

**Griffon Loring LLC v Amethyst Alt Asset Fund 2016  
LLC**

2020 NY Slip Op 30751(U)

March 4, 2020

Supreme Court, New York County

Docket Number: 154292/2019

Judge: Paul A. Goetz

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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. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

-----X.
GRIFFON LORING LLC.,

Plaintiff,

- v -

AMETHYST ALT ASSET FUND 2016 LLC., STOUT STREET FUND I, L.P.,

Defendant.

INDEX NO. 154292/2019
MOTION DATE 02/14/2020, 02/14/2020
MOTION SEQ. NO. 001 004

DECISION + ORDER ON MOTION

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 84, 85, 89, 90, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 142

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 144, 145, 146, 147, 148, 149, 150, 151, 152, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205

were read on this motion to/for LEAVE TO FILE

On April 25, 2019, petitioner Griffon Loring commenced this special proceeding pursuant to CPLR 5239 seeking a declaration that it is the owner of certain properties it allegedly purchased at a sheriff's sale in Brooklyn on December 12, 2012. The sale was held pursuant to a certain execution issued out of the Supreme Court, New York County, on January 18, 2012, on a judgment entered in the same court in an action captioned DLJ Mortgage Capital, Inc. v. Thomas Kontogiannis, et al., Index No. 104675/2010 ("Fraudulent Conveyance Action), on December 2, 2011, in favor of DLJ Mortgage, judgment creditor, and against Loring Estates, LLC, judgment debtor. Affirmation of Jonathan B. Schwartzman dated July 3, 2019, Exhs. 1-3. After the sale, the sheriff executed a deed on January 3, 2013 conveying 21 properties to petitioner Griffon Loring. Schwartzman Aff., Exh. 1. However, the sheriff's notice of sale advertised the sale of

only 12 of the 21 properties. Affirmation of Lorenzo DeLuca dated May 16, 2019, Exh. F (Affidavit of Joseph Fucito sworn to July 16, 2018, filed in *In re Loring Estates, LLC*, Case No. 12-45757(NHL) (E.D.N.Y. Bakr. Ct.)), and Exh. I. On March 28, 2013, the sheriff executed and recorded a corrected deed which conveyed only 12 properties to Griffon Loring. DeLuca Aff., Exh. F (Fucito Aff., Exh. C).

In response to the petition, respondent Amethyst cross-moved pursuant to CPLR 3211 to dismiss the petition (motion seq. #001). After filing the petition, petitioner Griffon Loring moved by order to show cause to stay the sale of eight of the properties that were noticed for sale by the sheriff for March 13, 2019 (motion seq. #002). This motion was resolved by stipulation dated July 11, 2019, in which the parties agreed to stay the sale of these properties until a final determination of petitioner's purported ownership of these properties through this petition. (NYSCEF Doc. 91). Thereafter, by order dated July 19, 2019, the court granted the motion by proposed intervenor Stout Street Fund I, L.P. to intervene in this proceeding, amended the caption to add Stout Street as a respondent, and deemed the proposed intervention pleading setting forth Stout Street's defenses, counterclaim and cross-claim to be served on the parties to this proceeding (motion seq. #003; NYSCEF Doc. 94). Respondent Stout Street then moved by order to show cause seeking an order deeming its amended answer properly served pursuant to CPLR 3025 or alternatively, for permission to file an amended answer (motion seq. #004). In response, petitioner Griffon Loring opposed the motion and cross-moved pursuant to CPLR 3212 for summary judgment seeking dismissal of Stout Street's answer and counterclaim. Currently pending before the court is Griffon Loring's petition and respondent Amethyst's motion to dismiss (motion #001), and respondent Stout Street's motion to amend and Griffon Loring's

cross-motion for summary judgment (motion #004). The motions are consolidated for purposes of this decision.

With respect to respondent Amethyst's motion to dismiss the petition pursuant to CPLR 3211, Amethyst first argues that the petition was not properly served pursuant to CPLR 5239, which requires service of process to be made on the respondent and the sheriff or receiver. However, after Amethyst filed its cross-motion, petitioner moved by order to show cause to stay the sale and in signing the order, the court directed petitioner to serve respondent and the sheriff with the motion papers and the petition. Amethyst does not argue that petitioner failed to comply with these service directives and thus this argument is now moot.

Next, Amethyst argues that the petition should be dismissed under CPLR 3211(a)(4) because petitioner is seeking the same relief in four other actions or proceedings. While it is true that petitioner filed an identical proceeding in Kings County one month prior to filing its petition here (*Griffon Loring v. Amethyst*, Index No. 504769/2019), petitioner did so because it could not obtain an injunction of the sheriff's sale noticed for March 13, 2019, from the court in Kings County, which denied petitioner's application with leave to renew in this Court. Schwartzman Aff., Exh. 14. Further, there is a motion pending in the Kings County action to consolidate the two proceedings and based on the parties' representations, it appears that the Kings County action will soon be consolidated with this action and transferred to this Court. Thus, this is not a basis to dismiss this proceeding under CPLR 3211(a)(4).

