Thomasino;

In Seq. No. 3, the defendant Alveeru Inc. moves for an order, in effect pursuant to CPLR 317, vacating its default in answering the amended complaint; and

In Seq. No. 1, the plaintiffs Christopher Thomasino and Anne Marie Skillins, formerly known as Anne Marie Thomasino (collectively, the plaintiffs), move for leave, pursuant to CPLR 3215, to enter a default judgment against the defendants Christopher Thomasino as administrator of the estate of James V. Thomasino, deceased; Joseph Thomasino as executor of the estate of Anne Thomasino, deceased; Alveeru, Inc. (Alveeru); All Seasons Door & Window, Inc.; New York State Department of Taxation and Finance; and United States of America Internal Revenue Service.

Background

At issue in both actions are the rights of various parties to the parcel of commercial real property located at 1131-1137 McDonald Avenue in Brooklyn, New York (the property). On May 2, 2006, James V. Thomasino (James), acting under a power of attorney previously granted to him by his mother, Anne Thomasino (Anne), executed a deed that conveyed the ownership of the property from Anne to her and himself as joint tenants with the right of survivorship (the underlying deed). On the same day, James, acting on his own behalf and on behalf of Anne by way of the same power of attorney, executed the Emigrant mortgage which is the subject of the foreclosure action. When Anne died on December 18, 2008, James, who had already been on the title to the property as a joint tenant with the right of survivorship, succeeded to Anne's interest to the property and became its full owner.

The Foreclosure Action

Since January 10, 2013, the property has been the subject of the foreclosure action commenced by Emigrant against James, its then-living owner. When James died on August 21, 2013, his children Christopher Thomasino (Christopher) and Anne Marie Skillins, formerly

known as Anne Marie Thomasino (Anne Marie), as the co-administrators of his estate, succeeded him as the named defendants by stipulation dated November 26, 2013.¹

The judgment of foreclosure and sale was issued on September 4, 2018. By order, dated November 14, 2018, the court presiding over the foreclosure action denied Christopher's motion to invalidate James's deed to the property. The court explained that:

"Defendants [Christopher] Thomasino & [Anne Marie] Skillins were substituted into [the] case by stip of parties dated 11/26/13. Movant [Christopher] now contends that they [*i.e.*, he and Anne Marie] own [the property] directly and not by virtue of their status as co-administrators. This is mere sophistry. If this was an issue, it should have been raised at some point during the last 4 years. Accordingly, motion denied."

The Instant Action

On January 3, 2018, or approximately five years after the inception of the foreclosure action, Christopher and Anne Marie commenced the instant action seeking to invalidate the underlying deed and the Emigrant mortgage. The plaintiffs' theory in this action, like their recently raised and since-rejected position as the defendants in the foreclosure action, is that James had exceeded his authority under the power of attorney when he conveyed the property from Anne to her and himself as joint tenants and that, consequently, the underlying deed and the Emigrant mortgage are both void.

Emigrant, in its amended answer, has raised, among other affirmative defenses, the failure to state a cause of action, res judicata and collateral estoppel, as well as waiver, laches and estoppel (the first, fourth, and sixth affirmative defenses, respectively), together with cross claims against the respective estates of James and Anne (the first, second, and third cross claims).

¹ By decree, dated November 12, 2013, Christopher and Anne Marie were appointed as the co-administrators of James's estate (*see Matter of James V. Thomasino*, File No. 2013-3560 [Sur Ct, Kings County]). Thereafter, Anne Marie renounced all her right, title and interest in James's estate, and by decree dated August 11, 2014, the Surrogate's Court accepted Anne Marie's renunciation and appointed Christopher as the sole fiduciary of James's estate.

Discussion

Emigrant's Motion to Dismiss

Although Emigrant's motion raises numerous defenses, its reliance on the collateral estoppel defense is dispositive of its motion. "The doctrine of collateral estoppel precludes a party from relitigating in a subsequent action an issue that was raised in a prior action and decided against that party (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). The issue must have been material in the first action and essential to the decision entered therein (*id.*). Collateral estoppel applies "if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1999]). "The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues, whereas the party attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action" (*Lamberti v Plaza Equities, LLC*, 161 AD3d 837, 839 [2d Dept 2018]).

