Encarnacion v RMS Asset Mgt. LLC
2018 NY Slip Op 31807(U)
July 27, 2018
Supreme Court, New York County
Docket Number: 155990/2017
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ROBERT DAVID KALISH** *Justice* **PART** **IAS MOTION 29EFM**

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NIURKA ENCARNACION,

Plaintiff,

- v -

RMS ASSET MANAGEMENT LLC, JEFFREY GREENE,

Defendants.

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INDEX NO. 155990/2017

MOTION DATE 06/06/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1–17, were read on this motion to/for DISMISSAL.

Motion by Defendants RMS Asset Management LLC as Attorney-in-Fact for US Bank National Association as Trustee of GMAT Legal Title 2014-1 s/h/a RMS Asset Management, LLC, Jeffrey S. Greene, Attorney in Fact of U.S. Bank Association as Trustee of GMAT Legal Title 2014-1 ("RMS") and Jeffrey S. Greene ("Greene") pursuant to CPLR 3211 (a) (1), (4), (5) and (7), CPLR 6514, and 22 NYCRR 130-1.1 to dismiss the complaint of Plaintiff pro se Niurka Encarnacion ("Encarnacion", "Plaintiff", or "Plaintiff pro se") in its entirety, cancel the notice of pendency, award sanctions and/or costs to Defendants, and enjoin Plaintiff from further pro se litigation is granted to the following extent.

BACKGROUND

Plaintiff pro se commenced the instant action on July 3, 2017, by e-filing a summons and verified complaint, dated June 30, 2017. (NYSCEF Doc No. 1 [Complaint].) The Complaint states that

> "[t]he Plaintif[f] herein, Niurka Encarnacion© is a Private Citizen of the State of New York, Ms. Encarnacion©. As a living, breathing, flesh and blood woman, whose address is 501 WEST 150TH STREET NEW YORK CITY NEW YORK STATE 10031. Please take note that I am a PRIVATE Citizen of New York and, to my knowledge I am not, nor have I ever been a, serf, slave, vassal, debtor, bankrupt, absconding debtor, resident, legal fiction, *ens legis* or any other designation the Government agencies may have presumptively foisted upon my person without my express written knowledge and consent. I have not waived any of my constitutionally protected SUPREME LAW OF CAUSE AND EFFECT rights secured under natural law of the land."

(Complaint ¶ 1.) The Complaint then lists "Jeffrey S. Greene" as "[t]he defendant herein." (Complaint ¶ 2.)

The Complaint states that "Plaintiff needs to be certain that Defendants are the RIGHTFUL HOLDER in Due Course of the Promissory Note and ORIGINAL DEED" but does not indicate to what property it is referring. (*Id.* ¶ 3.) In sum and substance, the Complaint recounts certain events, from October 26, 2016, to December 13, 2016, whereby Plaintiff was attempting to "visually inspect or be provided with an AFFIDAVIT stating Defendant(s) are the holder of THE ORIGINAL WET INK SIGNATURE OF THE PROMISSORY NOTE and the DEED." (*Id.*)

Among the documents the Complaint alleges were "sent" are "[a]n ORDER TO DISMISS CASE INDEX NO.: 079094/16." (*Id.*) The Complaint states "*[p]resentment* was delivered to Defendant(s) . . . [and] received and accepted by *you*." (*Id.* [emphases added].) The Complaint does not state to whom "you" refers. The Complaint then makes two additional references to "[p]resentment" but does not state what, if anything, was being "presented," although the Complaint states that certain deliveries were made to "Defendant(s)". (*Id.* ¶¶ 4, 5.) The Complaint then states that Plaintiff "sent a NOTICE OF NON-RESPONSE with NOTARY CERTIFICATE OF SERVICE", does not state to whom it was sent, and then states that "[p]resentment was delivered to Defendant(s)". (*Id.* ¶ 6.) The Complaint then states that Plaintiff sent a "NOTICE OF FAULT IN DISHONOR". (*Id.* ¶ 7.) The Complaint next states that "RUSHMORE LOAN MANAGEMENT SERVICES replied to the ORDER TO DISMISS CASE INDEX NO.: 079094/16." (*Id.* ¶ 8.) The Complaint then states that "*Plaintiff* is in Default." (*Id.* ¶ 9 [emphasis added].) The Complaint then makes certain general statements regarding law, states that "defendant has breached the contract," and demands "150,000" from "defendant". (*Id.* ¶ 10–18.)

