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769 EAST LLC v. OFORI

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: HOUSING PART G

X

769 EAST LLC,

Petitioner,

-against-

Index No.

L&T 33577/19

Present:

Hon. Christel F. Garland

VICTOR OFORI, JOHN DOE, and JANE DOE,

DECISION/ORDER

Respondents.

X

RECITATION, AS REQUIRED BY CPLR 2219(A), OF THE PAPERS CONSIDERED IN
THE REVIEW OF THIS MOTION BY RESPONDENT TO DISMISS

PAPERS

NUMBERED

Notice of Motion, Affidavits & Affirmation Annexed	1
Answering Affidavits	2
Replying Affidavits & Affirmation Annexed	3

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER IN THIS MOTION IS
AS FOLLOWS:

Petitioner commenced this summary holdover proceeding seeking to recover possession of the second floor unit of the building located at 769 East 218th Street, Bronx, New York, following service of a 10-day notice to quit titled "ten (10) day notice to quit with exhibition of deed", alleging that Petitioner took title to the premises pursuant to a judgment of foreclosure and subsequent auction and sale of the property.

Victor Ofori ("Respondent") appeared by counsel and his answer was deemed a general denial.

After no resolution could be reached, the proceeding was transferred to the Expediter and referred to this part for trial.

On the date scheduled for trial, Respondent sought leave to interpose an amended answer which was deemed served and filed without objection and includes a counterclaim for harassment¹. Petitioner's answer to Respondent's counterclaim was deemed a general denial.

¹ With the understanding that Respondent was precluded from raising any traverse claims.

At trial, Petitioner's witness, Kamlesh Patel, testified to the elements of Petitioner's prima facie case which consisted of introducing a certified copy of the deed for the property into evidence.

At the close of Petitioner's case, Respondent moved for an order dismissing the petition. The oral motion was adjourned pursuant to a briefing schedule and later argued before this Court.

Respondent's motion is made pursuant to § 4401 of the Civil Practice Law and Rules ("CPLR"), § 713 (5) of the Real Property Actions and Proceedings Law ("RPAPL") and § 5-703 (1) of the General Obligations Law ("GBL").

In support of his motion, Respondent argues that the petition must be dismissed as a matter of law because Petitioner failed to establish its prima facie case as it relates to the ownership of the building, Petitioner lacks standing to bring this proceeding and Petitioner failed to properly exhibit the referee's deed within the meaning of the law.

In the alternative, Respondent seeks an order pursuant to CPLR § 321 (b) (2) disqualifying the law firm representing Petitioner based on his claim that an attorney employed at the firm ought to be called as a witness at trial.

In support of his claims, Respondent argues that Petitioner failed to offer into evidence a piece of writing that reflects that Wilmington Savings Fund Society, FSB, dba as Christiana Trust, authorized Sarah Nelson, a request for offer manager for Fay Servicing LLC, to execute the deed transferring the property to Petitioner. As a result, Respondent argues that Petitioner failed to satisfy the Statute of Frauds rendering the deed void and unenforceable as a result of which the deed is insufficient proof that Petitioner owns the subject property.

In addition, Respondent argues that even if this Court were to hold that Petitioner in fact owns the subject property, Petitioner nonetheless does not have standing to maintain this proceeding because of Petitioner's admission that Petitioner is not the holder of the deed delivered pursuant to the foreclosure sale.

Further, Respondent argues that should this Court find that Petitioner has standing, Petitioner nonetheless failed to prove that prior to commencing this proceeding it exhibited the referee's deed or a properly certified copy of the referee's deed to Respondent as required by RPAPL § 713 (5).

In the alternative, Respondent argues that should this Court not dismiss the petition, it should disqualify the law firm representing Petitioner in this proceeding because a partner at the firm should be called as a witness in this proceeding.

In opposition, Petitioner contends that its proof at trial, including the testimony of its witness, the admission into evidence of a certified deed for the property, and the Court having taken judicial notice of the contents of the court file, is sufficient to sustain its burden of proof. In support of its position, Petitioner contends that the Housing Court lacks the jurisdiction to adjudicate an

affirmative claim for title, and asserts that it served upon Respondent certified copies of two deeds establishing Petitioner's ownership interest in the premises.

Petitioner also challenges Respondent's argument, which it frames as a challenge to its ownership of the property based on its alleged failure to show that the prior owner of the property had the authority to convey the premises to Petitioner, as creating an impossible burden for Petitioner to sustain within the context of a summary proceeding brought before a Court of limited jurisdiction.

In response to Respondent's standing argument, Petitioner contends that exhibition of a certified copy of the deed by means other than personal delivery has been found to suffice. As such, Petitioner argues that its service of the deed along with the pleadings and the fact that Respondent does not challenge service do not subject the petition to dismissal and establish that Petitioner has standing in this proceeding.

Petitioner further contends that Respondent's claim of disqualification is untimely and asserts that no notice to produce a witness has been served on Petitioner. Notwithstanding, Petitioner argues that Respondent has not met his burden for disqualification as his allegations are based on speculation that Dustin Bowman, esquire, may have personal knowledge of the events surrounding Petitioner's acquisition of the premises which does not make him a necessary witness and does not override Petitioner's right to choose its own counsel. And, Petitioner asserts that the law firm itself should not be disqualified as there are other members of the firm and if required Mr. Bowman can testify about his personal knowledge of the events surrounding the closing.

In Response, Respondent argues that Petitioner misunderstood and/or mischaracterized his argument as it relates to Petitioner's ownership of the property. Respondent argues that his argument is based on the requirement that Petitioner show an actual possessory interest in the premises and does not seek to have Petitioner establish the prior owner's authority to transfer title which is not required. Respondent asserts that he does not argue that Petitioner does not in fact own the subject property, but only that it failed to show that it has enforceable title to the property by failing to show that Ms. Nelson had authority to sign deeds on behalf of Wilmington Savings not that Wilmington itself did not have authority to transfer title. As a result, Respondent argues, Petitioner is unable to show that it has an actual possessory interest in the premises.

Respondent also reiterates his argument that since Petitioner is not the holder of the referee's deed delivered pursuant to a foreclosure sale it lacks standing. And, Petitioner's failure to file a properly certified copy of the referee's deed with the Court, its failure to offer a properly certified deed into evidence and its failure to elicit testimony that a properly certified copy of the deed was served on Respondent requires dismissal of the proceeding.

Lastly, Respondent continues to maintain that disqualification is required as Mr. Bowman's knowledge is based on his statements in a letter to Respondent dated June 14, 2019 which confirmed his presence at the time the deed was executed. In addition, Respondent argues that the letter shows that Mr. Bowman has first-hand knowledge of the facts regarding the validity of

the deed, it failed to show that anyone else has knowledge of these facts, and Mr. Bowman's testimony regarding the certification of the deeds which were certified by him is necessary because he alone can testify about his certification of these documents.

Pursuant to CPLR § 4401, any party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions. It has been held that "a motion for a directed verdict pursuant to CPLR § 4401 should not be granted unless there is no rational process by which the fact-finder could base a finding in favor of the nonmoving party" and that "in assessing the motion, the court must afford the party opposing the motion every inference that may be properly drawn from the evidence presented, and the evidence must be viewed in the light most favorable to the nonmoving party" (*145 East 16th Street, LLC v Spencer*, 49 Misc 3d 128 (A) [App Term, 1st Dept 2015] (internal quotation marks and citation omitted).

At the outset, the Court notes that the deed which purports to transfer title to Petitioner does not include the required writing giving the signatory, Ms. Nelson, the authority to act on behalf of Wilmington Savings Fund Society (*see* § 5-703 of the GBL) ("an estate or interest in real property...cannot be created, granted, assigned, surrendered or declared unless by act or operation of law, or by deed or conveyance in writing, subscribed by the person creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing"). Here, the deed is acknowledged by Ms. Nelson without any writing granting her any authority to act on behalf of Wilmington Savings Fund Society which is not a proper transfer and therefore calls into question whether Petitioner has good title and thus standing to sue in this proceeding.

Secondly, Petitioner commenced this proceeding based on its claim that it became the title owner of the subject apartment pursuant to a judgment of foreclosure and a subsequent auction and sale. However, Petitioner's own pleadings reflect that it is not 769 East LLC that obtained title at foreclosure. Rather the referee appointed by the Court in the foreclosure action transferred the property to Wilmington Savings Fund Society following the entry of the judgment of foreclosure and sale. It is Wilmington Savings Fund, the deed holdover pursuant to the judgment of foreclosure and sale, that then transferred the property to Petitioner. As a result of these transfers, Petitioner holds title to the property by bargain and sale deed and not by reason of the foreclosure judgment and sale. As held by the Court in *Fay Capital Corp v Rans*, NYLJ 12026650119347, *1 [Civ Ct, Kings County 2014]), "there is no statutory construction that permits a subsequent owner such as the petitioner who is the third owner post foreclosure...to commence a holdover proceeding pursuant to RPAPL 713 [5]".

As to Respondent's argument that Petitioner failed to properly exhibit the deed to Respondent, although exhibition of a deed following foreclosure by means other than personal service is now permissible, a certified copy of the deed is still required. Under the holding of *Plotch v Dellis*, 60 Misc 3d 1 [App Term, Second Department, 2d, 11th and 13th Jud Dists 2018] service of a copy of the attorney's certification was found to suffice where the petition filed with the court bore the certifying official's original certification. However, here not only were copies of the deed served on Respondent, but a copy of the deed including a copy of the foreclosure judgment and sale

rather than an original were filed along with the petition. Although this would under the appropriate circumstances subject the petition to dismissal, this requirement applies to proceedings where the property has been sold in foreclosure (see RPAL § 713 [5]).

Here, Petitioner is one owner removed from the owner who held title following the judgment of foreclosure and sale and cannot be held to this requirement. Notwithstanding, based on the above, Petitioner is not the holder of title following the judgment of foreclosure and sale as it claims herein. This, coupled with the fact that there is a question about the authority of one of the signatories to the deed transferring title to Petitioner, requires that the petition be dismissed. Petitioner's argument as it relates to a certified copy of the deed having been introduced into evidence at trial is insufficient to withstand dismissal for the reasons outlined above, and the Court notes that Respondent never waived his right to object to the propriety of this proceeding.

Respondent's motion seeking disqualification of the law firm representing Petitioner in this proceeding is denied as moot.

Based on the foregoing, Respondent's motion is GRANTED to the extent that the petition is dismissed without prejudice to a proceeding predicated on a petition which accurately states the interest of the petitioner in the premises from which removal is sought as required by RPAPL § 741 [1].

The proceeding is adjourned to February 24, 2020 at 9:30 a.m. for a hearing on Respondent's counterclaim relating to harassment.

This constitutes the decision and order of this Court.

A copy of this order will be mailed to all.

DATED: January 28, 2020

SO ORDERED:


HON. CHRISTEL F. GARLAND

Christel F. Garland, J.H.C.