

Salem v U.S. Bank

2009 NY Slip Op 33420(U)

October 21, 2009

Supreme Court, Nassau County

Docket Number: 14828/07

Judge: Ute Wolff Lally

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SHORT FORM ORDER

mg,mg

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

IVELIS SALEM,

Plaintiff(s),

MOTION DATE: 8/3/09

INDEX No.:14828/07

-against-

MOTION SEQUENCE NO:3,4

CAL. NO.: 2009H1524

U.S. BANK, et al.,

Defendant(s).

The following papers read on this motion:

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Upon the foregoing papers, it is ordered that this motion by defendant US Bank National Association (USBNA or the Trustee) for an order pursuant to CPLR 3212 awarding summary judgment in its favor against plaintiff and dismissing the complaint is granted, and the complaint is dismissed as against USBNA. Motion by defendant Prudential Action Real Estate (Prudential) for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint against it is granted and the complaint is dismissed as against Prudential.

Plaintiff commenced this action for unlawful eviction, trespass, negligence, private nuisance, and intentional infliction of emotional distress based upon defendants' entry and securing of premises which plaintiff had lost in a foreclosure proceeding.

The foreclosure proceeding was initially stayed by plaintiff's

bankruptcy, until such time as USBNA sought and secured a lifting of the automatic stay allowing the foreclosure to proceed. USNA bought the property at the auction on June 19, 2007.

USBNA retained the services of Prudential to inspect and secure, if necessary, the premises located at 10 Davidson Avenue, Lynbrook, New York. Prudential inspected the premises, deemed it abandoned, and secured the premises.

Plaintiff alleges that on July 2, 2007 she received a call from her neighbor Philip Greco who informed her that a "for sale" sign had been placed in a window at the property. Plaintiff alleges that she then drove to the premises and observed that a chain and padlock had been placed on the front door. She contacted her attorney, who in turn contacted Prudential. Prudential sent a representative to allow plaintiff entry. At deposition plaintiff admitted that she had been prevented from entering the premises for only a few hours.

Initially, the evidence in the record establishes as a matter of law that neither the Bank nor Prudential violated any of plaintiff's rights in connection with the securing of the premises. Contrary to plaintiff's assertion, Prudential's inspection provided it with a reasonable belief that the premises had been abandoned and justified its actions in securing the premises (see, *Manufacturers and Traders Trust Co. v. Maier*, 280 AD2d 835, 837 [3d Dept 2001], lv app dsmd, 96 NY2d 824 [2001]).

Defendants have produced photographs taken by Prudential on an inspection of the premises showing it empty. One of the photographs shows the address No. 10 on the door. Plaintiff herself admitted through deposition testimony that she had moved all her big furniture to her boyfriend's home and acknowledged that she had been living with him for several months. Plaintiff's neighbor Philip Greco also provided deposition testimony that plaintiff had not lived at the premises for six months. There is also plaintiff's admission that she terminated her telephone service at the premises. Although plaintiff testified at deposition that she had taken pictures of the premises on July 2 showing her belongings inside, she has not produced them.

On July 2 plaintiff sought entry to remove remaining belongings and USBNA permitted her to do so. The locks were changed and she was given a key.

On a motion for summary judgment "the court's inquiry must be directed to a determination of whether a factual issue is 'genuine or unsubstantiated' and if the issue claimed to exist, such as plaintiff's claim that she had not abandoned the premises, "is not genuine, but feigned, and ... there is in truth nothing to be tried" (*Hirsch v. S. Berger Import & Mfg. Corp.*, 67 AD2d 30, 34 [1st Dept 1979], appeal dsmd 47 NY2d 1008 [1979]). Therefore, the court must search the proof, if any, "as proffered by affidavits or otherwise, to ascertain whether it discloses a real issue, rather than a formal, perfunctory, or shadowy one" (*Hirsch v. S. Berger Import & Mfg. Corp.*, *supra*).

A claim based upon a bank's taking possession of foreclosure premises under the forgoing circumstances is not wrongful. In *Manufacturers and Traders Trust Co. v. Maier*, cited above, under strikingly similar circumstances, a bank took possession and secured abandoned premises before it took title and before any foreclosure sale was scheduled and the defendant was permitted entry to retrieve belongings (see, *Manufacturers and Traders Trust Co. v. Maier*, *supra*). The court found the defendant's claims against the bank devoid of merit, notwithstanding that the bank there did not have title, as does the bank here. No evidence has been presented on behalf of plaintiff that she continued to reside at the premises. Her only testimony concerns the possessions she purportedly left behind. All claims based upon plaintiff's possession of or upon any possessory interest in the premises are therefore rejected. Wrongful eviction is clearly dismissed, as plaintiff was not evicted; she abandoned the premises.

An action for trespass may be brought by "a person in exclusive legal possession at the time of trespass" (*Allied 31st Ave. Corp. v. City of New York*, 27 AD2d 948, 949 [2d Dept 1967]). Plaintiff did not own the premises or reside there on July 2, 2007.

With respect to private nuisance, which is a substantial

interference with the use or enjoyment of land (*Copart Indus. v. Consolidated Edison Co.*, 41 NY2d 564 [1977]), only a person who has a legal interest in the affected land has standing to maintain the action (*Kavanaugh v. Barder*, 131 NY 211 [1892]). Accordingly, plaintiff may not pursue an action in nuisance for the premises owned by the Trustee.

Plaintiff's negligence claim is premised upon the Trustee's alleged breach of duty to commence a summary proceeding before entering the premises. Plaintiff was not in possession of the premises at the time the USBNA made entry. She was not there in April of 2007 when Prudential put up notices. She was not there in June when Prudential's representatives returned to the premises to padlock and chain the door. Plaintiff has cited no authority which would require the Trustee to commence a summary proceeding for abandoned property (see, *Manufacturers and Traders Trust Co. v. Maier*, 280 AD2d 835, 837 [3d Dept 2001], *lv app dsmd*, 96 NY2d 824 [2001], *supra*).

Plaintiff's final claim for intentional infliction of emotional harm must be dismissed. The four elements of the claim are "(i) extreme and outrageous conduct; (ii) intent to cause . . . severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" (*Howell v. New York Post Co.*, 81 N.Y.2d 115, 122 [1993]). The element of outrageous conduct is "rigorous, and difficult to satisfy, . . . its purpose is to filter out trivial complaints and assure that the claim of severe emotional distress is genuine" and it may be determined as a matter of law (*Roach v. Stern*, 252 AD2d 488, 491 [2d Dept 1998] [internal quotations omitted]).

The conduct complained of here falls far short of the "strict standard" outlined, as liability has been found "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Murphy v. American Home Products Corp.*, 58 NY2d 293, 303 [1983]). Indeed, the conduct complained of here was not atrocious or utterly intolerable, it was the prudent conduct of the premises owner and its representatives to secure premises which had been abandoned.

Based upon the foregoing, the complaint is dismissed as against defendants USBNA and Prudential.

Dated: OCT 21 2009

Ulrich

J.S.C.

ENTERED

OCT 26 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**