

<b>McWhite v I &amp; I Realty Group LLC</b>
2019 NY Slip Op 31552(U)
May 28, 2019
Supreme Court, Kings County
Docket Number: 511363/2017
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

Index No. 511363/2017  
Motion Date: 1-7-19  
Mot. Cal. No.: 19-20, 26

-----X  
CYRILEN MCWHITE,

Plaintiff,

Action 1.

-against-

I & I REALTY GROUP LLC,

Defendant.

**DECISION/ORDER**

-----X  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

Index No.: 524104/2017

-----X  
I & I REALTY GROUP LLC,

Plaintiff,

-against-

CYRILEN MCWHITE and STAR ACADEMY DAY  
CARE,

Action 2.

Defendants.

-----X  
The following papers numbered 1 to 7 were read on these motions:

Papers:	Numbered:
Notices of Motion and Cross-Motion	
Affidavits/Affirmations/Exhibits/.....	1-3
Answering Affidavits/Affidavits/Exhibits.....	4-5
Reply Affidavits/Affidavits/Exhibits.....	6-7
Other.....	

Upon the foregoing papers, the motions are decided as follows:

CYRILEN MCWHITE ("McWhite"), the plaintiff in Action No. 1 and a defendant in

Action No. 2, commenced Action No. 1 pursuant to Article 15 of the RPAPL to quiet title to the

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MS # 01 & 02 - MDAI

real property located at 1766 Dean Street, Brooklyn, New York. McWhite now moves for an order pursuant to CPLR 602(a) consolidating Action No. 1 and Action No. 2, dismissing Action 2 pursuant to CPLR 3211(a)(7) for failure to state a cause of action and, awarding her summary judgment in Action No. 1 and enjoining I & I Realty Group from trespassing onto the premises and forcefully ejecting any of the tenants during the pendency of the action.

I & I REALTY GROUP LLC (I & I Realty Group), the plaintiff in Action No. 2 and a defendant in Action No.1, commenced Action No. 2 alleging, *inter alia*, a cause of action for reforeclosure pursuant to RPAPL 1503 and 1523 and seeks judgment in the action extinguishing any right defendants may have to enforce their equity of redemption in same real property at issue in Action No. 1. I & I Realty Group now moves, *inter alia*, for an order granting it summary judgment. The motions are consolidated for disposition.

**Background:**

On September 8, 2016, the real property at issue was auctioned off at a judicial sale pursuant to a judgment of foreclosure and sale. I & I Realty Group was the successful bidder. On March 29, 2017, I & I Realty Group was given a referee's deed to the property which was recorded on April 5, 2017. McWhite was the record owner of the property at the time the foreclosure action was commenced. Although she was named as a defendant in the action and was purportedly served with the summons and complaint, she never appeared in the action. When the plaintiff in the foreclosure action moved for a default judgment against McWhite, even though the motion was unopposed, by order dated October 8, 2014, Justice Larry Martin denied the motion on the ground that plaintiff failed to initiate proceedings to obtain the default judgment within a year of her default as required by CPLR § 3215©. Justice Martin concluded

that the foreclosure plaintiff did not demonstrate sufficient cause for the untimely motion.

Notwithstanding Justice Martin's order, the attorneys for the foreclosure plaintiff submitted a judgment of foreclosure and sale to the Court which included McWhite's name in the caption and the judgment purports to extinguish her right to enforce her equity of redemption in the property. The plaintiff in the foreclosure action did not more to renew or reargue the motion for a default judgment against McWhite, nor did it appeal from the Justice Martin's order. , **The**

**Motions:**

The Court will first address the motion to consolidate. A motion to consolidate actions pursuant to CPLR 602(a) rests in the sound discretion of the trial court (*see, Marshall v. Monegro Investors*, 132 A.D.2d 651, 518 N.Y.S.2d 23; *Cushing v. Cushing*, 85 A.D.2d 809, 445 N.Y.S.2d 636). Absent a showing of prejudice to a substantial right by a party opposing the motion, consolidation should be granted where common questions of law or fact exist (*see, Marshall v. Monegro Investors, supra; Cushing v. Cushing, supra*). Here, the two actions involve common questions of law or fact and a consolidation of the two actions will not prejudice a substantial right of any of the parties. Accordingly, McWhite's motion to consolidate is **GRANTED** and the consolidated action shall proceed under Index No. 511363/2017. The pleadings served to date shall serve as the pleadings in the consolidated action.

Turning to I & I Realty Group's motion for summary judgment, a plaintiff may commence an action seeking reforeclosure pursuant to RPAPL § 1503 when:

1. "[R]eal property has been sold pursuant to a judgment in an action to foreclose a mortgage under article 13..." (RPAPL § 1503);
2. "[I]t appears from the public records or from the allegations

of the complaint that such judgment, sale or conveyance was or may have been, for any reason, void or voidable as against any person, including an owner of the real property mortgaged” (RPAPL § 1503); and

3. The plaintiff is the “purchaser”(RPAPL § 1503).

“Such action may be maintained even though an action against the defendant to foreclose the mortgage under which the judgment, sale or conveyance was made, or to extinguish a right of redemption, would be barred by the statutes of limitation (RPAPL § 1503). The remedy of reforeclosure pursuant to RPAPL § 1503, however, is limited to situations where the defect in the foreclosure proceedings was not the result of fraud or wilful neglect and the defect did not prejudice the defendant ( RPAPL § 1523(1) & (2)). “If it shall appear to the court in any such action that the defect in the foreclosure proceedings was not due to fraud or wilful neglect of the plaintiff and that the defendant or the person under whom he claims was not actually prejudiced thereby, the judgment may fix a time for redemption of the property and provide that a failure to redeem within such time shall thereafter preclude the defendant from redeeming the property or claiming any right, title or interest therein” (RPAPL 1523(2)). The word “plaintiff” as used in RPAPL 1523(2) refers to the foreclosure plaintiff, not the plaintiff in the reforeclosure action (see *HSBC Bank USA, Nat'l Ass'n, Tr. for Ellington Loan Acquisition Tr. 2007-1, Mortg. Pass-Through Certificates, Series 2007-1 v. Guardian Pres. LLC*, 160 A.D.3d 1236, 1237, 75 N.Y.S.3d 636, 638) *Davis v. Cole*, 193 Misc. 2d 380, 382, 747 N.Y.S.2d 722, 724). Although RPAPL § 1523 does not define “wilful neglect,” at least one court has held that the phrase connotes a knowing, conscious and voluntary act and not a simply neglectful one (*37-40 Realty, Inc. v. A.P. Zheng, Inc.*, 38 Misc. 3d 1202(A), 966 N.Y.S.2d 349).

Here, there is no dispute that the real property at issue was sold pursuant to a judgment in an action to foreclose a mortgage under article 13 of the RPAPL and that I & I Realty Group was the purchaser of the foreclosed property. Further, the judgment of foreclosure and sale is void or at the very least, voidable as to McWhite since her name should have been deleted from the caption once Justice Martin denied the foreclosure plaintiff's motion for a default judgment against her. The absence of a necessary party in a foreclosure action leaves that party's rights unaffected by the judgment and sale, and the foreclosure sale may be considered void as to the omitted party (*see, Polish Nat. Alliance v. White Eagle Hall Co.*, supra, at 406, 470 N.Y.S.2d 642; *see also, Marine Midland Bank v. Freedom Rd. Realty Assocs.*, 203 A.D.2d 538, 611 N.Y.S.2d 34). Since McWhite should have been absent from the foreclosure proceedings once the motion for a default judgment against her was denied, the same rule should apply here.

Since this case falls within the purview of RPAPL 1503, in order to establish its entitlement to summary judgment, I & I Realty Group had the burden of demonstrating, as a matter of law, that any defect in the original foreclosure action was not the result of fraud or the wilful neglect of the foreclosure plaintiff and that the defect did not prejudice McWhite. (RPAPL § 1523(1) & (2), *HSBC Bank USA, Nat'l Ass'n, Tr. for Ellington Loan Acquisition Tr. 2007-1, Mortg. Pass-Through Certificates, Series 2007-1*, 160 A.D.3d at 1236-37, 75 N.Y.S.3d at 637). I & I Realty Group did not meet this burden.

The foreclosure plaintiff clearly knew of McWhite's interest in the real property. While the foreclosure plaintiff's failure to promptly move to enter a default judgment against her have been no more than law office failure or simple neglect, once its motion was denied, the foreclosure plaintiff took no further action to secure a valid judgment against her. It did not move

to renew or reargue the motion, appeal from Justice Martin's order, nor did it discontinue the action and commence a new action naming McWhite. Instead, the foreclosure plaintiff submitted an erroneous judgment naming McWhite to the Court for signature. The Court finds that for these reasons, triable issues of fact as to whether the defective judgment was a result of the foreclosure's plaintiff's wilful neglect (see *Davis v. Cole*, 193 Misc. 2d 380, 382, 747 N.Y.S.2d 722, 724 [holding that an issue of fact existed as to wilful neglect where the foreclosure plaintiff did not name a defendant as a party to the proceeding even though it was award of the defendant's identity and interest in the property] . Because I & I Realty Group failed to sustain its burden of proof on its motion for summary judgment, the motion is denied, regardless of the sufficiency of McWhite's opposing papers (see, *Revelo v. Weithorn*, 253 A.D.2d 869, 678 N.Y.S.2d 356; *Hirsh v. Bert's Bikes & Sports*, 227 A.D.2d 956, 643 N.Y.S.2d 294).

McWhite's motion for summary judgment quieting title in her name is denied since there are triable issue of fact as to whether I & I Realty Group will prevail in its action to reforeclose.

McWhite's contention that I & I Realty's Group's action is barred by collateral estoppel or res judicata from bring the action is without merit. Since I & I Realty Group's was not party to the foreclosure action and the issue of its entitlement to reforeclosure relief was not litigated in the foreclosure action, collateral estoppel or res judicata do not apply (*Ahern v. Pierce*, 236 A.D.2d 343, 344, 653 N.Y.S.2d 620, 622). Moreover, the doctrines of res judicata and collateral estoppel only apply to determinations on the merits (*Mudry v. Giannattasio*, 8 A.D.3d 455, 456, 779 N.Y.S.2d 111, 112). Contrary to McWhite's contention, a dismissal of an action as abandoned pursuant to CPLR 3215(c) is not on the merits unless the court so states (see *Rodrigues v. Samaras*, 117 A.D.3d 1022, 1024, 987 N.Y.S.2d 78, 81, *Shepard v. St. Agnes*

*Hosp.*, 86 A.D.2d 628, 630, 446 N.Y.S.2d 350). Justice Martin did not so state in his order denying the foreclosure plaintiff's unopposed motion for a default judgment against McWhite.

McWhite's contention that I & I Realty Group's action against her under RPAPL § 1503 must be dismissed because such an action does not lie against a homeowner is without merit since the clear wording of RPAPL 1503 gives a plaintiff the right to seek reforeclosure where a judgment of foreclosure and sale is "for any reason, void or voidable as against any person, including an owner of the real property mortgaged" (*emphasis added*). While McWhite correctly points out that reforeclosure pursuant to RPAPL § 1503 does not afford homeowners with the same protections they are provide with in an action for foreclosure under Article 13, such as the requirements that they be served with a 90 day notice pursuant to RPAPL 1304 and a thirty day notice pursuant to RPAPL 1303, this is not a valid reason to dismiss the action, as McWhite requests. If the legislature intended to afford the same protections to a homeowner in a reforeclosure proceeding that are provided for by Article 13 of the RPAPL, RPAPL 1503 would so provide.

McWhite also incorrectly contends that under *Bass v. D. Ragno Realty Corp.*, 111 A.D.3d 863, 976 N.Y.S.2d 118, relief pursuant to RPAPL § 1503 is unavailable to any party who was named in an underlying foreclosure proceeding. The only issue addressed in *Bass* was whether a strict foreclosure or reforeclosure action may be maintained against an easement holder. Further, since an action pursuant to RPAPL § 1503 lies where "[i]t appears from the public records or from the allegations of the complaint that such judgment, sale or conveyance was or may have been, for any reason, void or voidable as against any person, including an owner



of the real property mortgaged”, the remedies afforded by the statute are clearly available against persons who were named in the foreclosure proceeding.

Lastly, McWhite’s motion to dismiss pursuant to CPLR 3211(a)(7) is denied. I & I Realty Group’s complaint clearly states a cause of action for reforeclosure pursuant to RPAPL 1503.

For all of the above reasons, it is hereby

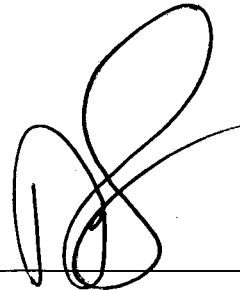
**ORDERED** that Cyrilen McWhite’s motion in Action No. 2 insofar as its seeks and order consolidating Action No. 1 and Action No. 2 is **GRANTED** ; it is further

**ORDERED** that Cyrilen McWhite’s cross-motion in Action No. 1 is in all other respects **DENIED** except that I & I Realty Group is hereby enjoined from taking any action to evict McWhite or her tenants until further order of the Court; and it is further

**ORDERED** that I & I Realty Group’s motion for reforeclosure under RPAPL § 1503 is **DENIED**.

This constitutes the decision and order of the Court.

Dated: May 28, 2019



PETER P. SWEENEY, J.S.C.

HON. PETER P SWEENEY

2019 JUN -3 AM 8:32  
KINGS COUNTY CLERK  
FILED

