Kocot v Contorino
2018 NY Slip Op 33885(U)
May 10, 2018
Supreme Court, Orange County
Docket Number: EF009780/17
Judge: Robert A. Onofry

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

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ALEXANDER KOCOT,

Plaintiff,

- against –

MARIO J. CONTORINO, LISA CONTORINO, ASSET ACCEPTANCE LLC, JOSEPH MOSHER, 3 CONTORINO WAY, LLC and CONNECTONE BANK, LLC,

Respondent.

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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF009780/17

DECISION, ORDER AND JUDGMENT

Motion Dates: March 21, 2018

The following papers numbered 1 to 21 were read and considered on a motion by the Plaintiff for a declaration that there are three valid and existing judgment liens against the Defendant Mario J. Contorino; that such liens may be enforced against property owned by the Defendant 3 Contorino Way, LLC that was formerly owned by the Defendants Mario J. Contorino and Lisa Contorino, and that such liens are superior to the mortgage lien on the property held by the Defendant Connectone Bank, LLC.

Order to Show Cause- Lubitz Affirmation- Exhibits A-K 1-3
Complaint 4
Answer with Counterclaims and Cross Claims 5
Opposition to Order to Show Cause- Bartley Affirmation- Devoe Affidavit- Exhibits A-M . 6-9
Notice of Amended Petition- Exhibits A-W- Memorandum of Law 10-12
Affirmation in Support of Order to Show Cause- Stein- Exhibits A-M 13-14
Affirmation in Opposition- Bartley 15
Affirmation in Further Support- Lubitz- Exhibits A-E 16-17
Affidavit in Further Support- Kocot- Exhibits A-D 18-19
Answer 20
Affirmation in Reply- Bartley 21

Upon the foregoing papers, it is hereby,

ORDERED, ADJUDGED and DECREED, that the Plaintiff has a valid and existing

judgment lien against the Defendant Mario J. Contorino in the sum of $102,257.41, entered by the Orange County Clerk on December 30, 2015; and it is further,

ORDERED, ADJUDGED and DECREED, that the judgment lien may be executed against real property located at, and commonly known as, 3 Contorino Way, Chester, Orange County, New York 10918, formerly owned by the Defendants Mario J. Contorino and Lisa Contorino and currently owned by the Defendant 3 Contorino Way, LLC; and it is further,

ORDERED, ADJUDGED and DECREED, that the judgment lien is superior to the mortgage lien held by the Defendant Connectone Bank, LLC on the same property; and that the Defendant Connectone Bank, LLC is not entitled to be equitably subrogated to the rights of the prior mortgage holder; and it is further,

ORDERED, ADJUDGED and DECREED, that the motion is otherwise denied; and it is further,

ORDERED, ADJUDGED and DECREED, that the cross claims interposed in the action be, and the same are hereby, severed.

Introduction

The Plaintiff Alexander Kocot (hereinafter "Kocot") alleges that he, the Defendant Asset Acceptance , LLC (hereinafter "Asset Acceptance LLC") and the Defendant Joseph Mosher are all judgment creditors of the Defendant Mario J. Contorino (hereinafter "Mario J.").

After all three judgments were filed, he alleges, Mario J. and his wife, the Defendant Lisa Contorino, sold property they owned at 3 Contorino Way, Chester, Orange County, New York (hereinafter the "Subject Property") to the Defendant 3 Contorino Way, LLC (hereinafter "Contorino LLC"). The sale was completed with a loan from the Defendant Connectone Bank, LLC (hereinafter

"Connectone"), which holds a mortgage on the property.

In relevant part, Kocot alleges that Mario J. was able to sell the property without satisfying the judgments because Mario J. and his father, Mario Contorino, Sr. (hereinafter "Mario Sr."), submitted affidavits to Connectone and the title company falsely claiming that the judgments were against Mario Sr., not Mario J.[1]

Kocot commenced this action seeking a declaration that the liens are valid and enforceable as against the Subject Property, and are superior to the mortgage lien held by Connectone.

Contorino LLC and Connectone, *inter alia*, cross claim against the Contorinos.

Factual/Procedural Background

On April 30, 2009, Asset Acceptance LLC filed a judgment against "Mario Contorino" in the total sum of $11,517.03 (Motion, Exhibit D).

On June 29, 2015, Mosher filed a judgment against "Mario Contorino Sr." in the total sum of $14,773.35 (Motion, Exhibit E).

On December 30, 2015, Kocot filed a judgment against "Mario J. Contorino" in Supreme Court, Orange County for the total sum of $102,257.41 (Motion, Exhibit A).

By Bargain and Sale Deed, dated June 22, 2016, "Mario Contorino and Lisa Contorino," as husband and wife, deeded the Subject Property to Contorino LLC.

By mortgage and security agreement, also dated June 22, 2016, Connectone loaned $217,500.00 to the Contorino LLC, which was secured by a mortgage on the Subject Property

[1] There is apparent inconsistency in the record as to how Mario J. has identified himself over time. At different times he appears to have identified himself as both "Mario J. Contorino, Jr."and "Mario Contorino Sr." The designations herein of "Mario J." and Mario Sr." are not intended to resolve this apparent inconsistency. Rather, the designations are solely to distinguish between father and son, respectively, for purposes of this motion practice.

(Motion, Exhibits B & C).

On December 1, 2017, Kocot filed a summons with notice seeking a declaration that Asset Acceptance LLC, Mosher and he all have valid and existing liens against Mario J.

By order to show cause dated December 18, 2017, Kocot sought a declaration that Asset Acceptance LLC, Mosher and he all have valid and existing liens against Mario J., and that such liens may be enforced against the Subject Property, and are superior to the mortgage lien held by Connectone.

In support of his motion, Kocot submits an affirmation from counsel, Murray Lubitz.

Lubitz notes that, in connection with the mortgage and loan *supra*, Connectone hired Benchmark Title Agency, Inc. (hereinafter "Benchmark") to do a title search. Further, that Benchmark in fact discovered all three of the judgments at issue. However, he notes, the sale was nonetheless completed because Benchmark erroneously concluded that the judgments were not against the Defendant Mario J., but were against his father, Mario Sr. Lubitz asserts, upon information and belief, that this occurred because Mario J. and Mario Sr. submitted false affidavits to that effect to Benchmark.

Lubitz notes that, in 2012, Mario J. filed for bankruptcy (Exhibit H). His listed assets including the Subject Property, which he valued at $475,000.00, and his listed debtors included Kocot (Exhibits H & I). The petition was subsequently dismissed. From these filings, Lubitz argues, it can be determined that Mario J., not Mario Sr., is the debtor on Kocot's judgment and was an owner of the Subject Property.

Further, he asserts, from the picture identification (driver's license) produced at the closing on the sale to Contorino LLC, it can be seen that the seller was in fact Mario J.

Finally, Lubitz notes, he had been in contact with the Sheriff concerning a sale of the Subject Property to satisfy Kocot's judgment. However, the Sheriff told him that he could not act without a judicial determination that the judgments at issue remain valid liens on the Subject Property.

In further support of his motion, Kocot submits his own affidavit.

Kocot avers that he had known Mario J. for approximately 25 years, and that they were social friends (Exhibit K). Kocot asserts that the sale of the Subject Property to Contorino LLC resulted from false statements made by Mario J. and Mario Sr. that his judgment was against Mario Sr. Kocot avers that, based on the photographic identification produced at the closing, Mario J. is the debtor.

Appended as exhibits to Kocot's affidavit are, *inter alia*:

(1) An affidavit from "Mario Contorino," from the closing, in which he states that none of the creditors listed in "Exceptions #10" to the title report were creditors of his.

(2) An affidavit from "Mario J. Contorino, Sr." from the closing, in which he states that all of the creditors listed in the Exceptions #10 of the title report were creditors of him, not his son, "Mario J. Contorino, Jr."

(3) Photocopies of the identification allegedly produced by "Mario J. Contorino" at the closing with Contorino LLC.

On February 9, 2018, Kocot filed the complaint at bar seeking a declaratory judgment as to the relief *supra*.

The Defendant Contorino LLC and Connectone answered and raised affirmative defenses.

Further, Contorino LLC and Connectone interposed cross claims.

Connectone alleges that the monies it loaned the Contorinos were used to discharge a prior

mortgage on the Subject Property held by Atlantic Capital Funding LLC (hereinafter "Atlantic Capital"). Further, that, at the time, it lacked actual and/or constructive notice of the judgments at issue against Mario J. Thus, Connectone alleges, if it is determined that Kocot, Asset Acceptance LLC and Mosher do hold valid existing judgment liens that may be executed against the Subject Property, Connectone is entitled to an order and judgment declaring that, under the doctrine of equitable subrogation, it has succeeded to the mortgage priority held by Atlantic Capital, and its mortgage lien is superior to the judgment liens.

As a first cross claim, Contorino LLC alleges that, in the event that it is determined that Kocot, Asset Acceptance LLC and Mosher hold judgment liens that may be enforced against the Subject Property, that such circumstances will constitute a breach by Mario J. and Lisa Contorino of the covenant against grantors' acts contained in the deed, and gives rise to damages.

As a second cross claim, Contorino LLC and Connectone allege that, in the event that it is determined that Kocot, Asset Acceptance LLC and Mosher hold valid judgment liens that may be enforced against the Subject Property, and the property is ordered sold to satisfy the same, Mario J. will be unjustly enriched, giving rise to damages.

As a third counterclaim, Contorino LLC and Connectone allege that, in the event that it is determined that Kocot, Asset Acceptance LLC and Mosher hold valid judgment liens that may be enforced against the Subject Property, then the Contorinos made knowingly false representations at the closing, that were relied upon Contorino LLC and Connectone, giving rise to damages for fraud and/or negligent misrepresentation.

In opposition to Kocot's motion, Contorino LLC and Connectone submit an affirmation from counsel, Alana Bartley.

Bartley argues that Kocot's order to show cause must be denied because it is procedurally improper, to wit: there is basis for seeking a declaratory judgment as to the priority of liens by what is, in effect, a motion for summary judgment in lieu of a complaint.

In any event, she argues, the motion must nevertheless be denied because there are significant issues of fact that preclude a summary determination of Kocot's claim at this juncture. At a minimum, she asserts, Kocot's motion is wholly premature, as the Defendants are entitled to disclosure.

As to the relevant facts, Bartley asserts that Mario Sr. is a natural person with a last known residence of 6407 Neave Industrial Park Road, Denver, North Carolina 28037. Further, that upon information and belief, the Defendant Mario J. also goes by the name "Mario Contorino, Jr."

Here, she notes, Asset Acceptance LLC entered a judgment against "Mario Contorino"; Kocot entered a judgment against "Mario J. Contorino"; and Mosher entered a judgment against "Mario Contorino Sr."

Bartley notes that the Subject Property was owned by "Mario Contorino and Lisa Contorino, as husband and wife" until June 22, 2016, when they sold it to Contorino LLC. Non-party Katrina Adams is listed as the Managing Member of Contorino LLC. The entire proceeds of the mortgage loan from Connectone were used to satisfy the prior mortgage.

At the closing, she notes, the title company (Benchmark) identified various judgments purported to be against "Mario Contorino." However, at the closing, the Contorinos submitted affidavits attesting that the judgments, which included the three judgment at issue, were against Mario Sr., not Mario J.

Bartley notes that, on or about December 4, 2017, Kocot filed the Order to Show Cause at

bar.

On January 31, 2018, Contorino LLC and Connectone filed a Notice of Appearance and Demand for a Complaint.

On February 9, 2018, Kocot filed a complaint alleging a single cause of action for a judgment declaring that he, Asset Acceptance LLC and Mosher all have valid and existing judgment liens upon the Subject Property, and that such liens have priority over the purchase money mortgage held by Connectone.

Bartley argues that action was "commenced in an irregular fashion, by service of a Summons with Notice and Order to Show Cause with supporting affidavits, thus incorporating some of the attributes of a motion for summary judgment under CPLR § 3213, and bearing some resemblance to a special proceeding."

However, she asserts, while there is no authority to bring what is, in essence, a quiet title action under RPAPL Article 15 via CPLR §3213, the courts are empowered to convert a civil judicial proceeding not brought in the proper form into one which would be in proper form, rather than to grant a dismissal, making whatever order is necessary for its proper prosecution. However, she notes, the Court must still have jurisdiction over all of the parties before any conversion.

Here, she argues, because jurisdiction over all parties has not yet been obtained, and because the Plaintiff has already filed and served a Complaint asserting its cause of action for a declaratory judgment, no order of conversion is required and the Order to Show Cause must be denied.

In any event, she asserts, even if Kocot's motion was procedurally proper, there are significant questions of fact.

First, she notes, the drastic remedy of summary judgment should only be granted where there

is no doubt as to the existence of a triable issue of fact.

Here, she asserts, there is a significant issue of fact as to whether the judgments at issue are against Mario J. and, therefore, encumber the Subject Property.

Further, she argues, Kocot has failed to proffer competent evidence in admissible form in support of his motion, to wit: the photocopies of the "picture identifications" allegedly produced at the closing, produced by Kocot, are not in admissible form, as they are not authenticated by any person with personal knowledge of the facts.

Otherwise, she asserts, Kocot has provided no evidence, either in admissible form or otherwise, that the "Mario Contorino" who formerly possessed an interest in the Subject Property is the same "Mario Contorino" or "Mario Contorino Sr." named in the Asset Acceptance LLC and Mosher judgments.

By contrast, she notes, the "Mario Contorino" with an interest in the Subject Property not only submitted a sworn affidavit at the closing that the judgments at issue were not against him, but also, he submitted an affidavit from his father, "Mario Contorino Sr." averring both that the judgment were against him ,and that he had no interest in the Subject Property. As a result, she argues, significant issues of fact exist with respect to which "Mario Contorino" is liable for the three judgments at issue.

Moreover, she argues, the motion must be denied as premature, as no disclosure has been conducted.

Indeed, she notes, Contorino LLC and Connectone intend on filing a third-party action against "Mario Contorino Sr." in this matter.

On the merits, Bartley argues that the doctrine of equitable subrogation should be applied.

Under the doctrine, she notes, where funds of a mortgagee are used to satisfy the lien of an existing, known incumbrance when, unbeknown to the mortgagee, another lien on the property exists which is senior to his but junior to the one satisfied with his funds, the court, in order to avoid the unjust enrichment of the intervening, unknown lienor, will give priority to the lien of the subsequent mortgagee. Given such, she asserts, Connectone's mortgage lien would be superior to the judgment liens.

In further opposition to Kocot's motion, Contorino LLC and Connectone submit an affidavit from Christopher Devoe, who was the title closer at the sale of the Subject Property to Contorino LLC.

Devoe asserts that, in connection with the sale to Contorino LLC, he reviewed the title report for the Subject Property prepared by Benchmark. The report noted several judgments which purported to encumber the Subject Property, including the three judgments at issue. Upon inquiry, he was told that none of the judgments were against Mario J. Indeed, he avers, Mario J. personally appeared at the closing and submitted affidavits from himself and Lisa Contorino in which they each averred that the judgments at issue were not against Mario J. Devoe notes that the affidavit from Lisa Contorino was actually signed on her behalf by Mario J. pursuant to a power of attorney, as were all other documents signed at the closing. In addition, he notes, he was also given an affidavit from Mario Sr., who averred that the three judgments at issue were against him, and that he did not have an interest in the Subject Property.

Based on the above submissions, Devoe asserts, he concluded that the three judgments did not encumber the Subject Property.

In further support of Kocot's motion, Joseph Mosher submits an affirmation from his

attorney, William Stein.

As factual background, Stein asserts as follows.

In February of 2010, while Mosher was stationed with the United States Army in Iraq, he entered into an agreement with Mario J., doing business on E-Bay as "Bosscamaro@qmail.com, to purchase a 1969 GTO convertible. E-mails sent to and from that address show the name of Mario J.'s wife, Lisa Contorino. Mosher paid Mario J. the sum of $7,500.00 by two checks, which were endorsed by Mario J. Mario J. also signed the bill of sale for the vehicle. After restoring the vehicle for over 2 years, Mosher attempted to register the vehicle, at which time he discovered that the GTO had been reported stolen in 2007. This led to a police investigation pursuant to which Mario J. was interviewed by the police. After it was confirmed that the vehicle was stolen, Mosher returned the vehicle to its rightful owner and demanded that Mario J. refund his money. When Mario J. did not respond to the request, Mosher then filed a lawsuit in Jefferson County for a refund and damages. The summons and complaint was served on Mario J. at 3 Contorino Way, Chester, New York in February 2014 by personal service. The Affidavit of Service describes Mario J. as being approximately 45 - 55 years old. Mosher moved for summary judgment in the action, which was granted. However, the judgment was never satisfied. Thus, Mosher filed the judgment with the Orange County Clerk on July 9, 2015. In attempting to enforce the Judgment, Mosher sent a subpoena to Paypal, which responded that the account for bosscamaro@qmail.com was held by a Mario Contorino living at 3 Contorino Way, Chester, New York. Further, he notes, Mosher also reviewed records of the Orange County Clerk's office and found a Business Certificate, dated January 14, 2013, signed by Mario Contorino and Lisa Contorino in which they stated they were doing business as Krileemar Rentals at 3 Contorino Way, Chester, New York. In the business

certificate, Mario J. identified himself as "Mario Contorino, Sr.", and signed the document Mario Contorino. Stein notes that a comparison of the signature of "Mario Contorino" on the Business Certificate to the signature on the two checks and the Bill of Sale for the vehicle reveal that they were all signed by the same individual.

In addition, he asserts, he had conducted a search of the records of the New York State Department of Motor Vehicles, which indicated that Mario J. was born in 1963, which would have made him 51 years old when he was served with the summons in 2014, which is consistent with the affidavit of service in Mosher's action *supra*.

Further, Stein contends, the signature of Mario J. on the affidavit submitted at the closing, denying that the judgments at issue were against him, matches the signatures on the checks, the bill of sale and the business certificate.

By contrast, Stein asserts, the alleged signature of Mario Sr. did not match any of the signatures on the documents.

Further, Stein notes, at the closing on the sale to Contorino LLC, the title closer (Devoe) did not receive any proof or verification of the existence of Mario Sr., either by a driver's license, passport or some other photographic identification. Stein argues that this is "contrary to standard practice at real estate closings in light of today's fraud filled world."

In sum, he asserts, Mosher respectfully requests that the Court enter an order declaring that Mosher has a valid and existing judgment that may be enforced against the Subject Property.

In opposition to Mosher's submission, Contorino LLC and Connectone submit another affirmation from Bartley.

Bartley argues that Mosher should not be allowed to "piggy-back on to the Order to Show

Cause brought by [Kocot]."

Moreover, she asserts, for the reasons discussed *supra*, Kocot's motion was procedurally improper, premature, and must be denied based on questions of fact.

In addition, she argues, Stein offers a variety of opinions as to the signatures on various documents without demonstrating that he is an expert in the analysis of handwriting. Thus, she asserts, he is unable to offer a meaningful, non-conclusory and non-speculative opinion on whether the alleged signatures at issue are all from the same individual.

Finally, she notes, although Stein contends that the "title closer did not receive any proof or verification [of] the existence of Mario Contorino, Sr." at the closing of the Subject Property, Stein does not claim any personal knowledge of the same.

In further support of his order to show cause, Kocot submits another affirmation from Lubitz.

Lubitz asserts that, although Contorino LLC and Connectone have attempted to categorize this proceeding as one to quiet title, or for summary judgment in lieu of complaint, Kocot is not challenging the conveyance of title to Contorino LLC, or the validity of the mortgage recorded by Connectone. Rather, he notes, Kocot "is simply claiming that he has a money judgment docketed against the defendant Mario Contorino who held title to the premises known as 3 Contorino Way in Chester, that his judgment was not paid when title to the property was conveyed to the defendant 3 Contorino Way LLC. on June 22, 2016, and therefore it is a continuing judgment lien on the premises."

Indeed, he asserts, as conceded in the affidavit of Devoe, the title closer, Kocot's judgment was not paid or discharged at the closing. Similarly, Mario J. denied that any of the judgments at issue were against him, or encumbered the Subject Property.

Lubitz notes that the purported affidavit from Mario Sr. submitted at the closing did not appear to have a notary stamp or seal.

Moreover, Lubitz notes, although Devoe states that he inquired as to whether or not the judgments identified in the title report were against the Mario J., he provided no detail as to the nature of the inquiry. Lubitz opines that "the most logical inquiry would have been directed to either the holders of the judgments or their counsel, as they might have personal information regarding their judgment debtor such as the date of birth or social security number that would enable an informed determination to be made as to the identity of the Mario Contorino who was conveying title." Lubitz notes that he was never contacted by anyone concerning the sale.

In addition, Lubitz notes, Facebook postings by Lisa Contorino disclose that she has a son named Mario Contorino Jr., and Facebook postings by Mario Contorino Jr. indicate that he lives in Denver, North Carolina, at the same address reflected on the purported affidavit of "Mario Contorino Sr." that was provided to the title company and relied upon at the closing.

Finally, he notes, conspicuously absent from the submissions is an affidavit from Mario J. or Lisa Contorino.

In further support of his order to show cause, Kocot avers that, as previously stated, he has known Mario J. for over twenty five years, as they were both raised in Orange County to families engaged in the farming business.

Kocot notes that he wanted to "state unequivocally that the Mario Contorino who transferred title to the premises known as 3 Contorino Way in Chester is the same Mario Contorino against whom my money judgment was entered."

As to the chain of title, Kocot notes that Mario J.'s father, John Contorino Sr., conveyed the

Subject Property to Lisa Contorino in 2006, and that, thereafter, Lisa Contorino conveyed the property to Mario J. and herself, as husband and wife.

Kocot notes that photographic identifications he submitted into evidence were obtained from Glen Keene, who is in-house counsel to Benchmark. Based on his review of the same, Kocot asserts, he can identify Mario J. as having attended the closing on the sale to Contorino LLC.

Indeed, Kocot contends, Mario J. and Lisa Contorino have a son, also named Mario, who lives in Denver, North Carolina.

In addition, he asserts, he had performed a Facebook search for both Lisa Contorino and Mario Contorino Jr., and Lisa Contorino lists a son named "Mario Contorino, Jr.", and, in posts, Mario Contorino Jr. talks about the theft of a trailer from his shop in Denver, North Carolina.

These postings, Kocot argues, clearly demonstrate that the person who signed the affidavit in Denver, North Carolina, submitted at the closing, and who identified himself as Mario Contorino Sr., is in actuality, Mario Contorino Jr., the son of the Mario J.

Kocot asserts that no one ever contacted him about his judgment in relation to the sale of the Subject Property to Contorino LLC. Rather, he notes, he learned about the same by "sheer coincidence," to wit: after the sale, his attorney was contacted by Stein, the attorney for the Mosher (*supra*).

Finally, Kocot notes, in none of the documents signed by Mario J. does he refer to himself as "Mario Contorino Jr."

On March 13, 2018, Mario J. and Lisa Contorino answered the complaint and interposed an

affirmative defense.[2]

In reply, Contorino LLC and Connectone submit another affirmation from counsel, Alana Bartley.

Bartley argues that the alleged photographic identifications remain inadmissible, as Kocot did not submit an affidavit from counsel to Benchmark.

Further, she notes, concerning the purported evidence obtained from the internet, several federal courts had described such "evidence" as "inherently untrustworthy" as "hackers can adulterate the content on any web-site from any location at any time."

Finally, she asserts, Kocot does not purport to have any personal knowledge of the facts concerning the judgments of Asset Acceptance LLC or Mosher.

Discussion/Legal Analysis

This case presents several threshold issues.

First, Contorino LLC and Connectone are correct that service of an order to show cause is not a proper method to commence an action seeking a declaratory judgment. *Staskoski v. Government Employees Ins. Co.*, 138 A.D.2d 587 [2nd Dept. 1988]. Rather, such an action must be commenced by service of a summons and complaint, or summons with notice. *CPLR 304; Staskoski v. Government Employees Ins. Co.*, 138 A.D.2d 587 [2nd Dept. 1988].

Here, however, on December 1, 2017, Kocot filed a summons with notice. Thus, the action

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[2] The Court notes the following about the Contorinos' answer. First, although captioned a "Verified Answer, Counterclaims and Affirmative Defenses," the pleading sets forth no counterclaims. Second, although the complaint in the action contains only 19 numbered paragraphs, the answer purports to respond to allegations through paragraph 36. Third, while Lisa Contorino's signature appears properly notarized, Mario J.'s signature is witnessed by a person identified only by an illegible signature and the designation "Notary Public." There is no license number, or notary stamp, etc.

was properly commenced. *CPLR 304.*

Moreover, it is noted, on February 9, 2018, Kocot filed a complaint, and all Defendants have answered the complaint without raising a jurisdictional defense, or otherwise challenging the manner in which the action was commenced.

Thus, the merits of the action may be reached.

This raises a further threshold issue.

It is fundamental that a litigant possess standing. Standing requires an inquiry into whether the litigant has an interest in the claim at issue in the lawsuit that the law will recognize as a sufficient predicate for determining the issue at the litigant's request. *Westhampton Beach Associates, LLC v. Inc. Village of Westhampton Beach*, 151 A.D.3d 793 [2nd Dept. 2017]. Thus, to demonstrate standing, a plaintiff must establish that he or she will actually be harmed by the challenged action, and that the injury is more than conjectural. *Westhampton Beach Associates, LLC v. Inc. Village of Westhampton Beach*, 151 A.D.3d 793 [2nd Dept. 2017].

Here, Kocot seeks relief as to the judgments of Asset Acceptance LLC and Mosher. However, Kocot does not allege, and there is otherwise no evidence, that Kocot has any interest in either judgment in any capacity. Nor does he purport to have any personal knowledge of the relevant facts of either judgment.

Further, Kocot's attorney does not purport to represent either Asset Acceptance LLC or Mosher, and in fact named both as Defendants in the action. Thus, he cannot represent the same.

In sum, Kocot does not have standing to prosecute a claim by either Asset Acceptance LLC or Mosher, and his allegations concerning the same are dismissed.

This is, of course, without prejudice to Asset Acceptance LLC or Mosher seeking any

appropriate relief, by cross claim or otherwise. The Court notes that the submission of an affidavit from Mosher's attorney in support of Kocot's motion (*supra*) is not sufficient to obtain substantive relief in the action.

On the merits, it may be summarily determined that Kocot has a valid and existing judgment lien, and that lien may be enforced against the Subject Property.

Pursuant to CPLR § 5201(b): "A money judgment may be enforced against any property which could be assigned or transferred, * * * unless it is exempt from application to the satisfaction of the judgment."

Pursuant to CPLR § 5203(a):

> (a) Priority and lien on docketing judgment. No transfer of an interest of the judgment debtor in real property, against which property a money judgment may be enforced, is effective against the judgment creditor either from the time of the docketing of the judgment with the clerk of the county in which the property is located until ten years after filing of the judgment-roll, or from the time of the filing with such clerk of a notice of levy pursuant to an execution until the execution is returned, except:
>
> 1. a transfer or the payment of the proceeds of a judicial sale, which shall include an execution sale, in satisfaction either of a judgment previously so docketed or of a judgment where a notice of levy pursuant to an execution thereon was previously so filed; or
>
> 2. a transfer in satisfaction of a mortgage given to secure the payment of the purchase price of the judgment debtor's interest in the property; or
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> 3. a transfer to a purchaser for value at a judicial sale, which shall include an execution sale; or
>
> 4. when the judgment was entered after the death of the judgment debtor; or
>
> 5. when the judgment debtor is the state, an officer, department, board or commission of the state, or a municipal corporation; or
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> 6. when the judgment debtor is the personal representative of a decedent and the judgment was awarded in an action against him in his representative capacity.

CPLR § 5206 sets forth real property exempted from satisfaction of a money judgment.

CPLR § 5223 sets forth the procedure for a judicial sale of real property to satisfy a judgment.

Here, significantly, in the Contorinos' answer, Mario J. did not deny, and thereby is deemed to have admitted, (1) that Kocot filed a valid judgment against him on December 30, 2015 (¶ 9); (2) that, at that time, he owned the Subject Property with Lisa Contorino, as husband and wife (¶ 12); and (3) that he and Lisa Contorino sold the subject property to Contorino LLC on June 22, 2016 (¶ 13). *Santiago v. County of Suffolk*, 280 A.D.2d 594 [2nd Dept. 2001]; *CPLR 3018(a)*. Indeed, the failure of Mario J. to have submitted his own affidavit in this action is striking.

Further, no Defendant has argued that the Subject Property is exempt from satisfaction of Kocot's judgment under CPLR § 5206.

Thus, under CPLR § 5203(a), the transfer of the Subject Property by Mario J. was not effective as against Kocot. Thus, Kocot may enforce his judgment against the Subject Property to the extent of Mario J.'s former interest therein.

Further, also pursuant to CPLR § 5203(a), Kocot's judgment lien is superior to Connectone's mortgage lien.

Kocot's judgment lien was recorded prior to Connectone's mortgage lien, as the sale to Contorino LLC, pursuant to which the mortgage lien arose, occurred after Kocot's judgment was filed. In general, it has long been established that first in time priority obtains as between mortgages and judgments. *Bank Leumi Trust Co. of New York v. Liggett* (115 A.D.2d 378 [1st Dept. 1985].

Further, none of the exceptions set forth in CPLR § 5203(a) are applicable. Indeed, the only exception that requires any discussion is CPLR § 5203(a)(2), which concerns purchase money mortgages. *Beneficial Homeowner Service Corp. v. Beneficial Homeowner Service Corp.*, 199

A.D.2d 754 [3rd Dept 1993].

Here, however, Mario J. did not transfer the Subject Property to Connectone in satisfaction of a purchase money mortgage on property held by Connectone. Rather, Mario J. sold his interest in the Subject Property to a third-party, Contorino LLC, and Contorino LLC granted Connectone a purchase money mortgage. Thus, the facts of the sale do not fall under the exception set forth in CPLR § 5203(a)(2).

Indeed, Connectone implicitly recognizes this by arguing that it should be deemed the equitable subrogee of the prior mortgage holder (Atlantic Capital), and that its lien should inherit the priority of the prior lien. However, the doctrine is not applicable.

The doctrine of equitable subrogation applies where the funds of a mortgagee are used to satisfy the lien of an existing, known incumbrance when, unbeknown to the mortgagee, another lien on the property exists that is senior to the mortgagee's but junior to the one satisfied with the funds. *RTR Properties, LLC v. Sagastume*, 145 A.D.3d 697 [2nd Dept. 2016]. The courts, in order to avoid the unjust enrichment of the intervening, unknown lienor, hold that the mortgagee is entitled to be subrogated to the rights of the senior incumbrance. *RTR Properties, LLC v. Sagastume*, 145 A.D.3d 697 [2nd Dept. 2016]. The doctrine operates to erase the lender's mistake in failing to discover intervening liens, and grants the lender the benefit of having obtained an assignment of the senior lien that was caused to be discharged. Thus, equitable subrogation preserves the proper priorities by keeping the first mortgage first and the second mortgage second, and prevents a junior lienor from converting the mistake of the lender "into a magical gift for himself." *Arbor Commercial Mortg., LLC v. Associates at the Palm, LLC*, 295 A.D.3d 1147 [2nd Dept. 2012].

Actual notice of an intervening interest bars application of the doctrine of equitable

subrogation, but constructive notice does not. *Arbor Commercial Mortg., LLC v. Associates at the Palm, LLC*, 295 A.D.3d 1147 [2nd Dept. 2012].

The doctrine is applicable to the extent that funds were used to discharge the prior, superior lien. *Zeidel v. Dunne*, 215 A.D.2d 472 [2nd Dept. 1995].

Here, it appears that the prior mortgage on the Subject Property was recorded by Atlantic Capital on May 12, 2005 (Opposition, Exhibit B).

Kocot filed his judgment on December 30, 2015.

Thus, Atlantic Capital's mortgage lien was superior to Kocot's judgment lien.

Consequently, if Connectone is found entitled to equitable subrogation of the rights of Atlantic Capital, its mortgage lien will be superior to Kocot's judgment lien[3].

However, Kocot's judgment lien was not an unknown lien. *RTR Properties, LLC v. Sagastume*, 145 A.D.3d 697 [2nd Dept. 2013]. Rather, it was duly recorded and was expressly identified by the title company. Thus, this is not a case where a lender's mistake in failing to discover intervening liens will result in a "magical gift" for a junior lienor. Rather, it is a case where the lender made a unilateral, ultimately mistaken determination as to the validity of an existing, filed judgment. Thus, the doctrine is not applicable.

Further, the Court notes, even if the doctrine was applicable, the grant of equitable relief to Connectone on the record made would not be warranted.

First, although the sale of the Subject Property was by both Mario J. and Lisa Contorino, the

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[3] Contorino LLC and Connectone allege that all of the proceeds from the Connectone loan were used to pay-off Atlantic Capital's mortgage. However, from the HUD-1 closing statement provided by the same, it appears that most, but not all, of the funds ($279,907.91) were used for that purpose (Opposition, Exhibit E). Nonetheless, some of the funds were used as stated. Thus, subrogation is available to the extent of the same.

sale documents were signed by Mario J. only, *i.e.*, he signed both on his own behalf, and on behalf of his wife pursuant to a power of attorney.

Second, although the affidavit submitted by Mario J. denying that he was Kocot's judgment debtor is purportedly signed by both Mario J. and Lisa Contorino, Lisa Contorino's signature does not match her signature at other places in the record. Rather, it appears identical to her signature as signed by Mario J. on the contract of sale (Bartley Affirmation, Exhibit D). Indeed, the title closer, Devoe, avers that Mario J. signed the affidavit on behalf of Lisa Contorino, although Mario J. did not expressly indicate such, as he did when he signed her name on the contract of sale.

Third, and significantly so, the purported affidavit of Mario Sr. is rife with flaws of the most egregious nature.

To start, the document is not signed at the bottom by Mario Sr. (Bartley Affirmation, Exhibit J). Rather, there is a signature that purports to be his at the top of the document, before the body of the same.

Further, although the document purports to be an affidavit executed in North Carolina, it is witnessed by a person whose signature cannot be read, with the designation "Notary Public" and no more. That is, there is no license number, notary stamp, or any other relevant identifying information.

Moreover, almost the entire pre-printed body of the document is struck, and the handwritten additions are almost illegible.

In addition, significantly, Devoe does not expressly state how he obtained the affidavit from Mario Sr., *e.g.*,. whether it was from Mario Sr. directly. Rather, he merely states that he "was also given" the affidavit. Given that this statement is made in discussing the events at the closing, it may

be reasonably inferred that the affidavit was provided by Mario J.

Consequently, it appears that all of the information relied upon by Connectone in determining whether Mario J. was Kocot's judgment debtor came from a single source, *i.e.,* Mario J. himself, and was based upon documents flawed and concerning on their very face.

Further, this is the sole basis stated in the record for the conclusion that Kocot's judgment was not against Mario J. Neither Devoe nor Connectone assert that any further or additional inquiries, even of the most cursory nature, were made.

By contrast, Kocot appears wholly blameless. He properly filed a judgment against "Mario J. Contorino," and averred without contradiction that he was not notified, and otherwise had no knowledge, of the sale of the property to Contorino LLC.

In sum, the grant of equitable relief to Connectone on the facts presented would not be warranted. *Dandomar Co., LLC v. Town of Pleasant Valley Town Bd.*, 86 A.D.3d 83 [2nd Dept. 2011]; *Staskoski v. Government Employees Ins. Co.*, 138 A.D.2d 587 [2nd Dept. 1988].

In making this ruling, the Court emphasizes that it is not finding that Connectone acted with unclean hands. Rather, although the record is rife with badges of fraud and supports a compelling inference that Mario J. perjured himself, and Connectone's inquiry into the validity and applicability of Kocot's judgment was almost non-existent, there is no evidence on the record presented that Connectone is guilty of immoral, unconscionable conduct directly related to the subject matter in litigation or the events leading to the same. *Filan v. Dellaria*, 144 A.D.3d 967 [2nd Dept. 2016].

Further, the Court did not apply a summary judgment standard, as no party moved for summary judgment, and none otherwise charted a summary judgment course.

However, if such standard were applicable, the Court would not deny relief to Kocot as

premature due to a lack of disclosure. Here, all of the information concerning how Connectone determined that Kocot's judgment lien was not applicable to Mario J. and the Subject Property is within their own knowledge. *Le Grand v. Silberstein*, 123 A.D.3d 773 [2nd Dept. 2014].

In sum, Kocot's judgment is against Mario J., it may be enforced against the Subject Property, and it is superior to Connectone's mortgage lien.

This constitutes an award of all of the relief requested by Kocot. Further, there are no undecided counterclaims against him.

However, the action is not dismissed because Defendants have raised cross claims. Thus, the cross claims are ordered severed, and a preliminary conference scheduled. In the interim, the Defendants are to file and serve any additional pleadings and/or any additional papers required or warranted.

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, ADJUDGED and DECREED, that the Plaintiff has a valid and existing judgment lien against the Defendant Mario J. Contorino in the sum of $102,257.41, entered by the Orange County Clerk on December 30, 2015; and it is further,

ORDERED, ADJUDGED and DECREED, that the judgment lien may be executed against real property located at, and commonly known as, 3 Contorino Way, Chester, Orange County, New York, 10918, formerly owned by the Defendants Mario J. Contorino and Lisa Contorino, and currently owned by the Defendant 3 Contorino Way, LLC; and it is further,

ORDERED, ADJUDGED and DECREED, that the judgment lien is superior to the mortgage lien held by the Defendant Connectone Bank, LLC on the same property; and that the Defendant Connectone Bank, LLC is not entitled to be equitably subrogated to the rights of the prior mortgage

holder; and it is further,

ORDERED, ADJUDGED and DECREED, that the cross claims are severed; and it is further,

ORDERED, ADJUDGED and DECREED, that the Defendants, through respective counsel where applicable, are directed to, and shall, appear for a Preliminary Conference on Tuesday, June 5, 2018, at 1:30 p.m., at the Orange County Surrogate's Court House, 30 Park Place, Goshen, New York, and, in the interim, they are directed to file and serve any additional pleadings and/or any additional papers required or warranted.

The foregoing constitutes the decision and order of the court

Dated: May 10, 2018
Goshen, New York

ENTER

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