

LAW CURRENTS An informational newsletter from Richard A. Klass, Esq.

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Knocking Out Defenses Means They Don't Get Up!

The Executor of the estate of a man who owned a mixed-use building in Brooklyn sold it to someone for \$700,000. As part of the sale, the Executor agreed to take back two mortgages on the property from the buyer in favor of the decedent's wife, the beneficiary of the estate.

The buyer (and now building's owner) defaulted on the mortgages by failing to make payments on them to the beneficiary/lender. At that point, the mortgagee turned to *Richard A. Klass, Your Court Street Lawyer*, for legal assistance to commence foreclosure proceedings on the two mortgages against the buyer.

Once the foreclosure proceeding was brought, the buyer served its "Answer with Affirmative Defenses and Counterclaim." In general terms, an "affirmative defense" is the legal term for when the defendant in a lawsuit puts forth the reason he is not liable to the plaintiff.

The First Affirmative Defense was that the Summons and Complaint were not properly served upon the defendant according to law, so the court lacked jurisdiction over the person. The Second Affirmative Defense and the Counterclaim alleged that the buyer was coerced into buying the property, having known the decedent and his family for 15 years. The defendant claimed that the conditions of the premises were concealed from it by the plaintiff and it did not have an opportunity to inspect the premises prior to the sale. As a result, the defendant claimed that there exists a defective foundation and water seepage into the basement.

Strike First!

Both federal and state court procedural rules allow for parties to a lawsuit to make requests of the judge to deal swiftly with certain claims or defenses of a litigant. These



requests are called "Pre-Answer Motions to Dismiss." In essence, the party is claiming that the claim or defense has no legal merit whatsoever for a number of reasons and, therefore, that matter should not even proceed forward in the case.

Upon receipt of the Answer with Affirmative Defenses and Counterclaim, *Your Court Street Lawyer* brought a Pre-Answer Motion to Dismiss the defenses of the defendant (buyer of the building). This Motion challenged the legitimacy of these defenses.

Good service of process:

Attached to the motion papers was a copy of the Affidavit of Service of the Summons and Complaint upon the defendant from a licensed process server. New York law has traditionally held that a process server's affidavit ordinarily constitutes "prima facie" [at first sight] evidence of proper service. *National Heritage Life Insurance Company v. T.J. Properties Co.*, 286 AD2d 715 [2 Dept. 2001]. A defendant can rebut the process

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server's affidavit with a 'detailed and specific contradiction of the allegations in the process server's affidavit' sufficient to create a question of fact warranting a traverse hearing (citing to *Bankers Trust Co. of California v. Tsoukas*, 303 AD2d 343 [2 Dept. 2003]). However, in this case, the defendant did not deny the process server's allegations in an affidavit, but only in the attorney's affirmation (which has no evidentiary value). Also, the defendant failed to timely move to dismiss the case within the 60-day period in which a defendant must move to dismiss on this ground (see, Civil Practice Law and Rules Section 3211(e)).

No concealment charges against the Mortgagee:

The mortgagee asked the Judge to dismiss the Second Affirmative Defense and Counterclaim that the buyer was not given the opportunity to inspect the premises before purchase, and thus, should not have to pay the mortgages. The building was sold by the executor of the estate of the deceased person but the mortgages delivered at the closing were in favor of another family member, the beneficiary of the property under the Last Will and Testament.

Using the pre-Answer Motion to Dismiss, the mortgagee pointed out to the judge that the defenses were not permitted because they were directed against the estate, as opposed to the beneficiary of the property. Thus, under Civil Practice Law and Rules Section 3211(a)(6), the claim could not be maintained even though in the form of a counterclaim because it could not properly be asserted against the beneficiary. The Judge noted that the buyer did not join the seller of the property (the estate) as a party and could not bring the claims it was claiming in its defense.

In granting the plaintiff's motion to dismiss, the Judge held that the defenses and counterclaim of the defendant should be properly dismissed. *Kodsi v. 115 Bay Ridge Ave. LLC*, Sup. Ct., Kings Co. Index No. 33740/2008, 6/28/2010.

It is very important that, upon receiving an Answer to a lawsuit from a defendant, the plaintiff immediately review the Answer to determine the nature of any defenses and counterclaims, as well as decide whether to ask the judge to "knock 'em out" right away instead of waiting until trial.

— Richard A. Klass, Esq.

Honors and Appointments

We are pleased to announce that Richard A. Klass was recently appointed to *Co-Chair* of the *Publications Committee* of the New York State Bar Association's General Practice Section, as well as *Co-Editor* of *One on One*, the publication of the General Practice Section.

Richard A. Klass, Esq., maintains a law firm engaged in civil litigation at 16 Court Street, 29th Floor, Brooklyn Heights, New York. He may be reached by phone at (718) COURT•ST or e-mail at RichKlass@CourtStreetLaw.com with any questions. Prior results do not guarantee a similar outcome.

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