Emigrant has demonstrated, *prima facie*, that collateral estoppel bars the plaintiffs' claims against it in the instant action. Emigrant has established that the plaintiffs' contentions regarding the invalidity of the underlying deed and its mortgage were extensively briefed and argued before the court presiding over the foreclosure action. Emigrant has shown "the identity of the issues in the present litigation and the prior determination," and that these issues were decided against the plaintiffs in the foreclosure action (*Mahl v Citibank*, 234 AD2d 348, 349 [2d Dept 1996], *lv denied* 90 NY2d 804 [1997]). In opposition, the plaintiffs have failed to raise a triable issue of fact as to whether the issue of the validity of the underlying deed and the Emigrant mortgage was "material to the [foreclosure] action and essential to the decision rendered therein," or as to whether they "had a full and fair opportunity to contest the matter in the [foreclosure] action" (*SSJ Dev. of Sheepshead Bay I, LLC v Amalgamated Bank*, 128 AD3d 674, 676 [2d Dept 2015]).

[internal quotation marks omitted]). Accordingly, Emigrant is entitled to summary judgment dismissing the amended complaint as against it pursuant to CPLR 3211 (a) (5) and 3212 on the basis of its fourth affirmative defense of collateral estoppel (*see e.g. Mazzurco v Astoria Fed. Sav. & Loan Assn.*, 157 AD3d 943, 944 [2d Dept 2018]; *Hanspal v Washington Mut. Bank*, 153 AD3d 1329, 1331-1332 [2d Dept 2017]; *JPMorgan Chase Bank v Ezagui*, 90 AD3d 714, 715 [2d Dept 2011]). The remainder of Emigrant's motion is denied as academic.

Further, as Emigrant correctly points out, a judgment of foreclosure and sale entered against the plaintiffs as the co-administrators of James's estate in the foreclosure action "is final as to all questions at issue between the parties, and concludes all matters of defense which were or might have been litigated in the foreclosure action" (*Long Is. Sav. Bank v Mihalios*, 269 AD2d 502, 503 [2d Dept 2000]), and "granting the plaintiffs the relief they seek in the present action would destroy or impair the rights established by the judgment of foreclosure in the [foreclosure] action" (*SSJ Dev.*, 128 AD3d at 675-676).

Alveeru's Motion to Vacate Default

CPLR 317 provides that a person served with a summons, other than by personal delivery to him or her, who does not appear, may be allowed to defend the action within one year after he or she obtains knowledge of entry of the judgment upon a finding of the court that he or she did not personally receive notice of the summons in time to defend and has a potentially meritorious defense. "The determination of a motion pursuant to CPLR 317 is addressed to the sound discretion of the trial court, the exercise of which will generally not be disturbed if there is support in the record therefor" (*Acqua Cap., LLC v 510 W. Boston Post Rd, LLC*, 164 AD3d 1195, 1196 [2d Dept 2018] [internal quotation marks omitted]).

Business Corporation Law § 306 (b) (1) provides that service may be effectuated on a corporation by delivery of process to the Secretary of State. "[S]ervice on a corporation through delivery of process to the Secretary of State is not 'personal delivery' to the corporation or to an

agent designated under CPLR 318” (*Eugene Di Lorenzo, Inc. v A.C. Dutton Lumber Co.*, 67 NY2d 138, 142 [1986]). “A failure to file a change of address with the Secretary of State does not constitute a per se barrier to vacatur of a default judgment pursuant to CPLR 317” (*Evans v City of Mt. Vernon*, 163 AD3d 770, 772 [2d Dept 2018] [internal quotation marks omitted]).

Here, Alveeru has established, by way of the affidavit of its principal, that its address on file with the Secretary of State, at the time of the claimed service of process, was outdated, and that it thereafter updated its address on file with the Secretary of State. There is no basis in the record on which to conclude that Alveeru was deliberately attempting to avoid service of process (*see Marinoff v Natty Realty Corp.*, 17 AD3d 412, 413 [2d Dept 2005]). In addition, Alveeru has met its burden of demonstrating the existence of a potentially meritorious defense (*see Booso v Tausik Bros., LLC*, 148 AD3d 1108 [2d Dept 2017]; *Gershman v Midtown Moving & Storage, Inc.*, 123 AD3d 974, 975 [2d Dept 2014]). Accordingly, Alveeru’s motion is granted, as more fully set forth in the decretal paragraphs below.

