

New York Community Bank v Campbell

2011 NY Slip Op 32229(U)

August 1, 2011

Sup Ct, Suffolk County

Docket Number: 11291/2007

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

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NEW YORK COMMUNITY BANK, as Successor in
Interest to ROOSEVELT SAVINGS BANK,

Plaintiff,

INDEX NO.: 11291/2007
MOTION DATE: 2/24/2011
MOTION NO.: 004 MOT D;
005 MOT D; 006 MD; 007 MD

-against-

EDWARD F. CAMPBELL, JR., CAROL A.
CAMPBELL, E*TRADE BANK, ADVANCED
DERMATOLOGY P.C., SUFFOLK COUNTY DEPT.
OF SOCIAL SERVICES, PEOPLE OF THE STATE
OF NEW YORK, NEW YORK STATE
DEPARTMENT OF TAXATION AND FINANCE,
EDWARD F. CAMPBELL, LUCY A. CAMPBELL,
"JOHN DOE #1" to "JOHN DOE #30" inclusive, the
lat thirty names being fictitious and unknown to
plaintiff, the persons or parties intended being the
tenants, occupants, persons or corporations, if any,
having or claiming an interest in or lien upon the
premises described in the complaint,

PLAINTIFF'S ATTORNEY:
FORCHELLI, CURTO, DEEGAN,
SCHWARTZ, MINEO, COHN &
TERRANA, LLP
333 Earle Ovington Blvd., Suite 1010
Uniondale, New York 11553

DEFENDANTS' ATTORNEY:
EDWARD F. CAMPBELL, JR., ESQ.
1633 Broadway, 4th Floor
New York, New York 10019

JAMES D. REDDY, P.C.
873 South 7th Street
Lindenhurst, New York 11757

Defendants.

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Upon the following papers numbered 1 to 160 read on this motion for summary judgment, cross-motion for amended complaint, motion for recusal, cross-motion to cancel mortgage; Notice of Motion/ Order to Show Cause and supporting papers 1-36; 79-89; Notice of Cross Motion and supporting papers 37-38; 116-134; Answering Affidavits and supporting papers 39-52; 53-57; 90-99; 100-104; 135-141; Replying Affidavits and supporting papers 58-75; 76-78; 105-109; 110-115; 142-146; 147-160; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the following motions and cross-motions are consolidated for purposes of this decision and, as so consolidated, are determined as set forth hereinafter; and it is further

ORDERED that the motion (motion sequence no. 004) of plaintiff New York Community Bank, as successor in interest to Roosevelt Savings Bank, for an order granting plaintiff summary judgment pursuant to CPLR R. 3212, striking the joint answer with affirmative defenses of defendants Edward F. Campbell, Jr. and Carol A. Campbell; appointing a referee to compute the sums due and owing to plaintiff; and amending the caption to remove Edward F. Campbell, add David Johnson and Jessica Johnson as named party defendants and delete reference to "John Doe #3" to John Does #10 as defendants, is granted only to the extent that the caption is amended as hereinbefore set forth and the motion is otherwise denied; and it is further

ORDERED that the cross-motion (motion sequence no. 005) of defendant Lucy A. Campbell for an order and judgment declaring plaintiff's mortgage void, invalid and of no effect and cancelling or vacating such mortgage; declaring that plaintiff has no right, title, interest, claim

or lien in, to, or upon the premises at issue; dismissing plaintiff's complaint pursuant to CPLR §3211 on the ground that the deed upon which plaintiff relies has been declared void; consolidating this action with the action pending under Index No. 2001/23391 based on common questions of law and fact; vacating the default of defendant Lucy A. Campbell in appearing on the ground of excusable default and in the interests of justice and the discretion of the Court; granting defendant leave to submit a late answer to the summons and complaint in the interests of justice and the discretion of the Court, together with a reply to cross-claims of co-defendants Edward F. Campbell, Jr. and Carol A. Campbell, and awarding costs and attorney's fees pursuant to CPLR §8303-a based on the frivolous cross-claims and motions of such co-defendants, is granted only to the extent that the default of defendant Lucy A. Campbell is vacated in the interests of justice, and the defendant is granted leave to serve a late answer with reply to counterclaims, in the form annexed to defendant's motion papers, which answer shall be deemed served with the motion; and the first cross-claim is dismissed; and the cross-motion is otherwise denied; and it is further

