

Thomasino v Estate of Thomasino
2022 NY Slip Op 32566(U)
July 22, 2022
Supreme Court, Kings County
Docket Number: Index No. 500157/18
Judge: Lawrence Knipel
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At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 22nd day of July, 2022.

P R E S E N T:

HON. LAWRENCE KNIPEL,

Justice.

-----X
CHRISTOPHER THOMASINO and
ANNE MARIE SKILLINS, f/k/a ANNE MARIE THOMASINO,

Plaintiffs,

DECISION AND ORDER

-against-

Index No. 500157/18

ESTATE OF JAMES V. THOMASINO;
ESTATE OF ANNE THOMASINO;
EMIGRANT FUNDING CORPORATION;
ALVEERU INC.;;
NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE;
ALL SEASONS DOOR & WINDOW, INC.;;
UNITED STATES OF AMERICA INTERNAL REVENUE SERVICE;
and MASA REALTY LLC,

Mot. Seq. No. 5-6

Defendants,

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The following e-filed papers read herein:

NYSECF Doc. No.:

Notice of Motion/Cross Motion, Supporting Affirmations:
(Affidavits) with Exhibits Annexed _____

187-207; 210-224

Affirmations (Affidavits) in Opposition and in Reply
with Exhibits Annexed _____

226-228; 229-233

In this action under article 15 of the Real Property Actions and Proceedings Law to cancel the underlying deed to – and the attendant mortgage liens (among other liens) of Emigrant Funding Corporation (“Emigrant”) and Alveeru Inc. (“Alveeru”) against – certain commercial real property located at 1131-1137 McDonald Avenue in Brooklyn, New York (the “property”), the following motion and cross motion have been consolidated for disposition:

In Seq. No. 5, defendant Masa Realty LLC (“Masa”) moves, in principal part, for summary judgment on its cross claim for specific performance of the contract of sale for the property between Masa as the buyer and defendant Estate of James V. Thomasino (the “estate”), by Christopher Thomasino as the administrator of the estate as the seller (the “contract of sale”), as such sale was authorized by order, dated May 11, 2017 (Ingram, S.), in *Matter of James V. Thomasino*, File No. 2013-3560/D (Sur Ct, Kings County) (the “Surrogate’s Court’s order”); and

In Seq. No. 6, plaintiff Christopher Thomasino (“Christopher”) in his individual capacity as a beneficiary of the estate (but not in his fiduciary capacity as the administrator of the estate) cross-moves for summary judgment dismissing Masa’s answer in its entirety, including its cross claim as against the estate for specific performance of the contract of sale.

Determination of Motion and Cross Motion

The Court’s decision, order, and judgment, dated February 27, 2019 (the “prior order”), adequately sets forth the background of both this action and of the related (and still-active¹) action commenced by Emigrant to foreclose its mortgage lien against the property (*see Emigrant Funding Corp. v Christopher Thomasino and Anne Marie Skillins, as Co-Administrators of the Estate of James V. Thomasino, Deceased and of the James V. Thomasino Family Trust, et al.*, Index No. 540/13 [Sup Ct, Kings County]) (the “Emigrant mortgage” and “Emigrant foreclosure proceeding,” respectively), and such background need not be restated herein (*see Thomasino v Estate of Thomasino*, 2019 NY Slip Op 30505 [Sup Ct, Kings County]).

¹ See Order, dated June 8, 2022 (Cenceria P. Edwards, J.), entered as NYSCEF No. 3 under Index No. 540/13.

Thereafter, the Court, on reargument, modified the prior order insofar as it had previously declined to grant Christopher a default judgment against the third-party non-appearing defendants; namely, United States Internal Revenue Service, New York State Department of Taxation and Finance, and All Seasons Door and Window, Inc., and, upon reargument, granted him leave for a default judgment against those defendants (*see* Counter-Order and Judgment,” dated May 10, 2021). As part of reargument, however, the Court *denied* Christopher leave for a default judgment against the estate (*see* Order, dated October 10, 2019 [the “short-form order”]). The aforementioned orders on reargument have *not* in any way affected the lynchpin of the Court’s extant ruling in the prior order that Christopher (in *any* capacity) was – and still is – collaterally estopped from challenging the validity of the underlying deed and Emigrant mortgage.

Turning to the principal branch of Masa’s motion which is for specific performance of the contract of sale, the Court notes that “[t]he elements of a cause of action for specific performance of a contract for the sale of real property are that the plaintiff substantially performed its contractual obligations and was ready, willing, and able to perform its remaining obligations, that the defendant was able to convey the property, and that there was no adequate remedy at law” (*Heung Rha v Blangiardo*, 189 AD3d 1098, 1099 [2d Dept 2020]). Here, Masa has established, *prima facie*, that it is ready, willing, and able to close on the property in accordance with the terms of the contract of sale.

In opposition, Christopher (by way of his cross motion) has failed to raise a triable issue of fact precluding specific performance. As stated, Christopher is opposing Masa’s motion as a *beneficiary*, rather than as the administrator, of the estate. This is at odds with Christopher’s prior actions as the *administrator* of the estate when, in his fiduciary capacity, he had executed and delivered the contract of sale and when, likewise acting in his fiduciary

capacity, he sought and obtained approval of the proposed sale from the Surrogate's Court. Christopher in his individual capacity as a *beneficiary* of the estate is bound by the Surrogate's Court's order. Notably, Christopher's cross motion/opposition is *not* advanced in his fiduciary capacity as the *administrator* of the estate, even though the estate is a named defendant herein.² As a *beneficiary* of the estate, Christopher (like all other estate beneficiaries) is bound by the Surrogate's Court's order which he sought and obtained in his fiduciary capacity as the *administrator* of the estate. Thus, Christopher, as a *beneficiary* of the estate, may not claim (by way of his cross motion/opposition) either that his fiduciary duty as the *administrator* of the estate will be violated by specific performance of the contract of sale with Masa, or that "the Estate cannot sell [the] property to Masa which the Estate does not own" (Christopher's Reply Affirmation, ¶¶ 22-23).

In any event, Christopher (in *any* capacity) has failed to demonstrate "unreasonable hardship or injustice" warranting the denial of the remedy of specific performance (*see McGinnis v Cowhey*, 24 AD3d 629, 629 [2d Dept 2005] [internal quotation marks omitted]). Assuming, without deciding, the correctness of Christopher's position that the estate's title to the property is unmarketable, Masa as purchaser "may waive a defect in the title that might otherwise render title unmarketable and thus obtain specific performance" (*Lovell v Jimal Holding Corp.*, 127 AD2d 747, 748 [2d Dept 1987]). The Court has considered Christopher's remaining contentions and found them unavailing.

² As noted, Christopher, as a plaintiff in this action, twice tried – and both times failed as reflected by the prior order and the short-form order – to obtain a default judgment against defendant estate.

Conclusion

Accordingly, it is

ORDERED that the principal branch of Masa's motion in Seq. No. 5 which is for summary judgment on its cross claim as against the estate for specific performance of the contract of sale is *granted*; Masa is directed to close title on the property within 45 calendar days (unless the parties otherwise agree) – subject to, and in coordination with, the pending (and since-renewed) Judgment of Foreclosure and Sale in the Emigrant foreclosure proceeding – counting from the date of electronic service of this decision and order with notice of entry by Masa's counsel as more fully set forth below; and the *remainder* of Masa's motion which is for an award of attorney's fees and costs is *denied* with leave to renew (if it be so advised) on proper papers, including citation to the applicable provisions (if any) of the contract of sale; and it is further

ORDERED that Christopher's cross motion in Seq. No. 6 is *denied in its entirety*; and it is further

ORDERED that Masa's counsel is directed (subject to its careful review of the respective electronic and paper dockets in this action, the Surrogate's Court's matter, and the Emigrant foreclosure proceeding, in each instance, to verify the names of current counsel and fiduciaries which have appeared therein) to promptly serve a copy of this decision and order with notice of entry on: (1) Christopher as the administrator of the estate; and (2) the respective counsel to: (a) Christopher and his sister, complaintiff Anne Marie Skillins, formerly known as Anne Marie Thomasino, as the beneficiaries of the estate (as per their current counsel's appearance herein); (b) the estate (as per the estate's current counsel's appearances in the Surrogate's Court's matter and in the Emigrant foreclosure proceeding); (c) Emigrant (as per its counsel's appearance in the Emigrant foreclosure proceeding); and

(d) Alveeru (as per its counsel's appearance herein); and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the decision and order of the Court.

ENTER.



J. S. C.

**HON. LAWRENCE KNIPEL
ADMINISTRATIVE JUDGE**