

NYCTL 2015-A Trust v Masin

2020 NY Slip Op 31401(U)

May 12, 2020

Supreme Court, New York County

Docket Number: 650351/2016

Judge: Kathryn E. Freed

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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. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X

NYCTL 2015-A TRUST, THE BANK OF NEW YORK
MELLON AS COLLATERAL AGENT AND CUSTODIAN
FOR THE NYCTL 2015-A TRUST,

Plaintiffs,

- v -

GEORGE MASIN, NEW YORK CITY ENVIRONMENTAL
CONTROL BOARD, BOARD OF MANAGERS OF THE
GALLERY HOUSE CONDOMINIUM, JOHN DOE NO. 1
THROUGH JOHN DOE NO. 100 INCLUSIVE, THE NAMES
OF THE LAST 100 DEFENDANTS BEING FICTITIOUS,
THE TRUE NAMES OF SAID DEFENDANTS BEING
UNKNOWN TO PLAINTIFF, IT BEING INTENDED TO
DESIGNATE FEE OWNERS, TENANTS OR OCCUPANTS
OF THE LIENED PREMISES,

Defendants.

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INDEX NO. 650351/2016
MOTION SEQ. NO. 005 & 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145

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

The following e-filed documents, listed by NYSCEF document number (Motion 006) 146, 147, 148, 149, 150, 151, 152, 153, 155, 156, 157, 158, 159, 160, 161, 162

were read on this motion to/for DISCONTINUE.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 146, 147, 148, 149, 150, 151, 152, 153, 155, 156, 157, 158, 159, 160, 161, 162

were read on this motion to/for VACATE LIS PENDENS.

This action to foreclose on a tax lien was commenced by NYCTL 2015-A Trust (“the trust”) and the Bank of New York Mellon (“BONY”), as Collateral Agent and Custodian for the NYCTL 2015-A Trust (collectively “plaintiffs”), against George Masin (“Masin”), on whose apartment (“the premises”) the tax lien was imposed; the New York City Environmental Control

Board (“ECB”); the Board of Managers of the Gallery House Condominium (“GHC”), and John Does No. 1 through 100 (collectively “defendants”). By order entered November 29, 2019 (“the 11/29/19 order”) (Doc. 119), this Court held, inter alia, that Nisan Badalov, the purchaser of the premises at a public auction, breached the terms of sale by failing to close by the deadline set forth therein, and that Masin therefore had the opportunity to redeem the tax lien. Nonparty Adam Plotch (“Plotch”) now moves (motion sequence 005), by order to show cause and pursuant to CPLR 5014(a)(4) to vacate: 1) the branch of the 11/29/19 order which deemed invalid the assignment from Badalov to Plotch; 2) the branch of the 11/29/19 order which directed Referee Kenneth Glassman to return the \$60,000 down payment to Badalov; 3) the branch of the 11/29/19 order which determined that the terms of the contract of sale were breached; 4) the branch of the 11/29/19 order which granted this Court’s own motion to deem the foreclosure sale void; 5) the branch of the 11/29/19 order reviving Masin’s right of redemption; and 6) the stipulation of discontinuance filed by plaintiffs on December 16, 2019. Masin opposes the motion.

Plaintiff also moves (motion sequence 006) as follows: 1) pursuant to CPLR 6514(a), to cancel the notice of pendency filed January 21, 2016; 2) pursuant to CPLR 3217, to discontinue this action on the ground that it was resolved in accordance with the 11/29/19 order; 3) vacating the amended judgment of foreclosure and sale dated March 3, 2017; 4) vacating the second amended judgment of foreclosure and sale dated April 15, 2019; and 5) for such other relief as this Court deems just and proper. Plotch opposes the motion.

After oral argument, as well as a review of the motion papers and the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

The facts of this case are set forth in detail in the 11/29/19 order of this Court. Any additional relevant facts are set forth below.

By order dated June 5, 2019, this Court (Bluth, J.) issued an order in the matter of *Wells Fargo Bank, N.A. v Lee Shechtman, et. al.*, pending in this Court under Index Number 850181/17. Justice Bluth stated that, on that date, she “personally observed improper conduct by a purported bidder, NISON [sic] BADALOV.” This improper conduct consisted of bidding up the property and, after winning the bid, refusing to sign the contract or produce identification to the court-appointed referee. It was only after this Court, and the court officers, got involved did NISON [sic] BADALOV produce his identification.” Doc. 85 filed under Ind. No. 850181/17. As a result of this conduct, Justice Bluth deemed Badalov “INELIGIBLE TO PARTICIPATE in auctions in New York County for the rest of the year 2019.” Emphasis provided. Doc. 85 filed under Ind. No. 850181/17.

On or about December 11, 2019, Masin redeemed the tax lien in full in accordance with the terms of the 11/29/19 order. Docs. 122, 143.

By so-ordered stipulation entered December 12, 2019, plaintiff discontinued the captioned action. Doc. 123. The stipulation also vacated the amended judgment of foreclosure and sale filed January 9, 2019, as well as the judgment filed against Masin on February 22, 2019. Doc. 123.

Referee Glassman emailed Plotch and Badalov on December 24, 2019 and January 2, 2020 to advise them that he still had in his possession the \$60,000 deposited by Badalov in accordance with the memorandum of sale. Doc. 144. He stated that he wished to return the said sum to Badalov but did not want to do so without Plotch’s consent given that Plotch claimed that

the bid was assigned to him. Doc. 144. By correspondence to this Court dated February 1, 2020, Referee Glassman advised this Court that neither Plotch nor Badalov responded to his emails seeking to return the funds. Doc. 144.¹

By OSC filed December 30, 2019, Plotch now moves (motion sequence 005) for the relief set forth above. In support of the motion, he argues that: 1) he has standing to bring the instant application because his interests were affected by the 11/29/19 order; 2) his failure to intervene in the action does not preclude him from seeking relief pursuant to CPLR 5015(a)(4); 3) this Court lacks jurisdiction to make any order regarding his interests; 4) this Court's finding that the terms of sale were breached violated his right to due process; and 5) that this Court improperly rendered the 11/29/19 order based on issues raised sua sponte, such as inadequate consideration and the failure to record the assignment.

Masin opposes the motion arguing, among other things, that Plotch was not deprived of due process since he twice had the opportunity to be heard at oral argument of Masin's motions seeking, inter alia, to vacate his default and the foreclosure sale. He further asserts that this Court correctly held that Referee Glassman acted within his authority in declaring that the sale was invalid due to Badalov's failure to comply with the terms of sale. Additionally, Masin argues that, although Badalov purported to assign the premises to Plotch on June 17, 2019, he represented to Masin in emails dated June 18 and 19, 2019 that he still owned the premises and that he would sell them back to Masin.²

¹ On or about May 12, 2020, Referee Glassman filed an OSC (motion sequence 007) seeking permission to pay the \$60,000 down payment into court and to be discharged as referee in this matter.

² The emails are actually between Masin's attorney and someone named "Ben Badalov although, when read in context, it is apparent that they relate to the foreclosure sale. Doc. 142.

Plaintiff also moves (motion sequence 006) for the relief set forth above, asserting that, since the tax lien has been redeemed, the notice of pendency and judgments of foreclosure must be vacated and this matter must be marked disposed.

Plotch opposes the motion, arguing that CPLR 3217(b) prohibits plaintiff from moving to discontinue the action while a motion is pending and that plaintiff cannot discontinue a claim no longer being asserted. Further, Plotch claims that he would be prejudiced by a discontinuance since he was assigned the rights to the premises.

In reply, plaintiff argues that the 11/29/19 order resolved the entire action since it allowed plaintiff to discontinue its claim if Masin paid off the tax lien. Plaintiff further asserts, among other things, that Plotch lacks standing to intervene in this action.

LEGAL CONCLUSIONS:

Plotch's Motion To Vacate (Motion Sequence 005)

Plotch argues that he is entitled to move to vacate the 11/29/19 order because his rights were affected thereby. However, he has no standing to make such a challenge. Any rights Plotch would have taken to the premises would have arisen through the purported assignment to him by Badalov which, as noted in the 11/29/19 order, was technically improper. The terms of sale specifically required Badalov to close on the premises by July 8, 2019, and time was made of the essence. When Badalov failed to close by that date, Referee Glassman advised him that the sale was canceled. Since Badalov never complied with the terms of sale, he never had an interest in the premises to assign to Plotch, and Plotch thus lacks standing to vacate the 11/29/19 order.

