

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
	:	
v.	:	Civ. No. 3:01cv796 (PCD)
	:	
SUSAN A. SNYDER, RUSSEL MAHLER,	:	
STELLE MAHLER, and BANK OF	:	
AMERICA, N.A., as successor in	:	
interest to NATIONSBANC	:	
MORTGAGE CORPORATION,	:	
Defendants.	:	

RULING ON PENDING MOTIONS

Plaintiff moves for entry of judgment *nunc pro tunc*, for distribution of proceeds, and for dismissal of Sunoco’s cross-claim. Sunoco moves to vacate in part the entry of default judgment against Defendants. For the reasons discussed below, Plaintiff’s motion for entry of judgment *nunc pro tunc* is **granted**, Plaintiff’s motion for distribution of proceeds is **granted in part**, Sunoco’s motion to vacate is **denied**, and Plaintiff’s motion to dismiss Sunoco’s cross-claim is **granted**.

I. Background

Plaintiff filed this suit on May 8, 2001, seeking a decree that a constructive trust and/or a resulting trust be imposed upon certain real property located at 14 Michelle Lane, Madison, Connecticut (subject property), in which Susan A. Snyder held legal title for the benefit of Russell and Stelle Mahler. Plaintiff sought to foreclose federal tax liens based on the Mahlers’ tax liability which were filed on March 22, 2001, in the land records of Madison, Connecticut against Susan A. Snyder as nominee of the Mahlers. Plaintiff named Bank of America as a Defendant because it had recorded a mortgage

interest in subject property. Plaintiff did not name Sunoco as a party because Sunoco had no recorded interest in the subject property when the suit was filed. On May 11, 2001, Plaintiff filed a Lis Pendens in the land records of Madison, Connecticut.

On August 6, 2002, Plaintiff sought to amend its complaint by adding the Mahlers as Defendants, alleging that Snyder apparently quit-claimed the property to the Mahlers (her parents). As the Mahlers might have held a prior unrecorded title Plaintiff believed they might claim an interest in the property. Plaintiff's motion to amend was granted on September 11, 2002. *See* Doc. No. 30. The amended complaint alleged that Snyder held record title as nominee of the Mahlers. The Mahlers did not answer the amended complaint, and Snyder and the Mahlers failed to respond to Plaintiff's written discovery requests and failed to appear for scheduled depositions.

On November 14, 2002, Plaintiff filed a motion for entry of default judgment. [*See* Doc. No. 41.] Plaintiff had not filed a motion for default. The Court construed its motion for default judgment as a motion for default¹ and ordered entry of a default against Snyder and the Mahlers on November 25, 2002 and instructed Plaintiff to file a motion for default judgment within thirty days. *See id.* Plaintiff filed a renewed motion for

¹ Plaintiff sought entry of default on the basis of the Mahler's failure to answer or otherwise plead in response to the amended complaint and Snyder's and the Mahler's repeated failures (1) to obey this Court's Order of October 7, 2002; (2) to give discovery in accordance with that Order; and (3) to attend the properly noticed depositions. Plaintiff's motion for default judgment sought a judgment against Defendants Russell Mahler, Stelle Mahler, and Susan Snyder, declaring that (1) the Mahlers are the legal and equitable owners of the real property at 14 Michele Lane, Madison, Connecticut; (2) Susan Snyder holds the real property located at 14 Michele Lane, Madison, Connecticut, as the nominee of Russell Mahler and/or Stelle Mahler; (3) the federal tax liens on the real property located at 14 Michele Lane be foreclosed; and (4) such property be sold according to law, free and clear of any right, title, lien, claim, or interest of all parties to this action, and that the proceeds of the sale be distributed first to the Bank of America to satisfy its mortgage, with the balance to Plaintiff to offset the costs and expenses of the sale, with the remainder to be applied in partial satisfaction of the tax liens and judgments against the Mahlers.

default judgment on December 12, 2002. [See Doc. No. 43.] The Court granted this motion absent opposition on January 10, 2003, which order was entered on the docket on January 17, 2003. *See id.* Subsequently, Plaintiff moved to order the Mahlers to vacate the premises and to appoint a receiver to sell the subject property pursuant to 26 U.S.C. § 7403, which the Court granted absent opposition. [See Doc. No. 45, 46, 48.] On July 2, 2003, Plaintiff moved for distribution of proceeds [Doc. No. 57].

Sunoco filed a motion to intervene [Doc. No. 61] on July 9, 2003, a cross-claim on July 15, 2003 [Doc. No. 62], a motion for summary judgment on July 15, 2003 [Doc. No. 63], and a motion to vacate Plaintiff's January 17, 2003 default [Doc. No. 65] on July 15, 2003. On May 28, 1997, Snyder allegedly became indebted to Sunoco for approximately \$500,000, as guarantor of a promissory note executed by Epic Holding Corp. ("Epic"), a company owned and/or controlled by the Mahlers. At the time Snyder executed the Guaranty, she was the record owner of the real property at 14 Michele Lane, Madison, Connecticut (the "Real Property"). On October 22, 2001, Sunoco filed a complaint against Snyder to collect its debt, and obtained a judgment against Snyder (the "Sunoco Judgment") in the amount of \$499,833.91 plus post-judgment interest. *See Sunoco Inc. (R&M) v. Epic Holding Corp., et. al.*, 3:01cv01988 (SRU) (D. Conn. 2001). On May 21, 2003, Sunoco recorded the Sunoco Judgment in the Madison, Connecticut Land Records. Pursuant to CONN. GEN. STAT. § 52-380a, Sunoco claims a lien on the Real Property (and its proceeds) to secure Snyder's repayment of outstanding repayment obligations under the Sunoco Judgment, but asserts no claim and cites to no authority for a claim to an interest in the property prior to its May 21, 2003 recording of its judgment.

On June 3, 2003, the Court granted Plaintiff's motion for confirmation of sale to Frank DiMartino for approximately \$465,000. Having recently become aware of Sunoco's alleged claim to the Real Property, Plaintiff requested that Sunoco execute a release of any interest it held in the Real Property, claiming that no such interest existed. Sunoco alleges that it had no knowledge of the procedural history of this case and was concerned that the impending sale might impede its interests. Despite its concerns that it did not have adequate time to research the reasonableness of the purchase price and other related matters, Sunoco agreed to release its lien on the Real Property, subject to Plaintiff's agreement that Sunoco's lien would attach to the Sale Proceeds with the same validity, priority, and amount as may exist in or against the Real Property at the time of closing. In addition, Plaintiff agreed to consent to Sunoco's intervention in this case.

II. Discussion

A. United States' Motion for Entry of Separate Judgment *Nunc Pro Tunc* [Doc. No. 87]

Plaintiff moves for entry of separate judgment *nunc pro tunc*, arguing that upon granting its motion for default judgment the clerk of the court should have but did not enter a final and separate judgment. On January 10, 2003, the Court granted Plaintiff's motion for default judgment against Defendants Russell Mahler, Stelle Mahler, and Susan Snyder.² *See* Doc. No. 43. This was entered on the docket on January 17, 2003. *See id.* Although the Court granted Plaintiff's motion for default judgment, no final judgment

² Plaintiff argues that the Court "inadvertently ignored" its motion for default judgment filed on November 14, 2002. However, the proper procedure is first to move for default, and once default is entered, to move for default judgment. Plaintiff's failure to follow procedure does not constitute "inadvertent[] ignor[ing]" by the Court.

was entered by the clerk of the court. However, this clerical scrivener's oversight does not alter the fact that final judgment against Defendants Snyder and the Mahlers was rendered. Sunoco cites to various cases to support its proposition that courts should not grant relief *nunc pro tunc* when such relief would be prejudicial. However, *Jacobs v. Patent Enforcement Fund*, 230 F.3d 567 (2d Cir. 2000) involved a substantially different question regarding whether jurisdiction may be created "after the fact." *Id.* at 567. The court suggested that "the courts of appeals may indeed create jurisdiction *nunc pro tunc* in this way, but . . . that this power 'should be exercised sparingly,' and only when doing so will not prejudice any of the parties to the litigation." *Id.* (quoting *Newman-Green, Inc., v. Alfonzo-Larrain*, 490 U.S. 826, 836-37, 104 L. Ed. 2d 893, 109 S. Ct. 2218 (1989)). The court further noted that "in the specific context of a default judgment, serious questions of prejudice would inevitably arise, because it might seem unreasonable to require a defendant to appear to defend a case over which the court had no subject matter jurisdiction whatsoever." *Id.* In contrast, the present case does not involve an after the fact assessment of subject matter jurisdiction.

Sunoco cites to cases for the proposition that courts should not make substantive changes affecting parties' rights *nunc pro tunc*. See *Transamerica Inc. v. South*, 975 F.2d 321, 325 (7th Cir. 1992); *King v. Ionization Int'l Inc.*, 825 F.2d 1180, 1188 (7th Cir. 1987). However, *Transamerica* clearly instructs that "district courts may issue *nunc pro tunc* to show what was actually done but not properly or adequately recorded." *Transamerica*, 975 F.2d at 325 (internal quotation omitted); see also *See United States v. Taylor*, 841 F.2d 1300, 1308 (7th Cir. 1988) ("A court may issue a *nunc pro tunc* order to

correct the record so that it reflects what was actually done but never recorded due to clerical inadvertence”), *cert. denied*, 487 U.S. 1236 (1988). “Thus, a *nunc pro tunc* order is typically used to correct clerical or ministerial errors or a failure of the court to reduce to judgment what it stated orally or in an opinion.” *Transamerica*, 975 F.2d at 325.

Although Sunoco claims that granting Plaintiff’s motion would be prejudicial, the Court had already clearly and explicitly granted Plaintiff’s motion for default judgment as of January 17, 2003, if not January 10, 2003. *See* Doc. No. 43. The granting of default judgment was “actually done” on the record and constituted an adjudication of Plaintiff’s claims to the property, thereby extinguishing the interests of Snyder and the Mahlers.

Accordingly, Plaintiff’s motion for entry of judgment *nunc pro tunc* to the foregoing effect as of January 17, 2003 [Doc. No. 87] is **granted**.

B. United States’ Motion for Distribution of Proceeds [Doc. No. 57]

On July 2, 2003, Plaintiff moved for distribution of proceeds from the sale of the Real Property. On June 24, 2003, Frank DiMartino paid \$465,125.68, which is being held by the Court appointed Receiver, Jennifer Trautman of the Beazley Company. Plaintiff represents that (1) the seller’s closing costs are \$1,386.44 payable to Snow, Atticks & Hollo; (2) the Receiver is entitled to 6% of the proceeds, or \$27,900 as commission; (3) Bank of America, which holds a first lien on the property, was owed \$249,289.53 as of June 20, 2003 (Plaintiff notes that Bank of America should be paid this amount plus interest from June 20, 2003)³; and (4) the remaining proceeds, approximately

³ In its motion Plaintiff requests that Bank of America notify Plaintiff regarding the exact amount of interest accrued since June 20, 2003 within two days of this Ruling.

\$186,549.71, less any further interest due to Bank of America, should be distributed to Plaintiff.

Bank of America filed an objection to Plaintiff's motion, arguing that because the loan has been accelerated, the fees and costs of Bank of America in enforcing its lien through its foreclosure action are part of its debt and must be paid out of the sale of the subject property its mortgage debt to be paid in full. Bank of America calculates the total amount due to it as of June 20, 2003 as \$251,196.23, and the amount due as of July 28, 2003 as \$253,345.88.

Sunoco filed an objection,⁴ requesting the Court to deny Plaintiff's motion to the extent Plaintiff seeks (1) authority to distribute any funds to the holder of any alleged interest in the Real Property, except to the extent a party in interest proves at trial (or by stipulation) that it held an interest in the Real Property on the date of the sale and that such interest had a greater priority than Sunoco's interest; (2) authority to distribute any funds on account of costs associated with the sale or preservation of the Real Property, except to the extent such costs conferred an actual, necessary benefit to the collateral; and (3) authority to distribute any funds to Plaintiff.

Sunoco argues that Plaintiff is not entitled to distribution of the sale proceeds of the Real Property because it did not acquire an interest in the property in the absence of a final judgment. The argument lacks merit, as discussed below.

⁴ Plaintiff's argument that Sunoco's objection should be dismissed as untimely lacks merit. Plaintiff filed its motion on July 2, 2003, with an order that any objections "shall be . . . filed . . . not later than July 14, 2003." *See* Doc. No. 57. Plaintiff does not have authority to issue orders upon other parties, and cites no legal authority to support its doing so. Accordingly, Sunoco's objection is deemed timely.

Citing to CONN. GEN. STAT. § 47-10, Sunoco argues that Plaintiff never acquired an interest in the Real Property because the judgment was not duly recorded. Section 47-10 provides that “[n]o conveyance shall be effectual to hold any land against any other person . . . unless recorded on the records of the town in which the land lies.”

Plaintiff argues that Sunoco’s objection was filed over two years after Plaintiff filed a lis pendens, and that a properly filed notice of lis pendens binds any subsequent purchaser or encumbrancer to all proceedings described in the lis pendens to the same extent as if it were a party to the action. *See* CONN. GEN. STAT. § 52-325(a). Section 52-325(a) provides that a notice of lis pendens

shall . . . be notice to any person thereafter acquiring any interest in such property of the pendency of the action . . . and each person whose conveyance or encumbrance is subsequently executed or subsequently recorded or whose interest is thereafter obtained . . . shall be deemed to be a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the recording of such notice, to the same extent as if he were made a party to the action.

Here, Plaintiff filed its notice of lis pendens on May 11, 2001. Sunoco filed its judgment lien in the land records on May 21, 2003. Plaintiff’s claim is based on federal tax liens, notices of which were filed in September 1993 and March 2001. As provided by CONN. GEN. STAT. § 52-325(a), the lis pendens put Sunoco on notice regarding Plaintiff’s interest in the property, and consequently binds Sunoco, a purported subsequent encumbrancer, as if it had been a party to the action referenced in the lis pendens. *See Webster Bank v. Zak*, 71 Conn. App. 550, 561-64 802 A.2d 916 (2002) (“The doctrine underlying lis pendens is that a person who deals with property while it is in litigation does so at his peril”) (internal citation and quotation omitted). Consequently, Sunoco is bound by the adjudications pertaining to the judgment rendered as of January 17, 2003, if

not January 10, 2003. When Sunoco recorded its judgment on May 21, 2003, seeking to reach Snyder's property interest, Snyder no longer had any such interest in the property since such had been extinguished by the Judgment dated January 10, 2003 and docketed on January 17, 2003. Thus Sunoco's judgment could not reach any interest of Snyder in the property as none then existed as a matter of law.

Accordingly, Plaintiff's motion for distribution of proceeds is **granted** in part. Plaintiff and Bank of America shall consult with each other, agree on, and set the appropriate distribution to Bank of America on or before October 16, 2003. If the parties are unable to agree on the amount, each party shall set forth its proposed amount for the distribution to Bank of America, shall explain how it reached this amount, shall cite to any relevant legal authority, shall explain why its calculations differ from the other party's calculations, and shall submit a joint motion to the Court. Such motion shall be filed on or before October 20, 2003.

C. Sunoco's Motion to Vacate [Doc. No. 65]

Pursuant to FED. R. CIV. P. 60(b), Sunoco moves to vacate in part the endorsement granting Plaintiff's renewed motion for entry of default against Defendants Russell Mahler and Stelle Mahler ("the Mahlers") and Susan Snyder. Sunoco requests that the Court vacate the Order to the extent that it constitutes (1) a declaration that the Mahlers are the legal and equitable owners of the property at 14 Michele Lane, Madison, Connecticut (the "Real Property"); (2) a declaration that Susan Snyder holds the Real Property; and (3) a declaration that Plaintiff holds any lien(s) against the Real Property, including but not limited to an authorization for the foreclosure of such lien(s).

