

**Beneficial Homeowner Serv. Corp. v Gannon**

2018 NY Slip Op 33848(U)

January 29, 2018

Supreme Court, Queens County

Docket Number: 700460/2017

Judge: Pam Jackman Brown

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - COUNTY OF QUEENS

IAS, PART 19

Short Form Order

Present: Hon. Pam Jackman Brown, JSC

BENEFICIAL HOMEOWNER SERVICE CORPORATION,

Plaintiff,

-against-

JOHN J. GANNON; DOREEN M. GANNON; BANK OF AMERICA, N.A.; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; NEW YORK CITY DEPARTMENT OF FINANCE PARKING VIOLATIONS BUREAU,

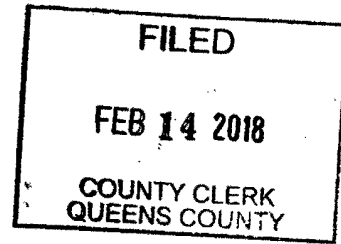
Defendants.

Index No. 700460/2017

Motion Date: 09/06/17

Cal. No. 17

Mot. Seq. No.: 003



Recitation, as required by CPLR § 2219(a), of the following papers e-file numbered 43 to 56 read on this notice of motion by Plaintiff for a judgment: (1) declaring Plaintiff's mortgage, dated July 9, 2003, and recorded by the Office of the New York City Register on September 23, 2003, and any consolidation, modification, and extension thereof, is a valid and subsisting mortgage upon the property commonly known as 85-17 80th Street, Jamaica, New York 11421 A/K/A 85-17 80th Street, Woodhaven, NY 11421; (2) declaring the satisfaction of mortgage, dated February 14, 2008, and recorded in CRFN 2008000088530 on March 4, 2008 is vacated and cancelled of record, and directing the Office of the New York City Register cancel and discharge of record the satisfaction of mortgage dated February 14, 2008 and recorded in CRFN 2008000088530 on March 4, 2008; (3) barring Defendants from all claims or interest in the property to the extent that any such claim may be asserted to be superior to Plaintiff's mortgage; and (4) for such other and further relief as to the Court seems just and proper, and together with the costs of this motion.

Table with 2 columns: Papers Numbered (Papers, Exhibits) and a row for 'Notice of Motion for Judgment & Other Forms of Relief - Exhibits, Affidavit(s) and Affirmation(s) Annexed' with values 43-56 and A-I.

Upon the papers listed above, this motion is hereby decided in accordance with this Decision/Order.

On July 9, 2003, Defendants John J. Gannon and Doreen M. Gannon (hereinafter collectively "Gannon Defendants") executed a mortgage, in the amount of \$220,000.00, against certain real property located at 85-17 80<sup>th</sup> Street, Jamaica, New York 11421 A/K/A 85-17 80<sup>th</sup> Street, Woodhaven, NY 11421, Block: 8851, Lot: 279 (hereinafter "Subject Property") in favor of Champion Mortgage, a division of KeyBank, USA, National Association (hereinafter "Champion") which was recorded in the Office of the New York City Register on September 23, 2003 (hereinafter "Mortgage 1"). On September 8, 2006, the Gannon Defendants executed a second mortgage, in the amount of \$35,614.99 against the Subject Property in favor of Champion which was recorded on October 4, 2006. Additionally, the Gannon Defendants executed a Consolidation, Extension and Loan Modification Agreement, dated September 8, 2006, in the amount of \$250,000.00 which was recorded on October 4, 2006 (hereinafter "CEMA"). Thereafter, by assignment, dated March 8, 2007, Champion transferred Mortgage 1, Mortgage 2, and the CEMA to Plaintiff which was recorded on August 7, 2007. On January 31, 2008, by assignment, Plaintiff transferred the mortgages to KeyBank National Association (hereinafter "KeyBank") which was recorded on March 4, 2008. On or about February 14, 2008, KeyBank executed a Satisfaction of Mortgage discharging the consolidated mortgage lien and which was recorded on March 4, 2008. On January 10, 2017, Plaintiff commenced this action for a judgment setting aside the mortgage satisfaction it purportedly issued by mistake by filing a summons, complaint, and notice of pendency with the Queens County Clerk. Plaintiff effectuated service of the summons, complaint, and notice of pendency upon the Gannon Defendants, in the manner as prescribed by CPLR § 308(2) by delivery to a person of suitable age and discretion. According to the Affidavits of Service, said delivery was effectuated on January 30, 2017 and mailed on January 31, 2017. Plaintiff effectuated service of the pleadings upon Defendant Bank of America (hereinafter "BOA"), New York State Department of Taxation and Finance (hereinafter "NYCDTF") New York City Department of Finance Parking Violations Bureau (hereinafter "NYCDPVB") in the manner as prescribed by CPLR § 311(a)(1) by delivery to an officer who is authorized to receive service, on behalf of the foregoing corporate and municipal Defendants. According to the Affidavits of Service, said service on Defendant NYCDTF was effectuated on January 26, 2017 and said service on Defendants BOA and NYCDPVB was effectuated on January 27, 2017.

Now, upon notice of motion, Plaintiff seeks: (1) a default judgment against Defendants named in the caption, all of whom have failed to appear by answer in response to Plaintiff's service of its summons and complaint; (2) a judgment declaring the mortgages against the subject property to be a valid and subsisting lien; (3) a judgment

vacating the satisfaction of mortgage; (4) a judgment directing the Office of New York City Registrar to cancel and discharge of record the satisfaction of mortgage; and (5) a judgment barring Defendants from all superior claims or interest in the property. Defendants do not oppose this motion. Plaintiff's application is denied.

It is a well established principle of equity that a lien affecting real property, satisfied through error, mistake or fraudulent acts may be restored to its original status and priority provided that no injury or prejudice is inflicted upon anyone who innocently relied upon the discharge and either purchased the property or made a loan thereon in reliance upon the validity of said satisfaction (*see Beltway Capital, LLC v Soleil*, 104 AD3d 628, 631 [2d Dept 2013]; *DLJ Mtge. Capital, Inc. v Windsor*, 78 AD3d 645, 647 [2d Dept 2010]). Accordingly, the identification and joinder of all those having interests in the premises recorded subsequent to the recording of the satisfaction piece that is the subject of the claim for cancellation is required (*see* RPAPL § 1515).

It is equally well established that to be entitled to a default judgment, the movant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to answer (*see* CPLR § 3215(f)); *U.S. Bank Natl. Ass'n v Alba*, 130 AD3d 715, 716 [2d Dept 2015]). To satisfy the "facts constituting the claim" element, Plaintiff must establish the existence of facts which constitute cognizable claims for the relief demanded in an affidavit or verified pleading by a person with knowledge (*see* CPLR § 3215(f)); *Resnick v Lebovitz*, 28 AD3d 533, 534 [2d Dept 2006]).

Here, the moving papers failed to establish the movant's entitlement to a default judgment on the complaint served and filed herein. A review of the moving papers reveals that Plaintiff failed to demonstrate possession of a viable claim for cancellation of the mortgage satisfaction issued by KeyBank. Facts constituting the elements of such a claim, including the nature and circumstances of the mistaken and erroneous issuance of the subject satisfaction piece are not discernable from the moving papers. Nor are there any allegations regarding the existence or non-existence of persons or entities who lent monies or otherwise relied upon the recorded satisfaction piece. In the absence of such allegations and some confirmation thereof, this Court is unable to ascertain whether jurisdiction over all persons whose rights and interests may be adversely affected has been acquired. A judgment rendered without personal jurisdiction over all necessary parties affords incomplete relief and may be subject to direct and/or collateral attacks by those not joined whose rights and interests were adversely affected thereby (*see Riverside Capital Advisors, Inc. v First Secured Capital Corp.*, 28 AD3d 457, 460 [2d Dept 2006]). Since Plaintiff has failed to demonstrate that the relief demanded in its complaint will not adversely affect the statutory rights and interests afforded to bona fide purchasers or

[\* 4]

encumbrancers that accrued subsequent to KeyBank's purportedly mistaken issuance of the subject mortgage satisfaction piece and prior to the filing of the notice of pendency Plaintiff's motion is denied.

The foregoing constitutes the decision and order of this Court.

Dated: January <sup>yn</sup> 29, 2018  
Jamaica, NY

  
\_\_\_\_\_  
HON. PAM JACKMAN BROWN, JSC

FILE  
FEB 14 2018  
COUNTY CLERK  
QUEENS COUNTY