

JP Morgan Chase Bank, N.A. v Johnson
2015 NY Slip Op 31067(U)
June 4, 2015
Supreme Court, Suffolk County
Docket Number: 35028/2011
Judge: James C. Hudson
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

Supreme Court of the County of Suffolk
State of New York - Part XL

COPY

PRESENT:
HON. JAMES HUDSON
Acting Justice of the Supreme Court

X-----X
JP MORGAN CHASE BANK, NATIONAL
ASSOCIATION, AS PURCHASER OF THE LOANS
AND OTHER ASSETS OF WASHINGTON MUTUAL
BANK, FORMERLY KNOWN AS WASHINGTON
MUTUAL BANK, F.A.,

Plaintiff,

- against -

- 1. WILLIAM C. JOHNSON,
- 2. NANCY C. JOHNSON,
- 3. MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS INC.
as Nominee for HOME 123 Corporation, and
- 4. JUDITH A. PASCALE,
SUFFOLK COUNTY CLERK,

Defendants.

X-----X

INDEX NO.:35028/2011

SEQ. NO.:001-MG
002-MG

DOLLINGER, GONSKI & GROSSMAN
Attorney for Plaintiff
One Old Country Road, Suite 102
Carle Place, New York 11514

STEPHEN C. SILVERBERG, PLLC
Attorney for Defendants Johnson
626 Rexcorp Plaza
Uniondale, New York 11556

DENNIS M. BROWN, ESQ.
Attorney for Defendant
Suffolk County Clerk
100 Vets. Mem. Highway, P.O. Box 6100
Hauppauge, New York 11788

Upon the following papers numbered 1 to 47 read on these motions to declare a satisfaction of mortgage void (001) and to extend a notice of pendency (002); Notice of Motion and supporting papers 1 - 17; Affirmation in Opposition and supporting papers 18 - 26; Reply Affirmation 27 - 28; Order to Show Cause and supporting papers 29 - 40; Affirmation in Opposition and supporting papers 41 - 47; ~~Replying Affidavits and supporting papers~~; ~~Other~~; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED, that the motion (001) by Plaintiff JP Morgan Chase Bank, National Association, as Purchaser of the Loans and Other Assets of Washington Mutual Bank, Formerly Known as Washington Mutual Bank, F.A. (JP Morgan) and the motion (002) by Plaintiff JP Morgan brought on by order to show cause, are consolidated for purposes of this determination; and it is further

ORDERED that this motion (001) by Plaintiff for an order declaring that the satisfaction of mortgage dated August 11, 2011 and recorded in the Suffolk County Clerk's Office on August 23, 2011, be deemed set aside, vacated and cancelled of record and declaring the \$1,400,000.00 mortgage it purportedly satisfied reinstated is granted; and it is further

ORDERED that this motion (002) by Plaintiff, brought by order to show cause dated November 5, 2014 (Spinner, J.), for an order pursuant to CPLR 6513 extending the duration of the notice of pendency filed with the Suffolk County Clerks Office against the premises known as 1 Washington Drive, Hampton Bays, New York (District 0900, Section 259.00, Block 02.00, Lot 043.034) for an additional 3 years expiring on November 11, 2017 is granted; and it is further

ORDERED that movant is directed to serve a copy of this order, with notice of entry thereof, on counsel for the Defendants and on the Suffolk County Clerk; and it is further

ORDERED that the Suffolk County Clerk is directed to cancel and discharge of record the satisfaction of mortgage dated August 11, 2011 and recorded in the Suffolk County Clerk's Office on August 23, 2011 in Liber M00022108, Page 641, and to extend the aforesaid notice of pendency upon service of the within notice of entry.

Plaintiff commenced the instant declaratory judgment action in November 2011 seeking, in essence, to cancel an erroneously prepared and recorded satisfaction of mortgage dated August 11, 2011 and to reinstate the purportedly satisfied mortgage. On December 20, 2006, Defendant William C. Johnson executed an adjustable rate note in favor of Home123 Corporation agreeing to pay the sum of \$1,400,000.00 at the starting yearly rate of 7.600 percent. On the same date, Defendants William C. Johnson and Nancy C. Johnson (Defendants) executed a mortgage in the principal sum of \$1,400,000.00 on the property located at 1 Washington Drive, Hampton Bays, New York. The mortgage indicated Home123 Corporation to be the lender and Mortgage Electronic Registration Systems, Inc. (MERS) to be the nominee of Home123 Corporation as well as the mortgagee of record for the purposes of recording the mortgage. The mortgage was recorded on January 29, 2007 in the Suffolk County Clerk's Office. Thereafter, on June 4, 2007, the note and mortgage were transferred by assignment of mortgage from MERS, as nominee for Home123 Corporation, to Washington Mutual Bank, FA (WAMU). The foregoing assignment of mortgage was lost and a duplicate original of the assignment of mortgage dated July 13, 2011 was made. Subsequently, Defendant William C. Johnson executed a Consolidation, Extension and Modification Agreement ("CEMA") dated June 21, 2011 in favor of WAMU in which the aforementioned note and mortgage were consolidated with a second adjustable

rate note in the sum of \$25,829.44 and second mortgage. The second mortgage, CEMA and assignment of mortgage were lost or misplaced and were not recorded. The consolidated mortgage in the amount of \$1,400,000.00 was recorded in the Suffolk County Clerks Office on January 29, 2007. Then, a satisfaction of mortgage dated August 15, 2011 by MERS as nominee for Home123 indicating that the mortgage in the sum of \$1,400,000.00 was satisfied was recorded in the Suffolk County Clerk's Office on August 23, 2011.

By its first cause of action in its amended verified complaint, Plaintiff alleges that the aforementioned satisfaction of mortgage was erroneously prepared and recorded, that its mortgage has been impaired, and requests judgment declaring that said satisfaction be deemed set aside, vacated and cancelled of record. Plaintiff now moves for said declaratory judgment relief. In support of its application Plaintiff submits, among other things, the affidavits of Larry Ross, assistant secretary to JP Morgan and Karen L. Stacy, assistant secretary of MERS. In pertinent part, the affidavit of Karen L. Stacy avers that “[o]n August 15, 2011, I, on behalf of MERS, as Nominee for HOME 123 CORPORATION, erroneously executed a Satisfaction of Mortgage ...allegedly satisfying the mortgage at issue in this matter...At the time of execution of the Satisfaction of Mortgage, neither MERS nor HOME 123 CORPORATION was the holder of the mortgage in question.”

Defendants in opposition assert, *inter alia*, that other than Plaintiff's conclusory declaration that the satisfaction of mortgage was executed without Plaintiff's knowledge, Plaintiff alleges no facts to explain how the satisfaction of mortgage could have been executed without Plaintiff's authorization; that Plaintiff has failed to allege facts that would infer its ownership of the mortgage; that the Plaintiff's affidavit in support of the application is insufficient and, that Plaintiff filed the instant motion despite outstanding discovery.

“A mortgagee may have an erroneous discharge of mortgage, without concomitant satisfaction of the underlying mortgage debt, set aside, and have the mortgage reinstated where there has not been detrimental reliance on the erroneous recording” (*New York Community Bank v Vermonty*, 68 AD3d 1074, 1076, 892 NYS2d 137 [2d Dept 2009]; *see Deutsche Bank Trust Co., Ams. v Stathakis*, 90 AD3d 983, 984, 935 NYS2d 651 [2d Dept 2011]; *DLJ Mtge. Capital, Inc. v Windsor*, 78 AD3d 645, 647, 910 NYS2d 160 [2d Dept 2010]). Only bona fide purchasers and lenders for value are entitled to protection from an erroneous discharge of a mortgage based upon their detrimental reliance thereon (*see Fischer v Sadv Realty Corp.*, 34 AD3d 630, 631, 824 NYS2d 434 [2d Dept 2006]; *Karan v Hoskins*, 22 AD3d 638, 638, 803 NYS2d 666 [2d Dept 2005]; *see also Beltway Capital, LLC v Soleil*, 104 AD3d 628, 631, 961 NYS2d 225 [2d Dept 2013]). The inadvertent discharge of a mortgage, without concomitant satisfaction of the underlying debt, does not extinguish Plaintiff's security interest; rather, it leaves Plaintiff with an unrecorded, equitable lien, that Plaintiff can enforce by way of foreclosure (*see, Citibank, N.A. v Kenney*, 17 AD3d 305, 793 NYS2d 84 [2d Dept 2005]).

Here, Plaintiff sufficiently demonstrated that the satisfaction of mortgage was erroneously executed and recorded, that the mortgage had not been satisfied, and that the balance due under the loan remains outstanding (*see, Mortgage Electronic Registration Systems, Inc. v Smith*, 111 AD3d 804, 975 NYS2d 121 [2d Dept 2013]). Notably, Defendants have not submitted an affidavit in opposition to Plaintiff's application either denying receipt of the aforementioned loan amounts or, stating that they paid off the loans secured by the mortgage dated December 20, 2006 nor, did they provide any proof to that effect. Inasmuch as they did not satisfy said first loan in the principal balance sum of \$1,400,000.00 and they are not bona fide purchasers or lenders for value, Defendants cannot assert the defense that they detrimentally relied on the subject satisfaction of mortgage. In addition, none of their alleged defenses raised in their answer or in opposition to the motion raise issues of fact or law in an action seeking to reinstate an erroneously discharged mortgage nor warrant discovery herein. Therefore, Plaintiff has demonstrated entitlement to reinstatement of the first mortgage dated December 20, 2006.

Plaintiff also moves, by order to show cause dated November 5, 2014, to extend the notice of pendency filed against the subject premises in this action. The order to show cause provides that the notice of pendency is extended pending the hearing and determination of the motion, and requires that the order be filed, recorded, and indexed prior to the expiration date. The order to show cause also provides that service upon counsel for the Defendants and upon the Suffolk County Clerk be made by overnight mail on or before November 24, 2014. A review of the submissions before the Court evidence that the order to show cause was served by overnight delivery (CPLR§ 2103[b] [6]) upon the named parties on August 17, 2011, and that the court's computerized records reflect that the order to show cause was filed in the Office of the Suffolk County Clerk on November 5, 2014. The Court finds, therefore, that the Plaintiff has met the requirements of the order to show cause prior to the expiration date of the notice of pendency (*see, RKO Props. v Boymelgreen*, 31 AD3d 625, 818 NYS2d 918 [2d Dept 2006]).

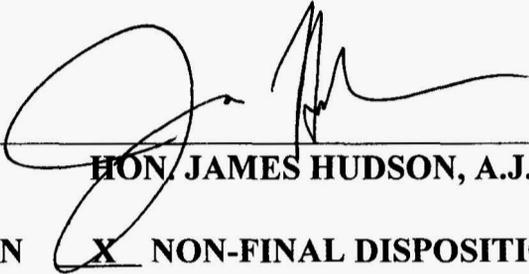
Pursuant to CPLR§ 6513, a notice of pendency is effective for a period of three years from the date of filing, and a court may extend it for an additional three-year period upon "good cause shown," provided that the extension is requested prior to the expiration of the original three-year period (*Matter of Sakow*, 97 NY2d 436, 741 NYS2d 175 [2002]; *Aames Funding Corp. v Houston*, 57 AD3d 808, 872 NYS2d 134 [2d Dept 2008]; *Petervary v Bubnis*, 30 AD3d 498, 819 NYS2d 267 [2d Dept 2006]). Here, the continued litigation, including the wrongful execution of a satisfaction of mortgage purportedly satisfying a mortgage in the amount of \$1,400,000.00, coupled with delays associated with the illness of defense counsel, has delayed the trial date in this action. The Court finds that the Plaintiff has demonstrated the requisite "good cause" to warrant the requested extension. In addition, the Court finds that there is no prejudice to the Defendants in extending the notice of pendency, nor do the Defendants indicate that there is any such prejudice. Furthermore, as

indicated above, Defendants cannot assert the defense that they detrimentally relied on the subject satisfaction of mortgage as they did not satisfy their first loan in the principal balance sum of \$1,400,000.00 and they were not bona fide purchasers or lenders for value.

Based on the foregoing, the Court declares that the satisfaction of mortgage dated August 11, 2011 and recorded on August 23, 2011 with the Suffolk County Clerk's Office be deemed set aside and declared void and that the mortgage dated December 20, 2006 and originally recorded on January 29, 2007 be reinstated as a lien against the subject property.

Submit judgment.

DATED: JUNE 4, 2015



HON. JAMES HUDSON, A.J.S.C.

_____ **FINAL DISPOSITION** **NON-FINAL DISPOSITION**