On July 12, 2017, Plaintiff filed a Notice of Lis Pendens of Action on 501 West 150th Street, New York, New York 10031, dated April 10, 2017. (NYSCEF Doc No. 2 [Notice of Pendency].) The Notice of Pendency states that "in the matter of succession of Title, I'm seeking to Quiet the Title to the property known as 501 West 150th Street New York City New York State 10031." (Notice of Pendency at 1.)

On January 5, 2018, Defendants filed the instant motion pursuant to CPLR 3211 (a) (1), (4), (5) and (7), CPLR 6514, and 22 NYCRR 130-1.1 to dismiss Plaintiff's complaint in its entirety, cancel the notice of pendency, award sanctions and/or costs to Defendants, and enjoin Plaintiff from further pro se litigation.

Defendants argue that "Niurka Encarnacion was a mere squatter at the subject foreclosed premises and lived 'rent free' for more than five (5) years, not paying any rent to anyone – and never paying rent to RMS." (Affirmation of Greene ¶ 24.) Defendants state that, based upon a stipulation, between Encarnacion and RMS, dated March 24, 2017, and so-ordered by a New York County Civil Court judge, Encarnacion agreed to return possession of 501 West 150th Street, Unit 1, New York, New York 10031 (the "Premises") to RMS as of June 30, 2017. (Greene affirmation, exhibit E.) Defendants argue that, as such, Plaintiff has no claims in her Complaint as against Defendants relating to any unlawful eviction.

Defendants further argue, in sum and substance, that prior litigation has a res judicata effect on the instant case. Defendants cite to index no. LT-079094-16/NY, where the New York County Civil Court granted RMS's petition for possession of 501 West 150th Street, first floor Unit 1 and basement, New York, New York 10031, enforced the related judgment, and so-ordered the March 24, 2017 stipulation. (Greene affirmation, exhibits B, C, D, E.) Defendants further cite to index no. CV-005475-17/NY, where the New York County Civil Court dismissed Encarnacion's prior complaint against Defendants for $150,000.00 sounding in, among other things, breach of contract. (Greene affirmation, exhibits F, G.)

Defendants further argue that another action is pending in Federal Court for the same causes of action in the instant matter. Defendants cite to index no. 1:17-cv-05299-WHP, where Encarnacion filed an amended complaint in the United States District Court for the Southern District of New York stating, among other things, similar claims to those alleged in the Complaint. (Greene affirmation, exhibit H, ¶¶ 3–6, 18 and at 15 ["defendants breached the contract"], 16 ["defendant still has not proven to be the lawful owners of the property located at 501 West 150th Street New York, New York 10031"].) At base, Defendants categorize Plaintiff's allegations as that she was unlawfully evicted in New York County Civil Court.

Defendants further argue that RMS, as a successful bidder at a foreclosure sale of the building located at 501 West 150th Street, New York, New York 10031, commenced a lawful holdover proceeding against Encarnacion to remove any holdover tenants in the building. As Defendants argue that RMS never had any contractual relationship with Plaintiff, even the most liberal reading of the Complaint—that Plaintiff alleges breach of a contract against Defendants, must fail. Defendants further argue that RMS never had a landlord-tenant relationship with Plaintiff. Defendants further argue that, while the Notice of Pendency states the action is to quiet title, the Complaint makes no such reference and fails to invoke the RPAPL. Defendants further argue that Greene has had no interaction with Plaintiff except as attorney for RMS. Defendants then argue, in sum and substance that the remainder of the Complaint fails to state a cause of action and that Plaintiff has no cause of action.

Although Defendants do not move to dismiss pursuant to CPLR 3211 (a) (8) on their notice of motion, Defendants argue in counsel's affirmation in support of the instant motion that Defendants have never been served with process or with the Notice of Pendency. Defendants further argue that the Notice of Pendency represents an encumbrance upon the property in bad faith that has unlawfully restricted the alienability of the subject building, which RMS has been in the process of marketing for sale to a third party. It was only upon a title search in anticipation of the sale that Defendants learned of the instant action.

Plaintiff has not filed any papers in opposition to the instant motion, and counsel for Defendants has stated to the Court that he did not receive any such papers. A box of papers, apparently sent to the Court by Plaintiff, contains no affidavit of service of the papers on Defendants, does not contain argumentation regarding the instant motion, is not properly before the Court, and will not be considered in opposition to the instant motion.

DISCUSSION

As the Civil Court noted, "[i]t appears, based on Plaintiff's submissions, that Plaintiff subscribes to the tenets of the 'sovereign citizen' movement, a category of vexatious litigation aimed at disrupting court operations usually manifesting—as it does here—as allegations and rhetoric questioning the legitimacy of courts, court procedure and personnel." (Greene affirmation, exhibit G, at 1.) The Court agrees. (*See, e.g., Sud v Sud*, 227 AD2d 319 [1st Dept 1996].) Plaintiff was removed from the Premises by a lawful order of the Civil Court, and the instant action is the fourth involving the parties as relates to the Premises.

The Court finds that the allegations in the Complaint fail to state a cause of action. The Complaint is totally incomprehensible and states no cognizable cause of action that this Court can discern. Certain of the terms used in the Complaint have no lawful meaning in our jurisprudence. To the extent Plaintiff may believe that certain documents she allegedly sent to Defendants as referenced in the Complaint, such as the "Order to Dismiss" and "Notice of Fault in Dishonor," were sufficient to form a contract, this Court recognizes the sending of such documents as part of what has been identified by law enforcement as a well-known sovereign citizen tactic to hinder property rights and harass individuals, among other things. As such, the Court finds that the statement in the Complaint indicating that Defendants were in breach of a contract is conclusory, nonspecific, and devoid of merit. Moreover, this "claim" and many others are before the Southern District, where Defendants have moved to dismiss the federal complaint.

It would appear, in sum and substance, upon this Court's review of both the NYSCEF documents and the documents in the federal action, available on PACER, that Plaintiff is taking issue with whether RMS had authority to bring the holdover proceeding in the first instance and whether the Premises were rent-stabilized. Those issues were in effect eventually resolved by the stipulation of settlement of the holdover proceeding entered into by the parties in this action before Judge Schneider in Civil Court on March 24, 2017. Under New York's transactional approach to the rule, "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." (*Matter of Josey v. Goord*, 9 N.Y.3d 386, 390 [2007], citing *O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981].) The issues raised in the holdover proceeding which was settled appear to be the same issues now raised in the instant matter as to the status of RMS and whether the apartment was rent-stabilized.

Critically, the Court finds further that Plaintiff has never filed an affidavit of service indicating that Defendants were served either with process or with the Notice of Pendency. CPLR 6512 states, in relevant part, that "[a] notice of pendency is effective only if, within thirty days after filing, a summons is served upon the defendant or first publication of the summons against the defendant is made pursuant to an order and publication is subsequently completed." Pursuant to CPLR 6514 (a), if such service is not made, the Court "shall direct any county clerk to cancel a notice of pendency." Pursuant to CPLR 6514 (b), the Court "may direct any county clerk to cancel a notice of pendency[] if the plaintiff has not commenced or prosecuted the action in good faith."

Here, Defendants have asserted that they were never served with the summons, and Plaintiff has failed to file an affidavit evidencing such service. As such, the Court directs the New York County Clerk to cancel the Notice of Pendency subject to the mandatory cancellation clause of CPLR 6514. Further, even if the summons had been served on Defendants pursuant to CPLR 6512, as the Court finds that Plaintiff has not commenced or prosecuted the instant action in good faith, the Court would have directed cancellation of the Notice of Pendency pursuant to the discretionary cancellation clause of CPLR 6514. The Court notes that "a second notice of pendency cannot be filed when a prior notice of pendency for the same property has been canceled for failure to comply with the statutory requirements." (*Weiner v MKVII-Westchester, LLC*, 292 AD2d 597, 599 [2d Dept 2002], citing *Israelson v Bradley*, 308 NY 511, 515–516 [1955] [holding that the "extraordinary privilege" afforded a litigant upon the mere filing of a notice of pendency requires strict compliance with the statutory provisions authorizing the filing and that, "[i]f the terms imposed are not met, the privilege is at an end."].)

