

**Lord-N-Fields Voice of Freedom Bible Church
Community Workers Intl., Inc. v Kwan**

2012 NY Slip Op 32151(U)

August 2, 2012

Supreme Court, Suffolk County

Docket Number: 2009-03156

Judge: Jeffrey Arlen Spinner

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SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI - COUNTY OF SUFFOLK

PRESENT:

HON. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

COPY

**LORD-N-FIELDS VOICE OF FREEDOM BIBLE
CHURCH COMMUNITY WORKERS
INTERNATIONAL INC,**

Plaintiff,

- against -

INDEX NO.: 2009-03156

**ALLEN KWAN, JACK WILSON, ANDREW CHEN,
FIRST BELL HARBOR DEVELOPMENT CORP
INC, MAIN STREET FUNDING CORP, PREMIERE
HOMES DEVELOPMENT INC, BRADFORD
CONSTRUCTION CORP, DAVID R. MALTZ & CO
INC, MERS, as nominee for BNY MORTGAGE
COMPANY LLC and EVERBANK,**

MTN SEQ NO: 00x1-CASE DISP
ORIG MTN DATE: 0xxxx/05/10

FINAL MTN DATE: 1xxxx0/12/11

Defendants.

UPON the following paper(s) numbered 1-15 read on the Motion and Cross Motions:

- Plaintiff's Motion [002] (Paper 1);
- Attorney General's Support [002] (Paper 2);
- Defendants MERS &Everbank's Cross Motion [003] (Papers 3-4);
- Plaintiff's Opposition [003] (Paper 5);
- Defendant BRADFORD's Opposition [002] and Support [003] (Paper 6);
- Attorney General's Opposition [003] (Paper 7);
- Defendants MERS &Everbank's Reply (Paper 8);
- Defendant CHEN's Cross Motion [004] (Papers 9-10);
- Plaintiff's Opposition [004] (Paper 11);
- Defendant CHEN's Reply (Paper 12);
- Defendants MERS &Everbank's Post-discovery Affirmations (Papers 13-15)

it is

ORDERED, that Plaintiff's application is hereby granted to the extent set forth herein below, and it is further

ORDERED that Defendants MERS &Everbank's application is hereby denied in all respects, and it is further

ORDERED that Defendant CHEN's application is hereby denied in all respects..

(RR)

Plaintiff moves this Court [002] for an Order, pursuant to CPLR 3212, granting it partial summary judgment on its first, second, fifth and sixth causes of action, and severing the remainder of the issues.

Defendants MERS, as nominee for BNY, and Everbank (collectively, the “Banks”) cross-move this Court [003] for an order:

- (a) Awarding them summary judgment pursuant to CPLR 3212; and
- (b) Declaring that the transfer of property located at 120 Beaver Dam Road, Bellport, New York, from Plaintiff to First Bell Harbor Development Inc, be deemed valid and not subject to the requirements of Religious Corporation Law § 12 (1), in full force and effect; that all subsequent transfers of the said property and attached mortgages, specifically held by the Banks, be deemed valid and in full force and effect; that the transfer of the said property from Plaintiff to First Bell Harbor Development Inc, be ratified and declared to duly constitute a valid transfer of property under Religious Corporation Law § 12 (1); or, alternatively, that the Court order Plaintiff or the Banks to file a petition for ratification pursuant to Religious Corporation Law § 12 (9).

Defendant CHEN moves this Court [004] for an Order, pursuant to CPLR 3211(a), dismissing all causes of action asserted against him based on documentary evidence.

Plaintiff, Lord-N-Fields Voice Of Freedom Bible Church Community Workers International, Inc., (the “Church”), a domestic not-for-profit religious corporation, commenced the instant action after learning that the parcel of land on which its active place of worship is located was under foreclosure and scheduled for a public sale. By the Oder of this Court dated May 19, 2009, the auction was stayed and this action ensued.

According to the Complaint, the Church was formed on April 1, 2003. On April 8, 2003, the Church received from an elderly parishioner title to a parcel of land (the “Property”), comprising 5.5 acres of land improved by two buildings, located at 120 Beaver Dam Road, Bellport, Town of Brookhaven, County of Suffolk, State of New York. At the time of the conveyance, the Property represented 70% of the total assets of the Church. The purpose of the donation was to allow the Church to develop the Property into a senior citizen's housing complex for local Church residents, and to use the existing improvements thereon for other parish business.

The Complaint further alleges that, in an effort to construct the senior citizen's housing, the Church's pastor, Reverend Fields, had laid the groundwork for making an application to the Town of Brookhaven for municipal approval, obtaining necessary permits to develop the property for the intended purpose, and securing a requisite financing, in the course of which he was introduced to some of the Defendants. The same Defendants advised Reverend Fields that the Church, being a religious corporation, would be unable to obtain the requisite financing for the project, and that a business entity needed to be formed in order to make the appropriate application for such financing.

The Church did not seek legal advice on that matter. Instead, the Church, through its President, Reverend Fields, and Defendant Kwan formed Defendant First Bell Harbor Development Inc, (“First Bell”) for the specific purpose of taking title to the Property. As a result of an alleged

conspiracy and material fraud among several Defendants, on December 11, 2003, the Church deeded the Property to First Bell. The Church never entered into a contract for sale with, or received, any consideration from First Bell for the Property.

Although the transfer of the Property, belonging to a religious corporation, required the approval of the Supreme Court of the State of New York, and the consent of the Attorney General of the State of New York, the same were neither sought nor obtained.

On March 23, 2004, Defendant Kwan, allegedly holding 51 percent of First Bell's stock, deeded the Property from First Bell to himself, individually, for no consideration, and without the knowledge of the Church, the Court, or the Attorney General. Simultaneously with the execution of the unauthorized deed from First Bell to Kwan, individually, he, assisted by some of the other Defendants, mortgaged the Property to Defendant MERS' predecessor in interest in the amount of \$330,000, by mortgage, dated March 23, 2004, and then to Defendant Everbank in the amount of \$157,000, by mortgage, dated June 10, 2004. These encumbrances have effectively consumed most, if not all, of the equity of redemption in the Property.

The Complaint alleges that these mortgages were arranged by Defendants Kwan, Wilson and Chen, each of whom received a portion of the proceeds, while the Church received no part of the proceeds from either mortgage.

When, in April 2007, it became apparent that the Town of Brookhaven would not approve the senior housing complex, the Church, through its attorney, made a written demand upon Kwan to deed the property back to the Church. However, despite Kwan's oral assurances, the Property was never deeded back to the Church, and while Kwan remains in title, both mortgages are now in default.

The Church moves for partial summary judgment on its first, second, fifth and sixth causes of action, seeking an Order vacating the deed of conveyance from the Church to First Bell, and from First Bell to Kwan, individually, and cancelling the mortgage liens held by the Banks.

Specifically, as to the first cause of action, the Church seeks a declaration that it is the owner of the Property. As to the second cause of action, the Church seeks imposition of a constructive trust on Kwan, for the benefit of the Church. As to the fifth cause of action, the Church seeks a declaration that the mortgages extended by MERS & Everbank never formed valid liens against the Property. As to the sixth cause of action, the Church seeks a permanent injunction against Kwan and Maltz, prohibiting them from conducting any auction, sale, hypothecation or other transfer of the Property, or from mortgaging or otherwise encumbering the Property.

The Church argues that since the transfer of the Property to First Bell was made in violation of Religious Corporation Law § 12 (1) ("RCL"), which requires approval of the Supreme Court and consent of the Attorney General, First Bell never obtained legal title to the Property, and therefore all subsequent transfers of the Property, and the two mortgage liens subsequently recorded against it, are null and void.

The Office of the Attorney General submitted an affirmation in support the Church's motion, stating that, pursuant to RCL and Not-for-Profit Corporation Law ("N-PCL"), its Office is entrusted with the responsibility to review real estate transactions involving not-for-profit corporations and religious corporations to ensure that they are protected from losing their property due to either poor decision or fraud.

Accordingly, it is the Attorney General's position that, had his office been properly notified, as required by N-PCL § 511(b), it would have objected to the transfer of the Property as unsupported by any contract, consideration or consent of the membership or the Board of Directors of the Church, and therefore not in the Church's best interest.

The Banks oppose the Church's motion, and cross-move for an order declaring that the initial transfer of the Property from the Church to First Bell be deemed valid, and not subject to the requirements of RCL § 12 (1), and therefore all subsequent transfers of the Property and attached mortgages be deemed valid, because the transfer was not a sale, mortgage, or lease exceeding five years, all of which require the court and the Attorney General's approval. According to First Bell's corporate records, it was a transfer from the Church to an entity wholly owned and controlled by Reverend Fields and his family. Since the members of the Church maintained ownership and complete control of the Property after its transfer to First Bell, the Church was never in danger of losing the asset so transferred, making the main purpose of RCL § 12 (1), *protecting religious corporations from dissipating their assets*, inapplicable herein.

The Banks further argue that the transfer of the Property to First Bell was ratified by the Church, and duly constitutes a valid transfer of Property under of RCL § 12 (1), because, despite its assertion to the contrary, the Church had knowledge of the requirements of RCL § 12 (1), as it previously sought and obtained the Court's approval in connection with the sales of its properties in 2005, 2006, and 2007. In sum, the Church's calculated inaction, and its salient knowledge of the requirement of RCL § 12 (1), for a minimum of three years after the transfer has effectively ratified the conveyance of the Property from the Church to First Bell.

The Banks further assert that the Church's allegation that it did not receive any consideration for the transfer is incorrect, since, through the Church's own admission, the transfer was executed for the purpose of obtaining financing for the intended use of the Property, which itself amounts to a valid consideration.

In the alternative, the Banks argue that they are entitled to an order mandating the Church to file a petition for ratification, pursuant to RCL § 12 (9), which allows for the ratification of a transfer of property from a religious corporation, after the transfer has been executed, or permitting the Banks to do so.

The Church opposes the Banks' cross-motion, arguing that the controlling provisions of RCL are not discretionary, but are a mandate.

Defendant Bradford opposes the Church's motion, and supports the Banks' cross-motion.

A party moving for Summary Judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see: Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Once a *prima facie* showing is made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see: Zayas v Half Hollow Hills Cent. School Dist*, 226 AD2d 713 [2 Dept 1996]). "[I]n determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant" (*Pearson v Dix McBride LLC*, 63 AD3d 895 [2 Dept 2009]). Since summary judgment is the procedural equivalent of a trial, the motion should be denied if there is any doubt as to the existence of a triable issue or when a material issue of fact is arguable (*see: Salino v IPT Trucking Inc*, 203 AD2d 352 [2 Dept 1994]).

This action involves a not-for-profit religious corporation, a class of litigants that the Legislature had determined to be entitled to special safeguards, and it is governed by both RCL and N-PCL.

RCL § 12(1) provides that "[a] religious corporation shall not sell, mortgage or lease for a term exceeding five years any of its real property without applying for and obtaining leave of the court" pursuant to N-PCL § 511.

N-PCL §§ 511(a) provides that "[a] corporation required by law to obtain leave of court to sell, lease, exchange or otherwise dispose of all or substantially all its assets, shall present a verified petition to the supreme court," and it sets forth the contents of such a petition.

"The purpose of these requirements is to protect the members of the religious corporation, the real parties in interest, from loss through unwise bargains and from perversion of the use of the property." (*see: Church of God of Prospect Plaza v Fourth Church of Christ, Scientist, Brooklyn*, 76 AD2d 712, 716 [2 Dept 1980], *aff'd* 54 NY2d 742 [1981].)

Accordingly, these provisions expressly make authorization by the Supreme Court and the consent of the Attorney General a condition precedent to the conveyance of real property belonging to a Non-for-Profit religious corporation (*see: Church of God of Prospect Plaza v Fourth Church of Christ, Scientist, Brooklyn*, 76 AD2d 712, *supra*). Therefore, until and unless leave of the court has been obtained, on notice to the Attorney General, a religious corporation cannot make a valid conveyance of its real property.

Here, it is admitted that the RCL § 12(1) requirement was not complied with in that leave of court, on notice to the Attorney General, was never sought or obtained for the transfer of title to the Property from the Church to First Bell. This is especially true since the Church consummated three previous conveyances, all after obtaining approval of the Supreme Court. Thus, the purported conveyance to First Bell is invalid and void, *ab initio*.

Since First Bell never obtained a valid legal title to the Property, it could not have conveyed valid legal title to Kwan. Consequently, at the time the Banks made the two loans to Kwan, and took security interests in the Property, Kwan held no valid legal title to it. Accordingly, the purported conveyance from First Bell to Kwan 'individually' is null and void. It follows, then, that mortgages held by the Banks also null and void, and must be discharged.

Defendant Chen moves this Court [004] for an Order, pursuant to CPLR 3211(a), dismissing all causes of action as asserted against him individually. The Church opposes Chen's application.

On a pre-answer motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction, and plaintiff's allegations are accepted as true, and accorded the benefit of every possible favorable inference (*see: Leon v Martinez*, 84 NY2d 83 [1994]). Pursuant to CPLR 3211(a)(1), such an application may be granted only if documentary evidence submitted by the moving party utterly refutes the factual allegations of the complaint, and conclusively establishes a defense to the claims as a matter of law (*see: Goshen v Mutual Life Ins Co of NY*, 98 NY2d 314 [2002]). For evidence to qualify as "documentary," it must be unambiguous, authentic, and undeniable (*see: Fontanetta v John Doe 1*, 73 AD3d 78 [2010]). Neither affidavits, deposition testimony, nor letters are considered "documentary evidence" within the intendment of CPLR 3211 (a) (1) (*see: Suchmacher v Mananer Grocery*, 73 AD3d 1017 [2010]).

In support of his motion, Chen submits his attorney's affirmation, a copy of the deed from First Bell to Kwan, First Bell's corporate records (including the list of its shareholders and the election of Chen as a director), and very brief excerpts of unsigned and uncertified transcripts of depositions of Kwan and Reverend Fields.

Contrary to Chen's contention, his submissions do not satisfy the standard described above, as they fail to refute the allegations of the complaint, including, among others, allegations of fraud. Accordingly, Chen's motion to dismiss the complaint is hereby denied.

Chen's request, made in his Reply papers, that the Court treat his motion pursuant to 3211 (c) is also denied. Aside from Chen's failure to serve adequate notice on all parties, the evidence offered by him demonstrates the existence of triable issues of fact as to his role and involvement in the transactions in the case at bar.

The Court notes that although the deposition transcripts submitted by the Banks and Chen in support of their respective motions were not signed, and not certified by a reporter, they were properly considered in support of the Defendants' motions, since the excerpts thereof included in the record were not challenged as inaccurate (*see: Zdot v Zieba*, 81 AD3d 935 [2 Dept 2011]).

For all the reasons stated herein above and in the totality of the papers submitted herein, it is therefore

ORDERED, that the above referenced Motion [002], is hereby granted in the following respects, it is

ORDERED ADJUDGED AND DECREED, that the conveyance of the Property from LORD-N-FIELDS VOICE OF FREEDOM BIBLE CHURCH COMMUNITY WORKERS INTERNATIONAL INC, to FIRST BELL HARBOR DEVELOPMENT INC, as evidenced by deed, dated December 11, 2003, and recorded in the Office of the Suffolk County Clerk in LiberD12292, Page 378, is null and void, *ab initio*, and it is further

ORDERED ADJUDGED AND DECREED, that the conveyance of the Property from FIRST BELL HARBOR DEVELOPMENT, INC., to ALLEN KWAN is null and void, *ab initio*, and it is further

ORDERED ADJUDGED AND DECREED, that mortgages held by MERS, as nominee for BNY Mortgage Company LLP and EVERBANK, are hereby annulled, cancelled and discharged, of record; and it is further

ORDERED, that the County of Suffolk Clerk is directed to cancel and discharge of record the mortgages attached to the property located at 120 Beaver Dam Road, Bellport, Town of Brookhaven, County of Suffolk, State of New York (District: 0200; Section: 976.10; Block: 03.00; Lot: 004.000), given by Defendant KWAN to Defendants BNY Mortgage Company LLP and EVERBANK; and it is further

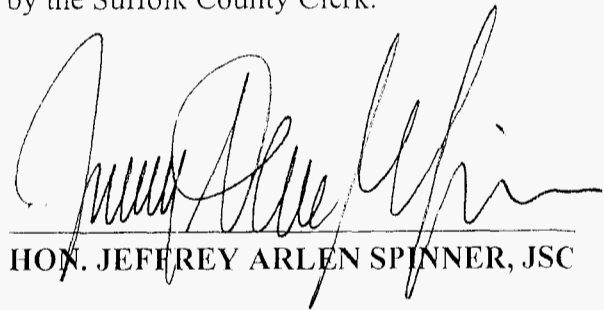
ORDERED, that the remaining claims are severed and continued; and it is further

ORDERED, that the above referenced application [003] of BNY/EVERBANK is hereby denied in all respects, and it is further

ORDERED, that the above referenced application [004] of CHEN is hereby denied in all respects, and it is further

ORDERED, that Counsel for Plaintiff is hereby directed to serve a copy of this Order, with Notice of Entry, upon Counsel for all other parties, the Clerk of this Court and the Suffolk County Clerk, within 20 days of entry of this Order by the Suffolk County Clerk.

Dated: Riverhead, New York
August 2, 2012


HON. JEFFREY ARLEN SPINNER, JSC

✓ FINAL DISPOSITION	...NON-FINAL DISPOSITION
✓ SCAN	DO NOT SCAN

TO:

Scheyer & Jellenick
110 Lake Avenue South, Suite 46
Nesconset, NY 11767

Attorney General of NYS
Alan B. Berkowitz, Assistant District Attorney
300 Motor Parkway, Suite 205
Hauppauge, NY 11788

Richard V. Archibald, PLLC
26 Court Street, Suite 711
Brooklyn, NY 11242

Andrew Chen, Esq.
1164 70th Street
Brooklyn, NY 11228

Jack Wilson
86-16 Queens Blvd. Suite 207
Elmhurst, NY 11373

Premiere Homes Development, Inc.
86-16 Queens Blvd. Suite 207
Elmhurst, NY 11373

Brief Carmen & Kleiman, LLP
805 Third Avenue, 11th Floor
New York, NY 11002

David R. Maltz & Co., Inc.
155 Terminal Drive
Plainview, NY 11803

Spiegel & Utrera, P.A., P.C.
45 John Street, Suite 711
New York, NY 10038