Respondent Amethyst also argues that petitioner also sought identical relief as a cross-claimant in *Stout Street Fund v. Amethyst*, 153235/2019 (Sup. Ct. New York County). However, that action was discontinued without prejudice and is currently marked disposed pursuant to a stipulation dated November 12, 2019. Similarly, respondent Amethyst argues that petitioner

Griffon Loring asserted an identical claim in *Griffon Loring v. Loring Estates*, Index No. 501948/2018 (Sup. Ct. Kings County). However, by order dated August 15, 2018, that proceeding was dismissed without prejudice in light of the bankruptcy stay in effect at the time due to Loring Estate's bankruptcy filing. Finally, respondent Amethyst argues that the identical issue is being litigated in a foreclosure action pending in Kings County captioned *Stout Street v. Halifax*, Index No. 25128/2011. However, respondent Amethyst did not provide any pleadings or orders from this action, which are not accessible on NYSCEF, and thus the court cannot determine the validity of this argument. Thus, the petition cannot be dismissed on this basis.

Next, Amethyst argues that Griffon Loring's claim is barred by res judicata. Amethyst's argument is based on an order dated December 26, 2018, from the Bankruptcy Court in the Loring Estates matter in which the court denied Griffon Loring's motion to lift the bankruptcy stay. DeLuca Aff., Exh. H. However, Amethyst fails to explain how the bankruptcy court's order regarding the automatic stay constitutes an adjudication on the merits of Griffon Loring's claim in this proceeding regarding its purported ownership of the disputed properties. Thus, the petition cannot be dismissed on this basis.

Finally, Amethyst argues that the petition should be dismissed because it is devoid of merit. Amethyst argues that the sheriff had no authority to sell all 21 properties as the sheriff's notice of sale, issued pursuant to CPLR 5236, listed only 12 properties for sale. However, Amethyst does not cite to any law to support its argument that the notice of sale limits the sheriff's authority, as opposed to the execution and judgment pursuant to which the sheriff's sale was held. See CPLR 5230; *Liggett v. Pichler*, 142 A.D.2d 206, 210 (1<sup>st</sup> Dep't 1988) (an "execution" is the formal document issued by the court that authorizes a sheriff to levy upon the

property of a judgment debtor). Accordingly, the petition will not be dismissed on this basis and the cross-motion is denied.

Turning next to respondent Stout Street's motion for leave to serve an amended responsive pleading, the motion will be granted. CPLR 405. As to Petitioner's cross-motion for summary judgment, it must be denied because pursuant to CPLR 409(b) a summary determination in a special proceeding is made upon the "pleadings, papers and admissions." There is no provision in Article 4 of the CPLR permitting a party to make a summary judgment motion in a special proceeding. *Cf Northwest 5<sup>th</sup> & 45<sup>th</sup> Rlty. Corp. v Mitchell, Maxwell & Jackson*, 164 AD3d 1158 (1<sup>st</sup> Dept 2018) (observing "a special proceeding is treated like a summary judgment motion"); *see also Gonzalez v NYC*, 127 AD3d 632, (1<sup>st</sup> Dept 2015) ("a special proceeding is subject to the same standards and rules of decision as apply on a motion for summary judgment, requiring the court to decide the matter upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised") (internal quotation marks omitted). In any event, even if petitioner had initially brought a plenary action, summary judgment would have to be denied as premature since respondent Amethyst has not responded to the counterclaim and cross-claim in Stout Street's amended answer, and thus issue has not been fully joined. Finally, as Stout Street argues, it appears that this proceeding involves numerous factual and legal issues regarding the ownership of properties in which petitioner seeks adjudication properly cognizable in an action for declaratory judgment. Thus, the proceeding will be converted into a plenary action under CPLR 103(c); *see Portanova v. Scher*, 75 Misc.2d 570 (Sup. Ct. Westchester Cty. 1973). Accordingly, it is

ORDERED that this proceeding is converted to a plenary action and the petition shall be deemed as the complaint in this action; and it is further

ORDERED that Amethyst's cross-motion to dismiss is denied and under CPLR 3211(f), Amethyst shall file an answer to the complaint within ten days after service of notice of entry of this order; and it is further

ORDERED that Stout Street's motion for leave to serve an amended answer is granted and the amended answer filed on August 19, 2019 and annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that petitioner's cross-motion for summary judgment is denied; and it is further

ORDERED that the parties shall respond to the counterclaim and cross-claim in Stout Street's amended answer within 20 days from the date of said service; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 1021, 111 Centre Street, on April 30, 2020 at 9:30 am.

3/4/20  
DATE

  
PAUL A. GOETZ, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input checked="" type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: