

Moses v Leaders of Tomorrow Intl. Ministries Inc.

2024 NY Slip Op 34488(U)

December 5, 2024

Supreme Court, Kings County

Docket Number: Index No. 512756/23

Judge: Ingrid Joseph

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At an IAS Term, Part 83, 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 5th day of December, 2024.

PRESENT:

HON. INGRID JOSEPH,

Justice.

-----X
MICHAEL MOSES as Trustee of 5904 FOSTER AVENUE TRUST,

Plaintiff,

-against-

LEADERS OF TOMORROW INTERNATIONAL MINISTRIES INC.
and LAMOR WHITEHEAD,

Defendants.
-----X
-----X

GLORY OF GOD GLOBAL MINISTRY, INC.,

Plaintiff,

-against-

LAMOR WHITEHEAD, in both his individual capacity and
as Trustee of the 5904 FOSTER AVENUE TRUST;
LAMOR WHITEHEAD, as Trustee of LEADERS OF
TOMORROW INTERNATIONAL MINISTRIES INC., etc.,

Defendants.
-----X

JOINT DECISION AND ORDER

Index No. 512756/23

Mot Seq. No. 2 (default)
Reconsideration of Mot Seq. No. 1 (PI Order)

(the "Moses Action")

Index No. 511827/23

Mot Seq. No. 1 (dismissal)
Mot Seq. No. 2 (intervention)

(the "GOG Action")

The following e-filed papers read herein in the Moses Action:

Notice of Motion and Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____
Documents Reflecting Service of Order to Show Cause _____
Affidavit of Michael Moses, dated April 26, 2023 _____
Letter to the Court, dated July 16, 2024 _____

NYSEF Doc Nos. in the Moses Action:

33-47 _____
30-31; 49-59 _____
32 _____
22-23 _____
6 _____
60 _____

The following e-filed papers read herein in the GOG Action:

Notice of Motion/Order to Show Cause, and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____
Orders, dated Jan. 9, 2024 and Jan. 26, 2024 _____
Letters to the Court, dated Feb. 9, 2014 and July 16, 2024 _____

NYSEF Doc Nos. in the GOG Action:

4-11, 14-16, 19-20, 33-34, 52; 35-50 _____
21-32; 58-78; 111-116 _____
104; _____
131, 141 _____
143; 144 _____

In the two related actions seeking, in essence, determination of title to certain commercial real property located at 5904 Foster Avenue, Brooklyn, New York 11234 (Block 7955, Lot 1) (the “underlying property”), the followings motions have been consolidated for disposition:

In the Moses Action, plaintiff Michael Moses as the trustee of 5904 Foster Avenue Trust (“Moses”) moves (in Seq. No. 2) for leave, pursuant to CPLR 3215 (a), to enter a default judgment against each of defendants Lamor Whitehead (“Whitehead”) and Leaders of Tomorrow International Ministries Inc. (“LOT”).

Further, in the Moses Action, Whitehead and LOT seek to reargue (in the undocketed but fully briefed motion, in effect, in Seq. No. 1) the Court’s order, dated January 26, 2024, which converted the TRO under the Order to Show Cause, dated May 24, 2023 (Toussaint, J.) (the “Order to Show Cause”),¹ to a preliminary injunction precluding the Moses Action defendants, individually or in combination, “from taking any action with respect to the sale or transfer or encumbering of [the underlying] property, until a determination by the Court of [its] ownership” (the “PI Order”).²

In the GOG Action, Whitehead, both individually and in his capacities as the purported trustee of 5904 Foster Avenue Trust and as the trustee of LOT, moves, pre-answer (in Seq. No. 1), for an order, pursuant to CPLR 3211 (a), among other provisions, dismissing the verified complaint, dated May 4, 2023, of plaintiff Glory of God Global Ministry, Inc. (“GOG”).

Further, in the GOG Action, Moses as trustee moves (in Seq. No. 2), by order to show cause, dated June 6, 2023 (Joseph, J.), for leave, pursuant to CPLR 1012 and 1013, to intervene in the GOG action as a defendant.³

Since approximately 2014, GOG, either directly or through its affiliate, non-party Triple C’s Venture, LLC (“TCV”), was allegedly in possession of all or part of the underlying property either as a licensee or tenant. As of March 22, 2022, nonparty Pastor Funmi Williams (the sole member and authorized signatory of TCV) and her husband, nonparty Pastor Robert Dugbo, were “the spiritual leaders of [GOG] for approximately thirteen . . . years,” with “a congregation of approximately 200 worshipers.”⁴ TCV and GOG are, in essence, one and the same, with the exception that TCV was

¹ NYSCEF Doc No. 43 in 512756/23.

² NYSCEF Doc No. 26 in 512756/23.

³ NYSCEF Doc No. 52 in 511827/23.

⁴ Affidavit of Pastor Funmi Williams, dated March 22, 2022, ¶ 5 (NYSCEF Doc No. 73 in 504666/18). GOG is a domestic not-for-profit corporation incorporated under Non-For-Profit Corporation Law § 402 on December 19, 2017 and bearing DOS ID No. 5253133 (<https://apps.dos.ny.gov/publicInquiry/EntityDisplay> [last accessed November 20, 2024]). GOG is not a religious corporation within the meaning of the Religious Corporation Law (see *Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 20 [2d Dept 2009] [“material derived from official government Web sites may be the subject of judicial notice”]).

the immediate predecessor-in-title of the then-current owner of the underlying property, nonparty YYSB Trust (“YYSB”).⁵

On March 7, 2018, a tax-lien foreclosure action with respect to the underlying property was commenced against YYSB, among other defendants, under Index No. 504666/18 (the “tax-lien foreclosure action”). Whereas YYSB was named as a party defendant in the tax-lien foreclosure action, neither GOG nor TCV were named a party defendant therein.

On January 22, 2020, a Judgment of Foreclosure and Sale (Partnow, J.) was issued in the tax-lien foreclosure action.⁶ Two years later on January 27, 2022, the underlying property was sold at the auction to the highest bidder which was identified as “5904 Foster Avenue Trust.”⁷ On the same day, Moses and his sister, nonparty Lydia Moses, established the “5904 Foster Avenue Trust” (the “Trust”), with Moses acting as the trustee, pursuant to Article XIII (A) of the Trust Agreement, dated January 27, 2022 (the “original trust agreement”).⁸

By referee deed, dated February 28, 2022 and recorded on March 28, 2022, the Trust acquired the underlying property from the court-appointed referee for the sum of \$1,940,000 (the “referee deed”).⁹

Shortly thereafter, Whitehead expressed an interest in purchasing the underlying property from the Trust for the sum of \$3,260,000, which was approximately 70% higher than what the Trust had paid for it in the tax-lien foreclosure action. Because Whitehead wanted to purchase the underlying property vacant and needed to arrange financing to close the transaction,¹⁰ the original trust agreement was amended, by addendum, dated as of March 9, 2022 (the “first modified trust agreement”), to state, in relevant part, as follows:

“[T]o assist . . . Whitehead’s purchase of the [underlying property], . . . Whitehead is appointed to act as trustee of the [trust] with the following limited and restricted grant of authority solely to enable him to perform the following two acts:

1 - *To secure financing for him to purchase the [underlying property] and . . .*

⁵ Deed from TCV to YYSB, dated September 3, 2015 and recorded on January 23, 2018 (NYSCEF Doc No. 40 in 511827/23).

⁶ NYSCEF Doc No. 48 in 504666/18.

⁷ Referee Report of Sale, dated March 1, 2022 (NYSCEF Doc No. 57 in 504666/18).

⁸ NYSCEF Doc No. 50 in 512756/23.

⁹ NYSCEF Doc No. 41 in 512756/23.

¹⁰ Affidavit of Michael Moses, dated April 26, 2023, ¶ 3 (NYSCEF Doc No. 6 in 512756/23).

2 - To commence and pursue an appropriate legal proceeding in a court of competent jurisdiction seeking a court order removing the current occupants of the [underlying property]. . . .

. . . Whitehead is not authorized, empowered or in any way sanctioned to take any other actions on behalf of the [first modified trust]. . . . Moses shall continue to act as trustee. . . . Whitehead may solely exercise the above[-]mentioned limited grant of authority.”¹¹

Separately, in March 2022, Moses acting both as the settlor and the trustee further modified the trust agreement (the “second modified trust agreement”).¹² In particular, the second modified trust agreement provided (in Article X [A] thereof) that:

“. . . Moses, shall be appointed to act as Trustee. Upon the execution and delivery to a person designated by . . . Moses of a note and mortgage in the principal amount of \$3,260,000 by . . . [defendant] Whitehead and the execution and delivery of a personal guaranty made by . . . Whitehead guarantying all obligations of the mortgagor arising under said note and mortgage, and the execution and recording of a declaration of restrictions prohibiting the transfer, encumbrance or any transaction that affects the title to the [underlying property,] without the express prior consent of the mortgagee, . . . Moses shall resign and . . . Whitehead shall be appointed successor trustee. In the event the note and mortgage are not satisfied in full in accordance with their terms, . . . Whitehead’s appointment as successor trustee shall be revoked[,] and . . . Moses shall be reinstated as trustee.”¹³

Finally, on March 22, 2022, Moses acting as the settlor and Whitehead acting as the trustee further modified the trust agreement (the “third modified trust agreement”),¹⁴ to provide in Article XII (A) thereof that:

¹¹ NYSCEF Doc No. 39 in 512756/23 (emphasis added).

¹² Although the second modified trust agreement is dated as of January 27, 2022 (which is the same date as the original trust agreement), its inclusion of Whitehead indicates that it was executed and delivered in March 2022 in connection with the execution and delivery of the first modified trust agreement which is dated as of March 9, 2022.

¹³ NYSCEF Doc No. 51 in 512756/23 (emphasis added).

¹⁴ Although the third modified trust agreement is likewise dated as of January 27, 2022 (which is the same date as those of the original and the second modified trust agreements), its appointment of Whitehead as trustee on March 22, 2022 (as set forth in Article XII [A]) indicates that it was executed and delivered on that date.

“ . . . Moses, appointed to act as Trustee of [the second modified trust,] has executed the sale of [the underlying property] in the principal amount of \$3,260,000 to . . . Whitehead. . . . *Moses shall resign or cease to act as trustee and[/]or settlor for any reason effective today March 22, 2022. . . . Whitehead shall be appointed to act as Trustee of [the Trust]. . . . Whitehead shall be appointed successor Trustee.*”¹⁵

On or about the same date of March 22, 2022, Whitehead in his capacity as trustee of the Trust under the third modified trust agreement (“Whitehead as trustee”) executed and delivered to nonparty BT Trust, which is a nominee for Moses and his associates, a mortgage on the underlying property.¹⁶ The aforementioned mortgage secured the mortgage note, dated as of March 11, 2022, in the principal amount of \$3,260,000, which Whitehead as trustee concurrently executed and delivered to BT Trust (the “mortgage note”). The mortgage note provided, in relevant part, that:

*“In the event that . . . any legal proceeding is commenced or continued which expressly challenges the ownership of the [underlying property] by any party in prior chain of title thereto, including tenancies, is brought or continued on or before the maturity date hereof, then in said event [Whitehead as trustee] shall be released of [his] obligations hereunder, provided that [Whitehead as trustee] promptly provides a deed in lieu of foreclosure to be executed simultaneously with the mortgage note and mortgage[,] as well as A DISCLAIMER OF FIDUCIARY OR BENEFICIAL INTEREST IN [THE TRUST].”*¹⁷

By amended order to show cause, dated March 25, 2022 (Partnow, J.), GOG (acting through TCV) moved to intervene in the tax-lien foreclosure action and obtained a temporary stay of the sale and transfer of the underlying property, on the basis of the GOG pastors’ representations (later shown to have been factually unsupported) that: (1) GOG (or, more precisely, TCV) was the true owner of the underlying property; and (2) TCV’s conveyance of the underlying property to YYSB under the deed, dated September 3, 2015 and recorded January 23, 2018 (the “TCV-to-YYSB deed”), was intended for security only.¹⁸

¹⁵ NYSCEF Doc No. 54 in 512756/23 (unnecessary capitalization and bold-face type omitted).

¹⁶ Form Mortgage, dated as of March 11, 2022 (NYSCEF Doc No. 67 in 511827/23 [first document]), which was superseded by Mortgage, Security Agreement and Assignment of Leases and Rents, dated as of March 11, 2022 and executed on March 22, 2022 (NYSCEF Doc No. 68 in 511827/23).

¹⁷ Mortgage Note, dated as of March 11, 2022 (NYSCEF Doc No. 67 in 511827/23 [second document]) (capitalization in the original; italics added).

¹⁸ NYSCEF Doc No. 82 in 504666/18. The TCV-to-YYSB deed is reproduced under NYSCEF Doc No. 40 in 511827/23.

In response to the amended order to show cause, Moses obtained his own order to show cause, dated April 14, 2022 (Partnow, J.), which permitted the Trust to “perform a routine insurance inspection through a third-party professional on April 21, 2022.”¹⁹ At the appointed date (April 21, 2022), Whitehead and others, consisting of an insurance inspector, an appraiser, and his bodyguard, arrived at the underlying property and met there with GOG’s Pastor Dugbo. After Pastor Dugbo summoned the NYPD and Whitehead produced the referee deed to the NYPD for their inspection, Whitehead and his entourage were permitted to enter and inspect the underlying property.”²⁰ By short-form order, dated May 13, 2022, the Court (Partnow, J.) denied TCV/GOG’s amended order to show cause, holding that TCV/GOG was not a necessary party to the tax-lien foreclosure action because it “failed to annex any documentation indicating that [the TCV-to-YYSB] deed was intended only as security in the nature of a mortgage.”²¹

Thereafter, the Trust moved, by order to show cause, dated June 25, 2022 (Partnow, J.), to eject nonparty TCV/GOG from the underlying property.²² By short-form order, dated September 6, 2022, the Court (Partnow, J.) denied relief to the Trust, without prejudice, on the grounds that it “failed to submit evidence of proper notice pursuant to RPAPL 713 and RPAPL 735.”²³

Whitehead was indicted on December 15, 2022 for his alleged involvement in several fraudulent transactions that had preceded the transaction at issue.²⁴ Ultimately, Whitehead failed to purchase the underlying property from the Trust and thus forfeited his beneficial interest in the Trust as its trustee.

Notwithstanding the pendency of his criminal case, Whitehead purporting to act as trustee locked GOG out of the underlying property sometime in 2022. Shortly thereafter but also in 2022, GOG commenced a proceeding against the Trust or, more precisely, against Whitehead as the purported trustee

¹⁹ NYSCEF Doc No. 93 in 504666/18.

²⁰ Affidavit of Pastor Robert Dugbo, dated April 22, 2022, ¶¶ 21-25 (NYSCEF Doc No. 119 in 504666/18).

²¹ NYSCEF Doc No. 126 in 504666/18.

²² NYSCEF Doc No. 139 in 504666/18.

²³ NYSCEF Doc No. 145 in 504666/18.

²⁴ *United States v Whitehead*, 1:22-cr-00692 (SD NY 2022), Docket Entry Nos. 1-2 (available on Westlaw). By jury verdict, dated March 11, 2024, Whitehead was found guilty on five counts of the indictment (Docket Entry No. 180). By judgment, dated June 17, 2024, Whitehead was sentenced to a prison term of 108 months (or 9 years) on four of the five counts (and to a concurrent prison term of 36 months, or 3 years, on the remaining count of the indictment (Docket Entry No. 232). An order of restitution was concurrently entered (Docket Entry No. 231). By order, dated September 18, 2024, the United States Court of Appeals for the Second Circuit denied Whitehead’s motion for bail pending appeal (Docket Entry No. 239, referencing his appeal Case No. 24-1769). Whitehead’s motion for reconsideration of the denial of bail pending appeal is currently pending before the Second Circuit (Docket Entry Nos. 241-243). It appears from the inmate look-up portion of the Federal Bureau of Prisons Web site that Whitehead, age 46, is incarcerated at FCI Fairton, a medium security federal correctional institution with an adjacent minimum security satellite camp and a detention center, with the projected release date of February 6, 2032 ([www.https://www.bop.gov/inmateloc](https://www.bop.gov/inmateloc) for Register No. 36692-510 [last accessed November 20, 2024]).

of the Trust, in Kings County Civil Court, Housing Part, under Index No. LT-329469-22/KI, alleging that GOG was illegally locked out of the underlying property, and that it must be restored to possession (the “first housing court proceeding”).²⁵ By order, dated December 21, 2022, the Civil Court (Capell, J.), who was presiding over the first housing court proceeding, awarded a judgment of possession to GOG against the Trust, which in actuality, was against Whitehead as the purported trustee of the Trust.²⁶ By decision/order, dated January 24, 2023, the Civil Court (Roper, J.) denied Whitehead’s order to show cause for leave to reargue, as well as denied his application for a stay pending appeal, without prejudice to GOG’s “claim for commercial tenant harassment and treble damages in a separate action.”²⁷ On the same day (January 24, 2023), the Civil Court (Roper, J.) issued a Landlord Tenant Judgment restoring GOG to possession of the underlying property.²⁸

On February 17, 2023, Whitehead, as the purported trustee, commenced against GOG a holdover proceeding in Kings County Civil Court, Housing Part, under Index No. LT-306009-23/KI (the “second housing court proceeding”).²⁹ It can be reasonably inferred that the second housing court proceeding was dismissed because the parties thereto stipulated to a schedule by which GOG was to file its motion to dismiss in light of the earlier judgment restoring it to possession,³⁰ although no order or stipulation to that effect appears in the record before the Court.³¹

Unsuccessful in either of the two housing court proceedings, Whitehead, as the purported trustee, conveyed the underlying property to himself in the capacity as trustee for LOT, by deed dated on April

²⁵ GOG’s counsel’s affirmation in opposition, dated Nov. 7, 2023, ¶ 7 (NYSCEF Doc No. 110 in 511827/23).

²⁶ Order awarding judgment of possession (NYSCEF Doc No. 115 in 511827/23). The reasons for Judge Capell’s determination to restore GOG to possession do not appear in the record before the Court.

²⁷ Order awarding judgment of possession (part of NYSCEF Doc No. 115 in 511827/23).

²⁸ Landlord Tenant Judgment (part of NYSCEF Doc No. 115 in 511827/23).

²⁹ Decision/Order, at 1-2 (part of NYSCEF Doc No. 115 in 511827/23).

³⁰ NYSCEF Doc No. 45 in 511827/23 (Stipulation of Settlement, dated May 1, 2023 [Stein, J], establishing the briefing schedule for GOG’s motion to dismiss in the second housing court proceeding).

³¹ Subsequent to the commencement of the GOG action (as more fully set forth in the text below), this Court, by order, dated January 26, 2024 (the “January 2024 TRO”), continued the prior TRO, dated September 27, 2023, which enjoined Whitehead from prosecuting the second housing court proceeding, as well as from commencing another housing court proceeding, against GOG (NYSCEF Doc Nos. 141 and 109, respectively, in 511827/23, Seq. No. 4). Whitehead’s ensuing request to the Second Judicial Department to vacate the January 2024 TRO or, in effect, to stay its enforcement, pending hearing and determination of his appeal, was denied by Decision & Order on Motion, dated June 5, 2024 (*Glory of God Global Ministry, Inc. v Whitehead*, 2024 NY Slip Op 68902[U] [2d Dept 2024]). Further, on the Second Judicial Department’s “own motion, the appeal [of the January 2024 TRO] [was] dismissed, without costs or disbursements, on the ground that no appeal lies as of right from an order that is not the result of a motion made on notice, and [the Second Judicial Department] decline[d] to grant leave to appeal” (*id.*) (internal citation omitted).

19, 2023 and recorded on April 25, 2023 (the “Whitehead-to-LOT deed”).³² The conveyance of the underlying property to LOT was without any consideration.

The following day, April 20, 2023, GOG commenced an action against Whitehead, both individually and as trustee for each of the Trust and LOT.³³ In the GOG action, GOG alleged that it was the owner of the underlying property “through [its] agents, fiduciaries and/or trustees” through a series, and a combination, of three deeds:³⁴ (1) the deed from nonparty Clair Realty, LLC (the predecessor-in-title to VCV/GOG) to VCV, dated December 26, 2014 and recorded on January 24, 2015;³⁵ (2) the aforementioned VCV-to-YYSB deed;³⁶ and (3) the aforementioned referee deed.³⁷ Thereafter, Whitehead, as the purported trustee of the Trust, moved, pre-answer (in Seq. No. 1), for an order, pursuant to CPLR 3211 (a), among other provisions, dismissing GOG’s complaint. Concurrently, Moses as trustee of the Trust moved (in Seq. No. 2) for leave to intervene in the GOG action.

Eight days later on April 28, 2023, Moses commenced the Moses Action to void the Whitehead-to-LOT deed and for ancillary relief. In May 2023, Whitehead, both individually and as trustee for LOT, was served with process by the “nail and mail” method of delivery at his residence in New Jersey.³⁸ LOT, an active New York not-for-profit corporation,³⁹ was served with process via the Secretary of State.⁴⁰

Shortly thereafter, Moses moved by the aforementioned Order to Show Cause (in Seq. No. 1) for a TRO enjoining Whitehead and LOT from selling, transferring, or encumbering the underlying property.⁴¹ Thereafter, this Court issued the PI Order, which stated that “the Court may reconsider its granting of an injunction if [Whitehead and LOT] file papers in opposition to this motion within 20 days of the filing of this order with Notice of Entry and [Moses] file[s] papers in reply within seven days of the filing of the opposition papers.” The PI Order was electronically served with notice of entry on February 8, 2024 and was mailed to the Moses Action defendants on February 14, 2024 at Whitehead’s residence in New Jersey.⁴² Thereafter, the Moses action defendants timely sought to have the Court

³² NYSCEF Doc No. 40 in 512756/23.

³³ Summons with Notice, dated April 20, 2023, as amended by Supplemental Summons with Notice, dated May 4, 2023 (NYSCEF Doc Nos. 1 and 3, respectively, in 511827/23).

³⁴ Verified Complaint, dated May 4, 2023, ¶ 7 (NYSCEF Doc No.111 in 511827/23). GOG’s complaint is verified by Pastor Joseph Williams, rather than by Pastor Funmi Williams or by Pastor Robert Dugbo.

³⁵ NYSCEF Doc No. 39 in 511827/23.

³⁶ NYSCEF Doc No. 40 in 511827/23.

³⁷ NYSCEF Doc No. 41 in 511827/23.

³⁸ Affidavit of Service, dated May 17, 2023 (part of NYSCEF Doc No. 44 in 512756/23).

³⁹ New York State Department of State, Division of Corporations, Entity Information for LOT (NYSCEF Doc No. 45 in 512756/23).

⁴⁰ Affidavit of Service, dated May 16, 2023 (part of NYSCEF Doc No. 44 in 512756/23).

⁴¹ NYSCEF Doc No. 43 in 512756/23.

⁴² NYSCEF Doc Nos. 27 and 28 in 512756/23.

reconsider the PI Order on the principal ground that the Order to Show Cause was not “personally” served on them as required therein.⁴³ On February 22, 2024, Moses timely replied, contending that five separate attempts to serve Whitehead with the Order to Show Cause at his personal residence, coupled with the service of same on LOT through the Secretary of State, were sufficient to justify the nail-and-mail method of service of the Order to Show Cause, in lieu of “personal service” specified therein.⁴⁴

Approximately one month later on March 26, 2024, Moses moved (in Seq. No. 2) for leave to enter a default judgment against Whitehead and LOT. In opposition, Whitehead and LOT once again reiterated their earlier principal contention that the aforementioned Order to Show Cause was not personally served on them.⁴⁵ On May 8, 2024, the Court expressly reserved decision on Moses’s motion (in Seq. No. 2) for leave to enter a default judgment against Whitehead and LOT, as well as implicitly reserved decision on their fully briefed request (in effect, in Seq. No. 1) for reconsideration of the PI Order.

The recitation of the facts would not be complete without mentioning the special proceeding under RPAPL 713 (4) which the Trust (by Moses as trustee) commenced against GOG in this court under Index No. 519559/23 on July 7, 2023 (the “special proceeding”). The special proceeding seeks removal of GOG from the underlying property.⁴⁶ By stipulation, dated January 10, 2024, the Trust and GOG as the parties to the special proceeding agreed that GOG’s time to respond to the Trust’s petition is “adjourned until ten (10) business days following the entry of an order from the court determining the owner of the [underlying] property in accordance with Index Nos. 511827/23 and 512756/23[,] and that the return date of the Petition shall be adjourned to a date to be determined by the court.”⁴⁷

As set forth above, the factual and procedural background of this matter is complex. In the final analysis, however, the principal issues before the Court at this juncture are limited and straightforward.

“On a motion for leave to enter a default judgment pursuant to CPLR 3215, a plaintiff is required to submit proof of service of the summons and complaint, the facts constituting the cause of action, and the defendant’s default in answering or appearing” (*Clarke v Liberty Mut. Fire Ins. Co.*, 150 AD3d 1192, 1194 [2d Dept 2017]). “To demonstrate the facts constituting the cause of action, the plaintiff need only submit sufficient proof to enable a court to determine if the cause of action is viable” (*id.* at 1194). “The court may consider the complaint, affidavits, and affirmations submitted by the plaintiff” (*id.*). “Once

⁴³ NYSCEF Doc Nos. 30-31 in 512756/23. The Order to Show Cause in the Moses action required “personal” service thereof (together with the underlying papers) on Whitehead and LOT.

⁴⁴ NYSCEF Doc Nos. 22-23 and 32 in 512756/23.

⁴⁵ NYSCEF Doc Nos. 49 and 59 in 512756/23.

⁴⁶ Petition, dated July 3, 2023 (NYSCEF Doc No. 1 in 519559/23).

⁴⁷ NYSCEF Doc No. 15 in 519559/23.

the plaintiff has made such a showing, the defendant, in order to avoid entry of a default judgment, must show either that there was no default, or that [the defendant] has a reasonable excuse for its delay and a potentially meritorious defense” (*Pemberton v Montoya*, 216 AD3d 988, 989 [2d Dept 2023] [internal quotation marks omitted]).

