

Defino v Cassini

2021 NY Slip Op 30236(U)

January 26, 2021

Supreme Court, New York County

Docket Number: 159662/2017

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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JOSEPH DEFINO,

Petitioner,

- v -

MARIANNE NESTOR CASSINI,

Respondent.

-----X

INDEX NO. 159662/2017

MOTION DATE 10/08/2020

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for

AMEND JUDGMENT

ORDER

Upon the foregoing documents, it is

ORDERED that to the extent that, pursuant to CPLR §§ 1018 and 1021, it seeks to amend the order dated September 26, 2019 to change the name of petitioner on the caption, the motion of petitioner for leave to amend the order dated September 26, 2019, which granted judgment on the petition herein, is GRANTED; and it is further

ORDERED that the caption of the herein action is amended to substitute Michael Katz, as petitioner, in place and stead of petitioner Joseph DeFino; and it is further

ORDERED that to the extent that it seeks to amend the order dated September 26, 2019 to eliminate the requirement that the net

sale proceeds up to the amount of the applicable exemption be paid to respondent, such motion is DENIED; and it is further

ORDERED that petitioner, by overnight courier, shall forthwith serve a copy of this order with notice of entry upon respondent, at her last known address, as set forth in the Substitution of Attorney dated January 15, 2021 (NYSCEF Document Number 44); and it is further

ORDERED that petitioner shall, within thirty days of entry of the herein order, serve a copy of this order with notice of entry, with proof of service as aforesaid, upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

DECISION

By Assignment of Judgment dated June 13, 2019 (the Assignment), Joseph DeFino, original petitioner herein, assigned a certain judgment against respondent that was filed in the

office of the New York Clerk on September 12, 2014 to Michael Katz, Esq., his attorney herein (money judgment).

By Verified Petition, dated October 20, 2017, the original petitioner herein sought to enforce such money judgment by seeking an order directing the sale of respondent's interest in the real property known as 135 East 19th Street, New York, New York (the subject real property), by the Sheriff of New York County. Respondent moved to dismiss such petition, and by stipulation dated September 25, 2019, respondent withdrew such motion, and judgment was granted upon such petition without opposition (sale judgment). Such sale judgment decreed, in pertinent part, "ORDERED that the net proceeds from this sale, in an amount not exceeding one hundred thousand dollars (\$150,000), which is the amount of the applicable homestead exemption under CPLR 5206 (e) (the Exempt Amount), be paid to respondent".

Now Michael Katz, Esq. moves to be substituted as petitioner herein based upon the Assignment. As there is no bar to an assignment of a judgment before it exists (see Field v City of New York, 6 NY 179 [1852]), the moving party is entitled to the relief sought pursuant to CPLR 1018 (see also U.S. Bank National Association v Duran, 174 AD3d 768 [2d Dept. 2019]).

With respect to the movant's application to amend the judgment to eliminate the homestead exemption of \$150,000, as a procedural

matter, this court disagrees with petitioner, who argues that the true nature of his application is one to renew pursuant to CPLR 2221(e). CPLR 2221(e) is inapplicable to the matter at bar, in light of the fact that the sale judgment was entered with no opposition from the respondent (see Dobbyn-Blackmore v City of New York, 123 AD3d 1083, [2d Dept. 2014]). Nor is petitioner's motion one to amend the judgment pursuant to CPLR 5019(a), as the proposed amendment is substantive, as opposed to representing an "irregularity not affecting a substantial right of a party" (see Johnson v Societe Generale S.A., 94 AD3d 663 [1st Dept. 2012]).

Instead, the true nature of petitioner's application is one pursuant to CPLR 2221 and 5015, in particular pursuant to CPLR 5015(a)(2). Specifically, petitioner cites to photographs that were submitted by respondent in her answer to a special proceeding brought by the Public Administrator of Nassau County against her, (Public Administrator of Nassau County v Cassini, New York County Supreme Court, Index No. 154462/2020), which petitioner contends show that the subject real property is unoccupied. He argues that such filings, made on September 5, 2020, constitute new evidence, which was unavailable at the time that this court granted the sale judgment. He contends that such photographs establish that the subject real property is not the principal residence of respondent, and that respondent, therefore, is not entitled to the homestead exemption.

However, the evidence now submitted by petitioner does not constitute "newly discovered evidence, which if introduced at trial, would probably have produced a different result and which could not have been discovered in time to move a new trial under section 4404" under CPLR 5015(a)(2). As stated in Greenwich Sav. Bank v JAJ Carpet Mart, Inc. (126 AD2d 451, 453 [1st Dept. 1987]), for the purposes of obtaining relief pursuant to CPLR 5015(a)(2):

"To qualify as new evidence, the evidence must have been in existence but have been undiscoverable with due diligence at the time of the original order or judgment."

As the purported claim in Greenwich Sav., supra, the filings in the case brought by the public administrator were not in existence at the time of the original judgment. Therefore, there is no basis for this court to exercise its discretion pursuant to CPLR 5015(a)(2) (see also Coastal Sheet Metal Corp. v RJR Mechanical Inc., 85 AD3d 420 [1st Dept. 2011]).

Nor does CPLR 5015(a)(3) ("fraud, misrepresentation, or other misconduct of the adverse party) apply, as the sale judgment was entered without opposition from respondent, and was not based on some purported misrepresentation on her part.

1/26/2021
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED		
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED

<input type="checkbox"/>	NON-FINAL DISPOSITION		
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
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<input type="checkbox"/>	SUBMIT ORDER
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
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<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
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