

Born to Build LLC v Saleh
2013 NY Slip Op 33941(U)
July 11, 2013
Supreme Court, Nassau County
Docket Number: 002345/11
Judge: Stephen A. Bucaria
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

ORIGINAL

BORN TO BUILD LLC,

Plaintiff,

-against-

IBRAHIM SALEH, a/k/a Abraham Saleh, a/k/a Kamel Saleh, a/k/a Kamel Y. Saleh, a/k/a Kamel Youssef Saleh, a/k/a Yaakoub Saleh, a/k/a Kaakoub Y. Saleh, a/k/a Yaakoub Youssef Saleh, 1141 REALTY LLC, KARIM BIN TALEB, a/k/a Karim Bentelab, BORN TO BUILD CONSTRUCTION CORP., SARITA VASWANI, BANCO POPULAR OF NORTH AMERICA, EDMUND A. NAHAS, ZRAICK, NAHAS & RICH, AND JOHN DOES 1 through 10 (such parties being persons or entities who have possession of plaintiff's tools and equipment, or who own or control the places where such tools and equipment are stored),

Defendants.

TRIAL/IAS, PART 1
NASSAU COUNTY

INDEX No. 002345/11

MOTION DATE: June 21, 2013
Motion Sequence # 014, 016

The following papers read on this motion:

- Notice of Motion..... X
- Cross-Motion..... X
- Affirmation in Opposition..... X
- Reply Affirmation..... XX
- Memorandum of Law..... X
- Reply Memorandum of Law..... X

Motion by plaintiff Born To Build LLC for leave to renew and reargue defendant Kamel Saleh's motion to vacate the levy and sheriff's sale is **denied**. Cross-motion by defendant Kamel Saleh for restitution, including return of the property, is **denied**, with leave to renew as to the 23-62 Steinway Street property upon notice to the Gregory Kalikas Revocable Trust.

This is a special proceeding to determine adverse claims to real property which was sold to satisfy a money judgment. The underlying action is for breach of construction contracts covering projects at 30-63 Steinway Street in Astoria, 38-16 220th Street in Bayside, and 1141 Broadway in Manhattan. Plaintiff Born to Build LLC named as a defendant Ibrahim Saleh, also known as Kamel Saleh, apparently understanding that Ibrahim and Kamel were the same person.

Justice Warshawsky entered a default judgment against defendant Ibrahim Saleh in the amount of \$3,563,307.58 on May 24, 2011. In granting the default judgment, Justice Warshawsky found that defendant Ibrahim Saleh was a party to the contracts covering the Astoria and Bayside projects and was liable on the contract covering the Manhattan project on a "piercing the corporate veil" theory. Justice Warshawsky severed the claims against the remaining defendants, emphasizing that his decision was not on the merits with respect to the other parties. The underlying action, aside from the present proceeding, has been assigned to Justice De Stefano.

On May 31, 2011, plaintiff Born to Build issued three writs of execution to the New York City Marshall in an effort to enforce the default judgment. The writs of execution named as garnishees the limited liability company holding title to the Astoria property, as well as the limited liability companies holding title to two other properties, 354 E 116th Street in Manhattan and 23-62 Steinway Street in Astoria. In the writs of execution, Born to Build alleged that the garnishees were indebted to the judgment debtor Ibrahim Saleh or that the judgment debtor had a membership interest in the garnishees.

By order to show cause dated June 9, 2011, defendant Kamel Saleh, who is Ibrahim's brother, moved pursuant to CPLR § 5239 to vacate the levies on the three properties. Kamel argued that the levies were invalid because Ibrahim Saleh had no interest in the limited liability companies which held legal title to the properties. In opposition, Born to Build argued that Ibrahim, the judgment debtor, was the beneficial owner because he exercised dominion and control over the properties. At the hearing on the motion to vacate, Born to Build's owner, George Hourani, testified that Ibrahim admitted to him that he put the properties in Kamel's name because Ibrahim could not own property personally (Plaintiff's ex K at 175-76). Although Kamel appeared through counsel, he was not present at the hearing. By order dated November 28, 2011, this court denied the motion to vacate and upheld the levies.

On December 22, 2011, the New York City Marshall conducted a sale of Ibrahim Saleh's purported interest in the limited liability companies holding title to the properties. Born to Build purchased Ibrahim's purported interests at the Marshall's sale and proceeded to act as the owner of the properties.

By notice of motion dated October 10, 2012, defendant Kamel Saleh moved for relief from the order denying his motion to vacate the levies. Kamel asserted that because he provided the funds to purchase the properties, they should not have been sold to satisfy the judgment against his brother.

By order dated February 22, 2013, the court granted defendant Kamel Saleh's motion to vacate the levy and Marshall's sale with respect to Kamel's interests in the limited liability companies holding title to the 354 E 116th Street and 23-62 Steinway Street properties. A sheriff's sale is void if the judgment debtor has no right, title, or interest in the property subject to the levy (*Herman v Sigmund*, 102 AD2d 810 [2d Dept 1984]). Nevertheless, under CPLR § 5239, the court has plenary jurisdiction to determine whether a third party's claim of ownership has been interposed as a sham in order to frustrate enforcement of the judgment (*Matter of Equilease Corp.*, 19 AD2d 19 [1st Dept 1963]; McKinney's Practice Commentary C5239:2).

Born to Build did not establish that the properties were fraudulently conveyed by the judgment debtor or that title was held by Kamel Saleh as a sham to frustrate enforcement of the judgment. Moreover, since the writs of execution named the legal title holders as garnishees, Born to Build was clearly not misled as to the owner of the properties. However, the court denied the motion to vacate the levy and sheriff's sale as to 30-63 Steinway Street in Astoria. Because 30-63 Steinway Street was one of the properties covered by the construction contracts, Born to Build had reason to believe that the judgment debtor had a membership interest in the limited liability company which held legal title to that property.

Born to Build moves for leave to renew and reargue defendant Kamel Saleh's motion to vacate the levies to the extent that the court granted the motion as to the 354 E 116th Street and 23-62 Steinway Street properties. Defendant Kamel Saleh cross moves for restitution, including rescission of a deed of the Steinway Street property from Born to Build to the Gregory Kalikas Revocable Trust. The deed is dated June 15, 2012. According to Kamel, the East 116th Street property is in foreclosure.

CPLR § 5239 provides that any interested person may commence a special proceeding to determine rights in the property prior to its application by the sheriff to the satisfaction of a judgment. However, CPLR § 5240 provides that the court may "at any time" regulate or modify any enforcement procedure. Thus, CPLR § 5240 implies that the court may restore property to its rightful owner, even after a sheriff's sale, if the judgment debtor had no interest in the property. In any event, Kamel commenced this proceeding to determine

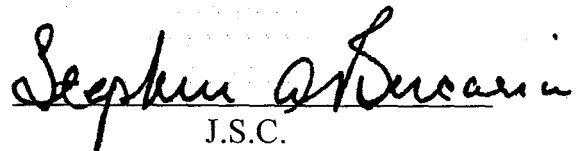
adverse claims prior to the sheriff's sale. Born to Build has not established that the court overlooked or misapprehended any matter of fact or law in deciding the prior motion (CPLR 2221[d]). Accordingly, plaintiff Born To Build's motion for leave to renew and reargue defendant Kamel Saleh's motion to vacate the levy and sheriff's sale is denied.

After a sheriff's sale has been consummated, the interests of persons other than the judgment debtor and creditor are implicated (Guardian Loan Co. v Early, 47 NY2d 515, 520 [1979]). Thus, CPLR § 5240 does not permit the judgment debtor, or his nominee, to undo the execution sale and take the property back from a bona fide purchaser, i.e. one having no relationship to the parties (Id). Nevertheless, CPLR § 2003 provides that the court may, within one year of the sale, set aside the execution sale for failure to comply with the CPLR requirements as to "notice, time, or manner of such sale." Additionally, the court has inherent equitable power over a sale made pursuant to its judgment to relieve oppressive or unfair conduct or to ensure the sale is not made an instrument of injustice (Id at 520-21). Nevertheless, this power should be used sparingly and with great caution (Id).

Defendant Kamel Saleh's motion to vacate the execution sale was made within one year of the sale. The court notes that the execution sale was based upon a default judgment. Moreover, plaintiff's claim that the judgment debtor is the beneficial owner has been discredited, at least with respect to the 1141 Broadway property (See Born to Build v 1141 Realty, 105 AD3d 425 [1st Dept 2013]). Nevertheless, defendant Kamel makes no showing that the grantee, the Gregory Kalikas trust, is related to the judgment creditor. Accordingly, defendant Kamel Saleh's cross-motion for restitution, including return of the property, is denied, with leave to renew as to the 23-62 Steinway Street property, upon notice to the Gregory Kalikas Revocable Trust. In view of the pendency of the foreclosure action, defendant's motion for restitution as to the East 116th Street property is denied.

So ordered.

Dated JUL 11 2013


J.S.C.

ENTERED
JUL 15 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE