SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

MIKEDP VENTURES, LLC II,
Plaintiff,

- against -

DENNIS L. GREEN a/k/a DAVID GREEN; HALLI L. GREEN; BETTY OSEI-MENSAH; GENEVA MORTGAGE CORP.; VELOCITY INVESTMENTS, LLC; NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE; HORIZON SHORES CONDOMINIUM; MERRILL LYNCH EQUITY MANAGEMENT, INC.; BANK OF AMERICA, N.A., as successor by merger to Fleet National Bank; CTIY OF LONG BEACH; and COUNTY OF NASSAU,
Defendants,

Index No. 19296/08
Sequence #s 001,002,003,004
Part 35

11/28/12

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At the outset, the Court would like to clarify some of the procedural history of this case which is related to the action *Aurora v. Loan Services LLC v. Osei-Mensah, et al.*, Index Number 22937/2009, a residential foreclosure proceeding.

Originally, the undersigned under the mistaken impression that all papers had been fully submitted on the applications decided herein before these matters were reassigned to this part, issued decisions without the parties' complete submissions. As a result, the Court vacated the decisions under motion sequence numbers 001 and 002 and, at a conference, counsel and the *pro se* defendants were informed of a new submission date and told to bring to the Court's attention any additional arguments they deemed appropriate.

After the new applications appeared on the calendar and were submitted for decision, the undersigned learned that instead of returning motions sequence numbers 001 and 002 to the calendar for a new submission date, the motion and cross-motion had been assigned new sequence numbers and the order of the motions had been reversed, *i.e.*, motion sequence 001 was now sequence 004 as a cross-motion and cross-motion sequence 002 was now motion sequence 004.

The Court addresses this unusual situation because, subsequent to the submission dated, the parties continued to send correspondence to chambers containing legal argument.

Consequently, as a matter of judicial discretion and in the interests of justice, the Court shall consider all such correspondence which will be preserved for the record over objection. *

In addition, the Court considers first the cross-motion of Aurora Loan Services, LLC to intervene as a party defendant in the action at bar (CPLR 1012 (a) (2) and (3)). That application is granted (Seq. #004) and its answer (exhibit 0) is deemed served.

Aurora is the purported current assignee of the note and mortgage to the subject property and is the plaintiff in the companion foreclosure matter (Index No. 22937/2009) in which plaintiff herein is a named defendant.

There is no other party to the instant action that may adequately represent the interests of Aurora as assignee. The only party defendant that might be able to is Geneva Mortgage Corp., the original holder of the note and mortgage. However Geneva has not answered the complaint and is the subject of a default application, part of plaintiff's omnibus motion that will be addressed below (Seq. #003).

CPLR Section 1012 (a) (2) and (3) allows intervention as of right when the action involves a disposition of property and the proposed intervener may be adversely affected, which is certainly the case here. Moreover, movant's application is timely (see *Norstar Apartments, Inc. v. Town of Clay*, 112 AD2d 750; compare *Jiggetts v. Dowling*, 21 AD3d 178).

Since the question on Aurora's cross-motion is not whether it will ultimately be successful in the action but if it should be heard in the first instance, Aurora is now considered a party defendant.

Now, upon the foregoing papers, plaintiff's motion for summary judgment pursuant to CPLR 3212 against defendants Dennis Green a/k/a David Greene and Halli Greene is granted as set forth below and its motion for a default judgment pursuant to CPLR 3215 (a) against defendants Betty Osei-Mensah, Geneva Mortgage Corp., Velocity Investment, LLC, Horizon Shores Condominium, Merrill Lynch Equity Management, Inc. and Bank of American, N.A. as successor by merger to Fleet National Bank is likewise granted (Seq. #003). The remainder of the application is determined as follows:

Initially, the Court permits plaintiff's application for default judgments to be heard because, although the complaint was filed on October 23, 2008 and service upon the defendants followed shortly thereafter, defendant Geneva filed for bankruptcy May 13, 2009 and the Chapter 7 petition was not closed until July 14, 2010. Moreover, with the exception of defendants Geneva and Osei-Mensah, the remaining defaulting defendants appear to have had previous liens against the property that were presumably satisfied. In any event, defendants' objections in this regard are without merit.

The Clerk is directed to enter a default judgment against the defendants listed above.

* In case there remains a question on the matter, *Aurora v. Osai Mensah*, et al. Index Number 22937/2009 is to be tried jointly with the action at bar. All prior corrected or amended decisions dated April 8, 2011 and April 21, 2011 are vacated and the motion and cross-motion under sequence numbers 001 and 002 herein shall be entered as withdrawn.

Plaintiff's motion for summary judgment against the Green defendants stems from an action to foreclose on a lien totaling $64,597.60 created by a judgment recorded in Nassau County on September 17, 2007. The underlying proceeding which lead to the judgment is not at issue in this application (see Civil Court, New York County, Doc. # 76994/2006).

In this action, plaintiff asserts defendant Dennis Green (Green) * fraudulently concealed his assets to appear judgment-proof. Toward that end, it is alleged that Green and a non-party "cohort" Addo Jayson secured two mortgages from defaulting defendant Geneva totaling $558,000. to be used to purchase property located at 31 Barnes Street, Long Beach, New York.

Allegedly, Addo Jayson's role was to employ a power of attorney on behalf of defaulting defendant Betty Osei-Menshah, who had an excellent credit rating and agreed to assist Green in obtaining the necessary mortgages to purchase the property.

The property was then purchased and the deed recorded in both Green's and Osei-Menshah's name. About one month later Green's interest was transferred to his daughter Halli without consideration so it would appear that he had no recorded interest in the Property. **

Plaintiff maintains that the power of attorney from defendant Osei-Menshah was forged using a fake notary stamp; therefore her initial purchase of the property should be deemed void *ab initio*. Likewise, with respect to the Halli transfer which relied upon the same fake notary stamp, plaintiff argues the conveyance must be set aside in its entirety as a fraudulent conveyance under the Debtor and Creditor Law.

Plaintiff's Exhibit 19 purports to be a copy of the power of attorney dated February 19, 2007 from Betty Osei-Mensah to Addo Jayson signed before notary Brian Kaye, #01KA3156492, whose commission was to expire September 30, 2009. The signature of Betty Osei-Mensah appears to be the same as that on the copy of the driver's license issued on July 19, [200 digit illegible] and expiring November 26, 2010, with her date of birth as November 26, 19 [digit illegible] 6 (see Exhibit 35).

Plaintiff seeks to have this Court conclude that the signature of Brian Kaye as a notary was a forgery as a matter of law. Exhibit 33, a print-out of a notary list from the Department of State Division of Licensing seven months before Kaye's commission was to expire, does not contain the name of any Brian Kaye or anyone assigned the identification number 01KA3156492.

First, the Court must emphasize that the decision in a summary judgment motion may not be based upon the credibility of any party. Only if plaintiff can demonstrate as a matter of law that it is entitled to judgment on the question of creditor fraud and the responding defendants fail to offer proof sufficient to raise a question of fact may the application be granted.

* The Court will refer to defendant Dennis Green as Green where appropriate. His daughter, defendant Halli Green, will be referred to as Halli.

** Plaintiff also claims defaulting defendant Geneva Mortgage Corp. assisted in the scheme to defraud creditors when it provided 100% financing for the purchase using solely the Osei-Mensah information on the loan application.

Plaintiff's assertions against the Green/Osei-Mensah/Geneva mortgage transaction and the subsequent Green/Halli intra/family transfer without consideration by the use of forged instruments is demonstrated by sufficient proof including that the notary stamp is fictitious or a forgery.

The only opposition to plaintiff's application for a declaratory judgment on these causes of action is from defendants Green and Halli, and to some extent, Aurora.

Defendant Green explains that although he did not have the necessary credit history he wanted to buy the subject property because he and Halli were about to be evicted from their apartment in a landlord/tenant proceeding. His "good friend" Addo Jayson, who Green told about the problem, arranged to have Betty Osei-Mensah, who had a credit rating high enough to receive no-document 100% financing, to assist in obtaining the loans for a fee.

According to Green, he found a better deal with Geneva Mortgage Corp. than the company originally suggested by the mortgage broker. He then asked Addo to cancel his first application where Osei-Mensah allegedly had appeared in person in Brooklyn and signed all the required documents.

Defendant Green describes that subsequently, he and Addo met at Osei-Mensah's apartment in the Bronx and she agreed to give Geneva's representative her personal and credit information by telephone. She also provided Addo with a power of attorney so she would not have to attend the closing in person. He admits there was no notary present at the meeting.

Nevertheless, Addo appeared at the closing with a notarized power of attorney which he and Green used to close the sale.*

Concerning the first recorded transfer to Halli which also relied upon the false notary signature, defendant Green claims that on June 3, 2009 he, along with Betty Osei-Mensah in a person (accompanied by a mutual friend Vita Guzmand and Addo, who waited in the car), executed a corrected deed transfer to Halli sworn to before a clerk of the Bronx County Court who was a notary (see Green's exhibit A). That transfer is declared void since it was allegedly attempted after defendants Green and Halli answered the complaint in this action. **

However, other than his self-serving affidavit describing these events, defendant Green provides no corroborating affidavits or admissible evidence whatsoever from Addo, Osei-Mensah, Brian Kaye, the first mortgage broker or anyone else who could raise a material, genuine issue of fact contesting plaintiff's evidence. Moreover, defendant Green fails to establish that the so-called "corrected" deed to Halli made after this action was commenced was even filed and recorded in the Bronx or elsewhere.

* A copy of the undated contract of sale, loan application, mortgage and note as well as the power of attorney demonstrate certain handwriting which appears to be similar to Osei-Mensah's alleged signature on her initial driver's license (plaintiff's exhibits 35, 46 and 14 through 19).

** The Court notes that the signature of Osei-Mensah on this latter document appears to be identical to the actual signature on the more recent driver's license, a copy of which was obtained by plaintiff's counsel from an attorney, who allegedly was consulted by a woman named Betty Osei-Mensah living at the same Bronx address, apparently after she was served with process in the instant matter (exhibit 34). That license has her date of birth as November <u>25</u>, 1956 (emphasis added).

Debtor and Creditor Law Section 273 provides that "[e] very conveyance made and every obligation incurred by a person who is... insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is made or the obligation is incurred without fair consideration." Case law holds that where a transfer is made without consideration, the defendant is presumed to be insolvent at the time of transfer. The defendant may rebut that presumption of insolvency by admissible evidence (see *Gasser v. Infanti Internation, Inc.*, 353 F. Supp. 2d 342, 354).

A claim under DCL Section 273 does not require proof of intent to deceive or other elements required under traditional fraud actions (*id.; Intuition Consolidated Group v. Dick Davis Publishing*, 2004 WL 594651). If the conveyance is made without fair consideration while the transferor is a defendant in an action for money damages or a judgment has been docketed against him, it is fraudulent without regard to his actual intent if he fails to satisfy the judgment (DCL 273-a).

In the case at bar there is no question that a New York County judgement was docketed in Nassau County. Even if Green, as he claims, was unaware of the judgment, as a matter of law Green knew that he was a defendant in an action for money damages that had been pending for a considerable amount of time and in fact at one point had signed a stipulation of settlement.

Furthermore, the defendants do not claim that Halli was a bona fide purchaser of her father's one-half interest in the property (or of Osei-Mensah's, for that matter).

Lacking consideration, the transfer from Green to Halli under these undisputed facts was a fraudulent conveyance and thus void as a matter of law (*Kavangh v. Rubin*, 230 AD2d 892; *Gasser, supra*, footnote 14).

Accordingly, plaintiff's motion for summary judgment against defendants Green and Halli, is granted only to the extent that Green's conveyance of one-half of his property interest to Halli constituted a fraudulent conveyance under DCL 273-a; therefore Halli's ownership interest in that one-half portion of the property is declared null and void and that one-half interest reverts back to Green.

Plaintiff also seeks to have Green declared the sole titled owner of the property by setting aside the interests of both Osei-Mensah and Geneva, two of the defaulting defendants.

With respect to Osei-Mensah, there is no admissible evidence opposing plaintiff's assertions that the first transfer to Halli by Osei-Mensah of her one-half interest on April 1, 2007 was void able, being based upon the fictitious notarization by Brian Kaye. Thus, the Court concludes the original deed recorded with Green and Osei-Mensah still stands. *

Concerning defendant Geneva, plaintiff's motion for summary judgment pursuant to DCL 272 and 276 must be denied based upon the questions of fact raised by defendant Aurora, its successor in interest.

* Also, as noted above, Green's allegation that he and Osei-Mensah "corrected" the transfer to Halli is unsubstantiated and cannot be regarded as a substitute for admissible proof *(Bank of New York v. Cherico*, 209 AD2d 914).

The Court keeps in mind that by the time this action was commenced, Geneva had already assigned the note and mortgage and subsequently filed for bankruptcy.

Also, defendant Green states in his affidavit that Osei-Mensah spoke to the Geneva agent on the telephone and he heard her provide Geneva with her credit information, which is corroborated within plaintiff's Exhibit 16 and signed by her purported attorney in fact, Addo, on February 27, 2007.

Therefore, the Court cannot determine as a matter of law that Geneva's mortgages are void pursuant to DCL Sections 272 and 276 as alleged in the third cause of action, nor for that matter conclude as a matter of law that Geneva acted with either constructive or actual knowledge of any fraudulent scheme (see *In re Brosnahan*, 324, B.R. 199 [2005]).

With no admissible evidence before the Court that Geneva was acting in bad faith at the time of these transactions (see DCL 276), that the subsequent assignments are void as a matter of law, or that defendant Aurora's interest in the note and mortgage occurring over two and one-half years after Geneva's first assignment was obtained in an illegal or fraudulent manner, plaintiff has failed to prove in the first instance an interest superior to Aurora's senior secured rights as a matter of law thereby shifting the burden to defendants Geneva (and Aurora).

As to the remaining applications, plaintiff's motion with respect to the fourth cause of action against Merrill Lynch Equity Management, Inc. and the fifth cause of action against Bank of America, N.A. as successor by merger to the Fleet National Bank is granted.

It is declared that these mortgages no longer constitute liens on the property and will be disposed of at the conclusion of the companion foreclosure action when the clerk shall make all appropriate entries (Index Number 22937/2009).

Plaintiff's sixth cause of action for attorney's fees shall be held in abeyance pending the conclusion of these matters.

The motion for judgement on the seventh cause of action for damages to an apartment in Manhattan, the subject of the action that resulted in the Green/Halli judgment filed in Nassau County, in the amount of approximately $15,000. is denied. Defendants have raised issues of fact in their affidavits.

In any event, the Court sua sponte severs this cause of action for money damages which is unrelated to the remaining causes of action and the companion case sounding in equity in that it does not involve a judgment or a foreclosure of property occurring in Nassau County.

Furthermore, both plaintiff and the Green defendants reside for venue purposes in New York County and the property that was allegedly damaged is located in New York County.

In order to expedite both main actions, the Court will entertain a motion on notice from defendant Aurora to transfer this seventh cause of action to New York County.

Finally, plaintiff's motion with regard to the eight cause of action is also denied. The priority of all liens and judgments shall be determined in the companion action.

In conclusion, the Court acknowledges the validity of plaintiff's Nassau County lien filed by virtue of the judgment rendered in New York County, which at this point attaches to one-half the debtor's interest in the subject property. That judgment may not be collaterally attacked in Nassau County; consequently the Green defendants' submissions in that regard will not be considered in the action at bar.

Nevertheless, at this juncture based upon the determination as noted above with reference to Osei-Mensah's and Geneva's interests, plaintiff has not established that it has priority over Aurora's apparently secured lien.

This question is a troublesome one which the undersigned would prefer addressing separately from the myriad issues raised in plaintiff's instant application and upon defendant Aurora's own motion to dismiss should it choose to bring one at this time.

To the extent that discovery may have been suspended pending this decision, the parties are to resume joint disclosure and depositions may be taken under both actions.

Accordingly, plaintiff's motion is granted in part and denied in part as set forth above.

January 25, 2012

Hon. John M. Galasso, J.S.C.

ENTERED
JAN 31 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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Defendants *Pro Se*