While this Court acknowledges that the purported assignment from Badalov to Plotch occurred on June 17, 2019 (Doc. 130), neither Badalov nor Plotch advised the Referee about the assignment. Even assuming, arguendo, that a valid assignment was made to Plotch in June 2019, Plotch failed to close by July 8, 2019 and thus the sale was never consummated. Therefore, this Court's finding that the assignment by Badalov to Plotch was invalid, is merely dicta.

Despite his protestations, Plotch was never deprived of due process in this action. On at least two occasions, this Court afforded Plotch the opportunity to intervene in the action, although he never did so. Tellingly, Plotch does not dispute that this Court allowed him to appear at oral argument and to submit papers although, as a nonparty, he was not permitted to efile them (although his attorney efiled papers in connection with motion sequence 006). Therefore, it is evident that, contrary to Plotch's contention, this Court took extra precautions to ensure that his due process rights were protected despite his failure, for reasons unbeknownst to this Court, to formally intervene. By appearing voluntarily without intervening, Plotch rendered moot any question regarding this Court's jurisdiction over him.

Although Plotch contends that the sale of the premises at the public auction extinguished Masin's ability to redeem the tax lien, this Court finds that the circumstances herein warrant a contrary result. First, as noted above, the foreclosure sale was never consummated. Additionally, by accepting the monies paid by Masin to redeem the lien, plaintiff waived any argument that Masin had no right to exercise his right of redemption.

Plaintiff's Motion To Vacate (Motion Sequence 006)

CPLR 3217(b) authorizes a voluntary discontinuance, pursuant to court order, upon motion by "a party asserting a claim." Here, the branch of plaintiff's motion seeking to

discontinue the action pursuant to CPLR 3217(b) is denied as moot, since plaintiff already filed a so-ordered stipulation of discontinuance, in accordance with the terms of the 11/29/19 order, on December 16, 2019. Doc. 123. That order granted plaintiff permission to discontinue the action in the event Masin redeemed the tax lien. Doc.123. Since plaintiff has discontinued its claims, it has, in effect, waived any lien it had on the premises and, thus, the branch of its motion seeking to vacate its notice of pendency filed January 21, 2016 is granted. Similarly, the branch of plaintiff's motion seeking to vacate the amended judgment of foreclosure and sale, dated March 3, 2017, and the second amended judgment of foreclosure and sale, dated April 15, 2019, is granted since Masin redeemed the tax lien in response to the 11/29/19 order, thereby obviating the need for any foreclosure proceedings. Doc. 143.

In asserting that CPLR 3217 precludes plaintiffs from discontinuing their claims, Plotch relies, inter alia, on *Shamley v ITT Corp.*, 767 NY2d 910 (1986). However, Plotch's reliance on that case is misplaced since the Court of Appeals stated in that decision that a party *defending* a claim could not move to dismiss under that section unless the party bringing the claim consented to, or joined in, the motion. Thus, that case does not apply to plaintiffs, who asserted claims herein.

The remaining contentions are either without merit or need not be addressed given the result above.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by nonparty Adam Plotch is denied in all respects; and it is further

ORDERED that the branch of the motion by plaintiffs NYCTL 2015-A Trust and the Bank of New York Mellon, as Collateral Agent and Custodian for the NYCTL 2015-A Trust, seeking leave to discontinue this action pursuant to CPLR 3217 is denied as moot; and it is further

ORDERED that the Clerk shall mark this action disposed in accordance with the stipulation of discontinuance filed December 16, 2019; and it is further

ORDERED that the County Clerk is directed, upon payment of proper fees, if any, to cancel and discharge of record a certain Notice of Pendency filed on January 21, 2016 against Block 1271, Lot 509, and said Clerk is hereby directed to enter upon the margin of the record of the same a Notice of Cancellation incorporating this order by reference; and it is further

ORDERED that the Amended Judgment of Foreclosure and Sale dated March 3, 2017 is hereby vacated; and it is further

ORDERED that the Second Amended Judgment of Foreclosure and Sale dated April 15, 2019 is hereby vacated; and it is further

ORDERED that this constitutes the decision and order of the court.

5/12/2020

DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE