

**Chauhan v AS Helios LLC**

2020 NY Slip Op 30141(U)

January 21, 2020

Supreme Court, New York County

Docket Number: 156579/2019

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32
Justice
INDEX NO. 156579/2019
PUSHPA CHAUHAN, PAUL EATON, MOTION DATE N/A, N/A
Plaintiffs, MOTION SEQ. NO. 001 003

- v -

AS HELIOS LLC, M & T BANK AKA MANUFACTURERS AND TRADERS TRUST COMPANY, JOHN DOE #1 THROUGH JOHN DOE #10, THE LAST TEN NAMES BEING FICTITIOUS AND UNKNOWN TO THE PLAINTIFF, THE PERSON OR PARTIES INTENDED AS PERSONS OR ENTITIES WHO EITHER HAVE SOME CLAIM OR INTEREST IN THE PREMISES DESCRIBED IN THE COMPLAINT, OR, IN THE ALTERNATIVE, THAT AIDED AND ABETTED THE CONDUCT WHICH FORMS THE BASIS OF THE COMPLAINT

DECISION + ORDER ON MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 34, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 61, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92

were read on this motion to/for DISMISS

Motion Sequence Numbers 001 and 003 are consolidated for disposition. The motion (MS001) by defendant M&T Bank AKA Manufacturers and Traders Trust ("M&T") to dismiss is granted. The motion (MS003) by defendant AS Helios LLC ("Helios") to dismiss is denied.

Background

This action relates to separate foreclosure actions commenced by Helios against plaintiffs (Index No. 850191/2013 and Index No. 850023/2016). Helios claimed that plaintiffs defaulted on a note and mortgage and sought to foreclose on an apartment owned by plaintiffs located at

200 Riverside Boulevard. The 2013 foreclosure action was dismissed based on Helios' failure to serve certain pre-foreclosure notices. However, Helios eventually obtained a judgment of foreclosure and sale in the 2016 foreclosure case. Plaintiffs asked for a stay of the foreclosure sale while their appeal in the First Department was pending and the appellate court denied their request for a stay. The property was sold at auction to M&T (who was a junior creditor in the 2016 foreclosure action). M&T recorded a deed for the property on December 12, 2018.

On December 13, 2018, the First Department vacated the judgment of foreclosure and sale and noted that plaintiffs had "raised a meritorious standing defense based on questions as to the sufficiency of the content of the conclusory lost note affidavit" and concerning "service of the requisite 90-day notice under RPAPL 1304" (*AS Helios LLC v Pushpa Chauhan*, 167 AD3d 492, 492-93, 87 NYS3d 878 [1st Dept 2018]).

M&T then moved, by order to show cause on March 13, 2019, for a declaration that it has title to the apartment. M&T was the winning bidder, closed on the sale and had title to the unit. For some reason, plaintiffs did not oppose the motion. And so the Court granted M&T its declaration in April 2019. Instead of opposing M&T's motion, plaintiffs waited until July 2019 and then commenced this action seeking *inter alia* title to the property.

M&T moves to dismiss on the ground that the decision granting it quiet title in the 2016 foreclosure action has a res judicata effect on the proceedings here. Plaintiffs argue that M&T was not entitled to get declaratory relief by motion—M&T should have filed a separate action because it had not filed a pleading seeking such relief in the 2016 action.

Here, the Court finds that the order in the 2016 action has res judicata effect and grants M&T's motion. Plaintiffs offered no substantive reason for why they failed to offer opposition in an e-filed case in which they had actively litigated for years. The reasons plaintiffs offer for why

the order was improper should have been raised in opposition to M&T's motion in the 2016 case or raised in a motion to vacate their default. M&T basically brought a motion in the foreclosure case to confirm that the sale ordered in that case's judgment was good. Starting a new case now does not permit plaintiffs to make arguments it should have raised in that foreclosure case.

The Court also dismisses the unjust enrichment claim against M&T. "[I]n order to adequately plead such a claim, the plaintiff must allege that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered. . . . a plaintiff cannot succeed on an unjust enrichment claim unless it has a sufficiently close relationship with the other party." (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516, 950 NYS2d 333 [2012]).

Plaintiffs failed to explain how M&T was enriched at their expense. They allege that M&T paid over \$1.1 million to Helios for the property. The fact is that M&T offered the winning bid at a foreclosure auction and filed a deed to the property after closing on the deal. That the First Department later vacated the judgment of foreclosure and sale does not mean that M&T was enriched at the plaintiffs' expense. The First Department decision focused only on Helios' potential mistakes in handling the 2016 case. Moreover, there is no sufficiently close relationship between plaintiffs and M&T. Although M&T was a junior lien holder against plaintiffs, it did not assert any claims against plaintiffs in the 2016 action. M&T simply placed the winning bid in a case started by Helios.

"[T]he theory of unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties" (*id.*). Any injustice claimed here was caused by Helios potentially pursuing a

foreclosure action where it failed to show it possessed the note. That has nothing to do with M&T's ability to bid at a foreclosure sale and pay over a million dollars for an apartment.

### **Helios' Motion**

Helios also moves to dismiss the complaint. Plaintiffs claim that Helios' motion is untimely. They point out that after they filed the summons and complaint on July 3, 2019, they entered into a stipulation dated August 1, 2019 in which Helios' time to respond to the complaint was extended to August 30, 2019. Plaintiffs point out that Helios filed its motion to dismiss on August 31, 2019. Plaintiffs note that Helios did not move to vacate its default and, therefore, the instant motion is defective.

In reply, Helios claims that any delay in filing its motion was *de minimis* and should be overlooked. Helios contends that its filings were completed shortly after midnight on August 31, 2019 and the delay (of 28 minutes) is not enough to find that Helios was in default. Helios also asserts its delay was inadvertent.

The Court denies the motion as procedurally improper. As an initial matter, Helios did not move to vacate or even acknowledge that its motion was filed late in its moving papers. Nor is there any evidence that Helios reached out to plaintiffs to acknowledge the late filing and ask for professional courtesy. Instead, it appears Helios just filed the motion and ignored the missed deadline. The Court also observes that the document filed by Helios labeled "affirmation" (presumably intended to be the affirmation in support) is actually just a notice of motion (*see* NYSCEF Doc. No. 23). In fact, it does not appear that Helios e-filed any affirmation in support; instead, it filed two notices of motion (NYSCEF Doc. Nos. 22, 23).

And this is a situation where Helios had already been granted an extension of time to respond to the answer. For some reason, Helios waited until the very last second to file its

motion. While the Court recognizes that this is common practice, that does not make it a wise practice. Waiting until the last moment to file before a deadline comes with risks. One of those risks is that it takes longer than expected to complete the filing process. Also, this is not a case where Helios claims that the e-filing system failed; rather Helios offers that there were "unexpected technical issues."

The Court recognizes that the filing was only a few minutes late. But deadlines have to be enforced if they are to have any meaning. With the advent of electronic filing, documents can be filed from anywhere at any time. But the ease with which documents can be filed should not give rise to the temptation to wait until the last minute to e-file. And parties that give in to this temptation risk the outcome here—that the filing takes longer than expected and a deadline is missed. The Court cannot simply ignore a deadline especially where the parties agreed to give Helios an extra month to respond and Helios failed to file an attorney's affirmation in support.

Accordingly, it is hereby

ORDERED that the motion (MS001) by defendant M&T Bank AKA Manufacturers and Traders Trust to dismiss the complaint against it is granted and all claims against this defendant are severed and dismissed; and it is further

ORDERED that the motion (MS003) by defendant AS Helios LLC to dismiss is denied.

Conference: May 12, 2020 at 2:15 pm.

1-21-20

DATE

ARLENE P. BLUTH, J.S.C.

|                       |                          |                            |                                     |                       |
|-----------------------|--------------------------|----------------------------|-------------------------------------|-----------------------|
| CHECK ONE:            | <input type="checkbox"/> | CASE DISPOSED              | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION |
|                       | <input type="checkbox"/> | GRANTED                    | <input type="checkbox"/>            | GRANTED IN PART       |
| APPLICATION:          | <input type="checkbox"/> | SETTLE ORDER               | <input type="checkbox"/>            | SUBMIT ORDER          |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/>            | FIDUCIARY APPOINTMENT |
|                       |                          |                            |                                     | OTHER                 |
|                       |                          |                            |                                     | REFERENCE             |