

Smith v Abby-Lovelace

2023 NY Slip Op 32020(U)

June 7, 2023

Supreme Court, Kings County

Docket Number: Index No. 510085/2016

Judge: Carl J. Landicino

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At an IAS Term, Part 81 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 7th day of June 2023.

PRESENT:

CARL J. LANDICINO, J.S.C.

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ALEXANDER SMITH and SIMONE NKOFI, f/k/a
SIMONE SMITH,

Index No.: 510085/2016

Plaintiffs,

- against -

PAULINE ABBY-LOVELACE, KIRK CHAPMAN and
GENESIS CONSULTING CORP.,

DECISION AND ORDER

Motion Sequence #6

Defendants.

-----X
Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	117-118, 121,
Opposing Affidavits (Affirmations).....	122-123,
Reply Affidavits (Affirmations)	128

After a review of the papers and oral argument the Court finds as follows:

Defendant Pauline Abby-Lovelace (hereinafter “Defendant Abby-Lovelace”), *pro-se*, moves (motion sequence #6) for an order pursuant to CPLR 5015(a)(b)(c) and (d) and seeks to void the Judgment (hereinafter the “Judgment”) entered by this Court on July 22, 2022. The movant proceeds by Order to Show Cause in pertinent part as follows: “[s]how cause why this void judgment should not rescinded, due to fraud upon the court, perjury, extortion, fraud and swindles, malicious abuse of process, conspiracy, violation of Defendants due process and equal protection of law in equity”, “[v]oid the judgment, and grant restitutionary relief to the Defendants on the grounds of perjury, defamation of character, libel, slander, damages to defendants' business, violation of due process, violation of equal protection of law by BAR members, a people bound by oath to be persons worthy of trust.”

Plaintiffs Alexander Smith and Simone Nkofi, f/k/a Simone Smith (hereinafter the "Plaintiffs") oppose the motion. The Plaintiffs argue that the motion by Defendant Abby-Lovelace is untimely pursuant to CPLR 4405 given that a post-trial motion must be made within fifteen days after the trial decision. The Plaintiffs also argue that the motion should be denied as Defendant Abby-Lovelace failed to properly serve the Order to Show Cause, the motion does not raise any new evidence, and the Plaintiffs did not commit fraud or make any misrepresentations.¹

As to the Defendant Abby-Lovelace's motion (motion sequence #6) pursuant to CPLR 5015, even assuming that the Plaintiffs' opposition concerning service, timeliness and intervention is without merit, the Court finds that Defendant Abby-Lovelace's motion is denied.

As an initial matter, CPLR 5015(b) and (c) do not apply to this application. As to CPLR 5015 (d), this provision relates to restitution in the event the application is granted. Accordingly, this provision would only be addressed herein in the event that the application is granted. Therefore, only CPLR 5015(a) is relevant to the analysis of the application.

CPLR 5015(a)(1) relates to excusable default and Defendant Abby-Lovelace was not defaulted in this matter. CPLR 5015(a)(5) concerns reversal, modification or vacatur of a judgment or order upon which the judgment or order is based. There is no such circumstance here. As such, the remainder of this decision and order will address CPLR 5015(a)(2), (3), and (4).

CPLR 5015(a)(2) (Newly Discovered Evidence)

Defendant Abby-Lovelace, in her supporting papers, does not indicate that she is relying on any newly discovered evidence. She does include certain documentation with her application. The Plaintiff in

¹ As an initial matter, the Court is treating this application as one by Defendant Pauline Abby-Lovelace, *pro-se*, although she has signed documents as "Pauline Abby: Lovelace, beneficiary, irrevocable trust Pauline Abby Lovelace Living Trust." The trust, assuming there is a trust, is not a party and has not sought to intervene. Moreover, Defendant Abby-Lovelace has indicated that she is not an attorney therefore, she can only represent herself.

opposition, contends that these are not new documents, and that Defendant Abby-Lovelace was precluded from offering any evidence at trial. In any event, there is no representation that the documents are newly discovered or that they would serve to change the underlying determination. Moreover, in reply (titled Affidavit in Opposition) Defendant Abby-Lovelace acknowledges that some of the documents are not newly discovered, and she fails to address the remaining documents in that regard. Moreover, it is unclear what relevance these documents have in relation to the application. Moreover, Defendant Abby-Lovelace remains precluded.

A party seeking to vacate a judgment pursuant to CPLR 5015 (a) (2) must establish, *inter alia*, that the newly discovered evidence probably would have produced a different result (see *Meltzer v Meltzer*, 140 AD3d 716, 717 [2016]; *Sicurelli v Sicurelli*, 73 AD3d 735 [2010]; *Federated Conservationists of Westchester County v County of Westchester*, 4 AD3d 326, 327 [2004]). Here, contrary to the defendant's contention, even if the evidence proffered in support of the motion was new within the meaning of the statute, it did not warrant vacatur of the judgment of foreclosure and sale.

-*OneWest Bank, FSB v. Galloway*, 148 AD3d 818, 819, 49 N.Y.S.3d 484 [2d Dept 2017].

The defendant failed to demonstrate that the newly discovered evidence probably would have produced a different result (see *Wall St. Mtge. Bankers, Ltd. v Rodgers*, 148 AD3d at 1089; *OneWest Bank, FSB v Galloway*, 148 AD3d at 819; *Meltzer v Meltzer*, 140 AD3d at 717).

-*M & T Bank v. Crespo*, 181 AD3d 667, 668–69, 117 N.Y.S.3d 870 [2d Dept 2020].

The defendant also failed to demonstrate that vacatur of her default was warranted under CPLR 5015 (a) (2), as she did not demonstrate that the evidence on which she relied “could not have been discovered earlier through the exercise of due diligence” (*Globe Trade Capital, LLC v Hoey*, 199 AD3d 775, 776 [2021]).

-*Wells Fargo Bank, N.A. v. Echeverria*, 204 A.D.3d 955, 957, 164 N.Y.S.3d 833 [2d Dept 2022].

Accordingly, the application based on CPLR 5015(a)(2) is denied.

CPLR 5015(a)(3) (Fraud, Misrepresentation, or other Misconduct of an Adverse Party)

Pursuant to CPLR 5015 (a) (3), the court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person, upon the ground of fraud, misrepresentation, or other misconduct of an adverse party. An order may not be vacated on the grounds of fraud, misrepresentation, or misconduct where the moving party had knowledge of the fraud, misrepresentation, or misconduct before the order was issued (*see SNC Props., LLC v DeMartino*, 185 AD3d 750, 752 [2020]; *Matter of Carroll v Bene*, 246 AD2d 649, 649 [1998]). Moreover, where allegations of fraud, misrepresentation, or misconduct, such as those asserted here, were readily obtainable prior to the time the order was issued, the allegations constitute nothing more than newly interposed theories which could have been asserted prior to issuance of the order (*see Fidelity N.Y., FSB v Hanover Cos.*, 162 AD2d 582, 583 [1990]; *Abacus Real Estate Fin. Co. v P.A.R. Constr. & Maintenance Corp.*, 128 AD2d 821 [1987]; *Central Funding Co. v Kimler*, 54 AD2d 748, 748 [1976]; *see also Matter of Anthony V.L. v Bernadette R.*, 178 AD3d 479, 480 [2019]).

-*Citimortgage, Inc. v. Roque*, 202 AD3d 1041, 1042–43, 163 N.Y.S.3d 602 [2d Dept 2022].

Defendant Abby-Lovelace references fraud and perjury but does not specify the basis for these conclusory allegations. Defendant Abby-Lovelace was represented at trial and, although precluded, had a full opportunity to examine the witnesses. The Court found in the underlying trial decision, dated May 10, 2022 and entered May 16, 2022, that:

Where the findings of fact rest in large measure on considerations relating to credibility of witnesses, deference is owed to the trial court's credibility determinations." (internal quotations omitted) *Ning Xiang Liu v. Al Ming Chen*, 133 AD3d 644, 19 N.Y.S.3d 565 [2d Dept 2015] quoting *Papovitch v. Papovitch*, 84 AD3d 1045, 923 N.Y.S.2d 209 [2d Dept 2011] quoting *Paraimnath v. Torres*, 59 AD3d 419, 873 N.Y.S.2d 133 [2d Dept 2009]; *See also, Zwaryez v. Marina Constr.*, 130 AD3d 922, 15 N.Y.S.3d 86 [2d Dept 2015]. An assessment of credibility by the trial court is given a significant level of discretion and deference by the appellate courts. This Court had the opportunity to observe the witnesses over the course of their examination during trial, on many issues related to the dispute and the history of the relationship between the parties.

Plaintiff Smith's testimony was credible. His frustration and sincerity in relation to the series of events in relation to the Premises was evident and believable. His lack of a clear understanding of the foreclosure proceeding, a short sale and mortgage debt was credible and supported the actions he had taken. The Court finds that Mr. Smith's representation that he only transferred the Property to accommodate the ability of Defendant Lovelace to negotiate a short sale was true. His trust in her was clear from his testimony. The Court

also finds that Plaintiff Knofi's testimony was credible and the Court finds that she followed Mr. Smith's direction to sign the transfer documents. However, she had little knowledge of the actions of the other parties and her testimony was of limited support.

The Defendants were precluded from offering testimony at trial. There is no basis to disturb the judgment in this matter based upon fraud, misrepresentation, or other misconduct of an adverse party. Accordingly, the application based on CPLR 5015(a)(3) is denied.

CPLR 5015(a) (4) (Lack of Jurisdiction)

Defendant Abby-Lovelace fails to support any allegation that the Court lacked jurisdiction to render the subject trial decision and order. This was not raised at trial and Defendant Abby-Lovelace did not make an application in relation to this issue. The controversy was properly before the Court. Moreover, the Court addressed in its decision that Abby-Lovelace Living Trust was not a necessary party and was subject to the Court's determination. The Court held in the Trial Decision as follows:

Moreover, pre-trial applications as to whether the Trust was a necessary party, resulted in the Court finding that the Trust was not a necessary party. Plaintiff had filed a Notice of Pendency on October 9, 2019. The Defendants do not dispute this. As such, the Trust "...is bound by all proceedings taken in the action after such filing to the same extent as if he or she were a party." *Wells Fargo Bank, Nat'l Ass'n v. Lance*, 196 A.D.3d 535, 536, 146 N.Y.S.3d 840, 841 [2d Dept 2021], quoting *Novastar Mortg., Inc. v. Mendoza*, 26 A.D.3d 479, 480, 811 N.Y.S.2d 411, 412 [2d Dept 2006].

The Court finds no reason to grant this application because it lacks jurisdiction. Accordingly, the application based on CPLR 5015(a)(4) is denied.

Finally, there appears to be some indication that the Court should recuse itself. There is no basis for this suggestion contained in the papers. No such application was made at trial, and no formal application has been made now. In any event, the Court has no reason to recuse itself and the suggestion that the Court should does not change that. The undersigned has searched his conscience and concluded that he did not and does not harbor any bias or animosity toward any party or counsel in this proceeding.

“Where, as here, there is no legal disqualification for recusal required under Judiciary Law § 14, ‘a Trial Judge is the sole arbiter of recusal.’” *Levine v. N. Shore Long Island Jewish Healthcare Sys., Inc.*, 163 AD3d 644, 81 N.Y.S.3d 214 [2d Dept 2018], quoting *People v. Moreno*, 70 N.Y.2d 403, 405, 516 N.E.2d 200 [1987]. In addition, “[a]bsent a legal disqualification under Judiciary Law § 14, a Trial Judge is the sole arbiter of recusal. This discretionary decision is within the personal conscience of the court when the alleged appearance of impropriety arises from inappropriate awareness of ‘nonjuridical data.’” *People v. Moreno*, 70 N.Y.2d 403, 405, 516 N.E.2d 200, 201–02 [1987].

Upon a review of the papers and the underlying decision and judgment, the Court finds no reason to vacate or modify same. Accordingly, the motion (motion sequence #6) is denied.

This constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.