

One W. Bank, FSB. v Saunders
2015 NY Slip Op 30053(U)
January 2, 2015
Supreme Court, Kings County
Docket Number: 500586/14
Judge: Mark I. Partnow
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2nd day of January, 2015

P R E S E N T:

HON. MARK I. PARTNOW,
Justice.

-----X
ONE WEST BANK, FSB.,

Plaintiff,

- against -

Index No. 500586/14

ALL THE HEIRS AT LAW, NEXT OF KIN,
DISTRIBUTEES, DEVISEES, GRANTEES,
TRUSTEES, LIENORS, CREDITORS, ASSIGNEES
AND SUCCESSORS IN INTEREST THEREOF OF
THE AFORESAID CLASSES OF PERSONS,
IF THEY OR ANY OF THEM BE DEAD, ALL OF
WHOM AND WHOSE NAMES AND PLACES OF
RESIDENCE ARE UNKNOWN TO THE PLAINTIFF
OF LOIS SAUNDERS, et al.,

Defendants.

-----X

The following papers numbered 1 to 4 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1 - 2 _____
Opposing Affidavits (Affirmations) _____	3 _____
Reply Affidavits (Affirmations) _____	4 _____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, defendant Zakeen Hasan a/k/a Mark Eugene Oldham, the Administrator of the Estate of James Oldham (Hasan), moves for an order 1) pursuant to

CPLR (a)(1) dismissing the complaint based upon documentary evidence that the subject mortgage is void ab initio, 2) pursuant to CPLR 3211 (a)(1) dismissing the complaint based upon documentary evidence that the mortgage is not secured by the one-half interest in the subject property formerly owned by decedent James Oldham and 3) pursuant to CPLR 3211 (a)(10) dismissing the complaint for the failure of plaintiff One West Bank, FSB to join a necessary party.

Plaintiff commenced this action to foreclose a reverse mortgage encumbering the subject property at 400 Putnam Avenue in Brooklyn. The mortgage was executed on February 20, 2008 in favor of plaintiff's predecessor, Financial Freedom Senior Funding Corporation (FFSFC) by "Lois Saunders as Trustee of the Lois Saunders Revocable Living Trust Dated the Second Day of October, 2002."

James Oldham and Lois Saunders took title to the subject property as tenants in common by deed dated January 31, 1966. James Oldham died on January 23, 1999. On August 15, 2000, Lois Saunders executed a deed purportedly conveying the property to herself and her daughter, Joanne Morton. In the deed, Lois Saunders represented that she was the "heir-at-law" and "next of kin" of James Oldham. By deed dated October 2, 2002, Lois Saunders purportedly conveyed the property to herself as Trustee of the "Lois Saunders Revocable Living Trust." By deed dated February 17, 2004, Lois Saunders, as Trustee of the "Lois Saunders Revocable Living Trust" purportedly conveyed the property to herself and Joanne Morton. By deed dated May 14, 2007, Lois Saunders and Joanne Morton

purportedly conveyed the property to Lois Saunders as Trustee of the “Lois Saunders Revokable Living Trust, Dated the Second Day of October, 2002.” The subject mortgage was thereafter executed by Saunders, as Trustee of the “Lois Saunders Revokable Living Trust, Dated the Second Day of October, 2002,” on February 20, 2008.

Hasan was issued Letters of Administration of James Oldham’s Estate on March 31, 2010. Hasan thereafter commenced a turnover proceeding in Kings County Surrogate’s Court. By order dated May 23, 2013, Surrogate Margarita Lopez Torres granted Hasan’s motion for summary judgment and ordered, adjudged and decreed that the deeds dated August 15, 2000, October 2, 2000, February 17, 2004 and May 14, 2007 “are declared null and void.”

A party seeking dismissal of a complaint under CPLR 3211 (a)(1) must submit documentary evidence that “conclusively establishes a defense to the asserted claims as a matter of law” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002], quoting *Leon v Martinez*, 84 NY2d 83, 88 [1994]). “Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity” (*Buechel v Bain*, 97 NY2d 295, 303 [2001]). Privity “includes those who are successors to a property interest” (*Matter of Juan C. v Cortines*, 89 NY2d 659, 667-668 [1997]), quoting *Watts v Swiss Bank Corp.*, 27 NY2d 270, 277 [1970]). Plaintiff’s predecessor, FFSFC, had a full and fair opportunity in the turnover proceeding to challenge the interest of James Oldham’s Estate in the subject

property and make arguments in support of the 2000 deed and subsequent deeds into Lois Saunders, including a claim that James Oldham's Estate was barred by the statute of limitations. Therefore, plaintiff is precluded by the doctrine of collateral estoppel from challenging the judgment of the Surrogate's Court which declared the deeds executed after 1966 to be null and void and that James Oldham's Estate retained a one-half interest in the property as a tenant in common.

A putative mortgagor must have a mortgageable interest in the property sought to be charged as security (*see Boyarsky v Froccaro*, 125 Misc 2d 352, 359 [Supreme Court, Nassau County 1984]). "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, 754 [2d Dept 2007]; *see ABN AMRO Mtge. Group, Inc. v Stephens*, 91 AD3d 801, 803 [2d Dept 2012]; *First Natl. Bank of Nev. v Williams*, 74 AD3d 740, 742 [2d Dept 2010]; *GMAC Mtge. Corp. v Chan*, 56 AD3d 521, 522 [2d Dept 2008]). "If a document purportedly conveying a property interest is void, it conveys nothing, and a subsequent bona fide purchaser or bona fide encumbrancer for value receives nothing" (*ABN AMRO Mtge. Group, Inc. v Stephens*, 91 AD3d at 803; *see Marden v Dorothy*, 160 NY 39, 48 [1899]; *Solar Line, Universal Great Bhd., Inc. v Prado*, 100 AD3d 862, 863-864 [2d Dept 2012]; *First Natl. Bank of Nev. v Williams*, 74 AD3d at 741). Thus, to the extent plaintiff claims a mortgage interest over the entire property, such mortgage interest cannot be predicated on the null and void 2000 deed

and subsequent deeds in favor of Lois Saunders, individually or as Trustee for the “Lois Saunders Living Revokable Trust.”

Nonetheless, each tenant in common “may sell, mortgage or otherwise encumber his or her rights in the property, subject to the continuing rights of the other” (*V.R.W., Inc. v Klein*, 68 NY2d 560, 565 [1986]). “A co-owner can only encumber its own interest in property without the consent of the other co-owners” (*Kwang Hee Lee v Adjmi 936 Realty Assoc.*, 34 AD3d 646, 648 [2d Dept 2006]; see *V.R.W., Inc. v Klein*, 68 NY2d at 565; *Northgate Elec. Profit Sharing Plan v Hayes*, 210 AD2d 384, 385 [2d Dept 1994]). “[A] mortgage given by one of several parties with an interest in the mortgaged property is not invalid; it gives the mortgagee security, but only up to the interest of the mortgagor” (*CitiFinancial Co. (DE) v McKinney*, 27 AD3d 224, 226–227 [1st Dept 2006]).

As a result, Hasan’s motion to dismiss this action is granted to the extent of plaintiff’s foreclosure claim over the one-half interest in the property formerly owned by James Oldham as a tenant in common (see *1.2.3. Holding Corp. v Exeter Holding, Ltd.*, 72 AD3d 1040, 1043 [2d Dept 2010]).

The court has considered the parties’ remaining arguments and finds them unavailing.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.
HON. MARK I PARTNOW
SUPREME COURT JUSTICE

FILED
KINGS COUNTY CLERK
15 JAN -9 AM 8:46