

**Holquin v Oshlani**

2018 NY Slip Op 33992(U)

September 14, 2018

Supreme Court, Bronx County

Docket Number: 22905/2018E

Judge: Ruben Franco

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX - IAS PART 26

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IDELFONSO HOLQUIN,

Plaintiff,

Index No. 22905/2018E

-against-

**MEMORANDUM  
DECISION/ORDER**

AGRON OSHLANI, LUIS CARRION, BAYVIEW  
LOAN SERVICING, LLC, and CITIMORTGAGE, INC,

Defendants.

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HON. RUBEN FRANCO

This is an action in which plaintiff alleges that he and his family were defrauded out of their home and he seeks monetary damages as well as to quiet title to the property.

The facts set forth by plaintiff in his submissions are as follows: On August 16, 2007, he purchased the premises located at 2344 Holland Avenue in Bronx County. However, because he lacked a credit history strong enough to qualify for a mortgage, he entrusted his very good friend, defendant Carrion, "to act as [his] Nominee in the purchase of the subject property" (Plaintiff's Aff. in support of Order to Show Cause, ¶ 6). The result is that defendant Carrion's name appeared on the deed, the Note and the Mortgage, as well as all other documents relative to the property. Plaintiff paid all of the closing costs, and made all mortgage payments, paid all carrying costs, and has lived in the premises with his family since 2007. The mortgage payments were made to defendant Carrion, who was to forward them to the lender, but instead, converted them for his personal use. Meanwhile, the initial mortgagee, defendant CitiMortgage, assigned the Note and Mortgage to defendant Bayview. Upon the default of the mortgage, defendant

Carrion assigned the deed to defendant Bayview in lieu of foreclosure, and defendant Bayview put the property up for sale on the internet, where defendant Oshlani was the purchaser. Plaintiff learned of the default and sale when defendant Oshlani appeared at his door to determine who resided in the premises, prior to his purchase. During defendant Oshlani's visit, plaintiff informed him that he was unaware of the default and sale, and that he was the true owner of the premises.

Oshlani brought a proceeding in Housing Court to evict plaintiff from the premises, and plaintiff countered by filing the instant action and moving by Order to Show Cause before this court to stay the Housing Court proceedings and to enjoin the City Marshall and the defendants from selling the premises and from evicting plaintiff. The plaintiff did not comply with the provisions of 22 NYCRR 202.7(f), nor did he provide substantiation for his allegation that he was the true owner of the property thus, the court denied his stay application, and he was evicted.

All defendants now move to dismiss the action pursuant to CPLR 3211 §§ (a)1 and 7, contending that documentary evidence warrants dismissal, and that plaintiff fails to state a cause of action. Defendant Oshlani cross-moves for the same relief, as well as for dismissal pursuant to CPLR 3211 § (a)(5), claiming the action is precluded by the Statute of Frauds.

A motion to dismiss a Complaint under CPLR § 3211(a)(1), will be granted only if the documentary evidence conclusively disposes of plaintiff's claim and resolves all factual issues (see Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314 [2002]; Attias v. Costiera, 120 A.D.3d 1281 [2<sup>nd</sup> Dept. 2014]; Cives v. George A. Fuller Co., Inc., 97 A.D.3d 713 [2<sup>nd</sup> Dept. 2012]). The documentary evidence needed to support such a motion must be "unambiguous, authentic, and undeniable" (Attias v. Costiera, supra, at 1282, quoting Granada Condominium III

Assn. v. Palomino, 78 A.D.3d 996, 996-997 [2<sup>nd</sup> Dept 2010]; Phillips v. Taco Bell Corp., 152 AD3d 806 [2<sup>nd</sup> Dept 2017]). And even where the proffered evidence qualifies as documentary evidence, “[d]ismissal is warranted only if the documentary evidence submitted utterly refutes plaintiff’s factual allegations and conclusively establishes a defense to the asserted claims as a matter of law” (Amsterdam Hosp. Grp. v. Marshall-Alan Assocs., 120 AD3d 431, 433 [1<sup>st</sup> Dept 2014]). While “Judicial records, as well as documents reflecting our-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case” ( Attias v. Costiera, *supra*, quoting Fontanetta v. John Doe I, 73 A.D.3d 78, 84-85), neither affidavits, deposition testimony, nor letters, are considered documentary evidence within the meaning of CPLR § 3211(a) (1) (Granada Condominium III Assn. v. Palomino, *supra*, at 997). A connecting link, such as an affidavit, is an appropriate vehicle for authenticating the documentation submitted in support of the motion (see Muhlhahn v. Goldman, 93 A.D.3d 418 [1<sup>st</sup> Dept. 2012]; Standard Chartered Bank v. D. Chabbott, Inc., 178 A.D.2d 11 [1<sup>st</sup> Dept. 1991]).

On a motion to dismiss a Complaint pursuant to CPLR§3211(a)(7), the court must liberally construe the Complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit any cognizable legal theory (see Nonnon v. City of New York, 9 N.Y.3d 825, 827 [2009], citing Leon v. Martinez, 84 N.Y.2d 83, 87-88 [1994]; Siegmund Strauss, Inc. v. East 149<sup>th</sup> St. Realty Corp., 104 A.D.3d 401 [1<sup>st</sup> Dept. 2013]).

Defendant CitiMortgage’s motion to dismiss is granted. Plaintiff states four causes of action in his Complaint, and the sole claim against CitiMortgage is under the fourth cause of

action, which is brought pursuant to Article 15 of the Real Property Actions and Proceedings Law (RPAPL). RPAPL § 1515(b) requires that the Complaint set forth facts showing that a defendant sued under the Article has an interest in the contested property which is adverse to the interest of the plaintiff. Plaintiff here has failed to show such an interest on the part of CitiMortgage inasmuch as all public documents submitted clearly show that CitiMortgage relinquished all of its interest in the premises on July 25, 2013, when it assigned the Note and Mortgage to defendant Bayview.

Defendant Bayview's motion to dismiss is granted. Bayview, as previously stated, became assignee of the Note and Mortgage on July 25, 2013. This transaction was recorded on August 24, 2013, and Bayview received title to the premises on August 24, 2016, when defendant Carrion assigned the deed in lieu of foreclosure. This transfer was recorded on February 2, 2017. Pursuant to deed executed on February 8, 2017, and recorded on May 3, 2017, Bayview conveyed title to the premises to defendant Oshlani. Plaintiff names Bayview in its Complaint in the First Cause of Action for common law fraud, the third Cause of Action for fraud under the Debtor and Creditor Law, and the Fourth Cause of Action to quiet title under Article 15 of the RPAPL. Plaintiff's claim against Bayview is, in essence, that by accepting title to the premises from defendant Carrion, and passing title to Oshlani, Bayview was involved in a chain of fraudulent conveyances, making it complicit in defrauding the plaintiff of, what he claims to be, his "rightful title and interest in the premises."

To make out a viable cause of action sounding in fraud, plaintiff must make out the following elements: a material misrepresentation of a fact; knowledge of its falsity; an intent to induce reliance; justifiable reliance by the plaintiff; and, damages (see Eurycleia Partners, LP v.

Seward & Kissel, 12 NY3d 553 [2009]). And CPLR § 3016(b) requires that “a claim rooted in fraud must be pleaded with the requisite particularity...” (*id.* at 559). Plaintiff and Bayview had no dealings, thus, plaintiff could not, and did not, plead with specificity the elements of fraud against Bayview. Additionally, plaintiff has failed to show that Bayview was involved in, or had knowledge of any misconduct on the part of its assignor of title to the premises, defendant Carrion. An examination of all public records would lead Bayview to conclude that Carrion was the legitimate holder of title to the premises, as well as the mortgagor. It appears that Bayview and CitiMortgage were unaware of the existence of the plaintiff.

In view of the fact that there was never a creditor/debtor relationship between plaintiff and Bayview, plaintiff’s cause of action under the Debtor and Creditor Law must fail (see Creditor and Debtor Law § 276).

Plaintiff has not pleaded, nor does it appear in the public records submitted, that Bayview has a present interest in the premises, having conveyed its title to Oshlani on February 8, 2017. Accordingly, no cause of action to quiet title lies against Bayview (see RPAPL § 1515[b]).

The court finds no need to reach the branch of defendant Bayview’s motion for dismissal on Statute of Fraud grounds.

Defendant Oshlani’s situation is not as clear. Plaintiff sets forth causes of action against Oshlani for common law fraud, fraud under the Debtor and Creditor Law, and to quiet title pursuant to Article 15 of the Real Property Actions and Proceedings Law. Plaintiff claims that prior to purchasing the premises on the internet on Auction.com, Oshlani appeared at the premises to ascertain who the occupants were, whereupon, plaintiff informed him that he was unaware of a default in the mortgage payments and that he was the rightful owner of the

premises, therefore, Oshlani was on notice that someone other than Bayview was claiming ownership. Plaintiff also claims that Oshlani proceeded with the auction purchase, despite the lack of any semblance of foreclosure proceedings.

Defendant Oshlani submits an affidavit in support of his cross-motion in which he states that he successfully bid for the property on December 9, 2016, and that “In anticipation of purchasing the Premises ...” ( Oshlani Affidavit ¶ 4) he obtained a certified title report, a copy of which he submits, dated January 20, 2017, which shows that title to the premises was held by defendant Bayview “WHO ACQUIRED TITLE BY DEED FROM LUIS CARRION DATED 8/24/16 RECORDED 2/2/17 ...” (capital letters in original). Oshlani further states that at the time he obtained title to the property, “I had no notice or knowledge of Plaintiff or any alleged interest Plaintiff claims to have in the Premises” (Affidavit ¶ 7). Oshlani also asserts that the first time that he became aware of plaintiff’s claim was after the closing occurred when he visited the premises “only to find a group of people who aggressively shouted to me that the Premises was not mine” (¶ 8).

Although plaintiff’s assertion that Oshlani visited the premises prior to the purchase is more believable inasmuch as it is inconceivable that one would not inspect a home prior to plucking down over \$400,000 for its purchase, nevertheless, in a motion to dismiss, the credibility of the parties is not under consideration (see Ippolito v. Lennon, 150 AD2d 300 [1<sup>st</sup> Dept 1989]). In any event, the court finds that at the time of the purchase of the premises, Oshlani could properly rely on the available public records which showed that his seller, defendant Bayview, had good and marketable title to the premises which it obtained from defendant Carrion, and which it could convey to him.

Defendant Oshlani's motion is granted on the strength of the documentary evidence submitted, as well as for the reasons that the motions were granted for defendants CitiMortgage and Bayview.

Defendant Carrion's attorney submits an affirmation<sup>1</sup> in which he states that he seeks to join "Defendant, Oshlani in opposing Plaintiff's Order to Show Cause dated March 12, 2018 and filed on March 13, 2018." Although the attorney proffers arguments for dismissal of the action, the court will not order such affirmative relief in the absence of a motion (see CPLR §§ 2211 and 2215; Fried v. Jacob Holding, Inc., 110 AD3d 56 [2<sup>nd</sup> Dept 2013]). Moreover, it bears mentioning that the affidavit of an attorney who lacks personal knowledge of the facts "is probatively valueless, both procedurally and substantively, and should be disregarded ..." (Hasbrouck v. City of Gloversville, 63 NY2d 916, 918 [1984]). Defendant Carrion, who, it would seem, has personal knowledge of the facts involved in this case, does not submit an affidavit.

Accordingly, defendant Carrion's application is denied.

This constitutes the Decision and Order of the court.

Dated: September 14, 2018.

  
Ruben Franco, J.S.C.  
HON. RUBÉN FRANCO

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<sup>1</sup> The affirmation is replete with errors, indeed, the court was unable to determine that the document is submitted on behalf of defendant Carrion until paragraph 9 on page 3 of the affirmation.