

U.S. Bank Trust, N.A. v Charles

2024 NY Slip Op 34685(U)

August 29, 2024

Supreme Court, Kings County

Docket Number: Index No. 39657/2007

Judge: Derefim B. Neckles

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At an IAS Term, Part FRP-2 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, 11201 on the 29th day of August, 2024.

PRESENT:

HON. DEREKIM B. NECKLES,
Acting Justice.

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U.S. BANK TRUST, N.A., AS TRUSTEE FOR
LSF9 MASTER PARTICIPATION TRUST,

Plaintiff,

- against -

Index No. 39657/2007

SERGE CHARLES; NEW YORK CITY TRANSIT
ADJUDICATION BUREAU; NEW YORK CITY
ENVIRONMENTAL CONTROL BOARD; NEW
YORK CITY PARKING VIOLATIONS BUREAU;
METRO PORTFOLIOS, INC.; JOHN DOE AND
JANE DOW OCCUPANTS WHOSE NAMES
REMAIN UNKNOWN TO PLAINTIFF,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Affidavits (Affirmations) Annexed
Opposition Affirmation to Motion

7-19
20-41

Upon the foregoing papers in this proceeding, defendant Serge Charles moves by order to show cause/motion (under mot. seq. 12) for an order (i) staying the sale of the subject premises currently scheduled for February 15, 2024, (ii) vacating the order of reference judgment dated 6/22/22, (iii) dismissing the complaint for improper service, (iv) appointing a guardian ad litem, and for such other and further relief as this Court deems just.

In support of his motion, defendant, through his attorney, asserts that that defendant is legally blind, lives in a nursing home, and is both mentally and physically incompetent. Defendant cites to CPLR §309 which states that “personal service upon a person judicially declared to be incompetent to manage his affairs and for whom a committee has been appointed shall be made by personally serving the summons within the state upon the committee and upon the incompetent, but the court may dispense with service upon the incompetent.” The defendant has not been judicially declared incompetent, but defendant offers a letter from his doctor describing his condition as “alert with period of confusion and forgetfulness.” Defendant asserts that service was improper in this case.

Here, defendant’s allegation of improper service has been previously litigated in this action. By order dated June 22, 2022, this court rejected defendant’s argument that he was not properly served, and held that it did not warrant a traverse hearing.

“Collateral estoppel, or issue preclusion, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same. The party seeking to invoke collateral estoppel has the burden to show the identity of the issues, while the party trying to avoid application of the doctrine must establish the lack of a full and fair opportunity to litigate” (*Bank of New York Mellon v. Treitel*, --- AD3d ---, 2023 NY Slip Op 03446 [2d Dept 2023]).

Under the doctrine of res judicata, “once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if

based upon different theories or if seeking a different remedy” (*Jones v. Flushing Bank*, 212 AD3d 791, 793 [2d Dept 2023]). “The doctrine of res judicata bars a party from relitigating any claim which could have been or should have been litigated in a prior proceeding” (*id.*) A judgment of foreclosure and sale entered against a defendant is final as to all questions at issue between the parties and concludes all matters of defense which were or might have been raised in the foreclosure action (*id.*)

Under CPLR 317 and 5015(a), for a defendant to have a default judgment vacated by the court they must meet three criteria: (a) reasonable excuse for default; (b) proof of a meritorious defense; and (c) a proposed answer with the papers. *Nicolosi v. Sleuth Sec. Systems, Ltd.*, 247 A.D.2d 521 (2d Dept. 1998).

Here, defendant argues that he is incapacitated, and could not have been properly served, which serves as his reasonable excuse for default. “A party's competence to enter into a transaction is presumed, even if the party suffers from a condition affecting cognitive function, and the party asserting incapacity bears the burden of proof.” *Ernest Delaney v. Pacchiana*, 170 A.D.3d 1008, 1009, 94 N.Y.S.3d 591, 593 (2019). No evidence was presented that defendant was judicially declared incompetent or of sound mind at the time of service. Defendant offers his attorney's own personal observations of the defendant's mental state, and an undated doctor's letter as his proof of incapacitation. The court finds that this does not amount to a reasonable excuse for defendant's default. Additionally, defendant does not offer a meritorious defense for his default.

Accordingly, it is

ORDERED that defendant's order to show cause is denied in all respects.

This constitutes the decision and order of the court.

E N T E R,



HON. DEREFIM B. NECKLES
A. J. S. C.