

Lindsay v 401Linwood BKPAU LLC

2023 NY Slip Op 31411(U)

April 24, 2023

Supreme Court, Kings County

Docket Number: Index No. 515656/2022

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of April 2023

HONORABLE FRANCOIS A. RIVERA

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DEIRDRE LINDSAY

DECISION & ORDER

Plaintiff,

Index No. 515656/2022

- against -

401LINWOODBKPAU LLC,

Defendants.

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Recitation in accordance with CPLR 2219 (a) of the papers considered on the order to show cause, under motion sequence number two, filed on July 14, 2022 by the plaintiff Deirdre Lindsay, for an order: (1) granting a default judgment against the defendant 401Linwood BKPAU LLC (hereinafter defendant) upon the ground that the defendant has failed to appear, answer or join this action; (2) cancelling the Memorandum of Contract between the plaintiff and the defendant in the ACRIS System; (3) declaring the Memorandum of Contract null and void; and (4) awarding damages in the amount of \$675,000.00.

- Order to Show Cause
- Affirmation in Support
- Exhibits A-E
- Affidavit in Support
- Exhibits F-H
- Memorandum of Law in Support
- Affirmation in Opposition
- Exhibits A-E
- Affidavit in Opposition

BACKGROUND

On May 31, 2022, the plaintiff commenced the instant action by filing a summons and verified complaint with the Kings County Clerk's office (KCCO). The verified complaint alleges thirty-two allegations of fact in support of three causes of action. The first and second cause of action seek a judgment declaring that a certain memorandum of contract between the plaintiff and the defendant is void and terminated. The third cause of action seeks, inter alia, treble damages for the defendant's alleged violation of Real Property Law § 265-A, the Home Equity Theft Prevention Statute.

The verified complaint alleges the following salient facts. On June 12, 2017, the plaintiff, as seller, and the defendant, as purchaser, entered a written contract of sale for a short sale for real property known as 401 Linwood Street in Brooklyn, New York (hereinafter the subject property) for a purchase price of \$220,000.00 in cash. The defendant was represented by Babatunde A. Bolaji, Esq. and the plaintiff was represented by Janet Nina Esagoff on the said transaction. Pursuant to the contract of sale the purchaser was to make a deposit of \$5,000.00, on account of the purchase price to seller's attorney in its attorney's escrow account and the closing was to take place on or about August 24, 2017. The short sale was contingent upon the bank's approval. The bank never approved the short sale which rendered the contract null and void. As a result, the plaintiff contends that the parties no longer have a contract for the subject property.

On June 7, 2018, the defendant convinced the plaintiff to sign a Memorandum of Contract. Unbeknownst to the plaintiff, the defendant co-mingled the Memorandum of Contract with the Contract of Sale and the plaintiff signed everywhere the defendant said

to sign, including the Memorandum of Contract. The defendant is in the real estate business and because the plaintiff was not versed in contracts the plaintiff assumed that the defendant would help her find a purchaser for the property so the plaintiff could pay off the bank. Instead, the defendant told the plaintiff because the plaintiff signed the Memorandum of Contract the defendant is entitled to half of any money the plaintiff sells the property for. The defendant never paid the down payment or any money to the plaintiff for the subject property. The plaintiff owes the bank a loan in the amount of \$600,000.00 and the bank is asking for the full amount of the loan. The plaintiff has a purchaser willing to purchase the premises for the sum of \$600,000.00. However, the Memorandum of Contract prohibits the plaintiff from selling to another purchaser without a further order of the court that renders the Memorandum of Contract null and void.

LAW AND APPLICATION

The order to show cause filed on July 14, 2022, was signed by the Court on July 25, 2022. The Court set the return dated for December 1, 2022, and directed service upon the defendant by personal delivery on or before August 29, 2022. The defendant did not serve the order to show cause as directed.

By order issued on October 31, 2022, the Court extended the plaintiff's time to serve the order to show cause filed under motion sequence number two. The Court directed service on or before November 30, 2022, by personal service via the New York State Secretary of State and set the return date to December 21, 2022.

On December 13, 2022, the plaintiff filed an affidavit of service by Corey Doyle, the plaintiff's process server (hereinafter Doyle), of the instant order to show cause in purported compliance with the Court's directive.

Corey alleged that on November 29, 2022, at 12:58 p.m., she served the instant order to show cause on the defendant by service upon Corporation Service Company, the defendant's registered agent, at 80 State Street, 10th floor, Albany, NY 12207 by delivering a true copy leaving it with "John Doe."

The method of service provided for in an order to show cause is jurisdictional in nature and must be strictly complied with (*Matter of Streng v Westchester County Bd. of Elections*, 131 AD3d 652, 653 [2d Dept 2015], citing *Matter of Hennessey v DiCarlo*, 21 AD3d 505, 505 [2d Dept 2005]; see *Matter of Nunziato v Messano*, 87 AD3d 647, 647 [2d Dept 2011]; *Matter of Del Villar v Vekiarelis*, 59 A.D.3d 642 [2d Dept 2009]).

Inasmuch as the plaintiff did not comply with the Court's direction as to the method of service, the Court lacks jurisdiction over the instant order to show cause.

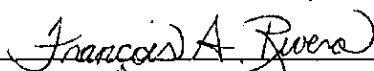
CONCLUSION

The order to show cause by plaintiff Deirdre Lindsay, for an order: (1) granting a default judgment against the defendant 401Linwood BKPAU LLC (hereinafter defendant) upon the ground that the defendant has failed to appear, answer or join this action; (2) cancelling the Memorandum of Contract between the plaintiff and the

defendant in the ACRIS System; (3) declaring the Memorandum of Contract null and void; and (4) awarding damages in the amount of \$675,000.00 is denied without prejudice for lack of jurisdiction.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.