

SUPREME COURT - STATE OF NEW YORK

Present:

HON. VITO M. DESTEFANO,
Justice

TRIAL/IAS, PART 21
NASSAU COUNTY

RICHARD CARTER,

Decision and Order

Petitioner,

MOTION SUBMITTED:

September 22, 2010

-against-

MOTION SEQUENCE:01

INDEX NO. 015757-10

**REBEKA LEVIAN, NORMA LEVIAN and
JOHN DOE and JANE DOE,**

Respondents.

The following papers and the attachments and exhibits thereto have been read on this motion:

Emergency Order to Show Cause	1
Affidavit in Opposition	2
Reply Affidavit	3

Background

On January 2, 2008, Petitioner Richard Carter ("Tenant") and John Petiton ("Landlord") entered into a five year lease (the "Lease") for certain property located at 143 Ontario Avenue, Massapequa, NY (the "Property") (Ex. "A" in Support of Petition). More than two years later, on July 7, 2010, Respondents Rebeka Levian and Norma Levian purchased the Property at a foreclosure sale (Ex. "B" in Support of Petition). On August 5, 2010, Respondents affixed a "Notice to Quit to Licensee" on the door of the Property ("Notice to Quit") (Ex. "C" in Support of Petition). The Notice to Quit demanded that Tenant "and all other persons occupying said premises remove therefrom and deliver possession thereof to the undersigned on or before August 22, 2010" (Ex. "C" in Support of Petition).

The Tenant then moved, by emergency order to show cause less than two weeks later, in the action entitled *U.S. Bank National Association as Trustee v John Petiton, Equicredit Corporation of America, Richard Stettine, Tracey Segal Nachamie, Wendy Stettine, Regina D'Marco, et al.*, Index No. 08-009861 (the "foreclosure action"), for an order: 1) "restraining, staying and enjoining" Rebeka Levian and Norma Levian "from commencing any and all actions and summary proceedings to remove and eject Richard Carter, tenant and occupant" of the subject property; 2) "recognizing that a Landlord-Tenant relationship exists"; 3) "recognizing Richard Carter's leasehold interest and its unexpired term"; and 4) "not interfering with Richard Carter's right to quiet enjoyment of his home and premises." (Order to Show Cause). Justice Anthony Parga declined to sign Tenant's order to show cause because the Tenant lacked "standing" in that foreclosure action (Ex. "E" in Support of Petition).

Thereafter, Tenant moved again by order to show cause, in the action *Richard Carter v Rebeka Levian, Norma Levian and John Doe and Jane Doe*, Index No. 10-015757 seeking the exact same relief as that sought in the prior order to show cause presented to Justice Parga, albeit under a different index number and different caption. For the reasons that follow, Tenant's motion is denied.

Analysis

The crux of Tenant's motion is that because he was purportedly not named in the underlying foreclosure proceeding, that the foreclosure sale at which Respondents purchased the Property does not affect him or his leasehold interest in the Property and, thus, he is entitled to remain in the Property.

In opposition to Tenant's motion, Respondents argue that Justice Parga's ruling that Tenant did not have standing in the underlying foreclosure action is the "law of the case" and on that basis alone, the instant motion should be denied and the underlying Petition should be dismissed. However, the doctrine of "law of the case" is limited to parties within the same action who have had a full and fair opportunity to litigate an issue on the merits (*Sterngass v Town Bd of Town of Clarkstown*, 43 AD3d 1037 [2d Dept 2007]). Here, Tenant was not a party to the underlying foreclosure action nor were the issues currently before this Court ever previously addressed on the merits. Accordingly, Respondents' argument that Justice Parga's decision that Tenant did not have standing, is not the "law of case" warranting dismissal of the instant Petition. Tenant's motion is nevertheless denied on other grounds.

Branches 1 and 4 of Tenant's Motion

The first branch of Tenant's motion seeking an order "restraining, staying and enjoining" the Respondents from commencing a proceeding to remove Tenant from the Property is similar to the relief sought in branch 4 of Tenant's motion, namely, that Respondents not interfere with Tenant's right to quiet enjoyment of the Property. Respondents oppose Tenant's motion on the grounds that Tenant's "application is premature as no action is pending regarding the Notice to

Quit.” (Affirmation in Opposition at ¶ 13).

Initially, this Court notes that, as a court of general jurisdiction,¹ the Supreme Court has concurrent jurisdiction with those specifically enumerated courts over summary proceedings for the recovery of real property pursuant to Article 7 of the RPAPL (*McKownville Fire Dist v Bryn Mawr Bookshop*, 54 AD2d 371 [3d Dept 1976] [action to recover possession of real property, rent due, and resolution of title issue was jurisdictionally proper before the Supreme Court]; *DiScala v Facilities Development Corp. for Office of Mental Retardation & Developmental Disabilities Staten Island Developmental Ctr*, 180 Misc2d 355, 367-68 (NY City Civ Ct 1998)). Nevertheless, given the absence of “continuous and vexatious litigation”, this Court refuses to restrain or enjoin the Respondents from commencing an action or proceeding concerning the Property or Tenant herein (*Molinari v Tuthill*, 59 AD3d 722 [2d Dept 2009] [party may forfeit right to free access to the courts if he abuses the judicial process or in some other way engages in meritless litigation motivated by spite or ill will]; *Robert v O’Meara*, 28 AD3d 567 [2d Dept 2006] [courts may impose injunctions barring parties from commencing further litigation where parties have engaged in continuous and vexatious litigation]) as “public policy mandates free access to the courts and zealous advocacy” as an “essential component of our legal system.” (*Sassower v Signorelli*, 99 AD2d 358, 359 [2d Dept 1984]; *Molinari v Tuthill*, 59 AD3d at 723, *supra*; *Robert v O’Meara*, 28 AD3d at 568, *supra*).

In *Spellman Food Services v Patrick* (90 AD2d 791 [2d Dept 1982]), the plaintiffs/tenants commenced an action seeking: 1) an injunction restraining the defendants/owners from instituting any action to evict the tenants as well as 2) a declaration of rights of the parties under a certain lease. The gravamen of tenants’ action was that the owners were planning to evict the tenants in violation of the lease agreement. In reversing the Supreme Court’s order which granted preliminary injunction, the Second Department held as follows:

It is well settled that the danger of impending judicial proceedings is not an injury justifying an injunction. As a specific illustration of this principle, it has been consistently held that a preliminary injunction restraining an eviction may not be granted in favor of a tenant on facts which may be effectively interposed as a defense in summary eviction proceedings.

(*see also Genovese Drug Stores, Inc. v William Floyd Plaza, LLC*, 63 AD3d 1102 [2d Dept 2009] [holding that the Supreme Court should have granted defendant’s cross motion to dismiss plaintiff’s cause of action seeking to enjoin defendant from attempting to terminate the lease because “the danger of impending judicial proceedings is not an injury justifying an injunction”]) (additional citations omitted).

Here, the Tenant seeks to restrain the Respondents from commencing an action or proceeding based on the fact that he was “never served with any papers or process during the

¹ New York State Constitution, Article 6, § 7.

pendency of the foreclosure action” (Petition at ¶ 5). However, in the event that a summary proceeding is ever commenced, Tenant’s argument as to the court’s failure to “acquire personal jurisdiction” over him may be raised as a defense in that proceeding (*see, Spellman Food Services v Patrick*, 90 AD2d at 791, *supra*, *Zuk v Budka*, 2002 WL 126256 [Sup Ct, App Term 1st Dept 2002]), Accordingly, branches 1 and 4 of Tenant’s motion are denied.

Branches 2 and 3 of Tenant’s Motion

Tenant also seeks, in essence, a declaration of rights between the parties and, more specifically, an order “recognizing that a Landlord-Tenant relationship exists” and “recognizing Richard Carter’s leasehold interest and its unexpired term.” Pursuant to CPLR 3001, a court may render a declaratory judgment as to the “rights and other legal relations of the parties to a justiciable controversy.” A “justiciable controversy” involves “a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect.” (*Chanos v MADAD, LLC*, 74 AD3d 1007 [2d Dept 2010]). However, because the courts are not permitted to issue decisions that can have no immediate effect and may never resolve anything, the “courts will not entertain a declaratory judgment action when any decree that the court might issue will become effective only upon the occurrence of a future event that may or may not come to pass” (*New York Public Interest Research Group, v Carey*, 42 NY2d 527, 531 [1977]).

At bar, the Respondents affixed a Notice to Quit on the Property. A Notice to Quit is a condition precedent to the filing of a summary proceeding for the recovery of real property pursuant to RPAPL § 713[5] (*see* RPAPL § 713, McKinney’s Practice Commentaries [notice to quit is not a pleading but, rather, a predicate to a pleading]).² However, merely because a Notice to Quit has been affixed to Tenant’s door does not mean that an action or summary proceeding will ensue (*see New York Public Interest Research Group, v Carey, supra*).

Assuming that no further action is taken on behalf of the Respondents, the Tenant may remain in the Property for the entire term of the purported Lease. Accordingly, any declaration by this court “recognizing” the Landlord/Tenant relationship and Tenant’s purported leasehold interest in the Property would be premature, as there is presently no justiciable controversy.

²RPAPL § 713[5] states that a “special proceeding may be maintained under this article after a ten-day notice to quit has been served upon the respondent . . . upon the following grounds: . . . 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.”

Based on the foregoing, it is hereby ordered that the motion by Petitioner Richard Carter is denied.

Dated: November 12, 2010



Hon. Vito M. DeStefano, J.S.C.

ENTERED
NOV 17 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE