Reich v Victor Horsford Realty Corp.
2019 NY Slip Op 31792(U)
June 17, 2019
Supreme Court, New York County
Docket Number: 850180/2015
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH **PART** IAS MOTION 32

Justice

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ALEXANDER REICH,

Plaintiff,

- v -

VICTOR HORSFORD REALTY CORP., ROCKY HORSFORD, THE CITY OF NEW YORK, GETTY PETROLEUM MARKETING INC.,JPMORGAN CHASE BANK, N.A., CACH OF COLORADO, NEW YORK CITY PARKING VIOLATIONS BUREAU, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, GLORIA HORSFORD, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, JOHN DOE

Defendant.

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INDEX NO. 850180/2015

MOTION DATE 06/06/2019

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 22, 23, 24, 27, 28, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43[1]

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The motion for summary judgment dismissing the complaint by defendants Rocky Horsford and Victor Horsford Realty Corp. (collectively, "Horsford") is denied.

Background

In this foreclosure action, plaintiff seeks to foreclose on a mortgages secured by two properties (one on Lenox Avenue in Manhattan and the other in the Bronx). Horsford moves for summary judgment on the ground that there was a previous foreclosure case about the same loans by a different plaintiff that was discontinued with prejudice.[2] Horsford claims that under the principle of res judicata, the previous dismissal compels the Court to dismiss this case.

[1] The Court did not consider the sur-replies (NYSCEF Doc. Nos. 44-47) because they were filed without Court permission.

[2] The Court suggests that counsel for Horsford consult the e-filing rules, which requires that the notice of motion, affirmations, and exhibits be filed as *separate* documents. Here, all the moving papers were filed as a single, 59-page document.

In opposition, plaintiff claims that the notice of discontinuance was ineffective because it was not served on defendants, it was filed more than twenty day after the filing of the summons and complaint and it had the incorrect venue (Kings County).

In reply, Horsford observes that the plaintiff here has the same attorney who filed the notice of discontinuance in the previous case and that any ambiguity must be interpreted against him (the drafter). Horsford also claims that all parties signed the discontinuance as of September 1, 2017 so the previous case was not terminated until that date—it claims that this case should be dismissed because there was another active case when the instant matter was commenced.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably

conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec*, Ltee, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], affd 99 NY2d 647, 760 NYS2d 96 [2003]).

As an initial matter, the Court observes that the Notice of Discontinuance filed by Mr. Rosengarten (counsel for the plaintiff in the previous action and the plaintiff here) states that "PLEASE TAKE NOTICE that the plaintiff hereby discontinues this action without costs to either party against the other and with prejudice. This stipulation may be filed without further notice with the Clerk of the Court" (NYSCEF Doc. No. 22 at 52). There are no signatures from defendants on this document, which indicates it was filed with the County Clerk's office on November 12, 2014 (*id.*).

Also attached to the moving papers is another copy of this discontinuance with Rocky Horsford's signature on it (*id.* at 58). However, this document has a stamp from the County Clerk's office dated September 1, 2017 (*id.*). This date is critical because *after* the notice of discontinuance filed in 2014, Horsford moved to dismiss pursuant to CPLR 3215(c) based on plaintiff's failure to take proceedings and the Court granted that motion on March 13, 2015 (*id.* at 49). The copy of this decision contains a stamp marking it as an unfiled judgment (*id.*).

These odd circumstances compel the Court to deny Horsford's motion. While there is no question that plaintiff's attorney filed a notice of discontinuance with prejudice in the prior case, he claims that this was done in error. And obviously, Horsford did not rely on that filing because it moved to dismiss for failure to take proceedings subsequent to that discontinuance. If Horsford actually believed that the 2014 notice of discontinuance ended the case with prejudice, then it would not have subsequently moved to dismiss.

Horsford's attempt to add signatures to the discontinuance to make it a stipulation were apparently done years after it was initially filed and after Horsford's motion to discontinue was granted. Horsford cannot transform the notice into a stipulation, especially where Horsford signed the discontinuance *after* this case was commenced.

The Court also observes that "[g]enerally, a dismissal prior to [the] close of the case is not on the merits unless the Court says otherwise. However, a dismissal with prejudice is usually accorded res judicata effect. A dismissal without prejudice saves the case for repleading if no statute of limitations problem exists" (*Yonkers Contracting Co., Inc. v The Port Auth. Trans-hudson Corp.*, 1996 WL 34550592 [Sup Ct, Westchester County 1996]). Here, the previous matter was dismissed [redacted] under CPLR 3215(c); clearly, that was not on the merits and the decision by Justice Schecter did not specify that the case was dismissed *with prejudice.* Therefore, the Court concludes that plaintiff was permitted to commence this case.

Horsford's claim that the case should be dismissed pursuant to CPLR 3211(a)(4) (prior action pending) is denied. Justice Schecter's order dismissing the prior case under CPLR 3215(c) in March 2015 marked the case disposed (NYSCEF Doc. No. 22 at 49). Therefore, the case was *not ongoing* when *this* matter began in May 2015. Moreover, Justice Schecter's order renders Horsford's attempt to "sign" the notice of discontinuance in 2017 moot because a judge had already dismissed the case.

The fact that the March 2015 decision was never filed is immaterial. Horsford cannot attempt to implicate the doctrine of res judicata by signing a nearly three-year-old document (the 2014 notice of discontinuance) that was never intended to be a stipulation. After all, foreclosure cases are matters of equity and it would be against good conscience to allow Horsford to

manufacture a claim of res judicata to dismiss this case and avoid meeting its obligations on the loans.

The parties had a preliminary conference on August 30, 2017 which required plaintiff to file a note of issue by February 9, 2018 (NYSCEF Doc. No. 17). No note of issue has been filed in this case. While the Court recognizes that defendant Rocky Horsford passed away in May 2018, the fact is that plaintiff was supposed to file the note of issue in February 2018. Therefore, the Court directs plaintiff to file a note of issue on or before November 12, 2019; any additional discovery must be completed prior to that date.

Accordingly, it is hereby

ORDERED that the motion by defendants Rocky Horsford and Victor Horsford Realty Corp. is denied and plaintiff must file a note of issue on or before November 12, 2019.

6/17/19
DATE

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE