

Dorvilier v Champion Mtge. Co.
2018 NY Slip Op 30591(U)
April 6, 2018
Supreme Court, Queens County
Docket Number: 706036/13
Judge: Allan B. Weiss
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS

IA PART_2_

HARRY DORVILIER

Index Number: 706036/13

Plaintiff,

Motion Date: 8/29/17

-against-

Motion Seq. No. 6

CHAMPION MORTGAGE COMPANY,

Defendants.

CHAMPION MORTGAGE COMPANY,

Third-Party Plaintiff,

-against-

LINCOLN EQUITIES CREDIT CORP.,
and WAYNE LIEBERMAN,

Third-Party Defendants.

The following papers read on this motion by Bank of America, N.A. (BANA), as successor in interest to third-party plaintiff Champion Mortgage Co. (Champion), pursuant to CPLR 3212 for summary judgment against third-party defendants Lincoln Equities Credit Corp. (Lincoln) and Wayne Lieberman as to liability only; and this cross motion by third-party defendants Lincoln and Lieberman pursuant to CPLR 3212(b) for summary judgment dismissing the amended third-party complaint, or alternatively, pursuant to CPLR 3212(f) to continue the motion and cross motion to permit disclosure with respect to third-party plaintiff Champion and its closing agent as to the title report delivered in 2009 and whether the report disclosed the notices of pendency filed in 2003 and 2006.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits	EF Doc. #145-#172
Notice of Cross Motion - Affidavits - Exhibits	EF Doc. #173-#181
Answering Affidavits - Exhibits	EF Doc. #189-#222
Reply Affidavits	EF Doc. #186-#188, #212-#214

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Kimie Miyamoto and Akira Miyamoto gave a mortgage dated March 29, 2000 and recorded on May 3, 2000 (the Lincoln mortgage) on the real property known 71-21 Loubet Street, Forest Hills, New York (the subject property) to secure a five-year note executed by Kimie Miyamoto, evidencing a loan from Lincoln in the original principal amount of \$110,000.00, plus interest.

On June 19, 2000, Lincoln commenced the action entitled *Lincoln Equities Credit Corp. v Miyamoto* (Sup Ct, Queens County, Index No. 14372/2000) (the *Lincoln* action) to foreclose the Lincoln mortgage based upon the Miyamotos' failure to pay the monthly installment due under the mortgage on May 1, 2000, and thereafter. By assignment of mortgage executed on July 26, 2000 by Wayne Lieberman, Lincoln assigned the note and Lincoln mortgage to Harry Dorvilier. The assignment of the Lincoln mortgage was never recorded.

During the pendency of the *Lincoln* action, but after the second notice of pendency filed therein had lapsed, Kimie Miyamoto executed a home equity conversion mortgage dated December 3, 2009, also known as a reverse mortgage, to secure advances to her by Bank of America, N.A. (BANA) pursuant to a fixed-rate note in the maximum principal amount of \$915,000.00 plus interest. The reverse mortgage was recorded December 23, 2009. Kimie Miyamoto also executed a second mortgage on December 3, 2009 in favor of the Secretary of Housing and Urban Development (the HUD mortgage) as additional security for the reverse mortgage. BANA thereafter assigned the reverse mortgage to Champion pursuant to an assignment of mortgage dated October 9, 2012 and recorded on October 24, 2012. Neither BANA nor Champion was named as a party defendant in the *Lincoln* foreclosure action, or moved to intervene therein. Dorvilier was substituted as the plaintiff in the *Lincoln* foreclosure action upon entry of the judgment of foreclosure and sale on May 14, 2014.

Meanwhile, on December 30, 2013, prior to the issuance of the judgment of foreclosure and sale in the *Lincoln* action, plaintiff Dorvilier commenced this action, alleging

that he was the assignee of the Lincoln mortgage pursuant to the July 26, 2000 assignment of mortgage, and that Champion held the reverse mortgage pursuant to the October 9, 2012 assignment. Plaintiff sought a judgment foreclosing defendant Champion's mortgage lien, and declaring that he was entitled to sell the subject property "free and clear" of the reverse mortgage.

Defendant/third-party plaintiff Champion thereafter served an answer and commenced the third-party action on July 1, 2014 against third-party defendants Lincoln and Wayne Lieberman, the vice president of Lincoln.¹ In the amended third-party complaint, it is alleged that prior to the making of the reverse mortgage, BANA became aware of the Lincoln mortgage, which appeared in the land records for the subject property. Because BANA purportedly intended the reverse mortgage to be a first mortgage secured to the subject property, BANA contacted Lincoln to inquire as to the status of the Lincoln mortgage. At the time of such inquiry, third-party defendants allegedly represented to BANA that the Lincoln mortgage had been paid in full and satisfied. It is alleged that the representations made by third-party defendants that the Lincoln mortgage had been paid in full and satisfied were material misrepresentations, and knowingly false when made.

It is also alleged that third-party defendants provided plaintiff with a copy of an executed document denominated "RELEASE OF MORTGAGED PREMISES SATISFACTION OF LIEN" (Release of Lien), releasing the Lincoln mortgage lien, with the intention that BANA and BANA's successors in interest rely upon it. Third-party defendants allegedly knew or should have known that Lincoln had previously sold or transferred the Lincoln mortgage to Dorvilier, and consequently, knew that Lincoln lacked authority to release the Lincoln mortgage lien. BANA allegedly was unaware of the prior transfer of the Lincoln mortgage to plaintiff Dorvilier, and reasonably relied upon the misrepresentations of the third-party defendants that the Lincoln mortgage had been paid in full and satisfied, in making the reverse mortgage loan to Kimie Miyamoto. It is also alleged that but for the misrepresentations, regarding payment and satisfaction of the Lincoln mortgage, BANA would not have originated the reverse mortgage loan. It is further alleged that BANA issued the reverse mortgage loan under the belief the Release of Lien was valid and enforceable, but third-party defendants have failed to produce the original Release of Lien for recording. BANA claims it was a bona fide encumbrancer, and that to the extent the Lincoln mortgage

1

Third-party plaintiff Champion also originally named Thomas J. Quigley as a third-party defendant, but thereafter served an amended third-party complaint, omitting Quigley as a third-party defendant and adding certain allegations. By order dated May 19, 2015, the caption of the third-party action was amended, to the extent of removing Quigley as a third-party defendant.

has not been satisfied, it will be damaged due to the negligence and culpable conduct of third-party defendants. In the amended third-party complaint, third-party plaintiff seeks indemnification/contribution and to recover damages for fraud and misrepresentation.

Third-party defendants served a joint answer dated June 1, 2015 to the amended third-party complaint, asserting various affirmative defenses. Prior to the service of such answer, plaintiff moved for summary judgment against defendant and defendant cross moved for summary judgment dismissing the complaint. By order entered December 9, 2014, the motion by plaintiff for summary judgment against defendant was denied, and the cross motion by defendant for summary judgment dismissing the complaint was granted. The court determined that plaintiff Dorvilier had failed to claim he purchased the subject property at foreclosure and therefore failed to state a cause of action for strict foreclosure (RPAPL 1352) or reforeclosure (RPAPL 1503).

Thereafter, on March 25, 2016, a foreclosure sale of the subject property was held pursuant to the judgment in the *Lincoln* action, and by referee's deed dated June 10, 2016 and recorded on July 12, 2016, the title thereto was conveyed to 71-21 Loubet LLC, the assignee of Dorvilier, as the successful bidder. On July 28, 2016, 71-21 Loubet LLC commenced a strict foreclosure action entitled *71-21 Loubet LLC v Champion Mortgage Co.*, (Sup Ct, Queens County, Index No. 708850/2016) against Champion and the Secretary of Housing and Urban Development (the Secretary) pursuant to RPAPL 1352 to extinguish those defendants' claimed right of redemption in the subject property (*see* RPAPL 1352). In the strict foreclosure action (Index No. 708850/2016), 71-21 Loubet LLC claims that the Lincoln mortgage encumbers the premises, and has record priority over the reverse mortgage and the HUD mortgage.

Nonparty BANA moves for partial summary judgment in its favor on the issue of liability with respect to the claims against third-party defendants in the amended third-party complaint. Third-party defendants oppose the motion, and cross move for summary judgment dismissing the amended third-party complaint. BANA opposes the cross motion.²

Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212[b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

2

Plaintiff Dorvilier has responded to the motion and cross motion, notwithstanding the complaint in the main action has been dismissed (*see* order entered December 9, 2014).

At the outset, the court notes that non-party BANA makes no showing that it has been assigned the causes of action set forth in the third-party complaint. However, BANA claims it is the holder of the reverse mortgage and note, and that under their terms, the borrower may not be personally liable and enforcement of the reverse mortgage debt is limited to the sale of the property. Thus, it asserts that in the event the holder of the Lincoln mortgage successfully forecloses the reverse mortgage lien, it will be unable to collect the reverse mortgage debt. Non-party BANA offers the affidavit of Laura Smith, an assistant vice president of Reverse Mortgage Solutions, Inc. (RMS), to show that BANA has constructive physical possession of the reverse mortgage note.

In her affidavit, Smith states that RMS received the reverse mortgage note on May 27, 2016 and continues to maintain possession of such note on behalf of BANA. Contrary to third-party defendants' assertion that Smith's affidavit constitutes inadmissible hearsay, Smith, as a representative of RMS, BANA's servicing agent, is entitled to rely on the loan records in addressing the issue of possession, as CPLR 4518(a) does not require a person to have personal knowledge. Third-party defendants have failed to offer any proof that Smith lacked the requisite knowledge necessary to proffer her affidavit as proof of the facts stated therein. Given Smith's agency status as assistant vice-president of RMS, the records qualify as business records (*see* CPLR 4518[a]). Furthermore, the copy of the BANA reverse mortgage note submitted by plaintiff bears an undated endorsement in blank. Under such circumstances, BANA has shown *prima facie* that it is the real party in interest vis-a-vis the third party claims. Third-party defendants have failed to rebut such showing.

By order dated December 9, 2014, the complaint in the main action was dismissed. Therefore, the causes of action asserted by third-party plaintiff against third-party defendants for common-law indemnification and contribution must be also dismissed. That branch of the cross motion by third-party defendants for summary judgment dismissing the third-party claims for common-law indemnification and contribution is granted. That branch of the motion by third-party plaintiff BANA for partial summary judgment on the issue of liability with respect to the third-party claims for common-law indemnification and contribution is denied.

With respect to the causes of action asserted in the amended third-party complaint for fraud and misrepresentation, it is well settled that in order to succeed on a cause of action grounded in fraud, a plaintiff must demonstrate that the defendant made a false representation which was either known to be untrue or made with reckless disregard of its truth and which was made with the intent to deceive and to induce the plaintiff to part with or refrain from obtaining something of value, thereby causing injury (*see Jo Ann Homes at Bellmore v Dworetz*, 25 NY2d 112, 119 [1969]; *see also Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403 [1958]; *Pappas v Harrow Stores, Inc.*, 140 AD2d 501 [2d Dept 1988]).

To the extent BANA claims third-party defendants advanced the representation that the Lincoln mortgage had been satisfied, BANA has failed to show any such alleged misrepresentation was intended for the purpose of fraudulently inducing BANA to originate the reverse mortgage loan to Kimie Miyamoto. Third-party defendant Lieberman, in his affidavit in support of the cross motion, states that at the time of BANA's inquiry as to the status of the Lincoln mortgage, he had no personal recollection of the Miyamoto mortgage, or its disposition, and still has no personal recollection. Lieberman also states that Lincoln had stopped making mortgage loans in 2005, and retained its mortgage records for those mortgages which had been assigned or satisfied for a period of three years, after which the records were destroyed. According to Lieberman, Lincoln nevertheless endeavored to accommodate requests for satisfactions by examining the public records and its accounting records. Lieberman states that in response to the BANA inquiry, he checked Lincoln's archived accounting records, and "saw Lincoln had been paid in full in 2000." He also states he checked the records of "ACRIS" (New York City Automated City Register Information System), which had no record of conveyances (relative to the subject plaintiff) after 2000. Lieberman admits that he told Kim Campbell, as BANA's representative, he believed Lincoln had been paid in full in 2000, but states he also told her that he could not be sure because there were no supporting conveyance records. Lieberman denies having told Campbell or any other BANA representative that the Lincoln mortgage had been satisfied. Lieberman also states that he informed Campbell he was unwilling to provide the "usual satisfaction-piece," but agreed to sign a "quitclaim conveyance." He further states Campbell sent a paper for his signature and acknowledgment, and that he advised her there would be a \$60 document fee which had to be paid in advance. Lieberman admits he executed the paper and faxed a copy of it to BANA, with a fax cover sheet with a handwritten notation stating "Original by Overnight," but did not deliver the ink original thereof to BANA. He states that BANA never paid the \$60 document fee. Lieberman denies that he made the handwritten annotations (other than on the fax cover sheet) on the copy of the executed Release of Lien submitted upon by BANA,³ but does not refute that such copy otherwise is an accurate copy of the paper he sent by fax.⁴

³ The copy of the Release of Lien submitted by third-party plaintiff in support of its motion is an incomplete copy on its face insofar as it is missing page 4 (of five pages). BANA has supplied the missing "page 4" as part of Exhibit "A" annexed to the reply affirmation dated August 10, 2017 of BANA's counsel, and third-party defendants make no objection to such page in their reply papers.

⁴ Third-party defendants do not submit a "clean" copy of the paper Lincoln faxed to BANA.

BANA has failed to offer any proof in rebuttal to show that third-party defendants were motivated by a fraudulent intent in making any oral representations to BANA, or in faxing a copy of the executed paper to it. In addition, to the extent the copy of the executed Release of Lien presented by BANA has language indicating the payment of \$110,000.00 by the Miyamotos as “Mortgagors,” and the release and discharge of the Lincoln mortgage, BANA has failed to show that it was reasonable for BANA to have closed on the reverse mortgage loan as a purported first mortgage lien, prior to receiving the original document from Lincoln, and in the absence of any escrow (*see Goldstein v Gold*, 106 AD2d 100 [2d Dept 1984] *affd* 66 NY2d 624 [1985]). Nor has BANA shown that it would have been reasonable to have closed on the reverse mortgage loan with the blanks appearing in the certificate of acknowledgment on the ink original of such executed Release of Lien.

Under such circumstances, the motion by BANA for summary judgment against third-party defendants Lincoln and Lieberman as to liability only is denied, and the cross motion by third-party defendants Lincoln and Lieberman for summary judgment dismissing the amended third-party complaint is granted.

Dated: April 6, 2018

J.S.C.