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| Hart 230 Inc. v PennyMac Corp. |
| 2016 NY Slip Op 33129(U) |
| September 28, 2016 |
| Supreme Court, Kings County |
| Docket Number: 512092/14 |
| Judge: Mark I. Partnow |
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At an IAS Term, Part FRP2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 28th day of September, 2016.

P R E S E N T:

HON. MARK I. PARTNOW,
Justice.

----- X

HART 230 INC.,

Plaintiff,

- against -

Index No. 512092/14

PENNYMAC CORP., OKBM INC., ALI UDDIN KHAN,
MAHITIMA BAA, JOEL ROLNITZKY, 230 HART
STREET INC. and JOHN DOE 2,

Defendants.

----- X

The following papers numbered 1 to 10 read herein:

Papers Numbered

| | |
|---|-------------------------|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____ | <u>1-3</u> <u>4-6</u> |
| Opposing Affidavits (Affirmations) _____ | <u>6, 8, 9</u> <u>7</u> |
| Reply Affidavits (Affirmations) _____ | <u>7</u> <u>8</u> |
| Sur-reply _____ | <u>10</u> |

Upon the foregoing papers, defendant PennyMac Corp. (PennyMac), moves for an order, pursuant to CPLR 3211 (a) (1) and (a) (7), dismissing the amended answer and cross claim(s) asserted by defendants OKBM Inc. (OKBM), Joel Rolnitzsky (Rolnitzky) and 230 Hart Street Inc. (230 Hart Street) “on the grounds of documentary evidence and Plaintiff’s/Third-Party Plaintiff’s failure to state a claim of action for which relief may be granted . . .”¹

¹ PennyMac’s July 31, 2015 notice of motion entitled “Notice of Supplemental Motion to Dismiss the Complaint and to Dismiss Third-Party Plaintiff Claims” erroneously refers to defendants OKBM, Rolnitzky and 230 Hart Street as “Third-Party Plaintiffs” and their amended answer as the “Complaint.”

Attorney André R. Soleil, Esq. (Attorney Soleil) submits a cross motion, seemingly on behalf of the “Plaintiff,”² for an order: (1) striking PennyMac’s answer “on the grounds that there [are] no triable issues of fact or law in defense of this action;” or, alternatively, (2) striking PennyMac’s answer “as a sanction for PennyMac’s fraud [on] the Court”; (3) granting summary judgment, pursuant to CPLR 213 (4) and RPAPL § 1501 and vacating the mortgage recorded against “Plaintiff’s premises at 230 Hart St. [in] Brooklyn”; (4) imposing sanctions against PennyMac and its former counsel; and (5) “[s]etting this matter down for an evidentiary hearing or proceeding to assess the dollar value of the fees and costs to which the Plaintiff is entitled.”

Background

Hart 230’s Quiet Title Action

Hart 230 commenced this quiet title action on December 21, 2014, pursuant to RPAPL Article 15, against PennyMac, OKBM, Ali Uddin Khan (Khan), Mahitima Baa (Baa), Rolnitzky, “John Doe 1” and “John Doe 2,” seeking to quiet title to Hart 230’s real property

² The September 11, 2015 notice of cross motion erroneously states that Attorney Soleil is “Attorney for Plaintiff” and that the cross motion was submitted on behalf of the plaintiff, Hart 230 Inc. (Hart 230), despite the fact that: (1) Attorney Soleil never represented the plaintiff, Hart 230, (2) Hart 230’s complaint was dismissed by order dated June 18, 2015, and thus (3) Hart 230 is no longer a party to this action (*see infra*).

Attorney Soleil apparently realized that he mistakenly filed the cross motion in the name of the plaintiff, Hart 230, and attempted to correct the error by submitting his February 10, 2016 “REPLY IN SUPPORT OF CROSS MOTION (*Seq. #4*) & IN OPPOSITION OF MOTION (*Seq. #3*)” in further support of the September 11, 2015 cross motion *on behalf of his actual clients, defendants OKBM, Rolnitzky and 230 Hart Street* (Soleil Reply Affirmation).

located at 230 Hart Street in Brooklyn (Property) and “secure the cancellation and discharge of record of the mortgage . . .” covering the Property.

The complaint – *which was not included in the parties’ papers*³ – alleged that Hart 230 is “the current owner[] in fee simple and in possession and occupation of the [Property]” (complaint at ¶ 3). Hart 230 allegedly acquired the Property by a August 6, 2014 deed from OKBM, which previously acquired the Property by a October 15, 2012 deed from Khan (*id.* at ¶¶ 4-5 and Exhibits A and B). The complaint alleged that Baa is the principal of OKBM and that “John Doe 1, is an unknown New York State duly incorporated corporation formed by . . . Rolnitzky for the purpose of taking title to the [Property]” (*id.* at ¶ 13).

The complaint alleged that Hart 230’s Property was encumbered by a \$544,000.00 mortgage, which was originated by Knightbridge Mortgage Bankers LLC on June 15, 2007 (complaint at ¶ 14). After two alleged mortgage assignments on June 15, 2007 and October 12, 2012, the mortgage is allegedly owned by PennyMac (complaint at ¶¶ 15-17).

The first cause of action in the complaint alleged that PennyMac’s predecessor in interest, Citimortgage, Inc., accelerated the mortgage on May 28, 2008, by commencing a foreclosure action against Khan,⁴ and that the “mortgage has become . . . barred by the statute of limitations” (*id.* at ¶¶ 25 and 27). The second cause of action against OKBM and Khan

³ The parties failed to include copies of any of the pleadings or other documents revealing the procedural history of this case, which burdened the court with the task of retrieving these documents from the court files.

⁴ See *Citimortgage, Inc. v Khan, et al.*, index No. 15495/08 (Baynes, J.) (hereinafter, the 2008 Foreclosure Action).

sought a declaration that title to the Property is vested in Hart 230 and that defendants have no “estate, right, title or interest” in the Property (*id.* at ¶ 37). The third cause of action sought “an order from the City Register of New York cancelling any other deed and transfer documents executed by the defendant OKBM . . .” on defendants’ behalf (*id.* at ¶ 41). The fourth cause of action alleged that defendants “entered into a conspiracy to defraud the plaintiff . . .” (*id.* at ¶ 43). The fifth cause of action alleged that defendants’ acts “involve such a high degree of moral turpitude as to support the award of punitive damages . . .” (*id.* at ¶ 49).

OKBM’s And Rolnitsky’s Answer And Amended Answer⁵

On February 4, 2015, OKBM and its alleged owner, Rolnitsky, answered the complaint, denying the material allegations therein and asserting 28 affirmative defenses.

Importantly, OKBM and Rolnitsky asserted a cross claim against PennyMac (erroneously labeled as a “Cross-Complaint”), alleging that PennyMac’s predecessor in interest accelerated the mortgage on the Property by commencing the 2008 Foreclosure Action based on Khan’s alleged October 1, 2006 payment default (answer at ¶ 36). The cross claim further alleged that “the bond and mortgage has become outlawed and barred by the statute of limitations” and that (then) non-party 230 Hart Street “now holds these premises

⁵ Like Hart 230’s complaint, OKBM and Rolnitsky’s answer was not included in the papers supporting either PennyMac’s motion or the cross motion that are presently before the court, which therefore required the court to obtain those pleadings.

in fee simple absolute free and clear from any claim, lien or encumbrance arising from the mortgage or the ownership thereof” (*id.* at ¶¶ 39 and 40).

OKBM and Rolnitsky served an amended answer with a cross claim against PennyMac on March 11, 2015 (March 2015 Amended Answer);⁶ however, like all of the pleadings in this action, the parties *failed to include a copy of the March 2015 Amended Answer in the submissions herein* and the March 2015 Amended Answer was not electronically filed. PennyMac failed to answer, reply or otherwise respond to defendants’ cross claim.

OKBM And Rolnitsky’s 2015 Dismissal Motion

On or about April 23, 2015, defendants OKBM and Rolnitsky moved for an order: (1) granting them a default judgment against their co-defendant PennyMac, pursuant to CPLR 3215, “for failure to answer the Cross-Complaint”;⁷ (2) dismissing Hart 230’s complaint for failure to state a cognizable claim; and (3) amending the caption to substitute 230 Hart Street, Inc. in place of “John Doe 1.”⁸

⁶ See ¶ 5 of Rolnitsky’s April 23, 2015 affidavit in support of defendants OKBM’s and Rolnitsky’s April 23, 2015 dismissal motion, a copy of each of which this court retrieved from the Kings County Clerk’s records (*see also* n 8).

⁷ Defendants’ April 23, 2015 notice of motion erroneously referenced defendants’ cross claim against their co-defendant, PennyMac, as a “Cross-Complaint.”

⁸ See defendants’ April 23, 2015 notice of motion, a copy of which this court retrieved from the Kings County Clerk’s records.

The June 2015 Dismissal Order

By a June 18, 2015 order, which was entered with the Kings County Clerk on June 22, 2015 (June 2015 Dismissal Order), the court (Baynes, J.) granted defendants' 2015 dismissal motion and ordered that: (1) Hart 230's complaint is dismissed "on default of Plaintiff after argument"; (2) the caption in this action is amended to substitute "John Doe 1" with "230 Hart Street Inc." as a party defendant; (3) defendants' motion for a default judgment against PennyMac is withdrawn without prejudice; and (4) defendants' "cross-claims shall survive dismissal."

Thus, the June 2015 Dismissal Order changed the nature and scope of this entire action because defendants' cross claim against PennyMac asserted in defendants' March 2015 Amended Answer is the only remaining claim in this action.

The Instant Motions

1. PennyMac's Dismissal Motion

Soon thereafter, PennyMac moved herein for an order, pursuant to CPLR 3211 (a) (1) and (a) (7), in a document entitled "Notice of Supplemental Motion to Dismiss The Complaint and to Dismiss Third-Party Plaintiffs' Claims."⁹

Without annexing copies of any of the pleadings in this quiet title action, including defendants' March 2015 Amended Answer with cross claims and the court's June 2015 Dismissal Order – which defines the scope and nature of this action – and without providing

⁹ See PennyMac's July 31, 2015 "Notice of Supplemental Motion to Dismiss the Complaint and to Dismiss Third-Party Plaintiff Claims."

the court with a recitation of the procedural history in this action, PennyMac, instead, focuses entirely on the 2008 Foreclosure Action, the acceleration of the mortgage and its contention that acceleration was rescinded. To add to the confusion, PennyMac seeks to dismiss Hart 230's complaint, which was already dismissed by the June 2015 Dismissal Order, and erroneously refers to the cross-claiming defendants as "Third-Party Plaintiffs."

Essentially, PennyMac asserts that its "mortgage supersedes Plaintiff's and Third-Party Plaintiff's purported interest in the subject property and the documentary evidence demonstrates that PennyMac's ability to foreclose and/or collect on the co-Defendant's obligation is not barred by the applicable statute of limitations."¹⁰

2. *The Cross Motion Filed By Attorney Soleil*

Attorney Soleil purportedly cross-moved on behalf of the plaintiff, Hart 230, on September 11, 2015, as mentioned earlier, for an order: (1) striking PennyMac's answer "on the grounds that there [are] no triable issues of fact or law in defense of this action"; or, alternatively, (2) striking PennyMac's answer, pursuant to *Creances v Cohen*, 23 NY3d 307 (2014), "as a sanction for PennyMac's fraud o[n] the Court"; (3) awarding plaintiff summary judgment and vacating the mortgage on the Property, pursuant to CPLR 213 (4) and RPAPL § 1501; (4) imposing sanctions and penalties upon PennyMac and its former attorneys for their fraud on the Court; and (5) "[s]etting this matter down for an evidentiary hearing or proceeding to assess the dollar value of the fees and costs . . ."

¹⁰ See PennyMac's July 31, 2015 Memorandum of Law in Support of Supplemental Motion to Dismiss the Complaint and to Dismiss Defendants' Third-Party Claims at page 1.

Attorney Soleil's initial submission had erroneously identified his client as the "Plaintiff," despite the facts that Hart 230's complaint was dismissed by the June 2015 Dismissal Order and Hart 230 was no longer a party to this action (*see* n 2). Apparently, Attorney Soleil realized his mistake mid-motion and, instead of withdrawing the cross motion, he submitted a reply affirmation in further support of the cross motion in which he pretends that the cross motion was originally filed on behalf of defendants OKBM, Rolnitzky and 230 Hart Street (*see* Soleil Reply Affirmation at ¶ 3 and n 2, herein). To make matters worse, the cross motion fails to include any of the pleadings or a copy of the court's June 2015 Dismissal Order and does not contain any recitation of the action's procedural history.

Discussion

(1)

The moving parties utterly failed to provide this court with copies of the pleadings in this action or a copy of the 2015 Dismissal Order, which changed the scope and nature of the entire action. While copies of the pleadings are not statutorily required (*cf.* CPLR 3212 ["A motion for summary judgment shall be supported . . . by a copy of the pleadings"]), it is beyond cavil that a motion pursuant to CPLR 3211 (a) (7) arguing that "the pleading fails to state a cause of action" must contain the pleading upon which the motion is based. This court was able to procure copies of the missing complaint and the 2015 Dismissal Order from the Kings County Clerk in an effort to make some sense of the parties' motion papers.

However, the parties *failed to include a copy of the March 2015 Amended Answer in the submissions* and the March 2015 Amended Answer was not electronically filed.

Consequently, this court has no means to obtain a copy of defendants' March 2015 Amended Answer containing the cross claim(s) at issue here and cannot determine whether the cross claim(s) asserted therein against PennyMac was amended to include allegations other than those previously asserted. Consequently, based on the parties' incomplete submissions, the court is unable to determine PennyMac's dismissal motion at this time.

(2)

The cross motion submitted by Attorney Soleil, on the other hand, is denied because the September 11, 2015 Notice of Cross Motion was seemingly submitted on behalf of the former plaintiff, Hart 230, a non-party ever since the complaint was dismissed by the June 2015 Dismissal Order. Accordingly, any cross motion submitted on behalf of Hart 230 is denied as a nullity.


Attorney Soleil's attempt to cure his obvious mistake by submitting the Soleil Reply Affirmation, which simply changed the name of the cross movant from Hart 230 to defendants OKBM, Rolnitzky and 230 Hart Street is rejected (*see* Soleil Reply Affirmation at ¶ 3). Essentially, Attorney Soleil improperly seeks to proceed with defendants' cross motion without having served a proper notice of cross motion, since the initial cross-moving papers were not filed on behalf of defendants. A cross motion without a notice of cross motion must be denied, as a matter of law (*Kokkinos v Dormitory Auth. of the State of N.Y.*, 238 AD2d 550, 551 [1997] [holding that cross motion was properly denied because "(t)he purported cross motion was improperly served without a notice of cross motion"]). Accordingly, it is

ORDERED that defendant PennyMac's motion is denied without prejudice to renewal; and it is further

ORDERED that defendants OKBM, Rolnitzsky and 230 Hart Street's cross motion is denied.

This constitutes the decision and order of the court.

E N T E R,


J. S. C.

**HON. MARK I PARTNOW
SUPREME COURT JUSTICE**

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