

**DeMaio v Capozello**

2013 NY Slip Op 30158(U)

January 18, 2013

Sup Ct, Suffolk County

Docket Number: 28320/2005

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK  
CALENDAR CONTROL PART - SUFFOLK COUNTY

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**PRESENT:**

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

-----X  
JAMES P. DeMAIO,

Plaintiff,

-against-

ROBERT CAPOZELLO, ANNA CAPOZELLO,  
STEPHEN ZANGRE, ANTHONY OLIVERI and  
JOSEPH PAPPALARDO,

Defendants.  
-----X

INDEX NO.: 28320/2005  
CALENDAR NO.: 200900831EQ  
MOTION DATE: 4/19/12  
MOTION SEQ. NO.: 011 MOT D

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Upon the following papers numbered 1 to 20 read on this motion for leave to amend caption, summary judgment and to compel; Notice of Motion/ Order to Show Cause and supporting papers 1-12; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 13-14; 15-16; Replying Affidavits and supporting papers 17-18; 19-20; Other    ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that this motion by plaintiff James P. DeMaio (DeMaio) seeking an order pursuant to CPLR Sections 1001, 3025, 3124 & 3212: 1) granting leave to add Wells Fargo Home Mortgage as successor in interest to World Savings Bank as an additional party defendant to this action and to amend the complaint; 2) compelling defendant Stephen Zangre (Zangre) to provide adequate responses to plaintiff's November 24, 2011 "Second Notice for Discovery and Inspection" and to provide additional discovery including depositions of defendant Zangre and his attorney; and 3) granting plaintiff summary judgment against defendant Zangre with respect to the fourth cause of action declaring that Zangre was not a bona fide purchaser for value of the premises in issue is determined as follows:

Plaintiff DeMaio is the former son-in-law of the defendants Robert and Anna Capozello (Capozellos). On February 23, 2005, while still married to the Capozellos' daughter, plaintiff conveyed title of the marital residence to his in-laws to prevent the home from being lost to foreclosure. The Capozellos obtained a \$187,00.00 mortgage which was used to pay off the existing mortgage and other debts accumulated by the DeMaio's, and promised to reconvey the premises to the plaintiff once DeMaio became creditworthy. In return, DeMaio agreed to continue to reside in the premises, collect rent payments from a tenant who occupied a portion of the premises and to make the monthly mortgage payments (together with tax & insurance payments). Five months later the DeMaio's separated and the plaintiff ceased making the agreed-upon mortgage payments. After evicting their former son-in-law in October, 2005, the Capozellos sold the premises to defendant Zangre on October 11, 2006.

Plaintiff commenced this action in November, 2005 seeking to have the deed set aside on the basis of fraud; declaring that DeMaio was the lawful title owner of the premises and directing the County Clerk to register title in the plaintiff's name; enjoining the Capozellos from conveying the premises; and awarding compensatory and punitive damages. The complaint was amended in March, 2006 setting forth causes of action claiming fraud (1<sup>st</sup> & 2<sup>nd</sup> causes of action), imposition of a constructive trust (3<sup>rd</sup> cause of action) and seeking a declaration that the February 23, 2005 Capozello/DeMaio deed was a mortgage pursuant to Real Property Law Section 320 (fourth cause of action).

By short form Order dated February 18, 2009 plaintiff's motion for an order pursuant to CPLR Sections 3212 & 3124 granting summary judgment with respect to the first, third and fourth causes of action and compelling the Capozello defendants to provide discovery was granted solely to the extent that partial summary judgment was granted in favor of the plaintiff with respect to the third cause of action (imposition of a constructive trust) on the issue of liability with the question of the amount of the net proceeds to be distributed to the plaintiff to be determined at a subsequent trial. Plaintiff's remaining requests for relief were denied. The February 18, 2009 Order also granted the defendants Capozello cross motion for summary judgment dismissing the first, second and fourth causes of action asserted in the amended complaint and granted the defendant Capozello's summary judgment on the third counterclaim set forth in their answer declaring that they were the title owners of the premises based upon the February 23, 2005 Capozello/DeMaio deed.

