Green Tree Servicing LLC v Votta
2017 NY Slip Op 31986(U)
September 20, 2017
Supreme Court, Tioga County
Docket Number: 45578
Judge: Eugene D. Faughnan

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tioga County Courthouse, Owego, New York, on the 14th day of July, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : COUNTY OF TIOGA

GREEN TREE SERVICING LLC,

Plaintiff,

vs.

JUDITH VOTTA INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF ALFRED VOTTA, UNITED STATE OF AMERICA (NORTHERN DISTRICT), "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, persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint.

Defendants.

DECISION AND ORDER

Index No. 45578
RJI No.

APPEARANCES:

Co-Counsel for Plaintiff:

BERKMAN, HENOCH, PETERSON, PEDDY & FENCHEL
By: Rajdai D. Singh, Esq.
100 Garden City Plaza
Garden City, NY 11530-2112

FIDELITY NATIONAL LAW GROUP
By: Vanessa R. Elliott, Esq.
350 Fifth Avenue, Suite 3000
New York, NY 10118

Counsel for Defendant, Judith Votta:

THE CROSSMORE LAW OFFICE
Edward Crossmore, Esq.
115 West Green Street
Ithaca, NY 14850

EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court on a motion by Plaintiff, Green Tree Servicing, LLC ("Green Tree") to amend its complaint. The motion is opposed by one of the named Defendants, Judith Votta ("Votta"), who is the widow of the original borrower, Alfred Votta. Mr. Votta passed away intestate on February 17, 2008.[1] A "cross-motion" was filed by Mary Beth Myers f/k/a Mary Beth Yankee ("Myers"), who purchased land now sought to be encumbered by a mortgage in Plaintiff's action. However, Myers has never been made a party to the action, and Green Tree argues that she has no standing to make any motions in this case.

BACKGROUND FACTS

Plaintiff filed a summons and complaint on March 20, 2015 seeking to foreclose on real property located in Tioga County, New York. The subject mortgage was executed on January 18, 2008 by Alfred Votta in favor of Countrywide Bank, FSB. An inaccurate metes and bounds description of the mortgaged premises is the source of the parties' dispute.

Defendant Votta's home is located on the easterly side of Crumtown Road in the Town of Spencer. However, the metes and bounds description in the 2008 mortgage refers to approximately 70 acres on the westerly side of Crumtown Road, property which Mr. Votta had conveyed to Cozza Enterprises in 2005. The evidence shows that the easterly side is designated Lot 33, and the westerly side is Lot 36, but both lots have, or did have, the same address of 421 Crumtown Road. According to Plaintiff, the loan application signed by Mr. Votta indicates that the parties intended to encumber the primary residence on the easterly side of Crumtown Road (Lot 33), and the mortgage proceeds actually paid off a 2006 Consolidated Extension and Modification Agreeement ("2006 CEMA") to Option One Mortgage Co., which then discharged its mortgage on Lot 33. Votta disputes the facts and accuracy of the alleged payoff of the 2006

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[1]Judith Votta was issued Letters of Administration on Alfred Votta's estate on March 27, 2008.

CEMA, pointing out possible irregularities in the agreements and payoffs. (See Crossmore Affidavit in Opposition pp. 10-12)

In 2011, Votta sold a one acre portion of Lot 33 to Myers, and after that subdivision, Lot 33 was re-designated as Lot 33.1 and Lot 33.2. (Plaintiff's letter of April 17, 2017 at p.2 states Myers purchased Lot 33.1; However, the proposed Amended Complaint (¶¶ 11-14) says Myers purchased Lot 33.2, as does the Crossmore Affidavit in Opposition to the Motion.) Plaintiff contends that Myers' interest is subordinate to the 2008 mortgage.

The record shows that Mr. Crossmore sent several letters to Plaintiff and Plaintiff's predecessors in interest, notifying them that the metes and bounds description contained in the 2008 mortgage referred to Lot 36, which Mr. Votta had conveyed in 2005. The first such letter was sent on February 11, 2009 and five other letters followed between then and September, 2014.

The Notice of Pendency which was attached to the summons and complaint provides the metes and bounds description to Lot 33. However, that was not the metes and bounds description attached to the original mortgage.

ANALYSIS

CPLR 3025 (b) provides that parties may amend their pleadings and courts shall freely grant leave. "'[L]eave to amend a complaint rests within the trial court's discretion and should be freely granted in the absence of prejudice or surprise resulting from the delay except in situations where the proposed amendment is wholly devoid of merit.'" *Moon v. Clear Channel Communs., Inc.*, 307 AD2d 628, 629 (3rd Dept. 2003) *quoting Selective Ins. Co. v. Northeast Fire Protection Sys.*, 300 A.D.2d 883, 883 (2002); *see Peebles v. Peebles*, 40 AD3d 1388 (3rd Dept. 2007) (while leave should be freely given, such requests should not be granted when the proposed amendment is lacking in merit). Unless the proposed amendment is palpably insufficient on its face, "a court should not examine the merits or legal insufficiency of the proposed amendments (*Newton v. Aqua Flo Co.*, 106 AD2d 919, 920 [4th Dept. 1984])." *Clark v. Taylor Wine Co.*, 148 AD2d 908, 909 (3rd Dept. 1989). Denial of leave is appropriate when the alleged insufficiencies are clear and free from doubt. *Clark, supra* (*citing Sentry Ins. Co. v.*

Kero-Sun, Inc., 122 AD2d 204, 205 (2nd Dept. 1986)).

Plaintiff's affidavit in support of its motion to amend requests "leave to amend the Complaint to reflect the correct metes and bounds portion of the property description of the 2008 Mortgage to reflect the metes and bounds description [of Lot 33] and to also establish, in the alternative, Plaintiff's right to be equitable [sic] subrogated to the rights of the prior lender whose lien was paid off with the proceeds of the 2008 Mortgage and its right to have an equitable mortgage imposed." (Affidavit of Rajdai Singh, Esq. ("Singh") at ¶7). Plaintiff asserts that the Borrower intended, and agreed to, mortgage the lot containing the residence. Plaintiff further asserts that Votta has been unjustly enriched because Plaintiff paid off the 2006 Mortgage. Plaintiff also claims that there is no prejudice or surprise to any party because the parties have been on notice of the transactions and occurrences that are the basis for this foreclosure action since the inception of the case. (Singh Affidavit at ¶16). Finally, Plaintiff claims that it "merely seeks to correct the legal description of the Mortgaged Premises to correspond with the proper Property Description. The amendment is necessary to preserve the right to foreclose under the 2008 Mortgage and does not impact the rights of any defendants named in this action." (Id. at ¶17).

The proposed amended complaint lists 5 causes of action: foreclosure of mortgage, unjust enrichment, equitable subrogation; equitable mortgage, and reformation of the 2008 mortgage (based on mutual mistake). The proposed amended complaint also refers to relief under Article 15 of the Real Property Actions and Proceedings Law (Action to Compel Determination of a Claim to Real Property) in paragraphs 2 and 4, but does not specifically list Article 15 under a cause of action.

At oral argument, Defendant's counsel advised that Plaintiff has a separate Article 15 case, pending in this Court. The Court can confirm, and takes judicial notice of, a pending Tioga County case bearing Index No. 46881, filed on September 13, 2016 relating to the same property, which is a claim specifically made under Article 15 and requesting a declaratory judgment including that Plaintiff has a valid first priority lien on Votta's property, Lot 33.

At the motion, Defendant's counsel also argued that the amended complaint did not actually set forth a cause of action under Article 15. Therefore, Defendant's counsel argued that

if Plaintiff wants to pursue such a claim, the Plaintiff should move to amend the complaint on the Article 15 theory, so that Defendant could be allowed to respond to that specific request.

Although the proposed amended complaint does mention Article 15, the affidavit in support does not make reference to Article 15, and the listed causes of action in the proposed amended complaint do not include a cause of action under Article 15. However, in paragraph 2 of the proposed Amended Complaint, it is stated that "[t]his action also is brought by Plaintiff for the purpose of obtaining a declaration and judgment of this Court pursuant to Article 15 of the [RPAPL] reforming the metes and bounds portion of the Property Description of the 2008 Mortgage to reflect the metes and bounds description contained in [an attached Exhibit]." In paragraph 4 it is noted that Plaintiff seeks a declaration that plaintiff has a first-lien priority. It appears, therefore, that the Plaintiff's primary theory for the Article 15 claim is reformation of the metes and bounds description. The claim for a first lien priority cannot really be ascertained until the other preliminary arguments are resolved.

The Court agrees with Defendant that Plaintiff's moving papers are insufficient to have put Defendant on notice as to a claim being made under Article 15. Accordingly, to the extent that the Plaintiff now seeks to add a cause of action sounding in Article 15, that request is denied, without prejudice to Plaintiff making a proper motion with notice to the Defendant.

Defendant argues that the remaining 4 causes of action sought to be added in the amended complaint are barred by the statute of limitations. A six year statute of limitations applies to claims for: unjust enrichment [*Davis v. Cornerstone Tel. Co.*, 61 AD3d 1315 (3rd Dept. 2009)]; equitable subrogation [*see, JP Morgan Chase Bank, N.A. v. Roseman*, 2017 NY Misc LEXIS 2437 (Sup. Ct. Queens County 2017) (citing CPLR 213(1)]; equitable mortgage [*US Bank N.A. v. Gestetner*, 103 AD3d 962 (3rd Dept. 2013) (citing CPLR 213(1)], and reformation based on mutual mistake [CPLR 213(6)].

With respect to a claim for unjust enrichment, Votta argues that the claim "accrued on January 18, 2008, when Alfred Votta received the benefit of [the] mortgage loan." (Defendant's Memorandum of Law at p.5). As such, according to Defendant, it is time barred by the six year statute of limitations. The claim for unjust enrichment was not asserted until May 30, 2017, when Plaintiff sought to amend the Complaint. Similarly, Defendant argues that any cause of

action for equitable subrogation, equitable mortgage, and reformation all have six year statutes of limitation which are now time barred-again contending that those causes of action accrued on January 18, 2008.

Plaintiff counters by arguing that the statute of limitations would not begin to run until the Court determines that Plaintiff has no adequate remedy at law (i.e. no legal right to foreclose on the 2008 mortgage). Plaintiff's position is that the 2008 mortgage is not the starting point for the statute of limitations, but the starting point is not until the Court denies the right to foreclose. Therefore, per Plaintiff, with respect to equitable subrogation, equitable mortgage and unjust enrichment, it is the denial of the right to foreclose on the mortgage which constitutes the accrual date. With respect to reformation based on mutual mistake, Plaintiff contends that the mortgage made clear what the parties intended and what parcels was meant to be encumbered. The parcel that Mr. Votta owned, where he had a residence and was designated as Lot 33, and had an address of 421 Crumtown Road.

Thus, the parties have differing views on the accrual date for claims of equitable subrogation, equitable mortgage and unjust enrichment. They have provided support for their respective positions on the statute of limitations in these 3 causes of action sounding in equity. The Court cannot say that the Plaintiff's proposed amendments, at least to these three causes of action, are "palpably insufficient on their faces." (*Clark*, supra). While it may be eventually determined that those three causes of action are, in fact, time barred, the Court cannot make that determination at this stage.

The Court recognizes that Defendant has made colorable arguments that the statute of limitations may render all the proposed amended causes of action untimely. However, the Defendant is essentially seeking a summary judgment determination to establish that the proposed amended causes of action of barred by the statute of limitations, and therefore, are palpably insufficient. It must be remembered, however, that this is a motion to amend the complaint. And that motion is freely given by the Court. As observed by Plaintiff's counsel at oral argument, if Plaintiff is allowed to amend the complaint, discovery may then proceed, as necessary. After that, if appropriate, dispositive motions may be made. Although Defendant seeks dismissal at this point, whereby needless litigation may be avoided, the Court is not

convinced that there is no further discovery that could be relevant to the instant action. While it is a close call, the more prudent course is to permit the amendment of the complaint.

The Court reaches a different conclusion with respect to the reformation claim, which is more clear on the statute of limitations issue. "Reformation based upon a purported mistake is governed by a six-year statute of limitations that is generally measured from the occurrence of the mistake." *Willshire Credit Corp. v.. Ghostlaw*, 300 AD2d 971, 973 (3rd Dept. 2002) *citing Matter of Wallace v. 600 Partners Co.*, 86 N.Y.2d 543, 547, 658 N.E.2d 715, 634 N.Y.S.2d 669); *see, Vollbrecht v. Jacobson*, 40 AD3d 1243 (3rd Dept. 2007); *FDIC v. Five Star Management, Inc.* 258 AD2d 15 (1st Dept. 1999); CPLR 213(6). Plaintiff provides no argument for the reformation claim to accrue at any date other than January 18, 2008, when the mortgage was executed. The summons and complaint was not filed within 6 years of January 18, 2018, so the cause of action for reformation based on mutual mistake is untimely.

Nor does the "relation back" doctrine save the reformation claim. Pursuant to CPLR 203 (f), "under the relation back doctrine, an otherwise untimely claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, 'unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.'" *Lawyers' Fund for Client Protection of the State of New York v. JP Morgan Chase Bank, N.A.* 80 AD3d 1129, 1130 (3rd Dept. 2011) citing CPLR 203(f), other citations omitted.

Even if the reformation cause of action in the proposed amended complaint were allowed, ti would only be deemed to have been filed as of the date of the original Summons and Complaint in this case- March 20, 2015, which is more than 6 years after the January 18, 2008 mortgage. Therefore, even the original summons and complaint would have been untimely for a claim of reformation. Unlike the claims for unjust enrichment, equitable mortgage and equitable subrogation which Plaintiff argues would have had a later accrual date, reformation would accrue on January 18, 2008. Thus, the claim for reformation is untimely, and is palpably insufficient on its face. Therefore, the Court denies the request to amend the Complaint to include a claim for reformation.

The Court also notes that based upon the determination that a claim for reformation is

barred by the statute of limitation and cannot be included in the amended complaint, that any claim to relief under Article 15 of the RPAPL based upon reformation, would also be barred.

MYERS' MOTION

Although Plaintiff's counsel did reference in a letter to Mr. Crossmore that Ms. Myers should be brought in and added as a party defendant, the proposed Amended Summons and Complaint did not actually do so. Therefore, Myers is not a party, nor a proposed party, and the Court agrees with Plaintiff that she does not have standing in this action to make any motions.

CONCLUSION

Based upon the foregoing discussion, the Court finds that Plaintiff is permitted to amend its complaint to include causes of action for unjust enrichment, equitable subrogation and equitable mortgage. Plaintiff's request to amend the complaint to include reformation is denied. Plaintiff's request to amend the complaint to include Article 15, quiet title, is denied without prejudice.

THIS CONSTITUTES THE DECISION AND ORDER OF THIS COURT.

Dated: September 20, 2017
Owego, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice

The following papers were received and reviewed by the Court in connection with this motion:

1) Plaintiff's Notice of Motion dated May 24, 2017 with Affirmation of Rajdai Singh, Esq., dated May 24, 2017 with attached Exhibits and proposed Amended Summons and Amended Complaint;
2) Notice of Cross Motion of Mary Beth Myers dated June 19, 2017 and filed on June 29, 2017, with Affidavit of Dirk A. Galbraith, Esq., sworn to on June 26, 2017, Affidavit of Mary Beth Myers, sworn to on June 22, 2017, Affidavit of Virginia A. Tesi, Esq., sworn to on June 21, 2017, and Memorandum of Law dated June 19, 2017;
3) Affidavit of Judith Votta, sworn to on July 5, 2017 in opposition to Plaintiff's motion to amend the complaint; Affidavit of Edward Y. Crossmore, Esq., sworn to on July 5, 2017, with attached Exhibits, and Memorandum of Law dated July 5, 2017;
4) Reply Affirmation of Vanessa R. Elliott, Esq., dated July 11, 2017, in support of Plaintiff's motion, and in opposition to Cross Motion of Myers;
5) Memorandum of Defendant Judith Votta, dated July 21, 2017 in response to reply Affirmation of Vanessa Elliot;
6) Sur-Sur-Reply Affirmation of Vanessa Elliott, dated August 3, 2017, with attached Exhibits, in further support of Motion to Amend.