

**Demaio v World Sav. Bank**

2015 NY Slip Op 31634(U)

August 19, 2015

Supreme Court, Suffolk County

Docket Number: 31159/12

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART XXXVI SUFFOLK COUNTY

**PRESENT:**

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

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JAMES P. DEMAIO,

Plaintiff,

-against-

WORLD SAVINGS BANK, WELLS FARGO HOME  
MORTGAGE and STEPHEN ZANGRE,

Defendants.

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INDEX NO.: 31159/12  
MOTION DATE: 2/19/15  
MOTION NO.: 002 MD

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Upon the following papers numbered 1 to 32 read on this motion to dismiss: Notice of Motion/ Order to Show Cause and supporting papers 1-14; Notice of Cross Motion and supporting papers   ; Answering Affidavits and supporting papers 15-28; Replying Affidavits and supporting papers 29-32; Other   ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion (motion sequence no. 002) of defendant Wells Fargo Bank, N.A., formerly known as World Savings Bank, FSB and incorrectly named in the complaint as Wells Fargo Home Mortgage, for an order pursuant to CPLR R. 3211(a)(1) and (a)(7) dismissing plaintiff's complaint against it is denied.

Plaintiff James P. DeMaio commenced the instant action on October 9, 2012 to vacate a purchase money mortgage granted to defendant World Savings Bank, FSB by defendant Stephen Zangre on October 11, 2006 in connection with his purchase of certain residential real property located at 135 Magua Street, Ronkonkoma, New York from non-parties Robert and Anna Capozello (the "Capozellos"). Plaintiff alleges that World Savings Bank was not a bona fide lender and mortgagee of the premises for value, and seeks an order and judgment declaring that the mortgage on the premises is null and void and that plaintiff has absolute title to the subject premises superior to and not subject to the lien or operation of the mortgage.

The mortgaged property is the subject of a separate action commenced on November 22, 2005 in this Court by James P. DeMaio against Robert Capozello alleging that he was fraudulently induced to deed the property to Capozello in February 2005 and asserting causes of action to determine claims to real property pursuant to Real Property Actions and Proceedings Law Article 15, for fraud, for injunctive relief and for the imposition of a constructive trust (hereinafter referred to as the "underlying action").<sup>1</sup> Plaintiff filed a notice of pendency against the subject property and

<sup>1</sup> *James P. DeMaio v. Robert Capozello, Anna Capozello, Stephen Zangre, Anthony Oliveri and Joseph Pappalardo*, Index No. 28320/2005.

simultaneously moved, by order to show cause (COHALAN, J.) dated November 22, 2005, for a temporary restraining order (“TRO”) and a preliminary injunction enjoining Capozello from selling the property and staying a then-pending district court eviction proceeding. The TRO was granted.

Defendant Capozello cross-moved to dismiss the complaint and to lift the TRO and cancel the notice of pendency. On March 3, 2006, after hearing oral argument on Capozello’s application to vacate the TRO and cancel the notice of pendency, this Court issued an order (BAISLEY, J.), vacating both the TRO and the notice of pendency. Thereafter, on March 13, 2006, plaintiff amended his complaint in the underlying action to add additional parties, including Stephen Zangre and Robert Capozello’s wife, Anna Capozello,<sup>2</sup> and additional causes of action, including a claim that the deed to the Capozellos was a mortgage pursuant to Real Property Law §320. Plaintiff also moved by order to show cause for an order, *inter alia*, vacating the March 3, 2006 order, reinstating the TRO and restraining the Capozellos from selling the property and Zangre from purchasing it, and staying plaintiff’s eviction from the property.

On October 11, 2006, while the foregoing motions were still pending before the Court, Zangre purchased the property from the Capozellos and executed the mortgage that is the subject of the instant action. Mark DeBenedittis, Esq., Zangre’s attorney in the underlying action, represented both Zangre as purchaser and World Savings Bank as mortgagee at the closing.