By Decision and Order dated June 8, 2010 the Appellate Division, Second Department modified the February 18, 2009 Order by granting the plaintiff's motion for summary judgment with respect to the fourth cause of action (RPL Section 320) declaring that the February 23, 2005 Capozello/DeMaio deed was a mortgage and by granting plaintiff's CPLR Section 3124 application to compel the Capozellos to produce copies of all documents relating to the sale of the premises to defendant Zangre. The June 8, 2010 Decision and Order also denied the defendant Capozellos' cross motion for summary judgment with respect to the first and fourth causes of action and the third counterclaim set forth in their answer. The action was remitted to the Supreme Court for a determination as to whether defendant Zangre was a bona fide purchaser for value when title of the premises was conveyed to him by the Capozellos on October 11, 2006 and for a hearing, if necessary, to determine the amount of net proceeds to be awarded to the plaintiff.

Plaintiff's motion seeks an order granting leave to amend the complaint by adding an additional party defendant, permitting additional discovery and granting summary judgment against defendant Zangre with respect to the fourth cause of action declaring that Zangre was not a bona fide purchaser for value of the premises. In support plaintiff submits four affirmations of counsel and claims that the addition of defendant Wells Fargo Home Mortgage as successor in interest to World Savings Bank is necessary to determine whether the mortgage lender had notice of plaintiff DeMaio's title claims prior to financing defendant Zangre's purchase of the premises and to therefore declare the Zangre/World Savings Bank's mortgage null and void. Plaintiff claims that the proposed second amended complaint is sufficient, meritorious and necessary to resolve the remaining issues surrounding the alleged transfer of title of the premises from the Capozellos to defendant Zangre since the Appellate Division June 8, 2010 decision granted plaintiff summary judgment against the Capozello defendants on the fourth cause of action. Plaintiff also claims that summary judgment must be granted against defendant Zangre declaring that Zangre was not a bona

bona fide purchaser for value of the premises in October, 2006 since the undisputed evidence in the record proves that Zangre had actual notice of DeMaio's claim based upon personal service of the amended complaint made upon Zangre in March, 2006 together with further proof of Zangre's notice and knowledge during oral argument of plaintiff's application for injunctive relief on March 24, 2006. It is the plaintiff's position that a hearing to determine whether Zangre is a bona fide purchaser for value is not required since the purchaser undisputedly had knowledge of DeMaio's claims more than seven months prior to the Capozellos/Zangre transfer. Finally plaintiff claims that he is entitled to full and complete responses to his "Second Notice for Discovery and Inspection" dated November 14, 2011 from defendant Zangre including examinations before trial of defendant Zangre and his attorney. Plaintiff argues that the Appellate Division decision directed disclosure of documents relating to the sale of the property and the proceeds from the sale and that the defendant Zangre has refused to provide the relevant documents.

In opposition the Capozello defendants submit an attorney's affirmation and claim that plaintiff's application seeking leave to amend the complaint must be denied since the proposed second amended complaint is insufficient since it sets forth only one cause of action with new factual allegations against all defendants. Defendants contend that any proposed amended pleading must clearly show the changes or additions which are made to the original pleadings and claim that DeMaio's proposed complaint fails to delineate all changes being made to the pleading. Defendants also contend that if the proposed complaint only sets forth one cause of action, the plaintiff must be deemed to have abandoned the remaining causes of action set forth in the amended complaint. Defendants also claim that triable issues of fact remain concerning whether defendant Zangre was a bona fide purchaser for value of the premises which requires that a hearing be conducted in compliance with the June 8, 2010 Appellate Division decision.

In further opposition defendant Zangre submits an attorney's affirmation and claims that the plaintiff is not entitled to conduct discovery until an application is made seeking to vacate the note of issue. Defendant also claims that the Appellate Division decision provides that triable issues of fact exist concerning Zangre's status as a bona fide purchaser for value and no basis therefore exists to grant the plaintiff's summary judgment motion.

Leave to amend a pleading may be granted at any time, including prior to or during trial, absent prejudice or surprise to the opposing party, unless the proposed amendment is palpably insufficient or patently devoid of merit (*see Galarraga v. City of New York*, 54 AD3d 308, 863 NYS2d 47 (2<sup>nd</sup> Dept., 2008)). Leave to amend is entrusted to the sound discretion of the court (*see Arcuri v. Ramos*, 7AD3d 741, 776 NYS2d 895 (2<sup>nd</sup> Dept., 2004)). Where the application is made long after the action is certified for trial, "judicial discretion in allowing such amendments should be discrete, circumspect, prudent and cautious" (*Morris v. Queens Long Island Medical Group, P.C.*, 49 AD3d 827, 854 NYS2d 222 (2<sup>nd</sup> Dept., 2008)).

Plaintiff has submitted a reasonable explanation for the proposed amendment adding an additional party defendant and has provided an arguably meritorious claim against the mortgage lender sufficient to justify the proposed amended pleading. Accordingly plaintiff's motion seeking leave to amend the complaint to add Wells Fargo Home Mortgage as successor in interest of, and formerly known as World Savings Bank, as a defendant must be granted.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material question of fact from the case. The grant of summary judgment is appropriate only when it is clear that no material and triable issues of fact have been presented (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 295 (1957)). The movant bears the initial burden proving entitlement to summary judgment (*Winegrad v. NYU Medical Center*, 64 NY2d 851 (1985)). Once such proof has been submitted, the burden shifts to the opposing party who, to defeat the motion, must offer evidence in admissible form and must set forth facts sufficient to require a trial of any issue of fact (CPLR Section 3212(b); *Zuckerman v. City of New York*, 49 NY2d 557 (1980)). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law (*Friends of Animals v. Associated Fur Manufacturers*, 46 NY2d 1065 (1979)).

The June 8, 2010 Decision and Order of the Appellate Division remitted to the Supreme Court for determination the issue of whether defendant Zangre was a bona fide purchaser for value when he purchased the premises on October 11, 2006. While the plaintiff has submitted evidence in the form of service of the amended pleadings, written applications made on behalf of the plaintiff and a transcript of the oral argument concerning plaintiff's motion for injunctive relief to show that defendant Zangre clearly had notice of Demaio's claim of title prior to the premises sale, the issue of whether Zangre was a bona fide purchaser for value cannot be determined purely on the basis of notice. That issue goes beyond the issue of notice and would necessarily involve a determination of whether the claims set forth in the plaintiff's amended complaint were arguably meritorious so as to compel a reasonably prudent purchaser to make further inquiry prior to the time the premises were to be sold to determine whether the seller retained legal title to the premises (*see Baron Associates v. Latorre*, 74 Ad3d 714, 903 NYS2d 447 (2<sup>nd</sup> Dept., 2010)). The evidence submitted by the plaintiff in the form of attorney settlement discussions primarily involves hearsay and does not provide a sufficient evidentiary framework to make that determination. Plaintiff's motion seeking an order granting summary judgment against the defendant Zangre declaring that Zangre was not a bona fide purchaser for value must therefore be denied.

Finally with respect to the plaintiff's application for additional discovery, the record is clear that such discovery is required in advance of a factual hearing concerning the claims set forth against defendants Zangre and Wells Fargo Home Mortgage. Accordingly the note of issue filed by the plaintiff shall be vacated and the action remanded to the original IAS Part so that completion of discovery relevant to the remaining issues can be scheduled in an expeditious manner. That discovery shall include the submission of adequate and complete responses to the plaintiff's Second Notice for Discovery and Inspection by defendant Zangre and the scheduling of depositions including examinations before trial of defendant Zangre, defendant Zangre's counsel, a representative of the defendant Wells Fargo Home Mortgage and any other witnesses relevant to the issues remaining to be resolved among the parties. Accordingly it is

**ORDERED** that plaintiff's motion for an order pursuant to CPLR Sections 1001 & 3025 is granted to the extent that the plaintiff is permitted leave to add the additional party defendant, Wells Fargo Home Mortgage and to amend the complaint. Upon personal service of copies of the pleadings in this action, the supplemental summons and complaint in the form annexed to the moving papers and this order with notice of entry in accordance with the requirements of CPLR

Section 311, Wells Fargo Home Mortgage shall be added as an additional party defendant. Responsive pleadings shall be served in accordance with CPLR Section 3025(d). The additional party defendant shall be served within twenty days of the date of entry of this order; and it is further

**ORDERED** that plaintiff's motion for an order pursuant to CPLR Section 3212 granting summary judgment with respect to the fourth cause of action against defendant Zangre is denied; and it is further

**ORDERED** that plaintiff's motion for an order pursuant to CPLR Section 3124 compelling defendant Zangre to provide responses to plaintiff's November 24, 2011 "Second Notice for Discovery and Inspection" is granted to the extent that the defendant Zangre is directed to provide adequate and complete responses to plaintiff's demands within twenty days of service of a copy of this order with notice of entry; and it is further

**ORDERED** that the Clerk of the Court is directed to vacate the note of issue, to remove this action from the trial calendar and to return this action to the Court's IAS Part for the purpose of completing all discovery. The parties are directed to appear for a conference at 11:00 a.m. on January 24, 2013 on the Court's IAS Part calendar to schedule depositions and to resolve all remaining discovery issues.

Dated: January 18, 2013

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J.S.C.