ORDERED that the cross-motion (motion sequence no. 006) of defendants Edward F. Campbell, Jr., appearing *pro se* herein, and Carol A. Campbell, for an order requiring plaintiff New York Community Bank to serve an amended complaint which (i) separately states and consecutively numbers the causes of action as required by CPLR R. 3014; (ii) identifies defendant Lucy A. Campbell as the owner of the premises located at 25 Fiddlers Green Drive, Huntington, NY 11743 which is the subject of this foreclosure action; (iii) identifies defendants David Johnson and Jessica Johnson as the tenants in possession and contract purchasers of the premises; and (iv) identifies defendants Edward F. Campbell, Jr. and Carol A. Campbell as creditors of defendant Lucy A. Campbell, is denied; and it is further

ORDERED that the motion (motion sequence no. 007) of defendants Edward F. Campbell, Jr. and Carol A. Campbell for an order disqualifying the Hon. Paul J. Baisley, Jr. in the above-captioned action as required by 22 NYCRR §100.3(E)(1)(e) so that it may be assigned to another Judge of this Court for any and all further proceedings is denied.

Plaintiff New York Community Bank, as successor in interest to Roosevelt Savings Bank, commenced this action on April 9, 2007 to foreclose a mortgage executed by defendant-mortgagors Edward F. Campbell, Jr. and Carol A. Campbell (the "mortgagors"; the "Junior Campbells") on May 23, 1997 in the principal amount of \$200,000.00 and a mortgage executed by the mortgagors on July 15, 1998 in the principal amount of \$56,784.51, which mortgages were consolidated pursuant to a consolidation, extension and modification agreement dated July 15, 1998 to form a single mortgage lien in the amount of \$250,000.00 against residential premises located at 25 Fiddlers Green Drive, Lloyd Harbor, New York (the "Premises"). Title to the Premises had previously been conveyed to the mortgagors by Edward F. Campbell, Sr. and Lucy A. Campbell (the "Senior Campbells"), the mortgagors' parents and in-laws, respectively. That conveyance was subsequently set aside on the ground of undue influence in a separate action commenced against the Junior Campbells by the Senior Campbells.¹ After the deed by which they acquired title to the Premises was vacated, the mortgagors ceased making mortgage payments. Plaintiff thereafter commenced the instant action to foreclose the mortgage against, *inter alia*, the

¹ *Edward F. Campbell and Lucy A. Campbell v. Edward F. Campbell, Jr. and Carol A. Campbell* (Sup Ct, Suffolk County, March 6, 2006, Baisley, J., Index No. 23391/2001).

mortgagors and Lucy A. Campbell (“Lucy Campbell”), to whom title to the Premises reverted as a result of the vacatur of the deed (Lucy Campbell having acquired her husband’s interest by operation of law after his death on May 15, 2006).

Plaintiff now moves for summary judgment on its claims against the mortgagors and for an order of reference as to the remaining defendants who defaulted in the action. The motion is opposed by the mortgagors, who have interposed a motion and cross-motion for various relief, as well as by defaulting defendant Lucy Campbell, who also opposed the mortgagors’ motions and cross-moves for, among other relief, an order vacating her default and granting leave to file and serve a late answer with reply to counterclaims.

Because the Court may not otherwise considers such defaulting defendant’s opposition to the various motions and cross-motions, the Court will first determine so much of defendant Lucy Campbell’s cross-motion as seeks to vacate her default in this matter. Although the submissions reflect that Lucy Campbell’s attorney filed a purported notice of appearance in this action (bearing the caption of another, unrelated foreclosure action involving the same Premises but filed under the index number of this action) after the time to answer the complaint had expired, it is undisputed that Lucy Campbell did not file and serve an answer to plaintiff’s verified complaint.

Lucy Campbell’s motion is predicated on her claim that plaintiff’s mortgage is not a valid lien against the Premises in light of the vacatur of the October 19, 1996 deed (the “Deed”) whereby the mortgagors acquired their fee interest in the Premises. Moreover, Lucy Campbell alleges that plaintiff is not a *bona fide* encumbrancer for value, as the Deed identified her and her husband as life tenants in the Premises, thus putting plaintiff on inquiry notice as to the Senior Campbells’ interest in the Premises at the time the mortgages were given by the Junior Campbells. The Court finds that the foregoing constitutes a potentially meritorious defense to plaintiff’s foreclosure action.

Lucy Campbell also alleges, through counsel, that she has a reasonable excuse for failing to timely answer the complaint and reply to the counterclaims: The mortgagors had been ordered to pay the mortgages; this foreclosure action had been stayed; the mortgages were expected to be dealt with upon the then-imminent sale of the Premises and/or within the framework of the damages trial decision in the action to set aside the deed; and a notice of appearance had been filed in the action on behalf of Lucy Campbell.

The Court finds that Lucy Campbell’s submissions do not establish a reasonable excuse for her default in answering as required by CPLR §3012(d). However, the default was not willful, the submissions reflect a potentially meritorious defense to the complaint and counterclaims, and there is no demonstration of prejudice to plaintiff or co-defendants if the motion is granted. In light of the strong public policy in favor of resolving cases on the merits, and the broad discretion afforded courts in granting relief from pleading defaults, plaintiff’s motion to, in effect, fix such defendant’s default is denied, and so much of Lucy Campbell’s motion as seeks to vacate her default and permit her to interpose an answer with reply to counterclaims is granted (*Goldman v City of New York*, 287 AD2d 482 [2d Dept 2001]). The proposed verified answer, in the form annexed to the motion papers, shall be deemed served with the instant cross-motion.

The Court will now proceed to determine the parties’ respective motions, including the balance of Lucy Campbell’s cross-motion.

As to plaintiff's motion for summary judgment, it is well established that a plaintiff in a mortgage foreclosure action establishes its entitlement to summary judgment by producing the mortgage, the unpaid note, and proof of defendant's default thereon (*Wells Fargo Bank v Karla*, 71 AD3d 1006 [2d Dept 2010]). Where, as here, it is established by the record that the deed whereby the mortgagors acquired their interest in the property was vacated on the ground of undue influence, the mortgagee must also establish *prima facie* that it was a *bona fide* encumbrancer for value, without notice of the fraudulently induced transfer (*JP Morgan Chase Bank v Munoz*, 2011 NY Slip Op 5671 June 28, 2011]).

As noted by plaintiff, "[a] mortgagee may make a *prima facie* showing that it was a *bona fide* encumbrancer by showing that a title search revealed that its mortgagors...were the record owners of the subject property and that there were no recorded contracts affecting their title" (*Fleming-Jackson v Fleming*, 41 AD3d 175 [1st Dept 2007]). Here, the title policy on which plaintiff relies to establish its purported status as a *bona fide* encumbrancer was not issued in connection with the original mortgage given to plaintiff's predecessor in interest by the Junior Campbells on May 23, 1997, but in connection with the subsequent mortgage and consolidation in June 1998. Accordingly, the record on plaintiff's motion in chief is devoid of any evidence as to plaintiff's state of knowledge regarding the validity of the conveyance of the Premises to the mortgagors at the time its mortgage lien first attached to the Premises. Moreover, while the title policy accurately reflects that title to the Premises was vested in the Junior Campbells pursuant to the Deed from the Senior Campbells dated October 19, 1996, no mention is made therein of the life estate reserved to the Senior Campbells, as set forth in the Deed which was of record, and a copy of which was annexed to plaintiff's motion papers. (A copy of the title policy issued in connection with the first mortgage was annexed to plaintiff's reply affirmation and similarly fails to reflect the Senior Campbells' life estates.) While "[a] mortgagee's interest in the property is protected unless it has notice of a previous fraud affecting the title of its grantor" (*Thomas v LaSalle Bank N.A.*, 79 AD3d 1015, 1017 [2d Dept 2010]), a mortgagee has a duty to make an inquiry where it is aware of facts that would lead "a reasonable, prudent lender to make inquiries of the circumstances of the transaction at issue" (*LaSalle Bank Nat'l Assn v Ally*, 39 AD3d 597, 600 [2d Dept 2007]). "A mortgagee who fails to make such an inquiry is not a *bona fide* encumbrancer for value" (*JP Morgan Chase Bank v. Munoz, supra*).

Notwithstanding the title policy's failure to accurately reflect the Senior Campbells' life estate in the Premises, the recorded Deed was constructive notice to plaintiff of the Senior Campbells' interest in the Premises, which interest is potentially impaired by the encumbrance of a mortgage. The fact that the Deed recites that the life estate "shall be subordinate to any mortgage now or hereafter affecting the above described premises" does not expressly authorize the Junior Campbells to encumber the Premises without the knowledge and consent of the life tenants, and does not relieve the plaintiff of its obligation to establish that it had no knowledge of any fraudulent intent or undue influence on the part of its mortgagors. Accordingly, the submissions establish the existence of a triable issue of fact as to whether plaintiff was a *bona fide* encumbrancer for value, and its motion for summary judgment must be denied (*Maiorano v Garson*, 65 AD3d 1300 [2d Dept 2009]).

The cross-motion of defendants Edward F. Campbell, Jr. and Carol A. Campbell for an order requiring plaintiff to amend its complaint on the grounds that it fails to comply with the requirements of CPLR R. 3014 and fails to properly plead and identify the interests of various parties is denied. Defendants' submissions fail to establish a legal or factual basis for the relief sought therein.

Defendants' motion for an order disqualifying the undersigned from presiding over this matter on the ground that this justice will be called to testify at trial as a material witness to the parties' settlement negotiations and agreement allegedly entered into before the undersigned in connection with the action to set aside the Deed is denied. Pursuant to CPLR R. 2104, "[a]n agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered. With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk."

The record reflects that the parties' alleged stipulation regarding their prospective responsibility for payment of the mortgage and other expenses related to the Premises was not made in "open court" (*In re Dolgin Eldert Corp.*, 31 NY2d 1 [1972]; *Kushner v. Mollin*, 144 AD2d 649 [2d Dept 1988]), and the stipulation was not otherwise reduced to a writing or to the form of an order and entered. Moreover, there is no showing that the terms of the stipulation were filed with the Suffolk County Clerk. In light of the foregoing, the Court finds that the stipulation is not enforceable pursuant to CPLR R. 2104, and the testimony of any purported witness to the alleged negotiations and agreement is irrelevant and immaterial to the instant action. In any event, as noted in the decision after hearing dated July 17, 2009, the judgment entered in the action to vacate the Deed, which directed the Junior Campbells to "continue... the payment of any mortgages, taxes, utilities and usual expenses of maintaining the Premises," "remained in full force and effect" and was never modified notwithstanding the parties' extended colloquy with the Court. Defendants' submissions thus fail to establish a basis for recusal and the motion is denied.

As to the balance of the relief sought in the cross-motion of defendant Lucy Campbell, that branch of the cross-motion that seeks an order dismissing the cross-claims of the Junior Campbells is granted only to the extent that the first cross-claim is dismissed. As previously determined herein, the alleged stipulation regarding prospective payment of the mortgage and other expenses related to the Premises is unenforceable. Accordingly, defendants' cross-claim predicated on the alleged stipulation fails to state a cause of action.

So much of defendant Lucy Campbell's cross-motion as seeks a declaration that plaintiff's mortgage is void and invalid and that seeks dismissal of plaintiff's complaint is denied. As noted previously herein, questions of fact exist regarding plaintiff's status as a bona fide encumbrancer for value. Accordingly, the validity of plaintiff's mortgage lien upon the premises may not be determined upon the submissions.

Except as previously determined herein, all other requests for relief in defendant Lucy Campbell's cross-motion are denied as without merit.

The parties are directed to appear for a preliminary conference at the Courthouse located at One Court Street, Riverhead, New York, Room 338 on August 25, 2011 at 9:30 a.m.

Dated: August 1, 2011

PAUL J. BAISLEY, JR.
J.S.C.