Cruz v Bank of Am., N.A.
2024 NY Slip Op 35599(U)
June 13, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 607911/2024
Judge: S. Betsy Heckman Torres
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
IAS PART 18 - SUFFOLK COUNTY

PRESENT:
HON. S. BETSY HECKMAN TORRES, J.S.C.

INDEX NO.: 607911/2024
MOTION DATE: 04/16/2024
MOTION SEQ. #: 001 MD
002 MG
CASE DISP

---X
Charles Cruz, Lisa C Cruz, Roger Rowe,

Petitioners,

-against-

Bank of America, Na, Irwin Equities LLC,

Respondents.
---X

Upon consideration of the electronically filed papers listed on NYSCEF as documents #1-31 read on this motion (#001) by petitioner and the cross-motion (#002) by respondent, it is,

ORDERED that this petition brought on by Order to Show Cause (Fields, J.)(#001) dated April 2, 2024 by Charles Cruz (hereinafter "petitioner") seeking to commence a special proceeding pursuant to RPAPL 731 is denied in its entirety; and it is further

ORDERED that the cross-motion (#002) by respondent Bank of America (hereinafter "hereinafter "resondent") seeking dismissal of the petition, inter alia, is granted as set forth herein; and it is further

ORDERED that counsel for respondent shall serve upon petitioners a copy of this order with notice of entry by ordinary mail, within 30 days of the entry date of this Order.

On March 31, 2023, pro se petitioner, among others, commenced this proceeding to, in essence, vacate the sale of certain property sold pursuant to a judgment of foreclosure and sale (Heckman, J.) dated June 19, 2019 and entered, upon default, in a related foreclosure action under Index # #603845/2018 (hereinafter "the foreclosure action"). Thereafter, on April 1, 2024, petitioner filed an amended petition in this proceeding. On the same date, petitioner filed an Order to Show Cause (#001) seeking to commence a special proceeding pursuant to RPAPL 731. Pursuant to the Order to Show Cause, service via "NYSCEF electronic service of a copy of this Order…upon each respondent on or before the 8th day of April 2024." Respondent filed opposition to the Order to Show Cause and a cross-motion seeking, inter alia, dismissal. No opposition was filed by petitioner, however, a "reply affirmation in support of motion and opposition to cross-motion was filed by Roger Rowe, "co-petitioner" (hereinafter "co-petitioner").

The court first notes that the signed Order to Show Cause (Fields, J.) required service upon the respondents via "NYSCEF." However, since petitioner was seeking to commence a special proceeding by filing a petitioner and order to show cause, no respondents were listed on NYSCEF. Accordingly, such service would not confer jurisdiction over the respondents.

Further, although petitioner filed an affidavit of service indicating that he served respondents via NYSCEF, he also indicated in his affidavit of service that he served "Christopher E. Medina, Esq. Aldridge Pite, LLC.,40 Marcus Drive, Suite 200 Melville, New York 11747 Attorney of the Respondent "BOA "; Gai Z. Rubinstein, Esq. 176 Mineola Blvd 2nd Fl Mineola NY, 11501 Attorney of the Respondent "IE" The court notes that such service also cannot confer jurisdiction upon the respondents.

Moreover, petitioner seeks by his application to commence a special proceeding pursuant to RPAPL 731. RPAPL 731(1), states that "the special proceeding prescribed by this article shall be commenced by petition and notice of petition. A notice of petition may be issued only by an attorney, judge or the clerk of the court; it may not be issued by a party prosecuting the proceeding in person." Here, petitioner did not file a notice of petition, and it was not issued by an attorney, judge or clerk of the court. Accordingly, filing an Order to Show Cause would not be the proper method in which to commence a special proceeding pursuant to RPAPL 731.

It is axiomatic that a special proceeding, existing pursuant to statute as a fast-tracked exception to the plenary action, comes with a high degree of strict compliance with the procedural requirements of that statute. 2 Rasch, New York Landlord and Tenant—Summary Proceedings § 29:5, 29:13 [3d ed], *Columbus Prop. v. I S K S Realty Corp.*, 163 Misc. 2d 446, 621 N.Y.S.2d 277 (Civil Court, N.Y. County, 1994), 25-31 *Ontario St. v. Anthony*, 2019 New York Slip Op. 29393, 66 Misc. 3d 566 (City Ct., Albany County, 2019) citing matter of *Cat Hollow Estates, Inc. v. Savoia*, 46 A.D.3d 1293, 849 N.Y.S.2d 111 (Third Department, 2007), *Clarke v. Wallace Oil Co*., 284 A.D.2d 492, 727 N.Y.S.2d 139 (Second Department, 2001). While a certain liberality has developed excusing hyper-technical failures to comply with some provisions of RPAPL article 7, it still must be said that strict compliance with the essential requirements of article 7 is necessary to establish a viable summary proceeding. Here, petitioner failed to strictly comply with the procedural requirements to commence this special proceeding.

Further, the relief from a default judgment generally is described in CPLR 317 and 51015(a). These provisions require the making of a motion for relief in the original action (see *Matter of Limitone Enters., Inc. v. Walker*, 102 A.D.3d 697, 697–698, 958 N.Y.S.2d 179; *Matter of Calabrese Bakeries, Inc. v. Rockland Bakery, Inc.*, 83 A.D.3d 1060, 1061, 923 N.Y.S.2d 556 ["(a) motion for relief from a default judgment must be brought in the original action or proceeding"]; see also *James v. Shave*, 62 N.Y.2d 712, 714, 476 N.Y.S.2d 532, 465 N.E.2d 39; *Babu v. 29 Cortlandt St. Realty Corp.*, 289 A.D.2d 273, 735 N.Y.S.2d 135; *New York Sign & Supply–Impressive Prods. v. Delong Realty Co.*, 282 A.D.2d 510, 722 N.Y.S.2d 756; *Levine v. Berlin*, 46 A.D.2d 902, 362 N.Y.S.2d 186). Here, rather than move in the original foreclosure action, petitioner has improperly sought to collaterally attack the default judgment by way of this special proceeding.

Additionally, respondent established by way of their cross-motion (#002) that the petition and proceeding must be dismissed. A motion pursuant to CPLR 3211(a)(1) to dismiss a complaint based on documentary evidence may be appropriately granted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v. Mutual Life Ins. Co. of NY,* 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190; see *Jahan v. U.S. Bank N.A.*, 127 A.D.3d 926, 9 N.Y.S.3d 65). By submitting the judgment of foreclosure and sale and other documents form the prior foreclosure action, respondent has established that it had a defense based on documentary evidence and that the instant proceeding is an improper attack upon the judgment (see, *Carbone v. Deutsche Bank Nat. Trust Co.* 145 A.D.3d 848; 44 N.Y.S.3d 147 2nd Dept. 2016). Thus, respondent conclusively disposed of the petitioners causes of action as a matter of law (see *Ciraldo v. JP Morgan Chase Bank, N.A.*, 140 A.D.3d 912, 913, 34 N.Y.S.3d 113).

Further, under the doctrine of res judicata, a final adjudication of a claim on the merits precludes relitigation of that claim and all claims arising out of the same transaction or series of transactions by a party or those in privity with a party (see *Djoganopoulos v. Polkes*, 67 A.D.3d 726, 889 N.Y.S.2d 213; *Sclafani v. Story Book Homes*, 294 A.D.2d 559, 743 N.Y.S.2d 283). A judgment of foreclosure and sale is final as to all questions at issue between the parties, and concludes all matters of defense which were or could have been litigated in the foreclosure action (see *SSJ Dev. of Sheepshead Bay I, LLC v. Amalgamated Bank*, 128 A.D.3d 674, 10 N.Y.S.3d 105; *Dupps v. Betancourt*, 121 A.D.3d 746, 994 N.Y.S.2d 633; *TD Bank, N.A. v. Talia Props., Inc.*, 110 A.D.3d 1057, 973 N.Y.S.2d 789).

While not addressed herein, the remaining arguments by petitioner and co-petitioner have been considered, and in light of the foregoing, lack merit.

Respondent's request for attorney's fees is denied, in the court's discretion. " 'The court rule set forth in 22 NYCRR 130–1.1, which is intended to limit frivolous and harassing behavior, authorizes a court, in its discretion, to award a party in a civil action reasonable attorney's fees resulting from frivolous conduct' " (*Hutter v. Citibank*, N.A., 142 A.D.3d 1049, 1049, 38 N.Y.S.3d 35, quoting Matter of *Miller v. Miller*, 96 A.D.3d 943, 944, 947 N.Y.S.2d 541). Conduct during litigation is frivolous and subject to sanction and/or the award of costs, including an attorney's fee, when: "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false" (22 NYCRR 130–1.1 [c]). To avoid sanctions, at the least, the conduct must have a good faith basis (see *Dank v. Sears Holding Mgt. Corp.*, 69 A.D.3d 557, 558, 892 N.Y.S.2d 510; see also 22 NYCRR 130–1.1a [b]). Here, the court is mindful that the petitioners in this action are proceeding pro se. While it is apparent that petitioners failed to follow the strict requirements in filing a proceeding and failed to raise these issues in the prior foreclosure action, the court finds that such actions by petitioners were based on their lack of knowledge of court rules and statutes and did not rise to frivolous conduct on their part. However, although the court is affording the pro se petitioners some latitude, petitioners should be cautioned that a pro se litigant "acquires no greater right than any other litigant" and is "held to the same standards of proof as those who are represented by counsel" (*Duffen v. State of New York*, 245 A.D.2d 653, 654, 665 N.Y.S.2d 978 [3d Dept. 1997]; see also *Roundtree v. Singh*, 143 A.D.2d 995, 996, 533 N.Y.S.2d 609 [2d Dept. 1988], lv denied 91 N.Y.2d 810, 670 N.Y.S.2d 404, 693 N.E.2d 751 [1998]). Although the court is declining to sanction the petitioners at this time, the court may re-consider its determination if the petitioners continue to engage in such conduct.

Accordingly, petitioner's Order to Show Cause (#001) is denied in its entirety and respondent's cross-motion (#002) to dismiss these proceedings with prejudice is granted as set for herein.

Dated: June 13, 2024

J.S.C.
HON. S. BETSY HECKMAN TORRES, J.S.C.