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Financial Freedom Acquisition LLC v Jackson
2012 NY Slip Op 52358(U)
Decided on December 24, 2012
Supreme Court, Queens County
Markey, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected in part through December 28, 2012; it will not be published in the printed Official Reports.

Decided on December 24, 2012

Supreme Court, Queens County

Financial Freedom Acquisition LLC
against
Evelyn L. Jackson a/k/a EVELYN L. JACKSON BROOKS, et al.

8473/2011

For the Plaintiff: Stein, Wiener & Roth, LLP, by Gerald Roth and Robert Sambursky, Esqs.,
One Old Country Road, suite 113, Carle Place, New York 11514

Guardian Ad Litem: Christina Cline, Esq., 224 Nassau Boulevard South, Garden City South,
New York 11530

Charles J. Markey, J.

Papers Numbered and Read:

Report of the Guardian Ad Litem Christina Cline, Esq.....	1
Affirmation of Services by Christina Cline, Esq., dated December 9, 2012.....	2
The Court's prior order dated October 26, 2012, and entered on November 19, 2012.....	3

CHARLES J. MARKEY, J.

In a sua sponte decision by the undersigned, dated October 26, 2012, and entered on November 19, 2012, the Court observed that the plaintiff financial institution submitted a proposed order for this Court's consideration to name a referee to compute sums allegedly due to the plaintiff in this mortgage foreclosure case.

In that decision, and based on a review of the plaintiff financial institution's papers, the undersigned already had grave concerns on the legitimacy of the service of process and the mental condition of the homeowner who was confined to a nursing home. In that order, this Court decided to appoint Christina Cline, Esq., a distinguished lawyer with an expertise in elderly law to act as the guardian ad litem for defendant Evelyn L. Jackson a/k/a Evelyn L. Jackson Brooks. The Court asked Ms. Cline to make an extensive investigation and submit proposed findings, recommendations, and conclusions. Finally, the Court set Ms. Cline's fee at \$275.00 fee per hour, plus expenses, and such fees and expenses shall be paid to her by the plaintiff. The hourly fee is modest when Ms. Cline's professional credentials and significant experience are taken into consideration. [*2]

Ms. Cline, taking her fiduciary appointment with admirable seriousness of purpose, set forth on her appointed task immediately, overcoming considerable time constraints and permitted the appointment to override her other pressing matters. The Court is impressed with the extensive report submitted by Ms. Cline, her investigation and recommendations. The Court adopts Ms. Cline's report in all respects, without exception, as though it were made by the undersigned. The Court ratifies and adopts all of the findings and conclusions contained therein. In brief, the results of Ms. Cline's investigation confirmed all of the undersigned's worst fears and suspicions when the Court issued its order in October.

The case law is already expansive on the rampant abuses in the mortgage foreclosure field. Documentary filmmaker Joel Sucher, in a series of articles for *American Banker*, *Huffington Post*, and in several other blogs available on the internet, has been an eloquent champion against the bullying, corrosive, and abusive tactics used by "servicers" of mortgages in debt. In one article dated March 26, 2012, for *American Banker*, entitled "Behind Every 'Distressed Asset' Is a Distressed Human Being," Joel Sucher, whose forthcoming film is entitled "Foreclosure Diaries," concerning the current financial crisis, states:

"I'm intrigued by the Orwellian phraseology that megabanking executives and the mortgage industry have coined to describe their work. They trade, for instance, in 'distressed assets.'

"What's a distressed asset? From what I understand, an asset, like a subprime mortgage, is distressed because it fails to churn out the revenue stream it was originally supposed to produce. But post-crash, with a nod to obfuscation, 'distressed assets' have become 'legacy assets.'

"It doesn't take [contemporary Italian essayist and philosopher] Umberto Eco to figure out the real meaning of these dehumanizing terms: for the millions of people whose assets - - their homes - - are underwater, it's their lives that have become truly distressed."

The Court will quote extensively from the report of Christina Cline, Esq., because the abuses that occurred in the case at bar would have overwhelmed a powerless individual such as defendant Evelyn Jackson, had the undersigned's earlier apprehensions not been aroused leading to the appointment of Ms. Cline. Ms. Cline's report to the Court, in pertinent part, states:

INTEREST OF MY WARD

2. My ward owns one half share of the property which is the subject of this foreclosure action. There is nothing in the court file that indicates that my ward is the sole owner. A view of the ACRIS records does not reveal how the property is held.

BACKGROUND

3. This action is one of FORECLOSURE upon a reverse mortgage. The defendant, [*3] EVELYN L. JACKSON, a/k/a EVELYN L. JACKSON BROOKS, and Harding Brooks allegedly signed a mortgage agreement with FINANCIAL FREEDOM SENIOR FUNDING CORPORATION, a subsidiary of Lehman Brothers Bank, FSB on May 21, 2004.

4. The mortgage allowed for an indebtedness of \$475,000.00 with interest. At the closing the following payments were made: \$215,745.00, Initial Payment of the loan which consisted of: \$16,668.00, closing costs; \$142,150.86, payment of liens; \$53,285.71, loan advance; \$3,640.43. At the time the action was commenced there was a balance due to Plaintiff in the amount of \$217,225.40.

5. On February 21, 2010, Harding Brooks died.

6. On March 9, 2011, FINANCIAL FREEDOM SENIOR FUNDING CORPORATION, a subsidiary of LEHMAN BROTHERS BANK, FSB assigned the mortgage to Plaintiff, FINANCIAL FREEDOM ACQUISITION.

DEFAULT on the MORTGAGE

7. On October 13, 2010 the assignee of the Mortgage, Financial Freedom Acquisition, L. L.C. sent a letter entitled "Home Equity Conversion Mortgage Repayment Notice" addressed to Evelyn L. Jackson-Brooks at 109-14 177th St. Jamaica, New York 11433. In part the letter states "Upon the occurrence of a maturity event, including the borrower's decision to permanently leave and no longer occupy the subject property as a primary residence, the loan becomes due and payable." It continues in the second paragraph, with information and assistance to which the borrower is entitled. Defendant, EVELYN L. JACKSON defaulted on the mortgage.

8. A Lis Pendens was filed in April 2011.

9. Plaintiff filed a summons and complaint in Queens Supreme Court.

10. Defendant did not appear in the action nor did she submit an answer in the action.

11. Plaintiff submitted a motion for an Order of Reference upon which the Court issued an Order appointing your affiant in connection with the motion.

INVESTIGATION

12. My ward, EVELYN L. JACKSON, the defendant in this action, currently resides at the Hollis Manor Nursing Home located at 191-06 Hillside Ave. Hollis, NY 11432, having been placed in the facility on May 12, 2010, by her son, Will Jackson. Her admitting diagnosis in 2010 was Alzheimer's disease, macular degeneration, seizure disorder, and hypertension. [*4]

13. Prior to being placed in Hollis Park Nursing Home by her son, Ms. Jackson resided at her home located at 109-14 177th Street, Jamaica, New York 11433 the premises of this action.

JURISDICTION

14. The Affidavit of Service submitted by plaintiff in support of personal jurisdiction over defendant, Evelyn L. Jackson, a/k/a Evelyn L. Jackson Brooks states the following:

a. that on 4/12/11 at the Hillside Manor Nursing Home located at 191-06 Hillside Ave, Hollis, NY 11432 Andrew Ceponis served the summons and complaint bearing Index No. 8473-11 & filing date 04/06/11 upon individual Evelyn L. Jackson a/k/a Evelyn L. Jackson Brooks defendant therein by delivering thereat a true copy of each to said defendant personally; deponent knew said person so served to be the person described as said defendant therein named. She identified herself as such.

b. The description of Evelyn L. Jackson is given as a female, black, grey hair of 85 years of age only 5ft. 3in. weighing 105lbs.

15. On December 4, 2012 I visited the defendant Evelyn L. Jackson at *the Hollis Park Nursing Home* - - **NOT** the Hillside Manor Nursing Home, as indicated in the Affidavit of Service - - where Ms. Jackson has been since May 12, 2010. I found Ms. Jackson a pleasant elderly woman. I inquired of her regarding the service of the summons and complaint, the notice of default, the judgment, and of the underlying mortgage on her house she has absolutely no recollection of anything about this action. I inquired of her as to her family members and the information she provided me is completely inaccurate and different from that supplied to me by the nursing home staff. I inquired of SHARON SELBERG, who

functions as both receptionist and director of social activities, whether she was present when EVELYN L. JACKSON was allegedly served with the Summons and Complaint, and she informed me that she had no recollection of any such event.

16. I inquired of Dr. Riki Koenigsberg, the resident Psychologist who advised me that EVELYN L. JACKSON suffers from Alzheimer's disease, dementia, and macular degeneration. When I inquired whether Ms. Jackson would be able to understand the documents even if one assumed that she was in fact served with any of them. I was informed by Dr. Koenigsberg that Ms. Jackson's eyesight is so poor that she can not even see her food never mind read legal documents. I asked if her eyesight had been poor in July 2011 and was informed that it had been just as poor at that time and in fact that it had been poor in May12, 2010 upon her admission to Hollis Park Nursing Home.

17. Dr. Koenigsberg also informed me that even if she had been able to see the papers she would have had no concept of the importance of the documents as her Alzheimer's disease and dementia had progressed to the point that she could neither understand not conceptualize the [*5]importance of a summons, complaint or a notice of default.

18. The Affidavit of Service submitted by plaintiff in support of personal jurisdiction over defendant, Evelyn L. Jackson, a/k/a Evelyn L. Jackson Brooks states the following:

a. that on 4/12/11 at the Hillside Manor Nursing Home located at 191-06 Hillside Ave, Hollis, NY 11432 Andrew Ceponis served the summons and complaint bearing Index # 8473-11 & filing date 04/06/11-upon individual Evelyn L. Jackson a/k/a Evelyn L. Jackson Brooks B/S/U Nathan Heilweil as Administrator of the Hillside Manor Nursing Home 3 story brick defendant therein named by delivering thereat a true copy of each to said defendant personally; deponent knew said person so served to be the person described as said defendant therein. (S)he identified (her) himself as such.

b. The description of NATHAN HEILWEIL is given as a male, white, brown hair of 54 years of age, height-6' 1" weighing 210lbs.

19. On November 12, 2012 I spoke to NATHAN HEILWEIL who informed me that he had no recollection of ever being served in this matter and referred me to the Edith Gonzalez in the Comptroller's office to review the records contained in Ms. Jackson's file. "Edith Gonzalez" indicated that Ms. Jackson's file contained a large manilla envelope with a date

stamp of August 22, 2012. The envelope contained a notice of default dated 7/27/12. Ms. Gonzalez indicated that the envelope had been delivered to the Nursing Home and forwarded to her office and that it had been retained by her in the Controller's office. There is nothing in the nursing home file that indicates that Ms. Jackson ever received the Summons and Complaint or the Notice of Default, or a copy of any Judgment entered against her.

20. While there, I inquired of Mr. Heilweil and he informed me that he is 62 years of age 5'9" tall weighing 190-200 lbs and has grey hair.

NOTICE OF DEFAULT IN THE ACTION

21. Upon visiting the Hollis Park Nursing Home, I was informed that they had an envelope in Ms. Jackson's file, but that Ms Jackson never received it.

APPLICABLE LAW: APPOINTMENT OF AGUARDIAN AD LITEM

22. Mrs. Jackson is an incapacitated person. Even though she had not been judicially declared incapacitated, in an Article 81 proceeding the Court still has certain obligations with respect to the proceeding in which a party is incapacitated.

23. CPLR 1201 states that "a person shall appear by his guardian ad litem . . . if he is an [*6]adult incapable of adequately prosecuting or defending his rights." (CPLR 1201).

24. The appointment by a guardian ad litem for an adult incapable of adequately prosecuting or defending his rights" is made by the court in accordance with CPLR 1202 . . .

* * * * *

25. CPLR 1203 states that, ". . . No default judgment may be entered against **an adult incapable of adequately protecting his rights** for whom a guardian ad litem has been appointed unless twenty days have expired since the appointment." (Emphasis added.)

26. While the statutes are vague if not silent with regard to a plaintiff's obligation when dealing with an incapacitated defendant, case law is replete with the court's interpretation that

Article 12 places an obligation upon a party to advise the court of the possibility that another party may suffer an incapacity or that he or she is a person "incapable of adequately prosecuting or defending his rights." (CPLR 1201)

* * * * *

The papers submitted in support of the application present a strong evidentiary showing that at the time the action was commenced and at the time the default judgment was entered, the decedent Defendant, Evelyn L. Jackson, although not judicially declared an incompetent, was "an adult incapable of adequately prosecuting or defending her rights" (CPLR 1201). As such, she should have been represented in the action by a guardian ad litem. In fact "it is questionable whether any appearance by the defendant . . . either pro se or by an attorney, without the appointment of a guardian ad litem, would have been authorized." (*Rand v Lockwood*, 65 Misc 2d 182 [Sup Ct Nassau County 1970]). A person specified in CPLR 1201 may only appear by a guardian ad litem.

* * * * *

CONCLUSIONS

31. From the examination and analysis of the entire file herein, the "Home Equity Conversion Mortgage Repayment Notice," the Summons and Complaint, the affidavit of services, the Notice of Default, and the affidavit of service: the files held by Hollis Nursing Home; the conversations with Nathaniel Heilwell, "EDITH GONZALEZ", the comptroller and other members of the nursing home staff, and my own investigation, my conclusions in this matter are as follows:

The Notice of Default in the Mortgage was improperly served upon defendant, Evelyn L. [*7] Jackson at 109-14 177th Street, Jamaica, New York 11433. In light of the fact that defendant's absence from the premises forms the basis of the default sending the Mortgage Repayment Notice denied the defendant of her right to notice and the opportunity to timely repay the balance amount and HUD services prior to the Foreclosure proceeding. As plaintiff had actual knowledge (plaintiff's action is based upon the fact that defendant was not living at the premises) of this condition precedent to the commencement of the action, the action must be dismissed.

