

Live Well Fin., Inc. v Robinson

2022 NY Slip Op 34553(U)

June 21, 2022

Supreme Court, Queens County

Docket Number: Index No. 722503/20

Judge: Allan B. Weiss

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

MEMORANDUM DECISION

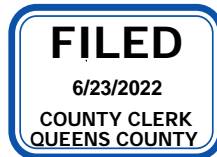
NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable ALLAN B. WEISS IAS PART 2
Justice

LIVE WELL FINANCIAL, INC.,

Plaintiff,

-against-



Index No. 722503/20
Motion Seq. No. 5 on
Motion Date: 4/27/22
- AND -
Motion Seq. No. 7 on
Motion Date: 6/08/22

NADINE ROBINSON AS POSSIBLE HEIR AND
NEXT OF KIN OF THE ESTATE OF ERNEST
GARDNER, et al.,

Defendants.

The papers numbered EF Document Numbers 5-16, found on NYSCEF, were read on Motion Sequence Number 5, on the motion by defendant Nadine Robinson for a preliminary injunction to enjoin the New York City Department of Finance from releasing post-foreclosure surplus funds, and, on Motion Sequence Number 7, on the motion by defendant Nadine Robinson ("Robinson") to confirm the Referee's Report.

The Court accepts the tardy papers of the State Attorney General and directs the Clerk to change the marking of the aforementioned motions from "Fully Submitted, No Opposition" to "Fully Submitted."

This action originated by plaintiff, under the former index number 7682/2011, seeking to foreclose a reverse mortgage. During the pendency of the action, the Court identified Nadine Robinson as a "Possible Heir and Next of Kin," of the deceased Ernest Gardner, as described in the caption. Subsequent to the return date of the present motion, on May 9, 2022, Surrogate Peter Kelly issued Letters Testamentary to Nadine Robinson under Surrogate's Court File No. 2011-4686/A. *See*, EF Doc. No. 23.

In the Referee's Report of Sale, dated October 10, 2017, and entered on June 26, 2018, the referee, Barry Goldstein, Esq., simply stated that he sold the property for \$420,000. The motion now made by defendant Robinson to confirm the report, made five years later, improperly tries to bootstrap that report into a list of distribution, where the aforementioned referee did not decide whom was entitled to such proceeds.

Robinson's motion under Motion Sequence Number 5 to confirm the Referee's aforementioned report is granted only to the extent that the report is ratified and confirmed, and the sale therein described is made absolute and binding forever. That report, however, made no mention of who was entitled to receive the proceeds, as Robinson improperly maintains. The motion, under Motion Sequence Number 5, is thus granted only to the extent indicated above.

The appropriate procedure in this case is for the Court to appoint a Special Referee, other than the original referee, who, with all convenient speed, shall ascertain and report to this Court the amounts due to any person, governmental entities or unit, company, or entity that has a lien on the proceeds. *See*, RPAPL § 1361(3); *American Holdings Inv. Corp. v. Josey*, 71 A.D.3d 927 (2nd Dept. 2010). The Court, reviewing the papers in this old case, as filed under the old index number, shows that the deceased may have owed money to the federal government, and, in fact, Robinson understands this fact well since the Office of the United States Attorney for the Eastern District was on her service list entitled to notice of her present two motions.

The appointed Special Referee in this Surplus Money Proceedings shall be a fiduciary to be named by the Court other than the original referee and shall be entitled to his or her attorney's fees at his/her hourly rate.

Only after such a Special Referee has submitted such a report and filed it on NYSCEF, an application or motion may be made on notice directing the distribution of any subject surplus monies.

The defendant's motion, under Motion Sequence Number 5, for a preliminary injunction to prevent the money now being held by the New York City to the Office of the State Comptroller raises interesting issues. Monetary proceeds from the sale of property that are deposited in court, and remain for three

years, are deemed abandoned property, pursuant to N.Y. Abandoned Property Law section 600(1)(a), and the Commissioner of Finance of the City of New York is then required to deposit the abandoned funds with the Comptroller of the State of New York, under Abandoned Property Law section 602.

First, the Court declines the State Attorney General's invitation to describe the \$304,242.15 that County Clerk Audrey I. Pheffer acknowledged was received by her office on October 25, 2017, and now held by the New York City Department of Finance, to be abandoned property. In this regard, the recent issuance of letters testamentary to Robinson by the Surrogate of Queens County is an important development that requires that the Court not treat the money as abandoned property. As to the passage of time from 2017 to the present, the Court has been mindful of the worldwide pandemic and the stays imposed by the Governor and the Unified Court System on foreclosure cases during the Covid-19 crisis.

The State Attorney General argues that any recovery to Robinson's attorney be capped at 15%, as stated in N.Y. Abandoned Property Law section 1416. The determination of what amount shall be allowed to Robinson's attorney shall also be the subject of the Special Referee's study and initial determination, subject to the review and approval of this Court, since the aforementioned provision of law concerning a 15% cap has exceptions that would require the taking and review of evidence. *See*, Abandoned Property Law § 1416(2). The referee's findings and recommendations are advisory only and have no binding effect on the Court, which remains the ultimate arbiter of the dispute. *See, Citimortgage, Inc. v. Kidd*, 148 A.D.3d 767, 768 (2nd Dept. 2017); *see, e.g., NYCTL 1997-1 Trust v. Stell*, 184 A.D.3d 9 (2nd Dept. 2020).

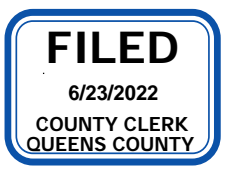
This Court grants the motion for a preliminary injunction under Motion Sequence Number 5, since the Surrogate's issuance of letters testamentary to Robinson, under File No. 2011-4686/A, on May 9, 2022, would make it unfair and unjust for the money to be described as "abandoned property." Such injunctive relief is necessary, in the provident exercise of this Court's discretion, to maintain the status quo. *See*, CPLR 6301; *538 Morgan Ave. Properties, LLC v. 538 Morgan Realty, LLC*, 186 A.D.3d 657 (2nd Dept. 2020).

Settle order on notice, which, as correctly observed by the State Attorney

General, should also be given to the Counsel for the New York City Department of Finance, and not only the Corporation Counsel.

Submit proposed order and Judgment to Chambers by filing it on NYSCEF and sending it by email to QSCPart2@nycourts.gov.

Dated: June 21, 2022
D#64



A handwritten signature in black ink, appearing to be the initials "A" or "J.S.C." written in a stylized, cursive manner.

.....
J.S.C.