Further, as "the judgment demanded in the complaint clearly would not affect the title to, or the possession, use, or enjoyment of, any real property . . . plaintiff's conduct in improperly filing the notice[] of pendency in the first instance . . . was completely without merit in law . . . and therefore[] was 'frivolous' within the meaning of 22 NYCRR 130–1.1." (*Delidimitropoulos v Karantinidis*, 142 AD3d 1038, 1040 [2d Dept 2016].) As such, pursuant to both 22 NYCRR 130–1.1 and CPLR 6514 (c), the Court is directing Plaintiff to "pay any costs and expenses occasioned by the filing and cancellation [of the Notice of Pendency], in addition to any costs of the action." (CPLR 6514 [c].) Such costs under CPLR 6514 (c) include Defendants' reasonable attorney's fees. (*See Dermot Co., Inc. v 200 Haven Co.*, 73 AD3d 653, 654 [1st Dept 2010].)

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CONCLUSION

Accordingly, it is

ORDERED that the motion by Defendants RMS Asset Management LLC as Attorney-in-Fact for US Bank National Association as Trustee of GMAT Legal Title 2014-1 s/h/a RMS Asset Management, LLC, Jeffrey S. Greene, Attorney in Fact of U.S. Bank Association as Trustee of GMAT Legal Title 2014-1 and Jeffrey S. Greene pursuant to CPLR 3211 (a) (1), (4), (5) and (7), CPLR 6514, and 22 NYCRR 130-1.1 to dismiss the complaint of Plaintiff pro se Niurka Encarnacion in its entirety, cancel the notice of pendency, award sanctions and/or costs to Defendants, and enjoin Plaintiff from further pro se litigation is granted to the extent that it is

ORDERED that the complaint is dismissed with prejudice; and it is further

ORDERED that the Clerk is directed, no sooner than five days after entry of this order, to cancel and vacate the Notice of Lis Pendens of Action (NYSCEF Doc No. 2 [Notice of Pendency]), on premises known as 501 West 150th Street, New York, New York 10031, dated April 10, 2017, and filed in the instant action on July 12, 2017; and it is further

ORDERED that the following issues are referred to a Special Referee, pursuant to Articles 43 and 44 of the CPLR, to hear and determine: (1) the costs and expenses, if any, to Defendants occasioned by the filing and cancellation of the Notice of Pendency; (2) the reasonable attorney's fees and actual costs and expenses of Defendants in this action; and (3) the amount of the judgment, if any, in favor of Defendants and against Plaintiff pro se for the fees, costs, and expenses determined in (1) and (2); and it is further

ORDERED that Plaintiff pro se is enjoined from purchasing any new index numbers, commencing any new actions, or filing any motions or cross-motions relating to pro se litigation involving Defendants or the premises known as 501 West 150th Street, New York, New York 10031 without prior approval of the Administrative Judge of the court in which she seeks to institute a further action or proceeding, and is enjoined from filing a second notice of pendency relating to the premises known as 501 West 150th Street, New York, New York 10031; and it is further

ORDERED that movant is directed to serve, within 10 days of the date of the decision and order on this motion, a copy of this order with notice of entry upon Plaintiff pro se and upon the Clerk, who is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of the Court.

July 27, 2018
DATE

HON. ROBERT D. KALISH, J.S.C.

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

APPLICATION: [X] GRANTED [ ] DENIED [ ] GRANTED IN PART [ ] OTHER

[ ] SETTLE ORDER [ ] SUBMIT ORDER

CHECK IF APPROPRIATE: [ ] INCLUDES TRANSFER/REASSIGN [ ] FIDUCIARY APPOINTMENT [X] REFERENCE

155990/2017 ENCARNACION, NIURKA vs. RMS ASSET MANAGEMENT LLC
Motion No. 001