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RH Partners LLC v. Junious

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RH Partners LLC v Junious

2022 NY Slip Op 32916(U)

August 22, 2022

Civil Court of the City of New York, Queens County

Docket Number: Index No. 65521/19

Judge: Kimon C. Thermos

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This opinion is uncorrected and not selected for official publication.

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF QUEENS HOUSING PART E

-----X
RH PARTNERS LLC

Petitioner,

INDEX # 65521/19

-against-

SIMONE JUNIOUS; OSCAR FULLER JR.
"JOHN DOE 1-2"; "JANE DOE1-2"

DECISION / ORDER

Respondents.
-----X

Present: Kimon C. Thermos, JHC

Recitation, as required by CPLR 2219(a), of the papers considered in the review of the instant moving papers.

Papers	Numbered
Notice of Motion, Affidavits and annexed exhibits (not on NYSCEF).....	1
Notice of Cross-Motion/Opposition, NYSCEF # 5-25.....	2
Affidavit in Opposition/Reply. NYSCEF #26-35.....	3
Affirmation in Reply NYSCEF # 36.....	4

Appearing for the Petitioner: Augustin D. Tella, Esq.

Appearing for the Respondent Fuller: Queens Legal Services by Ernie Mui Esq.
Appearing for Respondent Junious: (no Papers submitted) Stephen G. James Esq.

Upon the foregoing cited papers, the Decision/Order on this Motion and Cross-Motion is as follows:

This is a post foreclosure holdover proceeding brought by the successful bidder at an auction seeking to regain possession against Respondents one of which is a former owner of the property. The proceeding is predicated upon the service of a notice to quit, pursuant to RPAPL section 713 (5).

The proceeding was settled per stipulation dated November 15, 2019 with ostensibly all parties represented by counsel providing for a judgment of possession and a warrant of eviction against all Respondents.

On September 24, 2020, Petitioner moved for an Order permitting reissuance and execution of the warrant issued pre pandemic in compliance with then applicable Chief Administrative Judge's Administrative Order and the N.Y.C. Civil Court Administrative Judge's DRP which required a status

conference and reissuance of pre pandemic warrants to include certain additional notices. That motion has been adjourned several times for various reasons.

Respondent Oscar Fuller Jr. now cross moves for an Order denying Petitioner's motion entirely; vacating the stipulation dated November 15, 2019, and the resultant judgment and warrant; dismissing the proceeding pursuant to CPLR 3211 (a) (2) and or (7) and or (8) for failure to exhibit a proper deed to the predicate notice, and alternatively pursuant to CPLR 2004 and 3012 (d) for permission to file a late answer or a stay pursuant to CPLR 2201 until a determination on a pending motion in Supreme Court to vacate the judgment of sale in the foreclosure action, which imparted standing for Petitioner to commence the instant proceeding.

Brief procedural history

On November 15, 2019, Respondent Junious appeared through new counsel Stephen G. James who continues to represent her. A motion seeking dismissal filed by prior counsel was withdrawn by new counsel and the matter was settled by stipulation providing for the entry of a judgment of possession and issuance of a warrant of eviction with execution stayed through March 01, 2020. Although counsel's notice of appearance stated only Respondent Junious as represented, the stipulation was on its face apparently entered into by new counsel on behalf of "all Respondents". It appears that based on the representation made in the two-attorney stipulation, the clerk issued a single judgment of possession and a warrant of eviction against all Respondents including Respondent Junious. The proceeding and Petitioner's motion to restore were delayed by an Order to show cause stay imposed by the Supreme Court in the foreclosure action; the filing of a hardship declaration pursuant to CEEFPA; and also, apparently by the filing of a petition in bankruptcy.

Recently, Respondent Fuller obtained counsel in this proceeding and cross moved for relief inter alia seeking to vacate the stipulation asserting that he was not represented by counsel and that he did not consent to its terms. There is no pending stay in the foreclosure proceeding although ostensibly a motion to overturn the sale at auction is still pending.

At the conference had on May 17, 2022, Respondent Junious and Fuller were both represented. Respondent Junious has not opposed Petitioner's motion. Counsel for Respondent Junious made clear that on the stipulation and throughout this proceeding he intended and had authority to represent only Respondent Junious as reflected in the notice of appearance, and that even though the stipulation he executed in Court purports to be for all Respondents, it is a mistake.

Respondent's Cross motion to vacate the judgment and dismiss

The Court will address Respondent Fuller's cross motion first since its disposition impacts the course of the decision on Petitioner's motion for reissuance of the warrant of eviction. In the first branch of the cross-motion Respondent seeks vacatur of the Judgment and warrant entered pursuant to the stipulation of settlement asserting that he was not present in court on the date the stipulation was entered into, and that Respondent Junious counsel Mr. James never represent him. Petitioner's opposition to this branch of the motion argues that Respondent took advantage of the system's delays and that he has been benefiting for years without consequence. Be that as it may, these arguments do not serve to sufficiently contest Respondent's argument that he should not be bound by the stipulation. An email which appears to be from Respondent discussing bankruptcy filings while residing at a different

address is unauthenticated. Moreover, as Respondent correctly points out, Petitioner agent's purported affidavit in opposition to the cross-motion is unsigned and unsworn and therefore of little probative value.

Accordingly, since the cross motion on the ground that the stipulation is not binding upon movant Fuller is essentially unopposed, it is granted. The judgment of possession is vacated, and the ensuing warrant of eviction is vacated as against Respondent Fuller only.

In the next branch of the motion Respondent seeks dismissal of the proceeding against him by challenging the sufficiency of the predicate notice to quit and whether it comports with the strict deed exhibition requirement prior to commencement of the proceeding.

RPAPL 713 provides that:

A special proceeding may be maintained under this article after a 10-day notice to quit has been served upon the Respondent in the manner prescribed in section 735, upon the following grounds:

(5) Subject to the rights and obligations set forth in section thirteen hundred five of this chapter, the property has been sold in foreclosure and either the deed delivered pursuant to such sale or a copy of such deed certified as provided in the civil practice law and rules, has been exhibited to him.

Respondent argues indisputably and is evident from the examination of the predicate notice appended to the petition in the Court file, that the deed which was purportedly attached to the notice to quit was incomplete and or was not certified thereby rendering the purported attempt at exhibition as an attachment to the notice a failed attempt at compliance with the statute. See *Plotch v Dellis*, 60 Misc. 3d 1, 2018 NY Slip Op 28116 (App Term 2nd Dept. 2018). Petitioner's assertion in the unsworn and unsigned affidavit in opposition to the cross motion, even if probative, that exhibition of the deed was made to Respondent Junious which has attached, in support of the service claim, a copy of the exhibited referee's deed was certified after service of the notice to quit and so it could not have been served on or before the service of the notice to quit. Nevertheless, in either scenario Respondent Fuller was apparently never exhibited a complete or certified copy of the deed. Without a proper copy of the deed annexed to the notice to quit and without proof that a certified copy of the deed was otherwise exhibited to Respondent Fuller at or before the service of the predicate notice to quit, renders the notice served fatally defective. The Petition seeking to regain possession based on the defective predicate notice thereby fails to state a cause of action against movant.

Accordingly, based on the foregoing there is no need to decide the remaining branches of the cross motion. The cross motion is granted to the extent of vacating the stipulation and the ensuing judgment and warrant and dismissing the proceeding as against Respondent Fuller only.

Petitioner's motion seeking reissuance of the warrant

Petitioner's motion seeking reissuance of the warrant of eviction based on an older Administrative Order requiring same prior to January 15, 2022, is granted but on a modified basis and for a different reason. The motion is granted only vis a vis Respondent Junious because the judgment and warrant issued based upon the stipulation while represented would no longer be subject to reissuance under the

new Administrative Order 158/22. However, based on the decision granting such relief in favor of Respondent Fuller and for the additional reason set forth below, the judgment against all Respondents must be vacated and reissued but only as against Respondent Junious as provided in the stipulation of settlement she entered into. A warrant of eviction shall issue ensuing from the judgment. The earliest eviction date shall be August 22, 2022.

Lastly, in the interest of justice, since it clearly appears that the stipulation based upon which the judgment and warrant were issued pre pandemic only served to bind Respondent Junious and none of the other Respondents, the Judgment and warrant against those still non appearing Respondents must be vacated and the proceeding must also be dismissed. Given the fatal defect in the predicate notice Petitioner will not be able to prove its prima facie case at an inquest. Petitioner shall serve notice of entry of this Order within 10 days of the uploading of this Order and Decision on NYSCEF and file proof of service with the clerk by the next calendar date. The clerk shall send post cards to all non-appearing Respondents advising of the Court date.

Order

Respondent's cross motion is granted judgment and warrant vacated and proceeding dismissed as against him.

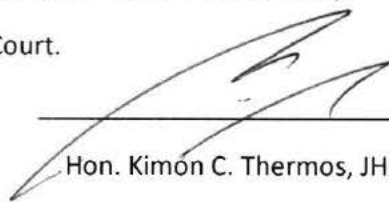
Petitioner's motion is granted to the extent of directing reissuance of a judgment of possession as against Respondent Junious, pursuant to the stipulation. Warrant of eviction to issue and execute forthwith EED 8/22/2022.

The Judgment and warrant as against all remaining Respondents are vacated, and the matter is also dismissed as against them, in the interest of justice and avoidance of futility.

This constitutes the Decision and Order of the Court.

Dated: August 22, 2022

Queens, New York



Hon. Kimon C. Thermos, JHC