

Barnes v O'Keefe

2024 NY Slip Op 34654(U)

December 26, 2024

Supreme Court, Kings County

Docket Number: Index No. 1922/2018

Judge: Lisa S. Ottley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24**

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LANNEL BARNES,

Mot. Seq. # 5 and 6

Plaintiff,

Index # 1922/2018

-against-

DECISION and ORDER

John O'Keefe, 49 Andrew, Islip, New York Oren I. Zaka Development, 15 Fairview Ave' Great Neck, N.Y. 11023 NYCTL 1998-2 TRUST, and THE BANK OF NEW YORK MELLON as Collateral Agent and Custodian for the NYCTL 1998-2 Trust, 1550 FULTON STREET REALTY HOLDINGS, LLC, 2152 59th Street, Brooklyn, New York 11204; HOME ABSTRACT CORPORATION AS AGENT (P.U. REJECTIONS)8225 THIRD AVENUE, HAR-1546 BROOKLYN, NY 11209; PRIMO HOLDINGS LLC 8 Douglas Drive Holmdel, NJ 07733 AND ANGELO GALLO, Notary No. O1GA4715241, JOHN AND JANE DOE,

Defendants.
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HON. LISA S. OTTLEY, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion to Dismiss and Cross-Motion for Default Judgment submitted on June 10, 2024.

Papers	Numbered
Notice of Motion and Affidavit	1&2 [Exh. A-B]
Notice of Cross-Motion and Affidavit.....	3&4 [Exh. A-D]
Affirmation/Affidavit in Opposition.....	5
Affidavit(s) in Reply.....	6 [Exh. A-D]; [Exh. A]

Defendant, Home Abstract Corporation, as agent (P.U. ejections) moves for an order pursuant to CPLR 3211(a)(7) dismissing the action against Home Abstract Corp. Plaintiff opposes the defendant's motion and cross-moves for an order granting a default judgment against defendant, Home Abstract, pursuant to CPLR 3215. Defendant, Home Abstract, opposes plaintiff's motion for a default judgment on the grounds that the plaintiff fails to follow the procedures set out by CPLR 3215, and the untimeliness of the plaintiff's motion.

In this action, inter alia, to quiet title, plaintiff alleges that he is the rightful owner of the premises located at 1550 Fulton Street Brooklyn, New York 11216 (hereinafter "Fulton Street property"), and 906 Putnam Avenue, Brooklyn, New York 11221, having inherited these premises

on February 10, 2010, by operation of law as the sole distributee of his deceased father, Augustus L. Barnes. Plaintiff alleges that Joan Ince Barnes, the decedent's spouse, from whom the decedent was separated at the time of his death, was appointed administrator of the estate on July 22, 2010, and received Letters of Administration that restricted her from selling the Fulton Street property without further order of the court. Plaintiff claims that due to Ince's mismanagement of his father's estate, defendant 1550 Fulton Street Realty Holdings forged a deed to the Fulton Street property and recorded same on June 5, 2014, reflecting a sale price of \$0, and thereafter acting in concert with defendant, Primo Holdings, LLC, recorded a corrected deed to the property. Plaintiff asserts that he learned that a foreclosure sale of the Fulton Street property was scheduled to take place on August 9, 2018, but that he was unable to get a home equity loan without the deed to the premises being in his name.

Plaintiff commenced this action seeking to quiet title to the premises, to permanently enjoin defendants from entering the property, and to recover damages for fraud, forgery, intentional infliction of emotional distress, conversion, slander of title, and unjust enrichment. Plaintiff filed a notice of pendency in this action on June 10, 2022. A review of the court records involving these parties/premises reveals that defendants NYCTL and BNY were holders of certain tax and other liens for the years 2009, 2013, and 2014, and commenced a tax lien foreclosure on November 30, 2016 (Supreme Court Kings County Index No. 521188/16) against defendant Primo Holdings, LLC and non-party Chillax Mgmt., LLC to recover the value of the tax liens against the Fulton Street property. A notice of pendency was filed in that action on November 30, 2016. Neither of the defendants answered or appeared in that action and NYCTL and BNY were granted a judgment of foreclosure and sale by order dated May 10, 2018. A sale of the property occurred on August 9, 2018, for the winning bid of \$1,600,000. NYCTL and BNY later stipulated with the purchaser to void the foreclosure sale and moved for an order for leave to add Ince as a necessary party to that action and for an extension of time to conduct the foreclosure sale. The relief was granted by separate orders dated December 9, 2020.

A foreclosure sale was held in the tax lien foreclosure action on April 28, 2022, and the successful bidder was 1550 Fulton Realty 123 LLC (hereinafter "123"). The tax lien foreclosure Referee conveyed the property to 123 by Referee's Deed dated April 20, 2023, and recorded on April 28, 2023. Although defendant 1550 Fulton Street Realty Holdings LLC ("Holdings") and the tax lien foreclosure sale purchaser 1550 Fulton Realty 123 LLC ("123") have similar names, they are separate, distinct, and unrelated entities which have no common ownership.

Defendant, Home Abstract's Motion to Dismiss

Defendant, Home Abstract moves to dismiss plaintiff's action pursuant to CPLR 3211(a)(7) for failure to state a cause of action. On a motion to dismiss for failure to state a cause of action, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable by law, the motion for dismissal will fail. *See, Harrison DGR44, LLC v. Luiso 44 Harrison, LLC*, 219 A.D.3d 1413, 196 N.Y.S.3d 734 (2nd Dept., 2023); *Podesta v. Assumable Homes Development II Corp.*, 137 A.D.3d 767, 31 N.Y.S.3d 74 (2nd Dept., 2016).

In the case at bar, the plaintiff has plead several causes of action, which this court finds to be cognizable by law. Defendant, Home Abstract, argues that its sole role in the entire transaction that the plaintiff claims is fraudulent was that Home Abstract recorded the deed in the initial transaction. On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must afford the complaint liberal construction, accept the allegations as true, and provide the plaintiff the benefit of every possible favorable inference. See, Lewis & Murphy Realty, Inc. v. Colletti, 187 A.D.3d 731, 130 N.Y.S.3d 350 (2nd Dept., 2020), citing, Leon v. Martinez, 84 N.Y.2d 83, 614 N.Y.S.2d 972; Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 401 N.Y.S.2d 182.

Based upon the argument presented by the defendant, Home Abstract, and plaintiff's opposition, the court denies defendant, Home Abstract's motion to dismiss pursuant to CPLR 3211(a)(7).

Plaintiff's Cross-Motion for Default Judgment

Plaintiff cross-moves for a default judgment against defendant, Home Abstract, pursuant to 3215(c), on the grounds that the defendant, Home Abstract, has failed to answer the amended summons and verified complaint. Defendant, Home Abstract, argues that due to plaintiff's failure to move within one year of the default, as required under CPLR 3215(c), the court cannot enter a default judgment in favor of plaintiff and against defendant, Home Abstract. Defendant also argues that the plaintiff has failed to serve a default letter when the default occurred.

On August 27, 2018, the defendant, Home Abstract, was served with the amended summons and verified complaint. The plaintiff filed the affidavit of service with the clerk of the court on August 27, 2018. Plaintiff is seeking a default judgment after six (6) years, which is beyond one year of the defendant, Home Abstract's default. CPLR 3215(c) provides in pertinent part, that if a plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. See, Pipinias v. J.Sackaris & Sons, Inc., et. al., 116 A.D.3d 749, 983 N.Y.S.2d 587 (2nd Dept., 2014). Failure to take proceedings for entry of judgment may be excused, however, upon a showing of sufficient cause, which requires the plaintiff to demonstrate that it had a reasonable excuse for the delay in taking proceedings for entry of a default judgment and that it has a potentially meritorious action. See, Wells Fargo Bank v. Aucapina, 193 A.D.3d 1106 (2021, 47 N.Y.S.3d 608 (2nd Dept., 2021). Here, the plaintiff fails to provide the court with a showing of sufficient cause as to why it took plaintiff six (6) years to move for entry of a default judgment of the defendant, Home Abstract. The plaintiff does not provide any reason for the delay. Plaintiff filed what he entitled a "sur reply," and states that annexes a copy of the Notice of Motion to Restore the case to the calendar, Request for Preliminary Injunction, Default Judgment and to Amend to Include Joan Ince Barnes as a defendant to the within action. (See, Exh. "D" to plaintiff's reply on the cross-motion for default). However, the defendant only annexes one (1) page of the motion and does not provide the court

with the full motion and supporting documents to that motion, nor does the defendant provide the court with a decision/order on the motion.

Under the circumstances, the plaintiff failed to offer a reasonable excuse as to why it failed to take any proceedings to enter a default judgment within one year after the defendant, Home Abstract's default. Since the plaintiff failed to set forth a reasonable excuse, the court need not consider whether plaintiff demonstrated a potentially meritorious action.


Accordingly, defendant, Home Abstract's motion to dismiss pursuant to CPLR 3211(a)(7) is hereby **DENIED**, and it is further

ORDERED that plaintiff's cross-motion to enter a default judgment against defendant, Home Abstract, Corporation, is hereby **DENIED**, and due to plaintiff's failure to take any proceedings to enter a default judgment within one year after defendant Home Abstract's default, it is hereby

ORDERED, that the complaint is dismissed as to the defendant, Home Abstract Corporation, Inc.

This constitutes the decision and order of this Court.

Dated: Brooklyn, New York
December 26, 2024



HON. LISA S. OTTLEY, J.S.C.
HON. LISA S. OTTLEY

KINGS COUNTY CLERK
FILED
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