

People v Empire Prop. Solutions, LLC

2012 NY Slip Op 30346(U)

January 27, 2012

Sup Ct, Nassau County

Docket Number: 09-017767

Judge: Steven M. Jaeger

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SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK

Present:
HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

PEOPLE OF THE STATE OF NEW YORK by
ANDREW M. CUOMO, Attorney General of the
State of New York,

Plaintiff,

-against-

EMPIRE PROPERTY SOLUTIONS, LLC, JOHN
RUTIGLIANO, KENNETH KIEFER, Individually and
as Members of EMPIRE PROPERTY SOLUTIONS,
LLC, ZORNBERG & HIRSCH, BARRY ZORNBERG
and NANCY HIRSCH, Individually and as Partners of
ZORNBERG & HIRSCH, CORY COVERT, BILL
TSOUMPELIS, H & Z ABSTRACT, INC., BARRY
ZORNBERG and Nanci HIRSCH, Individually and
as Officers of H & Z ABSTRACT, INC., LEONIE
NEUFVILLE d/b/a NEUFVILLE MORTGAGE, PAUL
HARRIS, FRANK LUSCAVAGE, AMERICAN
HOME MORTGAGE SERVICING INC., AMERICA'S
SERVICING CO., AVELO MORTGAGE LLC, BANK OF
AMERICA, N.A., DEUTSCHE BANK NATIONAL TRUST
COMPANY, GMAC MORTGAGE LLC, GOLDMAN
SACHS GROUP, INC., SELECT PORTFOLIO SERVICING,
INC., U.S. BANK NATIONAL ASSOCIATION, WELLS
FARGO BANK, N.A., AMERICAN EXPRESS
CENTURION BANK, CAPITAL ONE BANK, DEL NORTE
REFI, LLC., KAREN L. KIEFER, MDC CREDIT CORP.,
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS,
INC., ROBERT L. PRYOR, CHAPTER 7 TRUSTEE OF THE
BANKRUPTCY ESTATE OF FRANK LUSCAVAGE,
UNITED STATES OF AMERICA, ACTING BY AND
THROUGH FARMERS HOME ADMINISTRATION,
UNITED STATES DEPARTMENT OF AGRICULTURE
AND JOHN DOES,

Defendants.

TRIAL/IAS, PART 43
NASSAU COUNTY
INDEX NO.: 09-017767

MOTION SUBMISSION
DATE: 12-16-11

MOTION SEQUENCE
NO. 1

The following papers read on this motion:

Order to Show Cause with Temporary Restraining Order, Affirmation, and Exhibits	X
Plaintiffs' Reply Memorandum of Law in Support of Motion Memorandum of Law of Defendants, Avelo Mortgage LLC and GMAC Mortgage LLC in Opposition	X
Affirmation in Opposition	X

Order to show cause by the plaintiff, the People of the State of New York for, *inter alia*, an order: (1) enjoining the defendants Empire Property Solutions, LLC, John Rutigliano, and Kenneth Kiefer, *et. al.*, from transferring, selling, or otherwise disposing of any assets owned, possessed or controlled by them in the State of New York; and (2) staying certain mortgage foreclosures actions.

In August of 2011, the People of the State of New York [“the plaintiff”], commenced the within action as against, *inter alia*, Empire Property Solutions, LLC [“Empire”] and its principals. The verified complaint alleges that Empire engaged in a fraudulent, mortgage “foreclosure rescue scheme” in violation of Executive Law § 63[12] and General Business Law §§ 349, 350 (Cmplt., ¶¶ 39-72; 76-108 *see also*, *People v. Empire Property Solutions, LLC*, ___Misc.3d___, 2011 WL 5901372 [Supreme Court, Nassau County, 2011][Order of Jaeger, J.]; Cmplt., ¶¶ 40-44, 52-53).

In sum, the plaintiff alleges that victimized homeowners were instructed to convey their homes to – and then lease them back from – so-called “straw buyers” supplied by Empire. The Empire straw buyers would then submit fraudulent

applications for mortgage loans on which they later defaulted, thereby exposing the homeowners' properties to loss through subsequently commenced foreclosure proceedings (Cmplt., ¶¶ 39-42, 43-73).

Based upon these allegations and others, the complaint: (1) interposes several causes of action grounded on Executive Law § 63[12] and General Business Law §§ 349, 350; and (2) demands, *inter alia*, permanent injunctive relief and a declaration rescinding and/or "voiding any transfer of title to real property" or any other agreement "that arose out of * * * the fraudulent, deceptive and illegal" mortgage scheme (Wherefore Clause, ¶¶ 1-8).

Notably, among the defendants named as necessary parties to the action are various lenders, including codefendants Avelo Mortgage LLC ["Avelo"] and GMAC Mortgage LLC ["GMAC"]. Both Avelo and GMAC obtained title to their mortgages and notes (which were already in default at the time) through assignments – and both are now attempting to foreclose upon those mortgages, *i.e.*, mortgages originally made by other lenders to Empire's fraudulent, "straw buyers" (Cmplt., ¶¶ 39-72).

Contemporaneously with the service of its summons and verified complaint, the plaintiff brought on the instant application for preliminary injunctive relief, coupled with a temporary restraining order. Among other things, the temporary restraining order – which the Court signed – requested relief staying certain

foreclosure proceedings commenced by the defendant-lenders, including those instituted by Avelo and GMAC (*see*, OSC 4th decretal paragraph).

In support of its motion for injunctive relief, the plaintiff contends that a stay of the Avelo and GMAC foreclosure proceedings is required to avoid irreparable injury; maintain the status quo; and avoid the dissipation of property which could render any judgment for the relief sought ineffectual (CPLR 6301). More particularly, the plaintiff contends that if the foreclosure proceedings are permitted to conclude – and the victim’s former homes are acquired by third party purchasers – the residences could be irrevocably lost (*e.g.*, *Masjid Usman, Inc. v. Beech 140, LLC*, 68 AD3d 942). The plaintiff further contends, among other things, that the underlying loan transactions were already in default when the movants received their respective assignments, and were replete with “red flag” type anomalies, including, *inter alia*, mortgage applications containing inaccuracies; incomplete and inaccurate HUD-1 statements; purchasers who were not residing in the homes acquired when the assignments were made (*cf.*, *HSBC Mortg. Services, Inc. v. Alphonso*, 58 AD3d 598, 600); and numerous instances where lender-attorneys simultaneously acted as counsel for sellers and/or purchasers (Pltff’s Brief at 5-6, 17-18, 19-20).

Upon the papers submitted, the plaintiff has demonstrated its entitlement to the injunctive relief sought.

More specifically, the evidentiary record before the Court depicts in detail, the manner in which the alleged mortgage rescue scheme was perpetrated in violation of statutory proscriptions and establishes both a likelihood of success on the merits and a balancing of the equities in the plaintiff's favor (*see, Thomas v. Lasalle Bank Nat. Ass'n*, 79 AD3d 1015; *People v. Property Solutions, LLC, supra*, 2011 WL 5901372 *see also, Masjid Usman, Inc. v. Beech 140, LLC, supra*, 68 AD3d 94). The evidence further supports the plaintiff's assertions that if the *status quo* is not maintained through the granting of provisional relief, the victims of the scheme could sustain irreparable harm through the foreclosure sale and irrevocable loss of the homes to third parties.

Although the defendant-lenders Avelo and GMAC contend that they themselves have they not been accused of violating the statute, the two homes encumbered by their mortgages were titled in the names of the accused wrongdoers, who acquired the deeds through false pretenses and/or an allegedly fraudulent scheme plainly violative of, *inter alia*, Executive Law § 63[12]). It is settled that “[a] deed based on forgery or obtained by false pretenses is void *ab initio*, and a mortgage based on such a deed is likewise invalid” (*Cruz v. Cruz*, 37 AD3d 754 *see, U.S. Bank Nat. Ass'n v. Mayala*, 87 AD3d 691, 692; *First Nat. Bank of Nevada v. Williams*, 74 AD3d 740, 742; *GMAC Mtge. Corp. v Chan*, 56 AD3d 521 *see generally, Marden v*

Dorthy, 160 NY 39, 49 [1899]; *Wargo v. Jean*, 77 AD3d 919, 921; *National City Home Loan Services, Inc. v. Arango*, 72 AD3d 915, 916; *Johnson v. Melnikoff*, 65 AD3d 519; *People v. Property Solutions, LLC, supra*, 2011 WL 5901372). Further, “a mortgagee is under 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, and one who does not do so “is not a bona fide encumbrancer for value” (*JP Morgan Chase Bank v. Munoz*, 85 AD3d 1124, 1126; *LaSalle Bank Natl. Assn. v Ally*, 39 AD3d 597 *see, Thomas v LaSalle Bank N.A., supra*, 79 AD3d 1015, 1017; *Stracham v Bresnick*, 76 AD3d 1009, 1010; *First Nat. Bank of Nevada v. Williams, supra*; *HSBC Mortg. Services, Inc. v. Alphonso, supra*, 58 AD3d 598, 600).

Lastly, while the Court agrees that the plaintiff has made an adequate showing of irreparable injury, nevertheless “[t]raditional concepts of irreparable damage which apply to private parties do not govern this public interest field” (*State of New York v Terry Buick*, 137 Misc.2d 290, 296 [Supreme Court, Dutchess County 1987]). This is because “[t]he irreparable injury to be enjoined is an injury to the public, which need not be focused upon an individual to be actionable” (*State of New York v Terry Buick, supra see also, Spitzer v. Lev*, ___ Misc.3d. ___, 2003 WL 21649444, at 2 [Supreme Court, New York County 2003] *see generally, People ex rel. Bennett v Laman*, 277 NY 368, 383 [1938]; *Incorporated Vil. of Plandome Manor v Ioannou*, 54 AD3d

364; *State of New York v Brookhaven Aggregates*, 121 AD2d 440, 442; *Town of Islip v Clark*, 90 AD2d 500, 501 *cf.*, *F.T.C. v. Crescent Pub. Group, Inc.*, *supra*, 129 F.Supp.2d 311, 319 [S.D.N.Y. 2001]).

The Court has considered the defendants' remaining contentions and concludes that they are lacking in merit.

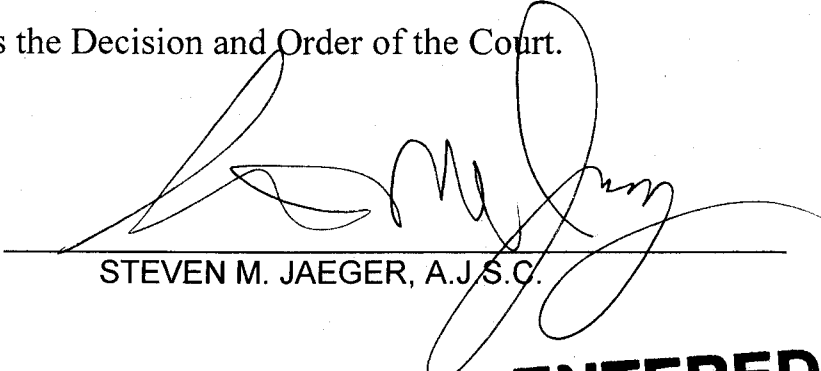
Accordingly, it is,

ORDERED that the order to show cause by the People of the Sate of New York for a preliminary injunction is granted, and it is further,

ORDERED that the directives contained in the restraining order signed by the Court upon the initial submission of the plaintiff's motion on September 1, 2011, shall be continued pending the conclusion of the action or until further order of this Court.

The foregoing constitutes the Decision and Order of the Court.

Dated: January 27, 2012



STEVEN M. JAEGER, A.J.S.C.

ENTERED
JAN 31 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE