

<b>Matter of Robinson</b>
2020 NY Slip Op 32779(U)
August 25, 2020
Supreme Court, Kings County
Docket Number: 100226/2019
Judge: Leon Ruchelsman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: PART 76

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In the Matter of

ROSE ROBINSON,

Decision and order

Index No. 100226/2019

An Incapacitated Person

August 25, 2020

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PRESENT: HON. LEON RUCHELSMAN

A tax lien foreclosure action was commenced by New York Mellon on April 16, 2018 concerning property located at 554 Eastern Parkway in Kings County. The property was owned by Rose Robinson. A motion seeking an order of reference was granted and on February 26, 2019 the court granted a motion of judgement of foreclosure and sale and on August 12, 2019 the property was sold at auction and purchased by 554 Eastern Parkway 123 LLC. Ms. Robinson's niece Keesha Kym Ross petitioned the court on September 16, 2019, seeking a determination Ms. Robinson was incapacitated and unable to carry out daily and normal functions. She was appointed as temporary co-guardian for Ms. Robinson on October 29, 2019 and moved seeking to void the sale of the property. On November 12, 2019 Justice Mark Partnow granted Ross' order to show cause on behalf of Rose Robinson staying the transfer of any interest in property located at 554 Eastern Parkway and from taking any action seeking to evict Rose Robinson. During the pendency of that motion this court consolidated the foreclosure action with this guardianship action. The parties have now moved seeking to, essentially,

oppose that determination on the grounds the guardianship matter and the foreclosure matter are two distinct lawsuits with no issues of law or fact in common. Further, the parties have also made motions and have submitted papers regarding the underlying issue, namely, whether the foreclosure should be vacated.

#### Conclusions of Law

It is well settled that when two cases represent common questions of law or fact there should be a consolidation (Longo v. Fogg, 150 AD3d 724, 55 NYS3d 61 [2d Dept., 2017]). A party objecting to the consolidation has the burden of demonstrating prejudice and that such prejudice will harm or jeopardize a substantial right (Scotto v. Kodsi, 102 AD3d 947, 958 NYS2d 740 [2d Dept., 2013]).

The consolidation is based on the fact the foreclosure matter and the guardianship matter both involve the same core issue, namely the mental capacity of Rose Robinson. The objection to consolidation is based on In Re Joseph J., 106 AD3d 1004, 965 NYS2d 588 [2d Dept., 2013] which held that consolidation of a guardianship proceeding and a foreclosure proceeding is not proper since the issues are too disparate. A careful reading of In re Joseph J., (supra) demonstrates that there is no absolute rule barring the consolidation of guardianship and foreclosure matters. Rather, the question of consolidation must be considered on a case by case basis. In that case Joseph

transferred title to property to an entity called 293 Adelphi LLC. A year later his daughter, acting as the managing member of 293 Adelphi LLC, executed a mortgage on the property in favor of Rite Capital Group LLC and kept the proceeds. Joseph and 293 Adelphi LLC commenced an action seeking to quiet title to the property on the grounds the daughter had no authority to execute the mortgage. Rite Capital commenced a foreclosure action against Joseph and a short while later another daughter of Joseph brought a guardianship proceeding. Joseph was declared incapacitated and a motion to consolidate all three actions was granted. The Appellate Division concluded consolidation was improper. The court held that "since the guardianship proceeding, which concerned the issue of Joseph's mental competency, and the foreclosure action and actions to quiet title, which concerned Rite Capital's mortgage on the property, did not share common questions of law or fact, consolidation would be inappropriate" (id). Thus, in that case the foreclosure action and the quiet title action did not involve the mental capacity of Joseph at all, rather it only involved whether his daughter had the authority and the right to execute a mortgage. Whether Joseph's daughter had the authority to execute the mortgage was completely unrelated to the capacity of Joseph himself. The issues surrounding that mortgage had nothing to do with a guardianship proceeding, which concerned the mental capacity of the subject

individual and consequently the Appellate Division held that consolidation should not have been granted.

In these cases the basis to vacate to the foreclosure proceeding is inextricably connected with the guardianship proceeding since they both directly touch upon the mental capacity of Ms. Robinson. Indeed, the primary basis seeking to vacate the foreclose action are issues related to invalid service of process upon Ms. Robinson, a person with clear and defined mental and cognitive deficiencies and the manifest unfairness of proceeding against such incapacitated individual. The guardianship proceeding obviously involves the mental state of Ms. Robinson during the time periods in question. Clearly, both matters concern the same questions of law and fact, namely the incapacity of Ms. Robinson and the effects and consequences of such incapacity. Separating these two matters can lead to an absurd result whereby Ms. Robinson has been declared incapacitated in the guardianship proceeding while being treated as having capacity in the foreclosure proceeding and having all the requirements and duties that are attendant to such capacity. These conflicting results are untenable. Therefore the consolidation of the two actions was proper and any motions seeking to oppose such consolidation are denied.

The next issue that must be dealt with is whether the foreclose should be vacated.

It is well settled that pursuant to CPLR §308(4) commonly known as 'nail and mail' service, the plaintiff must exercise due diligence to demonstrate that personal service or service upon someone of suitable age and discretion could not be made. Thus, this method of service is not available if someone is present at the location where service is attempted (Kambour v. Farrar, 188 AD2d 719, 590 NYS2d 586 [3<sup>rd</sup> Dept., 1992]). Therefore, in Bossuk v. Steinberg, 58 NY2d 916, 460 NYS2d 509 [1983] the Court of Appeals held that where a person of suitable age and discretion (and surely the defendant herself) refuses to open the door for a process server and "resists" service then service can be effectuated by leaving the summons and complaint outside the door and informing the individual the summons has been left there. Further, in Ramirez v. Romualdo, 25 AD3d 680, 808 NYS2d 733 [2d Dept., 2006] the court held that where an individual answers the door but refuses to accept service then the process server may not resort to service pursuant to CPLR §308(4) service. The court explained that "the affidavit of service indicated that the process server spoke to a person of suitable age and discretion at the defendant's actual dwelling place when he attempted service. Since service pursuant to CPLR 308(2) could have been made with due diligence, the process server's resort to 'nail and mail' service pursuant to CPLR 308(4) was improper and did not confer personal jurisdiction over the defendant" (id).


In this case the process server's affidavit states that on his first attempt "there was no answer. On my second attempt I spoke with a woman from behind the apartment door who identified herself as Rose Robinson a/k/a Rose Fleary. She refused to open the door to accept service of the documents" (see, Affidavit of Nnamdi Erskine, Paragraph #10, dated June 22, 2018). Consequently, in order to effectuate service, the process server was required to leave the papers in the vicinity and effectuate service pursuant to CPLR §308(1). Returning another date and time and serving the summons and complaint utilizing nail and mail service was improper and did not confer any service upon Rose Robinson (see, Plycon Transportation Group LLC v. Kirschenbaum, 36 Misc3d 1232 (A), 959 NYS2d 91 [Supreme Court Suffolk County, 2012]).

Consequently, there was no service upon Rose Robinson. The court need not examine any substantive issues regarding knowledge of incapacity or the status of the buyer as a bona fide purchaser since there was never jurisdiction conferred upon Rose Robinson. Therefore the motions seeking to vacate the foreclosure and vacate the sale are granted.

So ordered.

ENTER:

DATED: August 25, 2020  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC