

Riverbridge Ct. Condominium v Gospel Missionary Baptist Church

2019 NY Slip Op 31727(U)

June 17, 2019

Supreme Court, New York County

Docket Number: 112056/2009

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH **PART** IAS MOTION 32

Justice

-----X

INDEX NO. 112056/2009

RIVERBRIDGE COURT CONDOMINIUM, BY IT'S BOARD OF MANAGERS,

MOTION DATE _____

Plaintiff,

MOTION SEQ. NO. 08

- v -

THE GOSPEL MISSIONARY BAPTIST CHURCH, THE NEW YORK CITY PARKING VIOLATIONS BUREAU, THE NEW YORK CITY ENVIRONMENTAL CONTROL BOARD,

Defendants.

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**DECISION AND ORDER
FILED**

JUN 19 2019

**COUNTY CLERK'S OFFICE
NEW YORK**

The following papers, numbered 3, were read on this application to/for Vacate Default

Notice of Motion/ Petition/ OSC - Affidavits - Exhibits	No(s)	<u>1</u>
Answering Affidavits - Exhibits	No(s)	<u>2</u>
Replying	No(s)	<u>3</u>

The motion by Order to Show Cause to (1) Vacate the Judgment of Foreclosure and Sale dated March 27, 2018 (2) Set aside the foreclosure sale and place title of the premises back in the name of the Church (3) Enjoin W149 Realty LLC from encumbering, conveying or otherwise disposing of the premises until a trial can be held (4) Staying any further holdover proceedings to evict the Church is denied.

Background

This case arises from the foreclosure of defendant Gospel Missionary Baptist Church ("Church") located at 610 West 149th Street in Manhattan. The Church was established in 1991 by Pastor Henry Smalls. Throughout the years, it began to incur significant debt. In order to try

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and resolve the debt, Pastor Smalls began negotiating with developers from the Hirsh Group LLC, who allegedly agreed to pay off the Church's debt "in exchange for the right to develop the property into mixed-use building with residential housing built over a commercial condo space for the Church and private offices for the developers" (Defendant's Affirmation at pg. 2). Defendant claims that the developers told the Church it would no longer be liable for any further charges, including common area charges.

In 2009, plaintiff Riverbridge filed a lien for common charges against the Church. In 2010, plaintiff moved for summary judgment of foreclosure and for the appointment of a referee. The motion was granted on default in a decision dated November 29, 2010 (Plaintiff's Exh A). In 2012, a referee's report was submitted and plaintiff moved for confirmation of the report, which was granted (Plaintiff's Exh B). Thereafter, a Judgment of Foreclosure and Sale was entered on August 13, 2013 (Plaintiff's Exh C). A foreclosure sale was held but it was invalidated because it was discovered that the property was subject to a tax lien. Plaintiff then moved for a new Judgment of Foreclosure and Sale subject to any superior liens of record, including the tax lien. The motion was granted on October 22, 2014 (Plaintiff's Exh D). The tax lien was discharged in August 2016.

In 2017, plaintiff then filed an updated common charges lien to secure common charges due in the amount of \$229,805.74 and moved for an order directing the entry of a new Judgment of Foreclosure on the 2017 common charges lien. The order was granted without opposition and plaintiff was directed to submit a new order of reference to compute the amount owed (Plaintiff's Exh E). A referee was appointed, he computed the common charges, and determined them to be \$242,299.98 along with interest (Plaintiff's Exh G). On March 27, 2018, the referee's report was confirmed and a Judgment of Foreclosure and Sale was once again granted in favor of plaintiff

(Plaintiff's Exh H). The church was subsequently sold at a foreclosure auction on July 18, 2018 to W149 Realty LLC, who now owns the deed to the premises. Defendant brings the instant motion to vacate the March 27, 2018 Judgment of Foreclosure and Sale.

Discussion

Pursuant to CPLR § 5015(a)(1), "The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of: (1) excusable default" (CPLR 5015[a][1]). To vacate a default judgment, defendant must "demonstrate an acceptable excuse for its delay in appearing and answering plaintiffs' complaint and a meritorious defense to the action" *Gray v B.R. Trucking Co.*, 59 NY2d 649, 650, 449 NE2d 1270 [1983]).

Defendant claims that it has a reasonable excuse for not appearing and a meritorious defense to the foreclosure.

Reasonable Excuse

Defendant claims that it never received a copy of the March 2018 Judgment of Foreclosure and Sale. In support of this point, defendant points to an affidavit from a church member who opens the mail for the church, wherein she states that she never received the copy of the Judgment of Foreclosure and Sale or any other document relating to the foreclosure (Defendant's Exh A, Karalia Aff. at ¶ 22). The affidavit also states that the mail served on the different occupants of the building frequently gets mixed up, and the church's mail often gets delivered to Riverbridge and vice versa (*id.* at ¶ 23).

The Court finds this excuse unpersuasive. Plaintiff submits an affidavit of service, indicating service was effectuated (Plaintiff's Exh C). "A properly executed affidavit of service

raises a presumption that a proper mailing occurred. By statute, service is complete upon mailing” (*Engel by Engel v Lichterman*, 62 NY2d 943, 944–45, 468 NE2d 26 [1984]). Mere denial of receipt of service is insufficient to rebut this presumption. Furthermore, legal action against the Church has been occurring since 2009. It is hard to believe that the Church has not been receiving documents relating to this foreclosure over the past ten years.

Meritorious Defense

Defendant claims that it has a meritorious defense because it was deceived into believing the Church did not have to pay common charges based on representations made by Riverbridge and/or the Hirsh Group LLC. However, defendant does not submit any proof, such as a written agreement, to support this assertion. An alleged oral promise cannot constitute the basis for a meritorious defense for not paying common charges for almost a decade.

Additionally, defendant should have raised this defense in the original foreclosure action in 2010. Defendant failed to do so. In fact, it failed to raise it in the 2014 foreclosure action also. This is the third time the foreclosure action is being brought and defendant cannot raise a defense in this action that it should have raised in 2010.

Defendant further claims that it has a meritorious defense because plaintiff failed to name the Attorney General of the State of New York as a necessary party pursuant to Religious Corporations Law 12(1). This statute states: “A religious corporation shall not sell, mortgage or lease for a term exceeding five years any of its real property without applying for and obtaining leave of the court or the attorney general therefor pursuant to section five hundred eleven of the not-for-profit corporation law” (Religious Corporations Law 12 [1]). The statute is inapplicable

to the facts at hand because this case is not about the sale, mortgage, or lease of a property; it is about a foreclosure based on common charges. Thus, the statute is inapplicable.

Summary

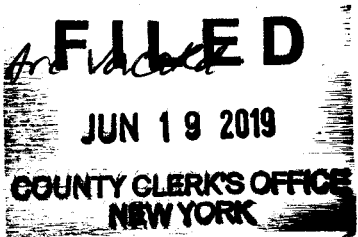
This is a case that has been going on since 2009. Defendant had multiple opportunities to litigate its claims but failed to do so repeatedly, resulting in multiple default judgments. It cannot now attempt to re-litigate issues it should have litigated years ago. And it cannot rely solely on purported oral promises to support its claims, without any proof.

Accordingly, it is hereby

ORDERED that defendant's motion to (1) Vacate the Judgment of Foreclosure and Sale dated March 27, 2018 (2) Set aside the foreclosure sale and place title of the premises back in the name of the Church (3) Enjoin W149 Realty LLC from encumbering, conveying or otherwise disposing of the premises until a trial can be held (4) Staying any further holdover proceedings to evict the Church is denied.

Any stays are vacated

6/17/19
DATE



[Signature]

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

CHECK ONE:

<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION
<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> REFERENCE

APPLICATION: _____

CHECK IF APPROPRIATE: _____