

Wells Fargo Home Mtge. v Moutopoulos

2011 NY Slip Op 33374(U)

December 12, 2011

Supreme Court, Nassau County

Docket Number: 23730/10

Judge: Joel K. Asarch

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU: PART 17

-----X
WELLS FARGO HOME MORTGAGE,
a division of WELLS FARGO BANK, N.A.,
its successors and/or assigns,

Plaintiff,

- against -

DECISION AND ORDER

Index No: 23730/10

Motion Sequence No: 001
Original Return Date: 09-05-11

**DIMITRIOS MOUTOPOULOS; VASILIA
MOUTOPOULOS a/k/a LISA MOUTOPOULOS;
and "JOHN DOE #1" through "JOHN DOE #12,"**
the last twelve names being fictitious and unknown
to Plaintiff, the persons or parties intended being the
tenants, occupants, person or corporations, if any,
having or claiming an interest in or lien upon the
property, described in the complaint,

Defendants.

-----X

P R E S E N T :

HON. JOEL K. ASARCH,
Justice of the Supreme Court.

The following named papers numbered 1 to 3 were submitted on this Notice of Motion on September 7, 2011:

	<u>Papers numbered</u>
Notice of Motion, Affirmation and Affidavit in Support	1-3
Affidavit in Opposition	X

The motion by plaintiff, Wells Fargo Home Mortgage, a division of Wells Fargo Bank, N.A., its successors and/or assigns, seeking a default judgment pursuant to CPLR §3215 against the

defendants Dimitrios Moutopoulos, Vasilias Moutopoulos a/k/a Lisa Moutopoulos, "John Doe #1" a/k/a Lisa Vassilou; and "John Doe #2" a/k/a Steve Moutopoulos; a declaration that plaintiff is owner and holder of an equitable mortgage upon the property; and a decree to quiet title against the defendants, is **granted in part**.

The instant motion arises out of an underlying action commenced under Article 15 of the RPAPL to declare that the plaintiff holds an equitable mortgage and to compel the defendants to re-execute a certain unrecorded mortgage and the unrecorded consolidation agreement. The plaintiff commenced this action by filing a Summons and Complaint with the County Clerk of Nassau County on December 31, 2010. Process was personally served upon Vasilias Moutopoulos, Steve Moutopoulos and Dimitrios Moutopoulos, by delivering copies of the Summons and Complaint with Lisa Vassilou, a person of suitable age and discretion, at the defendants' dwelling place (and the encumbered real property) and mailing copies of the process to the defendants.

FACTS

The Moutopoulos defendants, specifically Dimitrios and Vasilias (a/k/a/ Lisa) Moutopoulos, acquired a fee simple interest in the real property located at 311 Dorchester Road, Garden City South, New York 11530, and legally described as Section 33, Block 491, Lot 446 in the County of Nassau, from Anthony Riggi and Maria Riggi by a deed dated May 15, 2008. Such deed is recorded in the Nassau County Clerk's office in Liber 12401, p. 0834.

According to plaintiff, on or about May 14, 2008, the Moutopouloses executed certain mortgage instruments involving a first mortgage given by Anthony Riggi and Maria Riggi to JP Morgan Chase Bank, securing the amount of \$353,000, and a second mortgage given by Dimitrios and Vasilias Moutopoulos to Wells Fargo Bank in the amount of \$318,291.21. Both mortgages were

consolidated pursuant to a Consolidation Modification and Extension Agreement (“CEMA”) and such was to be recorded in the Nassau County Clerk’s office as a single lien in the amount of \$640,000. Plaintiff bank also tendered the sum of \$318,291.21 to the Moutopouloses.

The foregoing documents (in addition to the corresponding promissory notes) were executed in the Law Office of Alex Constantopes, P.C., the agent for the plaintiff bank. After execution, the mortgage documentation was to be filed with the Nassau County Clerk; however it was later discovered that the second mortgage and CEMA were never filed. The plaintiff was unable to locate the original documents as they were either lost or misplaced. As a result, the plaintiff issued a demand to the defendants in December 2010, by way of the underlying Summons and Complaint, to re-execute the mortgage documents.

The Summons and Complaint was served on the borrower defendants by leaving the same with a person of suitable age and discretion at the subject premises on January 6, 2011. Defendant, Lisa Vassilou, “John Doe, #1”, daughter -in-law of Dimitrios and Vasila Moutopoulos, and wife of Steve Moutopoulos, “John Doe, #2”, received service on behalf of the foregoing named defendants as well as on her own behalf. On January 10, 2011, the plaintiff also mailed the same to each party (with the exception of Lisa Vassilou) at the subject property. Proof of service was filed on January 12, 2011 and more than forty days have elapsed. The defendants did not respond nor did they answer the complaint.

The instant motion was filed in August 2011, to be heard before this Court on September 5, 2011. The defendants received notice as the moving papers were served on each of them by mail at the subject residence of 311 Dorchester Road, Garden City South, NY 11530. As of this date, the defendants have not answered or appeared in response to this motion.

PROCEDURE

Pursuant to CPLR §3215, when a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him or her. The record indicates that the defendants were properly served in accordance with the provisions set forth in CPLR §308, as evidenced by the affidavits of service in the record. CPLR §308(1) and (2) require that personal service upon a natural person shall be made, *inter alia*, by delivering the summons and complaint within the state to the person to be served; or by delivering the summons and complaint within the state to a person of suitable age and discretion at the actual dwelling place, place of business or usual place of abode of the person to be served and by mailing a copy of the process to the person to be served at his or her last known residence.

As to the instant motion, the plaintiffs were not required to give such notice since the defendants did not appear in the action, and the motion for a default judgment is being made less than one year after the default. (see *Jaffery v. MacMillan & Webb Enterprises, Inc.*, 27 AD3d 422 [2nd Dept 2006]). Notwithstanding, the plaintiff served a copy of the instant motion by mail to each defendant at the subject premises and their last known residence. None of the defendants have appeared in response to the process or the motion. Accordingly, that portion of the motion seeking entry of a default judgment pursuant to CPLR §3215 against the defendants Dimitrios Moutopoulos, Vasilias Moutopoulos a/k/a Lisa Moutopoulos, "John Doe #1" a/k/a Lisa Vassilou; and "John Doe #2" a/k/a Steve Moutopoulos **is granted**.

As the defendants have defaulted, this Court will now consider the relief requested by the

plaintiff. Regarding the issue of an equitable mortgage, a court will impose an equitable mortgage where the facts surrounding a transaction evidence that the parties intended that a specific piece of property is to be held or transferred to secure an obligation (see *Tornatore v. Bruno*, 12 AD3d 1115 [4th Dept 2004]; *Village of Philadelphia v. Fortis US Energy Corp.*, 48 AD3d 1193 [4th Dept 2008]). Further, New York has long recognized that “[a]n equitable mortgage may be constituted by any writing from which the intention so to do may be gathered, and an attempt to make a legal mortgage, which fails for want of some solemnity, is valid in equity, * * * a specific lien upon land * * * and that an equitable mortgage thus created” (see *F.D.I.C. v. Five Star Management, Inc.* 258 AD2d 15 [1st Dept 1999]).

Here, the evidence indicates that the parties intended to execute instruments purporting to be mortgages and Notes to be secured by the real property. However, the documentation has noted deficiencies. For example, on the signature page of the CEMA, while bearing the signatures of both Dimitrios and Vasilias Moutopoulos, there is an unsigned notary acknowledgment and another notary acknowledgment referring to a “Teresa Meyer” (sic).

Additionally, the mortgage referencing the amount of \$640,000 bears the signature of Dimitrios and Vasilia Moutopoulos, where the corresponding Note only bears the signature of “Dimitrios Moutopoulos”. Provisions of a mortgage that set forth that if there is more than one mortgagor, each shall be separately liable, are not sufficient to allow a promissory note, signed by only one mortgagor, to be secured by a jointly executed mortgage (*Coolidge East Equities, LP v. Babcock*, 283 AD2d 968 [4th Dept 2001]). Here, the relevant language in the subject instrument provides:

“...Lender may enforce Lender’s rights under this Security Instrument as Borrower, each of

us is fully obligated to keep all Lender's rights under this Security Instrument against each of us individually or against all of us together....However, if one of us does not sign the Note...that Person is signing this Security Instrument only to give that Person's rights in the Property to Lender under the terms of this Security Instrument; ...that Person is not personally obligated to pay the Sums Secured..." (see Wells Fargo Mortgage, ¶13).

Based on the foregoing, the Note was only signed by one party although the mortgage was jointly executed. Therefore, the Note cannot be secured by the mortgage as executed. Moreover, there is no evidence that the defendants actually received the \$318, 291.21 in mortgage proceeds.

This Court recognizes that there may have been an intent to create a mortgage, but additional evidence is required to evince the proper terms and to bind the proper parties. Accordingly, after due deliberation, it is

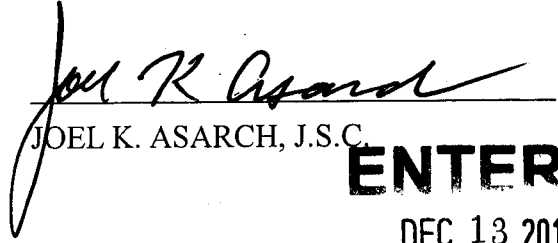
ORDERED, that the defendants Dimitrios Moutopoulos and Vasilias Moutopoulos a/k/a Lisa Moutopoulos, and the plaintiff, shall appear before the undersigned at this Court **on January 18, 2012 at 9:30 a.m.** at the courthouse, 100 Supreme Court Drive, Mineola, New York 11501, for a hearing where both parties will produce sufficient evidence to enable the Court to make a determination as to whether the plaintiff is entitled to a declaration as sought in the moving papers. If such evidence uncovers that the defendants have indeed received proceeds from a mortgage encumbering the subject residence and for the benefit of the home ownership, this Court will then compel the defendant Moutopouloses to re-execute the mortgage documents and such other relief as may be appropriate; and it is further

ORDERED, that the plaintiff shall cause this Order to be served pursuant to CPLR 308(1) or (2) upon all defendants within FIFTEEN (15) days of its issuance and shall file proof of service with the Court prior to the hearing date.

The foregoing constitutes the Decision and Order of the Court.

Dated: Mineola, New York
December 12, 2011

ENTER:



Handwritten signature of Joel K. Asarch in black ink, written over a horizontal line.

JOEL K. ASARCH, J.S.C.

Copies mailed to:
The Hopp Law Firm, LLC
Attorneys for Plaintiff

ENTERED
DEC 13 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dimitrios Moutopoulos and Vasilias Moutopoulos
Defendants *Pro Se*, in default