After extensive motion practice and several appeals in the underlying action, plaintiff has now been awarded summary judgment against the Capozellos on his claim that the deed is a mortgage pursuant to Real Property Law §320 (*DeMaio v Capozello*, 74 AD3d 864 [2d Dept 2010]) and against Zangre on his claim that Zangre is not a bona fide purchaser for value and that the deed held by Zangre is null and void and does not transfer title to the subject property to Zangre (*DeMaio v Capozello*, 124 AD3d 823 [2d Dept 2015]).

In response to plaintiff’s verified complaint in the instant action defendant Wells Fargo Bank, N.A., formerly known as World Savings Bank, FSB (hereinafter “Wells Fargo”) served a verified answer and cross-claims and now moves for an order pursuant to CPLR R. 3211(a)(1) and (a)(7) dismissing the complaint against it.<sup>3</sup> The motion is predicated on Wells Fargo’s argument that at the time the mortgage was issued, plaintiff did not have a title interest in the subject premises and there was no *lis pendens* filed against the property; accordingly, as a matter of law, it did not have constructive notice of plaintiff’s claims. Defendant argues that it was entitled to rely upon the public records and any title search report reflecting the same prepared by its title searcher in determining whether or not to issue the mortgage (*Regions Bank v. Campbell*, 291 AD2d 437 [2d Dept 2002]). Defendant further argues that even if had notice of plaintiff’s prior pending claims against the property, by virtue of a title search or otherwise, it cannot be said to have had notice of any fraudulent intent on the part of the Capozellos, so it is a bona fide encumbrancer for value and its mortgage is valid and in first lien position against the subject property.

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<sup>2</sup> The deed from plaintiff as grantor named both of the Capozellos as grantees.

<sup>3</sup> The submissions and the Court’s records reflect that on January 18, 2013, after the note of issue had been filed in the underlying action, plaintiff was granted leave therein to amend his complaint to add Wells Fargo Home Mortgage as successor in interest to World Savings Banks as an additional party defendant. The record does not reflect that plaintiff ever served Wells Fargo with the supplemental summons and second amended complaint therein, however.

Defendant concedes that plaintiff alleges in his complaint that defendant had *actual* notice of his claimed interest in the subject premises by reason of the fact that the attorney who represented Zangre at the closing, Mark DeBenedittis, Esq., was also his attorney of record in the underlying action and acted as the attorney for World Savings Bank in the closing of the purchase money mortgage. Defendant argues, however, that DeBenedittis acted only in the limited role of an independent third-party closing agent for World Savings Bank and that his actual knowledge of plaintiff's claims against Zangre in the underlying action cannot be imputed to the movant.

Finally, defendant cites the Court of Appeals' holding in *Da Silva v Musso* (76 NY2d 436, 438 [1990]) as support for its argument that as a matter of law, defendant did not have constructive notice of plaintiff's claimed interest in the property: "We hold that the purchaser's actual knowledge of a pending appeal is not legally significant and that, in the absence of an outstanding valid notice of pendency, the owner's ability to transfer clear title to the disputed property remains unimpaired."

Plaintiff opposes the motion on the ground that World Savings Bank had actual and constructive notice of plaintiff's litigation against the Capozellos and Zangre and his claims of superior title to the property, both by reason of the dual representation of Zangre and World Savings Bank at the closing by Zangre's attorney in the underlying action, and the fact that defendant's title company inquired of attorney DeBenedittis about plaintiff's underlying action and his claims therein, all of which was alleged in plaintiff's detailed complaint in this action. Plaintiff further argues that at the time of the closing of defendant's mortgage, there had been no final or interlocutory determination of the merits of plaintiff's claims in the underlying action. Finally, plaintiff argues that defendant's assertion that the remedy of cancellation of a mortgage is only available in actions in which there is a claim of forgery or fraudulent inducement is legally incorrect, and that a conveyance may be set aside where the purchaser/mortgagee has "either notice or knowledge of a prior interest or equity in the property, or...knowledge of facts that would lead a reasonably prudent purchaser to make inquiries concerning such" (*Yen-Te Hsueh Chen v Geranium Dev. Corp.*, 243 AD2d 708, 709 [2d Dept 1997]).

In determining a motion to dismiss a complaint pursuant to CPLR R. 3211(a)(7), "the standard is whether the pleading states a cause of action," and, in considering such a motion, "the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]). Where a motion to dismiss a complaint is predicated on documentary evidence pursuant to CPLR R. 3211(a)(1), the motion may be granted "only if the documentary evidence submitted utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law" (*Integrated Constr. Servs., Inc. v Scottsdale Ins. Co.*, 82 AD3d 1160, 1162-1163, 920 NYS2d 166 [2011]). Similarly, while affidavits and other evidentiary material may be submitted in support of a motion to dismiss pursuant to CPLR R. 3211(a)(7), such proofs "will almost never warrant dismissal under CPLR R. 3211 unless they establish conclusively that [the plaintiff] has no cause of action" (*Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901 [2d Dept 2014]).

In an action to invalidate a mortgage, a plaintiff may state a cause of action by pleading facts that establish that the mortgagee is not a bona fide encumbrancer for value (*Lucia v Goldman*, 68 AD3d 1064 [2d Dept 2009]). It is well established that a mortgagee that has knowledge of facts “that would ‘excite the suspicion of an ordinarily prudent person’ and fails to investigate...will be chargeable with that knowledge which a reasonable inquiry, as suggested by the facts, would have revealed” (*Booth v Ameriquest Mortgage Co.*, 63 AD3d 769 [2d Dept 2009] [internal citations omitted]). “A mortgagee who fails to make such an inquiry is not a bona fide encumbrancer for value” (*id.*).

Applying the foregoing standards, plaintiff’s verified complaint adequately states a cause of action against Wells Fargo. The complaint alleges, *inter alia*, that in connection with Zangre’s purchase of the property from the Capozellos, World Savings Bank granted Zangre a purchase money mortgage to finance his purchase of the premises,

“with full notice and knowledge of Plaintiff’s prior action against the Capozellos and Zangre (Index No. 28320-2005), and, particularly, Plaintiff’s afore-described claims...(i) that the Capozellos’ deed from Plaintiff dated February 23, 2005 was not an absolute conveyance, but instead intended as security, and was therefore null and void as a matter of law, pursuant to § 320 of the Real Property Law, and (ii) that, by virtue of the fact that the deed from Plaintiff to the Capozellos was thereby null and void as a matter of law, if Zangre did thereafter purchase the premises from the Capozellos, that the deed to Zangre from the Capozellos was likewise to be declared null and void as a matter of law, and set aside, and canceled of record” (§14).

The complaint further alleges that,

“prior to granting its purchase money mortgage to Defendant Stephen Zangre on October 11, 2006, Defendant WORLD SAVINGS BANK...acquired and had full notice and knowledge of all of Plaintiff’s claims of his prior interest and equity, and his sole and exclusive title, in the premises, as fully asserted against Zangre, and against the Capozellos...” (§20).

The complaint further alleges that prior to the closing,

“Zangre’s title company ([w]hich, upon information and belief, was also the insurer of the mortgage title of Defendant World Savings Bank) had inquired of attorney DeBenedittis about Plaintiff DeMaio’s action (Index No. 28320-2005), including particularly his claims that the Capozellos’ deed from Plaintiff to the subject property was null and void as a matter of law, and that, if Zangre did purchase the premises from the Capozellos, that his deed would be likewise null and void as a matter of law; that the title company which conducted the search for both Zangre, and for World Savings Bank, obtained copies of the lawsuit papers before the closing, and that title company; and Zangre’s mortgage bank, were fully and actually [emphasis in original] aware of Plaintiff’s lawsuit claims against the Capozellos’ title to his property before Zangre had his title from the Capozellos insured, and Defendant World Savings Bank granted Zangre a purchase money mortgage on October 11, 2006” (§21).

Finally, plaintiff's complaint alleges that

“by reason of the fact that Defendant WORLD SAVINGS BANK...had and/or is chargeable with having, full notice and knowledge of Plaintiff's claims of sole title, of superior right, title, and interest and equity in the premises, as asserted against Zangre, and against the Capozellos...it should be adjudged, determined and declared, that [defendant]...was not a bona fide lender and mortgagee of the premises for value, and that the mortgage...is therefore to be declared null and void, as a matter of law, and set aside and canceled of record...with Plaintiff's absolute title to the subject premises to be declared to be superior to, and not subject to the lien or operation of said mortgage...” (§22).

On their face, the foregoing allegations, which the Court presumes to be true for purposes of the instant motion, set forth a legally sufficient cause of action to vacate defendant's mortgage on the ground that World Savings Bank is not a bona fide encumbrancer for value (*Lucia v Goldman, supra*, 68 AD3d 1064). Defendant's motion to dismiss is supported only by the affirmation of its attorney dated December 24, 2013, annexed to which are copies of the pleadings herein, the deed of the subject premises from the Capozellos to Zangre, the subject mortgage, the notice of pendency, the March 3, 2006 order vacating the notice of pendency in the underlying action, the June 8, 2010 decision and order of the Appellate Division, Second Department granting plaintiff summary judgment in the underlying action on his claim that the deed to the Capozellos was a mortgage, and an “eLaw” printout regarding the status of the underlying action as of December 4, 2013.

The “documentary evidence” annexed to defendant's motion does not conclusively establish (or even suggest) that World Savings Bank did not have either actual or constructive notice of plaintiff's claims of title to the property at the time Stephen Zangre, who was then a defendant in the underlying action, purported to purchase the subject property and grant World Savings Bank a mortgage in the principal amount of \$308,000.00 (*Leon v Martinez*, 84 NY2d 83 [1994]). Contrary to defendant's argument, the mere fact that there was no notice of pendency filed against the property at the time of the closing does not establish that World Savings Bank FSB was a bona fide encumbrancer for value (*Da Silva v Musso, supra*, 76 NY2d 436). Notably, while defendant has claimed its entitlement to rely on the public record and any title search report reflecting the same prepared by its title searcher in determining whether or not to issue the mortgage (Def's Affirmation, ¶5, citing *Regions Bank v. Campbell*, 291 AD2d 437 [2d Dept 2002]), defendant has submitted no proof to establish whether it did or did not rely on any such title search report; in any event, no such title report was submitted in support of defendant's motion.

Plaintiff's submissions and the Court's records indicate that at the time of the closing, plaintiff's motion for a preliminary injunction, defendant Capozello's pre-answer cross-motion to dismiss the complaint, and plaintiff's motion to vacate the March 3, 2006 order cancelling the notice of pendency and vacating the TRO, and to restrain the Capozello defendants from transferring and Stephen Zangre from purchasing the subject premises, were pending before the Court, having been submitted on August 3, 2006. All of the substantive issues raised by plaintiff's pleading remained undetermined, including whether the deed whereby plaintiff conveyed the property to the Capozellos was a mortgage and whether Stephen Zangre was a bona fide purchaser for value. The *DaSilva* case relied on by Wells Fargo is inapposite here, as that case dealt with “the rights of the parties and the operation of the notice of pendency procedures prescribed by CPLR article 65 *after an action seeking*

to 'affect the title to, or the possession, use or enjoyment of, real property,' has terminated in a final judgment or order dismissing the claimant's complaint" [emphasis added] (*Da Silva v Musso, supra*, 76 NY2d at 438 [1990]). No such final judgment or order was ever issued in the underlying action.

Accordingly, defendant's motion to dismiss the complaint pursuant to CPLR R. 3211(a)(1) and (a)(7) is denied.

Dated: August 19, 2015

**PAUL J. BAISLEY, JR.**

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J.S.C.