

**Emerita Urban Renewal, LLC v New Jersey Court
Servs. LLC**

2019 NY Slip Op 30374(U)

February 11, 2019

Supreme Court, Kings County

Docket Number: 515517/2016

Judge: Loren Baily-Schiffman

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At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 11th day of February, 2019.

PRESENT: HON. LOREN BAILY-SCHIFFMAN
JUSTICE

EMERITA URBAN RENEWAL, LLC,
Petitioner,

- against -

NEW JERSEY COURT SERVICES, LLC and
JAY ITKOWITZ

Respondents.

Index No.: 515517/2016

Motion Seq. # 3, 4, 5 & 6

DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	<u>PAPERS NUMBERED</u>
Order to Show Cause, Affidavits, Affirmation and Exhibits	1
Notice of Cross-Motion, Affidavit, Affirmation and Exhibits	2
Michelle Maratto Itkowitz's Notice of Motion, Affidavit, Affirmation and Exhibits	3
Memorandum in Support	4
Memorandum of Law in Opposition	5
Order to Show Cause, Affidavits, Affirmation and Exhibits	6
Memorandum of Law in Opposition	7
Reply Memorandum in Support	8
Petitioner's Memorandum of Law in Opposition	9

Upon the foregoing papers Respondent, Jay Itkowitz ("Respondent"), move this Court for an Order granting a (i) an automatic stay pending the hearing and determination of the Appeal, enjoining Emerita Urban Renewal, LLC ("Petitioner") and the New York City Sheriff from proceeding with the auction of Respondent's entirety interest in real property located at 524 State Street, Brooklyn, NY 11217 ("the property")¹, pursuant to CPLR § 5519(a)(6); (ii) in the alternative, granting a stay pending the hearing and determination of the Appeal, pursuant to CPLR § 5519(c); and (iii) granting such other and further relief that this Court deems just and

¹ This property is a one-family home, owned by Respondent and his spouse, Michelle Maratto Itkowitz, by the entirety and occupied by them and their three children.

proper. Petitioner cross-moves this Court for an Order (i) directing Respondent to reimburse Petitioner for the costs associated with the Sale of the property; (ii) directing Respondent to perfect the subject appeal; (iii) vacating the stay pursuant to CPLR § 5519(c); or in the alternative (iv) setting an undertaking in an amount equal to Petitioner's \$1,911,877.12 judgment against Respondent. Nonparty, Michelle Maratto Itkowitz (Respondent's spouse) moves this Court for an Order, (i) pursuant to CPLR § 1012 and/or 1013 naming Michelle Itkowitz as an intervening Respondent, (ii) pursuant to CPLR § 1001(a) dismissing the proceeding, (iii) or alternatively, pursuant to CPLR § 5240 restraining Petitioner from selling and/or executing upon the property, and (iv) granting such other and further relief as the Court deems just and proper. Finally, Respondent moves this Court, (i) pursuant to CPLR § 2221(a) for leave to reargue this Court's Decision and Order dated June 30, 2017; (ii) vacating the Order granting Petitioner's motion to sell Respondent's entirety interest in the property; (iii) pursuant to CPLR § 1001(a) dismissing the Petition for Petitioner's failure to name Michelle Itkowitz; (iv) pursuant to CPLR § 5240 restraining Petitioner from selling and/or executing upon the property; and (v) granting such other and further relief as this Court deems just and proper.

Background

This case arises from Petitioner's repeated attempts to collect a judgment of \$1,911,877.12 from Respondent. On May 27, 2014, Petitioner obtained a judgment in the aforementioned amount from the Superior Court of New Jersey, Essex County. After diligent efforts to collect the foreign judgment, Petitioner brought a previous action in this Court, to enforce the foreign judgment. In a Decision and Order, dated June 30, 2017, this Court ordered the sale of Respondent's interest in the property to fulfill the foreign judgment and ordered that

the first \$150,000 of the sale proceeds be paid to Respondent. To date, Respondent has not made any payments on the foreign judgment.

Discussion

1. Automatic Stay Pursuant to CPLR § 5519(a)(6)

Under CPLR § 5519(a)(6), service upon the adverse party of a notice of appeal stays all proceedings to enforce a judgment when “the appellant or moving party is in possession or control of real property which the judgment or order directs be conveyed or delivered, and an undertaking in a sum fixed by the court of original instance is given that the appellant or moving party.” The requirement of an undertaking under that statute must be complied with “prior to or contemporaneously with the service of the Notice of Appeal.” *Tencza v Hyland* 149 Misc 2d 403, 406 (Sup. Ct., Oneida County 1990); *Vintage Flooring & Tile, Inc. v DCM of NY LLC*, 44 Misc. 3d 1229(A), N. 5 (Sup. Ct., Kings County 2014). In the instant case, Respondent failed to post an undertaking prior to or contemporaneously with the Notice of Appeal. Respondent’s motion for an automatic stay is, therefore, denied.

2. Stay Pursuant to CPLR § 5519(c)

Under CPLR § 5519(c), “the court of original instance may stay all proceedings to enforce the judgment or order appealed from pending an appeal or determination on a motion for permission to appeal in a case not provided for in subdivision (a).” Granting a stay pending appeal, under CPLR § 5519(c), is a matter of the trial court’s discretion. *Grisi v Shainswit*, 119 AD2d 418, 421 (1st Dept. 1986). In the present case, despite diligent efforts on behalf of Petitioner to enforce the judgment, over four years after litigation began no part of the judgment has yet been paid. During that time, Respondent has failed to answer subpoenas regarding his

assets. Additionally, Respondent has failed to utilize the automatic stay provision, discussed above, by failing to post an undertaking. Respondent's motion for a discretionary stay is, therefore, denied.

3. Reimbursement of Sale Costs

Petitioner moves for an Order directing Respondent to reimburse Petitioner for the costs associated the sale of Respondent's entirety interest in the real property, specifically past and future attorneys' fees and past and future publication costs. As the sale of the property has not yet occurred, an award of the above fees is premature. Petitioner's cross-motion for fees related to the sale of the property is, therefore, denied.

4. Perfecting Subject Appeal

This Court lacks jurisdiction over appeals. Accordingly, this Court does not have the power to direct Respondent to perfect the subject appeal as requested in Petitioner's cross-motion. Petitioner's cross-motion to perfect the subject appeal is, therefore, denied.

5. Vacating Stay Pursuant to CPLR § 5519(c)

As noted above, no stay has been granted pursuant to either **CPLR § 5519(a)(6)**, or **CPLR § 5519(c)**. This Court granted a stay of the sale in an Order dated December 14, 2017. The stay in question continued to January 25, 2018 and expired at that time. Accordingly, there is currently no stay in place and the cross-motion requesting its vacatur must be denied as moot.

6. Setting Undertaking in Amount of Foreign Judgment

Petitioner moves the Court for an undertaking, citing only **CPLR § 5519** as authority. **CPLR § 5519** applies only to stays of enforcement during the appellate process. As stated above, there is presently no stay in place. Accordingly, the cross-motion to set an undertaking is denied.

7. Naming Spouse as Intervenor Pursuant to CPLR § 1012 and/or 1013

In this Court's Decision and Order, dated June 30, 2017, the Court did not address Respondent's cross-motion to grant Michelle Itkowitz leave to intervene. This was an oversight that does not have any preclusive effect as to the current motion.

CPLR § 1012(a)(3) permits timely intervention "when the action involves the disposition or distribution of... property and the person may be affected adversely by the judgment." Additionally, CPLR § 1013 permits timely intervention by any person "when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact." CPLR § 1013. "However, it has been held under liberal rules of construction that whether intervention is sought as a matter of right under CPLR 1012(a), or as a matter of discretion under CPLR 1013 is of little practical significance." *Perl v Aspromonte Realty Corp.*, 143 A.D.2d 824, 825 (2nd Dept. 1988). Additionally, "intervention may occur at any time, provided that it does not unduly delay the action or prejudice existing parties." *Halstead v Dolphy*, 70 A.D.3d 639, 640 (2nd Dept. 2010). Finally, to ensure a party does not delay the action, this Court has the power to condition a grant of intervention on a party's stipulation that the party will conduct no additional discovery in the action. *Id.*

Petitioner opposes Michelle Itkowitz's motion to intervene on the grounds that only Respondent's interest in the property is affected by the earlier Decision and Order, and on the grounds that intervention will subject Petitioner to further delay. However, even though Michelle Itkowitz's interest in the property is not the subject of the action, she may be adversely affected by a judgment against her husband's interest in the property they both own. Moreover, as this

action involves the enforcement of a foreign judgment, nothing can be gained from further discovery. Accordingly, Michelle Itkowitz's motion to intervene is granted on the condition that she stipulates to not conduct any additional discovery in this action.

8. Motions to Dismiss Proceeding Pursuant to CPLR § 1001(a)

Respondent and Michelle Itkowitz move, separately, to dismiss the proceeding on the grounds that Michelle Itkowitz is a necessary party and she was not joined in the initial petition. Michelle Itkowitz's motion to intervene was granted above and she was joined as a party to the action. Accordingly, the motions to dismiss are denied as moot.

9. Motions to Restrain Sale and/or Executing Upon the Property Pursuant to CPLR §

5240

Respondent and Michelle Itkowitz move, separately, to restrain Petitioner from selling and/or executing upon the property unless and until (a) it becomes vacant; (b) is sold; or (c) Michelle Itkowitz predeceases Respondent. Under **CPLR § 5240**, "The court may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure." This section grants the Supreme Court broad discretionary power to alter the use of procedures set forth in CPLR Article 52. *Sirotkin v Jordan, LLC, 141 A.D.3d 670, 672 (2nd Dept. 2016)*. Neither Respondent nor Michelle Itkowitz provide any basis upon which a restraining order should be granted. Michelle Itkowitz claims that allowing Respondent's interest in the property to be sold is akin to "painting a target on Michelle Itkowitz's head until her husband predeceases her," (Memorandum in Support P. 14) as the buyer of Respondent's interest will not be able to use it until Michelle Itkowitz's death or divorce. Michelle Itkowitz

further claims “[p]eople have been killed for far less.” *Id* at P. 12. However, Michelle Itkowitz provides no basis for the suggestion that violence, much less homicide, will befall her if her spouse’s interest in the house is sold. Such extreme, hyperbolic assertions provide no reason for restraining the sale of the property in question, when Petitioner has waited years to collect on a judgment. However, the motions to restrain the sale and/or execution of the judgment on the property are granted solely to the extent that any purchaser of Respondent’s interest, will become a tenant in common with Michelle Itkowitz with no right to the possession, use, and/or occupancy of the property.

10. Leave to Reargue Pursuant to CPLR § 2221(a)

Under **CPLR § 2221(d)** a motion for leave to reargue “shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.” However, “where a motion for reargument is technically untimely under CPLR 2221(d)(3), a court has discretion to reconsider its prior ruling.” *HSBC Bank USA, N.A. v Halls, 98 AD3d 718, 721(2nd Dept. 2012)*; *see CPLR § 2004*. In the instant case, Respondent claims and Petitioner does not contest, that the Order with notice of entry was served on Respondent on July 20, 2017. Respondent did not move to reargue the Order until December 1, 2017—well after the thirty-days required by **CPLR § 2221(d)**. Moreover, Respondent provides no explanation for his delay, or for how it would not prejudice Petitioner. *See CPLR § 2004*. Accordingly, the Court refuses to exercise its discretion to grant Respondent’s untimely motion for leave to reargue. The motion for leave to reargue is, accordingly, denied.

11. Vacating Order to Sell the Property

As Court declines to grant leave to reargue, as stated above, there no basis on which to vacate the Order to sell the property and the motion to vacate the Order to sell the property is denied. It is HEREBY:

ORDERED that Jay Itkowitz's motion for an automatic stay is denied; and it is further

ORDERED that Jay Itkowitz's motion for a discretionary stay is denied; and it is further

ORDERED that Emerita Urban Renewal, LLC's motion to reimburse the costs of the sale is denied; and it is further

ORDERED that Emerita Urban Renewal, LLC's motion to perfect the subject appeal is denied; and it is further

ORDERED that Emerita Urban Renewal, LLC's motion to vacate the stay is denied; and it is further

ORDERED that Emerita Urban Renewal, LLC's motion to set an undertaking is denied; and it is further

ORDERED that Michelle Maratto Itkowitz's motion to intervene is granted on the condition that she not conduct any additional discovery in this action; and it is further

ORDERED that Michelle Maratto Itkowitz's motion to dismiss the proceeding is denied; and it is further

ORDERED that Michelle Marratto Itkowitz's motion to restrain the sale and/or execution upon the property is granted to the extent that that any purchaser of Respondent's interest will become a tenant in common with Michelle Itkowitz with no right to the possession, use, and occupancy of the property; and it is further

ORDERED that Jay Itkowitz's motion for leave to reargue is denied; and it is further

ORDERED that Jay Itkowitz's motion to vacate the Order to sell the property is denied;
and it is further

ORDERED that Jay Itkowitz's motion to dismiss the proceeding is denied; and it is further

ORDERED that Jay Itkowitz's motion to restrain the sale and/or execution upon the
property is granted to the extent that that any purchaser of Respondent's interest will become a
tenant in common with Michelle Itkowitz with no right to the possession, use, and occupancy of
the property.

The parties' remaining contentions are without merit.

This is the Decision and Order of the Court.

ENTER



LOREN BAILY-SCHIFFMAN
JSC

HON. LOREN BAILY-SCHIFFMAN



KINGS COUNTY CLERK
FILED
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