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Thane v. Thane

Recommended Citation

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Thane v Thane
2021 NY Slip Op 50687(U) [72 Misc 3d 1209(A)]
Decided on July 2, 2021
Civil Court Of The City Of New York, Queens County
Guthrie, J.
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Decided on July 2, 2021

Civil Court of the City of New York, Queens County

Sherrianne Thane, Petitioner,

against

Michelle-Ann Thane a/k/a Michelle Thane, Respondent.

L & T 65279/18

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Clinton J. Guthrie, J.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of respondent's motion to dismiss and for vacatur of the judgment of possession:

Papers Numbered

Notice of Motion & Affidavit/Memorandum of Law/Exhibits Annexed 1 (NYSCEF No.3-12)

Affirmation in Opposition & Affidavit/Exhibits Annexed 2 (NYSCEF #16-21)

Reply Memorandum 3 (NYSCEF #22)

Upon the foregoing cited papers, the decision and order on respondent's motion to dismiss and for vacatur of the judgment of possession is as follows.

PROCEDURAL HISTORY

This holdover proceeding based on termination of a month-to-month tenancy was commenced in July 2018. On November 2, 2018, the parties (petitioner appearing with counsel and respondent appearing *pro se*) executed a stipulation of settlement whereby petitioner was granted a judgment of possession and issuance of a warrant of eviction, with execution of the [*2]warrant stayed through December 31, 2018. The stipulation was so-ordered by Hon. Julie Poley. Thereafter, before execution upon the warrant could occur, the COVID-19 pandemic led to a suspension of eviction proceedings for several months. *See* Administrative Order (AO) 68/20. Respondent, represented by counsel, then filed the instant motion in April 2021. Counsel for the parties stipulated to a briefing schedule and after submission of opposition and reply, the court reserved decision on June 30, 2021.[FN1]

RESPONDENT'S MOTION

I. Request to vacate judgment.

Respondent moves to vacate the possessory judgment pursuant to CPLR § 5015(a)(2). Pursuant to CPLR § 5015(a)(2), a court may relieve a party of a judgment or order upon the ground of "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 for a new trial under [CPLR] section 4404." As petitioner's attorney correctly points out in his affirmation in opposition, no trial was had in this proceeding; rather, the judgment was granted on consent by stipulation. Moreover, the Appellate Division, Second Department has held that "newly-discovered evidence" under the statute is "evidence that was in existence but undiscoverable with due diligence at the at the time of the original order or judgment." *Wall St. Mtge. Bankers, Ltd. v. Rogers,* 148 AD3d 1088, 1089 [2d Dept 2017] [internal citations omitted]; *see also Matter of Monasterska v. Burns,* 121 AD3d 902 [2d Dept 2014] [New York State Office of Children & Family Services letters that were not in existence at the time of the relevant custody order did not qualify as "newly-discovered evidence" under CPLR § 5015(a)(2)]. The purported "newly-discovered evidence" offered by respondent is a final judgment dated December 24, 2019 from a probate case involving the same parties in the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County, Florida (Case No. 2018-CP-001053) (hereinafter "Florida Judgment"). As is relevant to this proceeding, the Florida Judgment includes findings of improper notarization of the deed for the subject premises, as well as undue influence upon and lack of capacity on the part of the former owner, Raymond Thane, when the deed to the subject premises was conveyed. The language of the judgment makes clear, however, that the Florida court "does not have jurisdiction over the New York property so an ancillary proceeding must be pursued in New York " (Florida Judgment at 35). Notwithstanding the potential import of the findings in the Florida Judgment in the pending Queens County Supreme Court action between the parties (Index No. 712485/19), said judgment was not in existence at the time that respondent consented to the judgment of possession in this proceeding. Therefore, it is not "newly-discovered evidence" that would justify vacating the judgment in this proceeding pursuant to CPLR § 5015(a)(2). *See Matter of Monasterska*, 121 AD3d at 903. Accordingly, respondent's motion to vacate the judgment via CPLR § 5015(a)(2) is denied.

II. Motion to dismiss.

Respondent also moves to dismiss pursuant to CPLR § 3211(a)(1). Initially, in view of the court's denial of respondent's motion to vacate the judgment, there is no procedural basis for the court to entertain a CPLR § 3211 motion. The judgment granted on consent on November 2, 2018 represented a determination of the parties' rights in this special proceeding. *See* CPLR § 411; *Israel v. Da Auto Repairs Corp.,* 57 Misc 3d 158[A], 2017 NY Slip Op 51667[U] [App [*3]Term, 2d Dept, 2d, 11th & 13th Jud Dists 2017]. Therefore, the pre-answer mechanism for accelerated judgment

provided by CPLR § 3211 is not applicable in the current posture.

Additionally, even if the court could entertain a motion to dismiss based on documentary evidence, a CPLR § 3211(a)(1) motion "may be appropriately granted only where the documentary evidence utterly refutes [petitioner's] factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]; *see also Fontanetta v. John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010] [Documentary evidence must be "unambiguous and of undisputed authenticity."]. Here, the documentary evidence offered by respondent is the Florida Judgment. Although respondent may challenge petitioner's right to ownership of the subject premises in the Queens County Supreme Court action on the strength of the the Florida Judgment, the out-of-state judgment (which acknowledges the Florida court's lack of jurisdiction over the subject premises) does not "conclusively establish" a defense in this proceeding.[FN2] As a result, respondent's motion to dismiss pursuant to CPLR § 3211(a)(1) is denied. **CONCLUSION**

For the foregoing reasons, respondent's motion is denied in its entirety, without prejudice to the parties' claims in the action pending in Queens County Supreme Court, Index No. 712485/19.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: July 2, 2021
Queens, New York
HON. CLINTON J. GUTHRIE, J.H.C.

Footnotes

Footnote 1: Counsel for the parties stipulated to submission of the motion without argument.

Footnote 2: The court notes that although an equitable defense that the petitioner is not the owner may be interposed in a summary proceeding (*see* RPAPL § 743), matters of title cannot be determined herein. *See e.g. Nissequogue Boat Club v. State*, 14 AD3d 542, 544 [2d Dept 2005]. In any event, to the extent that respondent seeks to prevail upon an equitable defense to petitioner's standing, the Florida Judgment does not "conclusively establish" said defense.

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