Plaintiffs’ Motion for Leave to Enter a Default Judgment

To be entitled to a default judgment pursuant to CPLR 3215 (f), a plaintiff is required to submit, among other things, “proof of the facts constituting the cause of action” (*Caliguri v Pentagon Fed. Credit Union*, ___ AD3d ___, 2019 NY Slip Op 00254, *1 [2d Dept 2019]). “To demonstrate the facts constituting the cause of action, the plaintiff need only submit sufficient proof to enable a court to determine if the cause of action is *viable*” (*L&Z Masonry Corp. v Mose*, 167 AD3d 728, 729 [2d Dept 2018] [emphasis added]). In other words, “while a default admits all factual allegations of the complaint and all reasonable inferences therefrom, it does not admit legal conclusions which are reserved for the court’s determination” (*Cohen v 1999 Pontiac*, 42 Misc 3d 401, 404 [Sup Ct, Suffolk County 2013]). Where a valid cause of action is not stated, the movant is deemed unable to demonstrate entitlement to the requested relief, even on default (*see Litvinskiy v May Enter. Group, Inc.*, 44 AD3d 627 [2d Dept 2007]).

Here, the plaintiffs have failed to submit adequate proof of the facts constituting their claims. Specifically, the plaintiffs have failed to establish the viability of their claim that either the underlying deed or the Emigrant mortgage, or both, are void. Christopher's contention in his supporting affidavit that James lacked authority under the power of attorney to make gifts to himself (*i.e.*, to convey one-half of the ownership of the property to himself as a joint tenant pursuant to the underlying deed, as well as to mortgage the entire property to Emigrant) is belied by the power of attorney which explicitly authorized him, on Anne's behalf, to engage in "real estate transactions" without limitation. Contrary to Christopher's position, it is irrelevant that box "M" on the power of attorney has been left blank. Box "M," when checked on the power of attorney, applies only to gifts in the aggregate monetary amount of up to \$10,000. Accordingly, the branch of the plaintiffs' motion which is for leave to enter a default judgment against the defendants Christopher Thomasino as administrator of the estate of James V. Thomasino, deceased; Joseph Thomasino as executor of the estate of Anne Thomasino, deceased; All Seasons Door & Window, Inc.; New York State Department of Taxation and Finance; and United States of America Internal Revenue Service is denied (*see e.g. Beaton v Transit Facility Corp.*, 14 AD3d 637, 637-638 [2d Dept 2005]; *Cree v Cree*, 124 AD2d 538, 541 [2d Dept 1986]). The remaining branch of the plaintiffs' motion which is for leave to enter a default judgment against the defendant Alveeru is denied as moot because, as noted, the court has granted Alveeru's motion to vacate its default.

Conclusion

Based on the foregoing and after oral argument, it is

ORDERED that, in Seq. No. 2, the defendant Emigrant's motion is *granted to the extent* that the amended complaint insofar as asserted against it is dismissed without costs or disbursements on the basis of its fourth affirmative defense of collateral estoppel pursuant to CPLR 3211 (a) (5) and 3212, and the remainder of its motion is denied as academic; and it is further

ORDERED that this action is severed and continued against the remaining defendants, and the caption is amended accordingly; and it is further

ORDERED that, in Seq. No. 3, the defendant Alveeru's motion is *granted* pursuant to CPLR 317, and Alveeru is granted leave to serve an answer or otherwise respond to the amended complaint within 20 days of the date of electronic service of this decision and order with notice of entry on its counsel by the plaintiffs' counsel; and it is further

ORDERED that, in Seq. No. 1, the branch of the plaintiffs' motion which is for leave to enter a default judgment against the defendants Christopher Thomasino as administrator of the estate of James V. Thomasino, deceased; Joseph Thomasino as executor of the estate of Anne Thomasino, deceased; All Seasons Door & Window, Inc.; New York State Department of Taxation and Finance; and United States of America Internal Revenue Service is *denied* for failure to submit adequate proof of the facts constituting their claims, and the remaining branch of their motion which is for leave to enter a default judgment against Alveeru is *denied* as moot.

Emigrant's counsel is directed to electronically serve a copy of this decision, order, and judgment on the other parties' respective counsel, and to electronically file an affidavit of said service with the Kings County Clerk.

This constitutes the decision, order, and judgment of the court.

ENTER FORTHWITH



J. S. C.
HON. LAWRENCE KNIPEL
Administrative Judge

Nancy T. Sunshine

NANCY T. SUNSHINE
Clerk

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KINGS COUNTY CLERK
FILED