32. As to the affidavits of service I find the following irregularities:

A. Service upon Evelyn L. Jackson

1. disparities in location of service— affidavit of service states that defendant, Jackson was served at Hillside Manor Nursing Home— while she is a resident of Hollis Park Manor Nursing Home. The Name is clearly displayed in the front of the building and it would seem difficult to mistake the name if the process server had been there.

2. disparities in description of individual served— affidavit of service describes defendant Jackson as a black female with grey hair being 85 years of age, 5'1" and 105 lbs. Ms. Jackson is 92 years of age.

B. Service upon Evelyn L. Jackson B/S/U NATHAN HEILWEIL as Administrator of the Hillside Manor Nursing Home.

1. disparities in person served—Mr Heilweil is the Administrator of the Hollis Park Manor Nursing Home.

2. disparities in description of person served— The Affidavit of Service contains a description of NATHAN HEILWEIL as a male, white, brown hair of 54 years of age, height-6' 1" weighing 210lbs. In fact, Mr. Heilweil is 62 years of age 5'9" tall weighing 190-200 lbs and has grey hair.

33. While counsel alleges in paragraph 13 of the affirmation in support of the instant motion that a notice pursuant to RPAPL 1303 was served with the Summons and Complaint no mention of that notice is indicated in the affidavit of service of the summons and complaint, nor is there any separate affidavit in the court file or in the Motion for an Order of Reference.

34. The Notice of the Default in the Action was served again at Hillside Manor Nursing Home.

35. The Motion for an Order of Reference was served again at Hillside Manor Nursing Home.

36. There is no indication of service of the notice of 3215(g)(3)(I) 20 day notice before

[*8]the entry of judgment.

37. Paragraph 24 of the affirmation of counsel states that all of the defendants herein are of full age and none of said defendants is an incompetent or absentee. Clearly defendant is incapacitated.

38. The estate of Harding Brooks was not served and there is nothing to indicate that there are no heirs at law of Harding Brooks who would be entitled to notice especially as there is nothing to indicate that the property was held by Harding Brooks and Evelyn L Jackson a/k/a Evelyn L Jackson-Brooks as tenants by the entirety giving her rights to the entire property upon Harding Brooks' death.

39. Thus, I conclude:

(1) the condition precedent to the commencement of the action has not been properly completed,

(2) that jurisdiction of this Court over EVELYN L. JACKSON has not been properly obtained in that she was not properly served and

(3) that there is no indication that the notice pursuant to RPAPL 1303 was served upon defendant Jackson,

(4) that the Notice that the action should not have proceeded without the appointment of a Guardian ad Litem for Ms Jackson in accordance with CPLR 1201. The action must be dismissed or in the alternative that defendant should be returned to her position upon the service of the "Home Equity Conversion Mortgage Repayment Notice" as the court did in *Oneida Nat. Bank & Tr. Co. v Unczur*, 37 AD2d 480, 483 [4th Dept. 1971].

In light of the irregularities and the failure of plaintiff to comply with the applicable law and statutes, it should be responsible for any and all additional costs, interests, incurred as a result of the delay in the proceeding.

The Court adopts each and every one of the findings, recommendations, and conclusions quoted above by Ms. Cline. The Court finds that defendant Jackson had no mental competency so as to understand what papers she was receiving, assuming *arguendo*

that papers had indeed been served on her. Second, aside from Ms. Jackson's dementia and lack of mental competency, the Court finds that the nursing home's administrator was not properly served as contended by the plaintiff.

The Court, finally, thanks Ms. Cline for the great amount of time, effort, and energy spent [*9]in preparing a comprehensive report.

The Court, entirely agreeing with Ms. Cline's report, dismisses the complaint for the improper service of process, as set forth above. The Clerk is thus directed to dismiss the action.

Concerning the appropriate fee, Ms. Cline's accompanying affirmation of services indicates that she has worked 18.2 hours on the report. The Court previously awarded her a fee of \$275.00 per hour. Accordingly, the Court awards Ms. Cline the sum of \$5,005.00 for her fees. The Court further awards Ms. Cline the sum of \$575.00 for expenses.

In sum, the plaintiff shall pay Ms. Cline the sum of \$5,580.00 within 20 days of the service upon it by Ms. Cline of a copy of this order bearing the County Clerk's dated stamp of entry. If such sum is not paid by the plaintiff timely, the Court shall convene a hearing and entertain an application by Ms. Cline for higher fees based upon a re-evaluation of whether Ms. Cline's services should have been compensated at the rate of \$550.00 per hour.

The complaint is dismissed for improper service of process, and the action is dismissed.

The foregoing constitutes the decision, opinion, order, and Judgment of the Court.

J.S.C.

Dated: December 24, 2012

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