SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

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HARLEM CONTRACTING LLC,

Plaintiff,

- v -

2201 7TH AVENUE REALTY LLC, BANCO POPULAR NORTH AMERICA, INDUSTRIAL FIRE DOOR & HARDWARE SUPPLY, INC., ALL CITY GLASS & MIRROR CORP., NORTHERN BUILDING PRODUCTS, INC., JNP CONTRACTORS LTD., RELIANT ELECTRONIC CONTRACTING, INC., KATZ METAL FABRICATORS, INC., INDEPENDENT TEMPERATURE CONTROL SERVICES, BORO KITCHEN CABINETS, INC., GRAYBAR ELECTRIC COMPANY, INC., TREVOR WHITTINGHAM, INC., NEW YORK CITY DEPT OF FINANCE, JOHN DOE 1 THRU 3, 1180 PRESIDENT FUNDING, LLC,

Defendants.

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INDEX NO. 102131/2010

MOTION DATE

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

HON. MELISSA A. CRANE

The following e-filed documents, listed by NYSCEF document number (Motion 008) 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 223, 224, 225, 226, 227, 228, 229, 230 were read on this motion to/for VACATE.

At a public foreclosure sale in 2015, plaintiff Harlem Contracting LLC (Harlem Contracting) purchased a property located at 2201 7th Avenue (the Property) that defendant 2201 7th Avenue Realty LLC (2201 LLC) owned. (P.'s Memo. In Opp., at 5 [NYSCEF Doc. No. 229].) Trevor Whittingham, apparently appearing *pro se* on behalf of himself and all defendants in this and a related matter (as discussed below), moves for an order "vacating the referee deed action sale of defendant[']s real estate property . . . ." (Notice of Motion, Mot. Seq. No. 008 [NYSCEF Doc. No. 210].) Mr. Whittingham moves pursuant to CPLR 5015 (a) (2)-(3), arguing that, because of "newly discovered evidence, fraud upon the court, and sewer process service,"

this court should vacate the referee deed and the auction sale. (Whittingham Aff., ¶ 1 [NYSCEF Doc. No. 211].) Plaintiff argues that this motion should be denied because Mr. Whittingham lacks standing, the corporate defendants are estopped from seeking relief, a default judgment bars such affirmative relief, and there is no basis for voiding the deed and sale. (P.'s Memo. In Opp., at 2-3 [NYSCEF Doc. No. 229].)

Background

This action initially arose out of the failure of defendant 2201 LLC to fully pay its contractors, including its general contractor and the initial plaintiff in this action, Galaxy General Contracting Corp. (Galaxy) for labor and services for construction on the Property. (Complaint, ¶¶ 2-11 [NYSCEF Doc. No. 2].) Galaxy terminated its agreement with 2201 LLC and filed a mechanic's lien. (*Id.*, ¶¶ 12-13.) Galaxy commenced this action by summons and complaint, dated January 28, 2010, to foreclose its lien. (*Id.*, ¶ 22.) Galaxy moved for an order voiding the discharge of its mechanic's lien and entering a default judgment against certain defendants. (Notice of Motion, Mot. Seq. No. 002 [NYSCEF Doc. No. 15].) By decision and order, dated March 28, 2011, Justice Carol Edmead voided the discharge of plaintiff's lien and granted the default judgment as against certain defendants, but denied the branch of the motion for a default judgment as against 2201 LLC. (March 28, 2011 Decision and Order [NYSCEF Doc. No. 29].) Galaxy appealed the court's decision to the extent it denied the motion as against 2201 LLC, and during the pendency of the appeal assigned its mechanic's lien and all claims in this action to plaintiff Harlem Contracting. (Assignment of Mechanic's Lien [NYSCEF Doc. No. 139].) The Appellate Division reversed and granted the default judgement as against 2201 LLC. (Remittitur [NYSCEF Doc. No. 58].)

As the Appellate Division directed, Justice Edmead entered judgment, dated July 28, 2015. (Judgment [NYSCEF Doc. No. 63].) Galaxy was granted judgment in the total amount of $4,188,559.90 against 2201 LLC and a judgment of foreclosure on the mechanic's lien against the Property, which authorized Galaxy "to sell the interest of Defendant 2201 7th Avenue Realty LLC in accordance with the law and that the proceeds of said sale be paid to [Galaxy] and in the event of any deficiency, [Galaxy] be awarded judgment in the amount thereof. (*Id.*, at 2.) The action was referred to Roberta Ashkin, Esq. to serve as Referee to confirm that amount due to Galaxy and to conduct the sale. (*Id.*, at 3.) Notice of Sale and subsequent Notice of Postponement of Sale were served on counsel for 2201 LLC and were published in the New York Post. (Notice of Sale [NYSCEF Doc. No. 131]; Notice of Postponement of Sale [NYSCEF Doc. No. 132].) Harlem Contracting was the successful bidder at the sale, and the title for the Property was vested with Harlem Contracting. (Recordation of Deed [NYSCEF Doc. No. 136].)

By order dated March 5, 2012, this action was transferred by Justice Edmead to Justice Bernard Fried. (March 5, 2012 Order [NYSCEF Doc. No. 37].) This action was "consolidated for the purposes of joint discovery and trial" with a related case before Justice Fried, *Banco Popular North America v 2201 7th Avenue Realty et al*, Index No. 650956/2010, by stipulation so ordered on March 13, 2012. (So-Ordered Stipulation [NYSCEF Doc. No. 39].) Defendants 2201 LLC, Trevor Whittingham, Global Investment Strategies Trust, and Trevor Whittingham, Inc.[1] moved in both actions by order to show cause, dated August 23, 2016, for an order, among other things, finding that plaintiffs committed fraud in obtaining the referee's deed at issue here and, accordingly, voiding the deed and dismissing both actions. (August 23, 2016 Order to Show Cause [NYSCEF Doc. No. 104].) After a hearing on the motion, the court, by decision

[1] Trevor Whittingham was a defendant only in the related action, not in this action. Each of the corporate defendants was a defendant in both actions.

and order dated September 29, 2016, denied the motion "in its entirety, on procedural and substantive grounds." (September 29, 2016 Decision and Order [NYSCEF Doc. No. 152].)

Defendants 2201 LLC, Trevor Whittingham, and Trevor Whittingham, Inc. moved by order to show cause, dated April 7, 2017, for an order voiding the referee's deed and staying the foreclosure sale pending the resolution of the related action. (April 7, 2017 Order to Show Cause [NYSCEF Doc. No. 168].) This order to show cause was subsequently withdrawn without prejudice. (Notice of Withdrawal [NYSCEF Doc. No. 172].) The court, however, by order dated June 6, 2017, ordered that such withdrawal be with prejudice. (June 6, 2017 Order [NYSCEF Doc. No. 175].) 2201 LLC subsequently moved by notice of motion, dated July 7, 2017, seeking the same relief sought by the previous order to show cause and also seeking reargument and renewal of the prior application to dismiss for fraud. (Notice of Motion, Mot. Seq. No. 005 [NYSCEF Doc. No. 177].) The court dismissed this application by decision and order dated July 14, 2017, in which it also ordered that "unless and until defendant 2201 7th Avenue Realty LLC is reinstated through vacatur of the existing default, no further applications shall be made before this court." (July 14, 2017 Decision and Order [NYSCEF Doc. No. 201].)

Discussion

Mr. Whittingham now moves to "vacate every order granted to the plaintiff, and most especially the referee deed, and the auction sales of defendant[']s real estate[]development property located at 2[2]01 7th Avenue . . . ." (Whittingham Aff., ¶ 1.) While this motion has been filed only under the present action, it appears from the caption and arguments that he attempts to bring this motion in both this and the related action. Mr. Whittingham makes this motion pursuant to CPLR 5015 based on "newly discovered evidence, fraud upon the court, and sewer process service . . . ." (*Id.*) He argues that defendants "were deliberately not notified by

the Referee's auction . . . ." (*Id.*, ¶ 3.) Mr. Whittingham argues that, based on this newly discovered information, he can demonstrate reasonable excusable for 2201 LLC's default. (*Id.*, ¶ 5.)[2] He further argues that this alleged deliberate failure to notify constitutes a fraud "to prevent defendants[']s participation in Referee Ashkin['s] auction sale . . . ." (*Id.*, ¶ 37.) This fraud, Mr. Whittingham argues, is part of a "diabolic and devious scheme" in which plaintiff "paid $400,000 and bought defendant[']s property in an auction which was 10% of the highest amount bid for 2201 Seventh Avenue, the defendant[']s property, which is worth more than $30 million dollars [sic], thus stealing title of the defendant[']s property. (*Id.*, ¶¶ 2-3.)

Plaintiff argues that Mr. Whittingham "is not a party to this action and lacks standing. (P.'s Memo. In Opp., at 6.) Plaintiff further argues that Mr. Whittingham "cannot maintain the current motion *pro se* on behalf of any corporate defendant." (*Id.*, at 7.) Even if Mr. Whittingham were found to have standing, plaintiff argues that "[Mr.] Whittingham and the corporate Defendants should be estopped and barred from maintaining this *third* motion seeking the same relief on the same grounds." (*Id.* [emphasis in original].) Plaintiff further argues that 2201 LLC cannot challenge the sale or the referee's deed because "it has default and that default has not been vacated by the Appellate Division." (*Id.*, at 9.) Finally, plaintiff argues that Mr. Whittingham has "failed to establish any basis to nullify the sale or void the referee's deed." (*Id.*, at 10.) Plaintiff accordingly argues that "the motion should be denied in all respects and financial sanctions awarded against [Mr. Whittingham] for engaging in utterly frivolous litigation conduct." (*Id.*, at 6.)

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[2] Mr. Whittingham also argues that plaintiff in the related action failed to issue a payoff letter in accordance with the order of the court. (Whittingham Aff., ¶ 23.) Mr. Whittingham previously moved to compel plaintiff in the related action to issue a payoff letter, and that branch of his motion was denied. (Decision and Order, at 4, 7 [Index No. 650956/2010, NYSCEF Doc. No. 447].) This branch of the motion is accordingly denied as moot.

As an initial matter, the court finds that Mr. Whittingham lacks standing in this action. This motion is apparently brought by "defendants 2201 7th Avenue, Trevor Whittingham, [and] Global Investment Strategies Trust et al . . . ." (Notice of Motion, Mot. Seq. No. 008, at 1.) Under his signature, Mr. Whittingham is denoted as "Trevor Whittingham pro se for 2201 7th Avenue Realty et al." (*Id.*) Pursuant to CPLR 321 (a), and with limited exceptions not at issue here, "a corporation or voluntary association shall appear by attorney . . . ." The Appellate Division held in an action where an owner of respondent corporations did not retain counsel for them, that "[s]ince a corporation is required, under most circumstances, to appear by counsel . . . he lacks standing to raise any arguments on behalf of these entities. (*People ex re. Spitzer v Park Ave. Plastic Surgery, P.C.*, 48 AD3d 367, 367 [1st Dept 2008].) Mr. Whittingham thus may not appear for any other defendant in this or the related action, each of which is a corporate defendant.

Mr. Whittingham also cannot appear on his own behalf. As this court previously noted on the record, Mr. Whittingham is not a party to this action. (September 29, 2016 Tr. of Proceedings, at 40-43 [NYSCEF Doc. No. 153].) Mr. Whittingham has not been substituted or added as a party since that time. Nor can Mr. Whittingham intervene as an interested party pursuant to CPLR 5015. CPLR 5015 (a) provides that the court "which rendered a judgment or order may relief a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct . . ." upon various grounds. "Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene . . . ." (CPLR 1013.) No motion for intervention has been made here. To the extent the motion at hand may be construed as a motion for intervention, the court finds that bringing this motion, over five years after the referee's deed was recorded, is untimely.

Further, for a nonparty to "obtain relief from a judgment or order, the moving party must show some legitimate interest, and the assurance that no injustice will result from the judicial assistance." (*Morgenthow & Latham v Bank of New York Co., Inc.*, 40 AD3d 454, 454 [1st Dept 2007].) Allowing Mr. Whittingham to intervene in this action, particularly in light of two previous denials of the same relief sought herein, would constitute an injustice. The court finds that Mr. Whittingham does not have standing to bring the present motion, on his behalf or on behalf of any other defendant, and the motion accordingly must be denied.

Even if Mr. Whittingham were to have standing, this motion would otherwise be rightfully denied. There is no doubt that the relief sought herein is the same relief sought on two prior motions. (*Compare* Notice of Motion, Mot. Seq. No. 008 *with* August 23, 2016 Order to Show Cause *and* Notice of Motion, Mot. Seq. No. 005.) Both prior motions were denied, and those decisions were not appealed. (*See* September 29, 2016 Decision and Order *and* July 14, 2017 Decision and Order.) Under the law of the case doctrine, "parties or their privies are precluded from relitigating an issue decided in an ongoing action where there previously was a full and fair opportunity to address the issue." (*Carmona v Mathisson*, 92 AD3d 492, 493 [1st Dept 2012] [internal quotation marks and brackets omitted].) Law of the case "is a judicially crafted policy that expresses the practice of courts generally to refuse to reopen what has been decided, and is not a limit to their power. As such, law of the case is necessarily amorphous in that it directs a court's discretion but does not restrict their authority." (*People v Evans*, 94 NY2d 499, 503 [2000] [internal quotation marks, citations, and brackets omitted].)

Law of the case bars the present motion. Mr. Whittingham has entirely failed to raise any new arguments than were heard on previous motions. Mr. Whittingham argues, as on prior motions, that "Defendants were deliberately not notified of the Referee's auction . . . ."

(Whittingham Aff., ¶ 3.) This issue has already been conclusively decided. On the record, Justice Edmead found that "notice [of the auction sale] was given in accordance with the law." (September 29, 2016 Tr. of Proceedings, at 27.)

Mr. Whittingham's contention that he now has probative evidence that the notice of the foreclosure sale was never provided is unavailing. In support of this argument, he submits a letter from a postmaster, dated June 21, 2017, returning mail for Mr. Whittingham's former counsel Joseph Sanchez and stating that mail going to Mr. Sanchez at that address "is being returned to sender since the end of 2014 . . . ." (Postmaster Letter, Whittingham Aff., Exh. C [NYSCEF Doc. No. 214].) This letter, dated a year and a half after the foreclosure sale and making no reference to the foreclosure sale or any other issue herein, is entirely unrelated to the present action and does not constitute probative evidence. Also unavailing is Mr. Whittingham's contention, made with no support, that such evidence "was in existence but undiscoverable with due diligence at the time Referee Ashkin executed the Referee deed to Harlem Contracting LLP." (Whittingham Aff., ¶ 32.)

Finally, this motion must be denied because neither 2201 LLC, nor any other defendant in default, may make such motion while it remains in default. By decision and order dated July 14, 2017, Justice Edmead ruled that "unless and until defendant 2201 7th Avenue Realty LLC is reinstated through vacateur of the existing default, no further applications shall be made before this court." (July 14, 2017 Decision and Order, at 2.) It is undisputed that 2201 LLC has not vacated the default. "It is well settled that a defendant seeking to vacate a judgment entered upon its default . . . must demonstrate a reasonable excuse for the delay, as well as a meritorious defense to the action." (*Rodgers v 66 East Tremont Heights Housing Development Fund Corp.*, 69 AD3d 510, 510 [1st Dept 2010].) On this motion, as discussed above, Mr. Whittingham lacks

standing to appear for 2201 LLC. Nor has Mr. Whittingham offered any reasonable excuse for the delay. His attempt to blame the delay on the alleged lack of service on his former counsel was already heard and rejected by the Appellate Division when it granted the entry of default judgment. (Remittitur, at 2-3.) The same argument cannot now be used in an effort to vacate the judgment. There is, accordingly, no basis for such vacatur pursuant to CPLR 5015. For the same reasons, no basis exists to vacate the default judgment against any other defendant currently in default, including Trevor Whittingham, Inc. (*See* March 28, 2011 Decision and Order.) "Since the defendants failed to demonstrate a reasonable excuse for their default, it [is] unnecessary to determine whether they demonstrated the existence of a potentially meritorious defense." (*U.S. Bank Nat. Ass'n v Stewart*, 97 AD3d 740, 740 [2d Dept 2012].) To the extent that Mr. Whittingham seeks to bring this motion on behalf of defendants against whom a default judgment has been entered, the motion must be denied because the default judgment has not been vacated. To the extent that Mr. Whittingham attempts to argue that purchase price constitutes a theft of title, such meritorious defense need not be considered. Even if the court were to consider such defense, it is made without support in the record and would be dismissed as baseless in law and fact.

Plaintiff asks for financial sanctions to be awarded against Mr. Whittingham, pursuant to 22 NYCRR § 130-1.1, for "engaging in utterly frivolous litigation conduct." (P.'s Memo. In Opp., at 6.) "The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court . . .costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct . . . ." (22 NYCRR § 130-1.1 [a].) "In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who

engages in frivolous conduct . . . ." (*Id.*) Conduct is defined as frivolous if "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false." (22 NYCRR § 130-1.1 [c].) On this record, the court declines to award financial sanctions against Mr. Whittingham. Mr. Whittingham is hereby warned, however, that further repeat attempts in this or the related action to vacate the referee's deed and void the foreclosure sale at issue here may result in a grant of sanctions. Mr. Wittingham is also warned that further hateful comments about opposing counsel will result in sanctions.

It is hereby ORDERED that the motion of non-party Trevor Whittingham to vacate the referee deed of sale is denied in its entirety; and it is further

ORDERED that the request of plaintiff Harlem Contracting LLC for financial sanctions is denied.

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6/1/2021
DATE

MELISSA ANNE CRANE, J.S.C.

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