Here, Moses has met all of the requirements for demonstrating his entitlement to enter a default judgment against Whitehead and LOT (*see Digital Direct & More, Inc. v Dialectic Distrib., LLC*, 230 AD3d 567, 569 [2d Dept 2024]). The affidavits of service submitted in support of his motion for leave to enter a default judgment constitute prima facie evidence that both Whitehead and LOT were properly served⁴⁸ (*see Clarke*, 150 AD3d at 1194). The complaint, which is verified by Moses, alleges that: (1) the Whitehead-to-LOT deed is fraudulent because, at the time of conveyance, Whitehead lacked the power to convey the underlying property to LOT or to anyone else; (2) Moses is the lawful and sole trustee of the Trust to the exclusion of Whitehead; and (3) LOT as the title holder to the underlying property under the Whitehead-to-LOT deed lacks the power to convey and should be enjoined from conveying the underlying property to anyone.⁴⁹ The complaint is supported by documentary evidence, including the referee deed, the referee report of sale, the first modified trust agreement, and the Whitehead-to-LOT deed.⁵⁰ Moses has satisfied his burden of submitting proof of the facts constituting his first, third, and fourth causes of action, respectively, for: (1) declaration of title pursuant to RPAPL article 15; (2) declaratory judgment; and (3) injunctive relief⁵¹ (*see Davis v Graham*, 229 AD3d 683, 684 [2d Dept 2024]).

In opposition, Whitehead and LOT have failed to offer a reasonable excuse for their default in answering the complaint and to establish a potentially meritorious defense to the Moses action (*see Hersko v Hersko*, 224 AD3d 810, 812 [2d Dept 2024]). Whitehead, as the purported trustee of the Trust and LOT, has submitted two affidavits in opposition, contending, in essence, that the Court lacks jurisdiction over him and LOT because the aforementioned Order to Show Cause was never “personally”

⁴⁸ NYSCEF Doc Nos. 44-45 in 512756/23.

⁴⁹ Verified Complaint, dated April 28, 2023, ¶¶ 14-20, 28-34, and 36-39 (the first, third, and fourth causes of action, respectively) (NYSCEF Doc No. 42 in 512756/23). The second cause of action for unjust enrichment seeks monetary relief (*Id.*, ¶¶ 23-26).

⁵⁰ NYSCEF Doc Nos. 37-40 in 512756/23.

⁵¹ Plaintiff, however, has not satisfied his burden of submitting proof in support of his second cause of action for unjust enrichment which seeks monetary relief. Verified Complaint, dated April 28, 2023, ¶¶ 23-26 (NYSCEF Doc No. 42 in 512756/23).

served on him and LOT, and further “vehemently requesting [that] a traverse hearing be urgently conducted by this Court immediately.”⁵²

CPLR 2214 (d) provides that a “court in a proper case may grant an order to show cause, to be served in lieu of a notice of motion, at a time and in a manner specified therein.” “The absence of proper service of an order to show cause deprives the court of jurisdiction to entertain the motion” (*Serrao v Slope Storage*, 223 AD3d 927, 927 [2d Dept 2024]).

Service of process or other papers pursuant to CPLR 308 (4), commonly known as the nail-and-mail method of service, may be used where personal service under CPLR 308 (1) cannot be made on an individual with “due diligence” (*Ramirez v Escobar*, 228 AD3d 791, 792 [2d Dept 2024]). “Because there is a reduced likelihood that a defendant will actually receive the [papers at issue] when [he or she] is served pursuant to CPLR 308 (4), the requirement of ‘due diligence’ is to be stringently observed” (*Kaszovitz v Weiszman*, 110 AD2d 117, 120 [2d Dept 1985]). “[The] ‘due diligence’ [requirement] may be satisfied with a few visits on different occasions and at different times to the defendant’s residence . . . when the defendant could reasonably be expected to be found at such location at those times” (*Estate of Waterman v Jones*, 46 AD3d 63, 66 [2d Dept 2007]).

Under the circumstances here, service of the Order to Show Cause was permissibly made on Whitehead by the nail-and-mail method pursuant to CPLR 308 (4), following five unsuccessful attempts at personal service on him at his residence on four different days and at various times in the afternoon and evening⁵³ (*see Wilmington Tr. Co. v Gewirtz*, 193 AD3d 1110, 1112 [2d Dept 2021]; *Yihye v Blumenberg*, 260 AD2d 371, 372 [2d Dept 1999], *lv denied* 93 NY2d 813 [1999]).⁵⁴

Whitehead’s bare denial that he was not properly served with the Order to Show Cause is insufficient to rebut the prima facie proof of proper service pursuant to CPLR 308 (4) created by the process server’s thorough affidavit and to necessitate a traverse hearing (*see Bank of New York Mellon v Silverberg*, 201 AD3d 695, 696 [2d Dept 2022]; *Federal Natl. Mtge. Assn. v Lakas*, 175 AD3d 1252, 1253 [2d Dept 2019]; *City of New York v Miller*, 72 AD3d 726, 727 [2d Dept 2010]).

⁵² Defendant’s Affidavit in Opposition to Plaintiff’s Motion for Default Judgment, dated May 7, 2024, ¶¶ 2, 16, and 18; Defendant’s Supplemental Affidavit in Opposition to Plaintiff’s Motion for Default Judgment, dated May 10, 2024, ¶¶ 4-6 (NYSCEF Doc Nos. 49 and 59, respectively, in 512756/23).

⁵³ The process server’s affidavit, dated May 17, 2023, detailed his five unsuccessful attempts at personally serving Whitehead (NYSCEF Doc No. 22 in 512756/23).

⁵⁴ As was observed by Court Attorney Referee Allman who, in an earlier unrelated action, upheld the nail-and-mail service of process on Whitehead at the latter’s place of residence at 1 Sipponta Ln, Paramus, NJ, in October 2022, “[t]here is no magical formula or rigid rule that must be applied to determine whether due diligence has been exercised in attempting to make personal service and thus permit the use of substituted service pursuant to CPLR § 308 (4)” (*Anderson v Whitehead*, 2023 WL 4234257, *2 [Sup Ct, Kings County 2023]). Rather, “[d]ue diligence is determined on a case-by-case basis” (*id.*, *3).

As to defendant LOT, CPLR 311 (a) (1) provides, in relevant part, that “[a] not-for-profit corporation may . . . be served pursuant to section three hundred six . . . of the not-for-profit corporation law” (“NCL”). In turn, NCL 306 (b), in conjunction with NCL 304 (a), authorizes service of process on a not-for-profit corporation by service on the New York State Secretary of State as agent of the not-for-profit corporation.⁵⁵ Because LOT was organized under NCL 402 (rather than under the Religious Corporation Law),⁵⁶ it may be and, here, it was personally served with the Order to Show Cause in accordance with the NCL.⁵⁷

Turning to Whitehead’s request (in effect, in Seq. No. 1) for reconsideration of the PI Order, the Court notes that his objection to the issuance of such order is substantially the same as that advanced in opposition to Moses’s motion for leave to enter a default judgment; namely, that he was not personally served with the underlying Order to Show Cause.⁵⁸ There being no other objections raised by Whitehead and LOT to the PI Order, the latter remains undisturbed.

It naturally flows from the Court’s earlier determination that neither Whitehead nor LOT possess any interest in the Trust and in the underlying property that Whitehead’s pre-answer motion (in Seq. No. 1) for an order dismissing the GOG action must be denied for lack of standing, whereas Moses’s motion (in Seq. No. 2) for leave to intervene must be granted because he, as the actual trustee of the Trust, is a necessary party to the GOG action.

“[C]ourts have regularly held that parties do not have standing to move for relief that properly belongs to another party, except where a statute explicitly allows any party to make such a motion” (*Amelius v Grand Imperial LLC*, 57 Misc 3d 835, 842 [Sup Ct, NY County 2017]), *rearg denied* 2018 WL 2710165 [(Sup Ct, NY County 2018)]. Not being an owner or an interest- holder in the underlying property or in the Trust, Whitehead and LOT lack standing to move to dismiss (or to otherwise participate) in the GOG action.

Turning to the matter of intervention, it is well established that “[w]hether intervention is sought as a matter of right under CPLR 1012 (a), or as a matter of discretion under CPLR 1013, is of little

⁵⁵ Under NCL 304 (a), “[t]he secretary of state shall be the agent of every domestic corporation formed under article four of this chapter.”

⁵⁶ New York State Department of State, Division of Corporations, Entity Information for LOT (NYSCEF Doc No. 45 in 512756/23); *see also* Verified Complaint, dated April 28, 2023, ¶ 2 (alleging that LOT is “a domestic not-for-profit corporation”) (NYSCEF Doc No. 42 in 512756/23).

⁵⁷ *Compare* Religious Corporation Law § 2-b (1) (c) which provides that NCL 306 does not apply to religious corporations (*see Mortgage Elec. Registration Sys., Inc. v Congregation Shoneh Halochos*, 189 AD3d 820, 823 [2d Dept 2020] [distinguishing between service on religious and on not-for-profit corporations]; *Schoenthal v Beth Jacob Teachers Seminary of Am., Inc.*, 176 Misc 2d 958, 959 [Sup Ct, Kings County 1998, Dowd, J.] [same]).

⁵⁸ Defendant’s Affidavit in Opposition to Order to Show Cause for Preliminary Injunction, February 16, 2024, ¶ 7 (NYSCEF Doc No. 30 in 512756/23).

practical significance since a timely motion for leave to intervene should be granted, in either event, where the intervenor has a real and substantial interest in the outcome of the proceedings” (*Wells Fargo Bank, Nat. Assn. v McLean*, 70 AD3d 676, 677 [2d Dept 2010]). Here, at a minimum, GOG’s and the Trust’s respective contentions concerning the ownership of the underlying property “involve common questions of law or fact” (*Atlantic Ave. Capital, LLC v 980 Atl. Holdings, LLC*, ___ AD3d ___, 2024 NY Slip Op 04754, *2 [2d Dept 2024] [internal quotation marks and alterations omitted]).

Based on the foregoing, it is

ORDERED in the Moses Action that Moses’s motion (in Seq. No. 2) for leave, pursuant to CPLR 3215 (a), to enter a default judgment against Whitehead and LOT is granted to the extent that:

(1) Moses is granted a default judgment against Whitehead and LOT on each of Moses’s first, third, and fourth causes of action for declaratory judgment under RPAPL article 15, declaratory judgment, and injunctive relief, respectively;

(2) The Deed, dated April 19, 2023 and recorded on April 25, 2023 at CRFN 2023000100795, from Lamor Whitehead as trustee for 5904 Foster Avenue Trust to Lamor Whitehead as trustee for Leaders of Tomorrow International Ministries, Inc., for the commercial real property located at 5904 Foster Avenue, Brooklyn, New York 11234 (Block 7955, Lot 1), is hereby declared null and void as a matter of law, and the Register of the City of New York is hereby directed to cancel, strike and discharge of record such deed;

(3) Leaders of Tomorrow International Ministries Inc. (either directly or by Lamor Whitehead or his agents) is hereby restrained from “conveying title to the [underlying] property or encumbering the property or leasing, renting, occupying or in any way using the [underlying] property”;⁵⁹

(4) Michael Moses is hereby declared “to be the lawful, sole continuous Trustee of the Trust since its creation,”⁶⁰ subject, however, to the outcome of the GOG action; and

(5) the remainder of Moses’s motion which is for a default judgment on his second cause of action for unjust enrichment is denied, subject to an inquest on his alleged damages to be scheduled after he files a note of issue and certificate of readiness in this action; and it is further

ORDERED in the Moses Action that Whitehead and LOT’s undocketed but fully briefed motion (in effect, in Seq. No. 1) to reconsider the PI Order is denied; and it is further

⁵⁹ Verified Complaint, dated April 28, 2023, ¶ 39 (NYSCEF Doc No. 42 in 512756/23).

⁶⁰ Verified Complaint, dated April 28, 2023, ¶ 34 (NYSCEF Doc No. 42 in 512756/23).

ORDERED that in the GOG Action, Whitehead’s motion (in Seq. No. 1), for an order, pursuant to CPLR 3211 (a), among other provisions, dismissing GOG’s verified complaint is denied in its entirety; and it is further

ORDERED that in the GOG Action, Moses’s motion (in Seq. No. 2) for leave, pursuant to CPLR 1012 and 1013, to intervene in the GOG action as a party defendant is granted; Moses’s “Proposed Intervenor’s Verified Answer with Counterclaim,” dated May 22, 2023,⁶¹ is deemed duly filed and served; and the caption of the GOG action is amended, with the addition of Michael Moses, Trustee of the 5904 Foster Avenue to Trust, as the principal defendant, to read as follows:

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GLORY OF GOD GLOBAL MINISTRY, INC.,

Plaintiff,

-against-

Index No. 511827/23

MICHAEL MOSES, Trustee of the 5904 FOSTER AVENUE TRUST, LAMOR WHITEHEAD, in both his individual capacity and as Trustee of the 5904 FOSTER AVENUE TRUST; LAMOR WHITEHEAD, as Trustee of LEADERS OF TOMORROW INTERNATIONAL MINISTRIES INC., if said above-named defendant be living, and if the said defendant be dead, then any and all other persons who may claim as heirs-at-law, next-of-kin, devisees, distributees, legal representatives, and successors in interest of said defendant, creditor, mortgagees, lienors, assigns and legal representatives of them and the successors in interest of said heirs-at-law, next- of-kin, devisees, distributees and legal representatives, their spouses, creditors, mortgagees, lienors, assignees and legal representatives of them and, if any specifically named defendant or any defendants named as a class be dead, then their heirs-at-law, next-of-kin, devisees, grantees, distributees, spouses, widows, widowers, executors, trustees, administrators, assigns, mortgagees, lienors and successors in interest and, generally, all parties having or claiming to have an interest in or lien upon the premises described in the complaint, or any amendment thereto by, through or under the specifically named defendant herein or by, through or under any of the other defendants herein named specifically or as a class, all of whom and whose places of residence are unknown to the plaintiff and cannot after diligent inquiry be ascertained, JOHN DOE# 1 THROUGH JOHN DOE #3, the last three names being fictitious and unknown to the plaintiff, the persons or parties intended being tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises described in the complaint,

Defendants.

-----X

⁶¹ NYSCEF Doc No. 34 in 511827/2023.

; it is further

ORDERED that in the special proceeding, GOG's time to respond to the Trust's petition in the special proceeding under Index No. 519559/23 remains adjourned, in accordance with the parties' stipulation, dated January 10, 2024, pending the disposition of the GOG action; and it is further

ORDERED that, pending the resolution of the GOG action, the Court's TRO, dated January 26, 2024,⁶² remains in full force and effect; and it is further

ORDERED that Moses's counsel, Lawrence R. Kulak, Esq., is directed to electronically serve a copy of the Joint Decision and Order with notice of entry on the other parties' counsel of record in the Moses action, Brian Figeroux, Esq., and on counsel of record for Glory of God Global Ministry, Inc. in the GOG action, Charles Lewis Mester, Esq., as well as by first-class mail on Whitehead in his current place of incarceration and at his former place of residence at 1 Sipporta Ln, Paramus, NJ 07652, and to electronically file an affidavit of service thereof with the Kings County Clerk.

The foregoing constitutes the Joint Decision and Order of the Court to be electronically filed under Index Nos. 512756/23 and 511827/23.

ENTER,



Hon. Ingrid Joseph, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice

⁶² NYSCEF Doc No. 141 in 511827/23, Seq. No. 4.