Plaintiff responds that the margin endorsement of January 10, 2003 granting its motion for default judgment is a final judgment. As discussed elsewhere, entry of a default judgment constituted a final judgment.

To the extent that Sunoco moves for reconsideration under Fed. R. Civ. P. 60(b), its claims fail. Fed. Rule Civ. P. 60 provides for relief based on “mistake, inadvertence, surprise, or excusable neglect,” FED. R. CIV. P. 60(b)(1), if the judgment is void, FED. R. CIV. P. 60(b)(4), or for “any other reason justifying relief from the operation of judgment,” FED. R. CIV. P. 60(b)(6).

Because Plaintiff filed a lis pendens on May 11, 2001, Sunoco cannot allege mistake, inadvertence, surprise, or excusable neglect. Rule 60(b)(2) provides for relief where a party presents “newly discovered evidence, which by due diligence could not have been discovered [earlier].” Plaintiff’s notice of lis pendens was filed two years before Sunoco recorded its judgment, and Sunoco’s delinquent discovery of the notice of lis pendens precludes a claim of newly discovered evidence.⁵

Rule 60(b)(4) provides for relief from judgment where the judgment is void. Sunoco contends that the Order was entered without due process, in that Plaintiff obtained relief by default against Snyder to the detriment of her creditors, including

⁵ Contrary to Sunoco’s argument, the fact that Sunoco did not react until two years after Plaintiff filed its notice of lis pendens does not mean that the Court’s rulings prior to Sunoco’s late intervention are based on mistaken facts. Moreover, the cases cited by Sunoco are distinguishable. For example, *Pioneer Inv. Serv. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1992) involved excusable neglect in the context of specific bankruptcy statutes. Sunoco cites to *Welch & Forbes, Inc. v. Cendant Corp. (In re Cendant Corp.)*, 234 F.3d 166 (3d Cir. 2000) for the principle of excusable neglect and lack of prejudice, but *Welch* involved a situation where mail delivery was accidentally delayed, which is not the case here. Nothing here hindered or precluded Sunoco from having knowledge of the lis pendens which a simple title search would have uncovered. Its failure to do so precludes a claim of newly discovered evidence.

Sunoco, without notice. However, as discussed above a properly filed notice of lis pendens constitutes notice, pursuant to CONN. GEN. STAT. § 52-325(a). Upon bringing this action, Plaintiff, in accordance with 26 U.S.C. § 7403(b), named all persons with liens on the subject property as defendants. Because Sunoco was not a record lienholder at that time, Plaintiff was not required to name Sunoco as a defendant. Sunoco cites no authority for the argument that even though it was a stranger to the property, having no land record notice of any claim as a creditor, it was entitled to any process with respect to its claim. CONN. GEN. STAT. § 52-325(a) forecloses such argument.

Accordingly, Sunoco's motion to vacate is **denied**.

D. United States' Motion to Dismiss Sunoco's Cross-Claim [Doc. No. 80]

Plaintiff moves to dismiss Sunoco's cross-claim, arguing that it may be brought, if at all, only as a counterclaim,⁶ that Plaintiff has not waived its sovereign immunity, and that Sunoco's claims against other Defendants should be dismissed as already decided.

1. Sovereign Immunity

Plaintiff argues that it has not waived its sovereign immunity under Connecticut's Uniform Fraudulent Transfer Act ("CUFTA"). Sunoco contends that Plaintiff has expressly consented to suit in federal court pursuant to 26 U.S.C. § 7426(a)(1).

⁶ Plaintiff argues that Sunoco is not a co-party and thus its claim is not a cross-claim. *See* FED. R. CIV. P. 13(g) ("A pleading may state as a cross-claim any claim by one party against a co-party"). Sunoco argues that it is not a defendant and thus its claim is not a counterclaim. *See* FED. R. CIV. P. 13(a) ("A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party"). Neither party cites to legal authority. The Court need not decide at this time whether Sunoco's claim should be characterized as a cross-claim or counterclaim, because such characterization as either a cross-claim or counterclaim would not be an apparent basis for dismissal. However, Sunoco's intervention, in opposition to Plaintiff's claims against the property, clearly aligns it as a Defendant asserting an interest in the property in defense of Plaintiff's claims to the property.

“Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.” *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). Where the United States has not consented to suit, the Court lacks subject matter jurisdiction over a suit against the United States. *Id.* “Any waiver of the government’s sovereign immunity is to be strictly construed in favor of the government.” *Long Island Radio Co. v. NLRB*, 841 F.2d 474, 477 (2d Cir. 1988) (quoting *United States v. Sherwood*, 312 U.S. 584, 586, 85 L. Ed. 1058, 61 S. Ct. 767 (1941)). Courts may not broaden a limited waiver of immunity. *Id.*

a. CUFTA

Sunoco cites no legal authority against Plaintiff’s position that it has not consented to be sued under CUFTA. Accordingly, to the extent that Sunoco’s claims against Plaintiff are based on CUFTA, they are **dismissed**.

b. 26 U.S.C. § 7426(a)

26 U.S.C. § 7426(a)(1) provides that

If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States.

The plain language of § 7426 authorizes suits against the United States by persons claiming that property was wrongfully *levied* upon. Plaintiff argues that it did not act pursuant to a levy; instead, it commenced a civil action to obtain judicial foreclosure of tax liens and sale of the Real Property. Sunoco states, in conclusory fashion without any analysis or discussion, that its claim “falls squarely within the terms of [the Government’s] waiver.” Sunoco has not shown that the United States has waived its

sovereign immunity against Sunoco's claims. Accordingly, Plaintiff's motion to dismiss is **granted**.⁷

2. Claims Against Other Defendants

Plaintiff argues that Sunoco's alleged claims against the other Defendants (Snyder and the Mahlers) should be dismissed as already decided. Sunoco complains that Plaintiff's argument is "circular," because Plaintiff "did not make Sunoco a party to this litigation when it commenced the case, although it knew that Sunoco's rights were being affected, as evidenced by its repeated requests that Sunoco waive its liens on the Real Property at the time of the sale." However, Sunoco's argument is misleading and flawed. At the time Plaintiff commenced the case, by the lis pendens it notified any party who had an interest in the Real Property. Plaintiff further notes that its only notice Sunoco's claim occurred after Sunoco filed its judgment lien on May 21, 2003. Until that time Sunoco had no legally cognizable interest in the property. The lis pendens filed on May 11, 2001, put Sunoco on notice of Plaintiff's claims regarding the Real Property. Sunoco cannot blithely ignore its subordinate status as to the property resulting from the lis pendens, when it did not seek to intervene until after default and default judgment had been entered. Sunoco's claim as to the property could not spring to life in defiance of Plaintiff's interest in the land as determined by the judgment of January 10/17, 2003.

Accordingly, Sunoco is bound to the rulings and orders against the Defendants

⁷

Sunoco's claim that Plaintiff cannot avail itself of sovereign immunity because Sunoco has been deprived of due process lacks merit. As noted, Plaintiff filed a notice of lis pendens on May 11, 2001, and accordingly Sunoco was put on notice of Plaintiff's claims at that time. As discussed above, the notice of lis pendens filed by Plaintiff put Sunoco on notice of Plaintiff's claims regarding the Real Property, and accordingly Sunoco is bound by the rulings and judgments against Defendants Snyder and the Mahlers.

(the Snyders and the Mahlers), and Plaintiff's motion to dismiss Sunoco's claim is **granted**.

III. Conclusion

For the reasons discussed above, Plaintiff's motion for entry of judgment *nunc pro tunc* [Doc. No. 87] is **granted**, Plaintiff's motion for distribution of proceeds [Doc. No. 57] is **granted in part**, Sunoco's motion to vacate [Doc. No. 65] is **denied**, and Plaintiff's motion to dismiss Sunoco's cross-claim [Doc. No. 80] is **granted**.

SO ORDERED.

Dated at New Haven, Connecticut, October __, 2003.

Peter C. Dorsey
Senior United States District Judge