

U.S. Bank N.A. v Mollah

2011 NY Slip Op 33295(U)

November 30, 2011

Supreme Court, Queens County

Docket Number: 23563/08

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE
Justice

IAS PART 6

U.S. BANK N.A.,

Plaintiff,

-against-

MOHAMMED MOLLAH, et al.,
Defendants.

Index No. 23563/08

Motion
Date October 25, 2011

Motion
Cal. No. 27

Motion
Sequence No. 1

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Upon the foregoing papers it is ordered that the cross motion by plaintiff, U.S. Bank, N.A. to amend the Complaint pursuant to CPLR 3025(c) to add Bangla Estate, Inc. and Bashir Rahman as additional defendants is granted. It is well-settled law that motions for leave to amend the pleadings are to be freely granted, as long as there is no prejudice or surprise to the adversary (CPLR 3025[b]; *Wirhouski v. Armoured Car & Courier Serv.*, 221 AD2d 523 [2d Dept 1995]). The trial court has discretion to grant the motion to amend pleadings and "[i]n exercising its discretion, the court should consider how long the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom" (*Branch v. Abraham & Strauss Dept. Store*, 220 AD2d 474 [2d Dept 1995]). Under CPLR 2001, the Court can allow a mistake to be corrected "upon such terms as may be just" (*see also*, CPLR 3025[b], which states that leave to amend pleadings shall be freely granted on such terms that are just.

The Court has discretion to add Bangla Estate, Inc. and Bashir Rahman as additional defendants to the action. CPLR

Section 1003: Nonjoinder and misjoinder of parties states in relevant part, that "[p]arties may be added at any stage of the action by leave of court. . ." Plaintiff demonstrated that Bangla Estate, Inc. and Bashir Rahman should be joined as defendants in this action, as plaintiff asserts, inter alia, that "Wells Fargo has raised issues which, if valid, will require plaintiff to explore other avenues of recovery and would mean that plaintiff was victimized by the proposed new defendants". As there is no prejudice and as a reasonable excuse for the delay has been offered, plaintiff's cross motion amend the Complaint pursuant to CPLR 3025(c) to add Bangla Estate, Inc. and Bashir Rahman as additional defendants is hereby granted.

Plaintiff is granted permission to add Bangla Estate, Inc. and Bashir Rahman as defendants by the filing and service upon the Clerk of the Court and upon all parties of a Supplemental Summons and Amended Complaint (see, *Connell v. Hayden*, 83 AD2d 30 [2d Dept 1981]) together with a copy of this order and notice of entry within thirty (30) days from the date of entry of this order.

Defendant, Wells Fargo Home Mortgage s/h/a Mortgage Electronic Registration Systems, Inc. As Nominee and Mortgagee of Record's motion for an order pursuant to RPAPL 1521 granting summary judgment on its twenty-second affirmative defense that said defendant's lien is superior to plaintiffs by virtue of the fact that said defendant's lien is recorded prior to plaintiffs is hereby denied.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v.*

Twentieth Century-Fox Film Corp., 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

It is undisputed that the property which forms the basis of this action is located at One Broadway, Howard Beach, New York 11414 ("Subject Property") and on September 24, 2008, plaintiff filed the within action seeking to foreclose on the Subject Property.

Pursuant to NY Real Property Law § 291:

A conveyance of real property, within the state, on being duly acknowledged by the person executing the same, or proved as required by this chapter, and such acknowledgment or proof duly certified when required by this chapter, may be recorded in the office of the clerk of the county where such real property is situated, and such county clerk shall, upon the request of any party, on tender of the lawful fees therefor, record the same in his said office. Every such conveyance not so recorded is void as against any person who subsequently purchases or acquires by exchange or contracts to purchase or acquire by exchange, the same real property or any portion thereof, or acquires by assignment the rent to accrue therefrom as provided in section two hundred ninety-four-a of the real property law, in good faith and for a valuable consideration, from the same vendor or assignor, his distributees or devisees, and whose conveyance, contract or assignment is first duly recorded, and is void as against the lien upon the same real property or any portion thereof arising from payments made upon the execution of or pursuant to the terms of a contract with the same vendor, his distributees or devisees, if such contract is

made in good faith and is first duly recorded. . .

Movant presented a prima facie case that there are no triable issues of fact. In support of the motion, movant submitted, inter alia: an affidavit of Jose Pinto, Vice President of Wells Fargo Bank, NA, who avers, inter alia, that:

3. On or about March 18, 2008, Tariz Reza executed a mortgage in favor of Mortgage Electronic Registration Systems, Inc., As Nominee for Advisors Mo securing a note in the amount of \$417,000 against the Subject Premises ("Reza Mortgage"). The Reza Mortgage was recorded on March 28, 2008. . .

4. Thereafter, on or about February 23, 2009, the Reza Mortgage was assigned to Wells Fargo Bank, N.A. which assignment was recorded on March 18, 2009. . .

5. I am informed by my attorney that on or about March 14, 2008 Mohammed Mollah executed a mortgage in favor of MERS as nominee for Dream House Mortgage Corporation securing a note in the amount of \$417,000 against the Subject Premises ("Mollah Mortgage"). I am further informed that the Mollah Mortgage was recorded on May 28, 2008. . .

6. I have reviewed the books and records of Wells Fargo, including the loan origination file, and hereby attest that Wells Fargo had neither actual nor constructive notice of the Mollah Mortgage at the time the Reza Mortgage was executed. . .

Movant established that the plaintiff's interests are void as against the movant's interest since movant encumbered the Subject Property in good faith, for valuable consideration and it recorded its interests prior to the plaintiff recording its interests.

In opposition, plaintiff raises triable issues of fact. In opposition, plaintiff submits, inter alia: the affidavit of Diana Rowland, an officer of plaintiff, who avers that:

3. Bangla Estate, Inc. ("Bangla Estate") was the record owner of the premises known as One Broadway, Howard Beach, New York ("Premises") immediately prior to March 14, 2008.

4. Bangla Estate conveyed the Premises to Mohammed Mollah ("Mollah") on March 14, 2008 for \$475,000 pursuant to a deed of that date.

5. On March 14, 2008, Mollah borrowed the sum of \$417,000 from Dream House Mortgage Corporation ("Dream House"). On March 14, 2008, Mollah executed and delivered a promissory note of same date to Dream House promising to repay said \$417,000 to Dream House.

6. On March 14, 2008, Mollah executed and delivered a mortgage to Dream House encumbering the Premises as security for the said loan of \$417,000.

7. The said note and mortgage that Mollah delivered to Dream House were assigned in writing to U.S. Bank, N.A. on September 8, 2008.

8. U.S. Bank, N.A. is the current owner and holder of the said note and mortgage that Mollah delivered to Dream House.

9. Neither Dream House nor U.S. Bank, N.A. had any knowledge or notice on March 14, 2008 of the purported conveyance of the Premises to Tariq Reza or of any mortgage executed by Tariq Reza or anyone else encumbering the Premises with any mortgage other than the said mortgage that Mollah delivered to Dream House.

10. U.S. Bank, N.A. had no knowledge of the purported conveyance of the Premises to Tariq Reza or of the purported mortgage executed by Tariq Reza until same were revealed in the foreclosure search that was ordered by counsel in preparation for commencing this action.

In opposition, plaintiff raises triable issues of fact, such

as: whether "Wells Fargo Home Mortgage" has standing to assert a claim to the mortgage it seeks to protect and whether the owners of the Reza Mortgage had notice of Mollah's interest due to the presence of Mollah at the Premises at and prior to the day of the Reza closing.

Accordingly, defendant, Wells Fargo Home Mortgage s/h/a Mortgage Electronic Registration Systems, Inc. As Nominee and Mortgagee of Record's motion is denied.

This constitutes the decision and order of the Court.

Dated: November 30, 2011

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Howard G. Lane, J.S.C.