Bank of Am., N.A. v Giwa
2019 NY Slip Op 33644(U)
December 13, 2019
Supreme Court, New York County
Docket Number: 850150/2016
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 32**

Justice

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BANK OF AMERICA, N.A.,

Plaintiff,

- v -

HAFEEZ GIWA, THE BOARD OF MANAGERS OF THE ONE STRIVERS ROW CONDOMINIUM HOMEOWNERS ASSOCIATION, BUMMI AKINYOSOYE, CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD, CITY OF NEW YORK PARKING VIOLATIONS BUREAU, CITY OF NEW YORK TRANSIT ADJUDICATION BUREAU, STATE OF NEW YORK,

Defendant.

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INDEX NO. 850150/2016

MOTION DATE N/A

MOTION SEQ. NO. 004

DECISION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 90, 91, 92, 93, 94, 95, 96, 97, 98, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117 were read on this motion to/for JUDGMENT - SUMMARY.

The motion by plaintiff for summary judgment is denied and the cross-motion by City West Capital LLC ("City West") for *inter alia* summary judgment on its declaratory judgment claim and to dismiss the complaint is granted.[1]

Background

An essential part of executing a mortgage to secure a property is the proper recording of that mortgage. "New York has a 'race-notice' recording statutory scheme whereby the mortgage recorded first by a mortgagee without notice of any other mortgages will maintain priority over

[1] While the parties agreed to allow City West to intervene in this action (NYSCEF Doc. No. 83), they did not amend the caption to add City West as a defendant nor do the papers submitted on this motion list City West as a defendant (*see e.g.,* NYSCEF Doc. Nos. 90, 97, 101).

such other mortgages" (*Alliance Funding Co. v Taboada*, 39 AD3d 784, 784, 832 NYS2d 814(Mem) [2d Dept 2007]).

The consequences for not recording are dire:

> "Every such conveyance not so recorded is void as against any person who subsequently purchases or acquires by exchange or contracts to purchase or acquire by exchange, the same real property or any portion thereof, or acquires by assignment the rent to accrue therefrom as provided in section two hundred ninety-four-a of the real property law, in good faith and for a valuable consideration, from the same vendor or assignor, his distributees or devisees, and whose conveyance, contract or assignment is first duly recorded, and is void as against the lien upon the same real property or any portion thereof arising from payments made upon the execution of or pursuant to the terms of a contract with the same vendor, his distributees or devisees, if such contract is made in good faith and is first duly recorded." (RPAPL § 291).

In this case, nearly all of the facts are undisputed. A building was converted into condominiums and defendant Giwa was one of the first purchasers of a condominium unit. The condo declaration was filed in May 2007 and Giwa closed on his unit in June 2007. Before the conversion, the building was designated Block 2041 **Lot 56**. However, because a condominium is real property, each unit gets its own block and lot designation when the new condos are created. In the condominium declaration, the individual units were assigned individual lots and Mr. Giwa's condominium was designated Block 2041 **Lot 1307**.

In connection with the purchase, plaintiff issued a mortgage to defendant Giwa in June 2007 for $412,000. That mortgage was recorded with the City Register on February 20, 2008. It was not recorded on his unit, Block 2041, Lot 1307; it was recorded against the whole building (Block 2041, Lot 56). In 2014, Giwa entered into a loan modification agreement that increased the principal balance to over $500,000. That agreement was also recorded against the wrong block and lot –Block 2041, Lot 56 -- in March 2014. Subsequently, Giwa stopped making payments and plaintiff commenced the instant action to foreclose the note and mortgage.

Eventually, plaintiff realized its mistakes. When plaintiff commenced this foreclosure action in 2016, its complaint asked the Court to "reform" the mortgage by substituting its "Intended Legal Description" (NYSCEF Doc. No. 2 at 8). That document, Schedule E, states the correct tax lot as 1307 (*id.* at 13). Plaintiff also attached the mortgage to its complaint which, as stated above, identifies the Lot as 56 (*id.* at 26). What this shows is that in July 2016, plaintiff knew or should have known that it had a problem regarding the recording of its mortgage. Otherwise, it would not have asked the Court in its requested relief to substitute a legal description that included the correct tax lot. Curiously, plaintiff filed a notice of pendency against the entire building, Block 2041, Lot 56 instead of the unit, Lot 1307 (NYSCEF Doc. No. 3 at 3).

But, for some reason, plaintiff did not try to fix this obvious problem in 2016 despite the fact that the New York County Law § 919(j) permits the correction of an "erroneous designation" (New York County Law § 919[j]).[2] That statute suggests that proper recording constitutes constructive notice of an instrument only from the time the instrument is properly recorded (*id.*).

While plaintiff meandered along in this 2016 litigation without any sense of urgency, City West acquired the property in February 2018 from a Sheriff's sale. Apparently, Giwa was not paying the monthly maintenance charges and the Condo had the property sold in an attempt

[2] "In cases where any instrument shall have been filed with an erroneous designation, such county clerk on presentation of proper proof thereof shall enter such instrument in the proper index under the proper block number of every block, the designation of which shall have been erroneously stated. He shall at the same time make a note of such entry and of the date thereof in every place in which such instrument may have been erroneously indexed, opposite the entry thereof, and also upon the instrument itself, if the same be in his possession or produced to him for the purpose, and the record of such instrument shall be constructive notice as to the property in any block not duly designated at the time of such filing only from the time when the same shall be properly indexed."

to satisfy its judgment. City West purchased the property and recorded its deed against the correct tax parcel - Block 2041, **Lot 1307**.

The parties agree that Lot 56 was the "Base Lot" used for the building prior to its conversion to a condominium building. They also agree that new lots were created for the individual condo units and that the lot for this particular apartment is 1307. The issue is that plaintiff's mortgage (and the loan modification) were recorded against only Lot 56. City West claims that it should take the property free and clear of the mortgage because when it bought the property, an ACRIS search revealed no recorded mortgages on the property. City West contends it performed the required due diligence and should not be subject to plaintiff's mortgage because plaintiff did not properly record the subject mortgage and loan modification.

Plaintiff points out that at the time the mortgage was executed, the individual lots for the units had not been created. Plaintiff argues that the mortgage was recorded against the only lot then available—the Base Lot. Plaintiff also attaches the affidavit of Daniel Engoron (a VP at Fidelity National Title Insurance Company). Mr. Engoron observes that the Base Lot was converted to condominium lots on July 3, 2007 (NYSCEF Doc. No. 94, ¶ 12). He concludes that a title search that did not include a review of the Base Lot is inadequate and points out that a search of this condo's Lot (1307) would not have revealed a deed (*id.* ¶¶ 16-17). Mr. Engoron argues that City West's decision to do only an ACRIS search prior to buying the property rather than a title search was not reasonable (*id.* ¶¶ 20-22). He opines that the lack of a prior mortgage on the ACRIS search should have been a red flag (*id.* ¶ 23).

City West argues that it need not search outside the chain of title. It also claims that there is no reason to check the Base Lot because a mortgage associated with a condo unit must be recorded against that unit's tax parcel and cannot be recorded against the property as a whole.

City West maintains that plaintiff was on constructive notice of the re-designation of the tax lots and should have recorded its mortgage against the new lot, at the very latest, when it recorded the loan modification.

Discussion

"The New York Recording Act, *inter alia*, protects a good faith purchaser for value from an unrecorded interest in a property, provided such a purchaser's interest is first to be duly recorded. The status of good faith purchaser for value cannot be maintained by a purchaser with either notice or knowledge of a prior interest or equity in the property, or one with knowledge of facts that would lead a reasonably prudent purchaser to make inquiries concerning such" (*Chen v Geranium Dev. Corp.*, 243 AD2d 708, 709, 663 NYS2d 288 [2d Dept 1997] [citations omitted]).

The Court finds that City West was a bona fide purchaser for value and it takes title to the property free and clear of plaintiff's mortgage because of the improper recording. Plaintiff is certainly correct that at the time Giwa executed the mortgage, the new condo lots had been designated but had not yet been formed by the city. But that does not absolve plaintiff of its responsibility to ensure its mortgage was recorded against the correct lot in the intervening time since the mortgage was executed. The fact is that Exhibit C to the Condo Declaration recorded on *May 31, 2007* (before the sale) contains new tax lot numbers for each of the condo units (NYSCEF Doc. No. 94 at 42). The subject mortgage was executed in June 2007 and recorded in *February 2008,* well after the city formed lot 1307.

Moreover, a Maps document filed with the City Register dated May 30, 2007 contains a notation that "The land affected by the within instrument lies in Section 7 Tax Block 2041, Tax Lot formerly known as Lot 56 and now known as Lots 1301-1316 including on the tax map of

the Borough of Manhattan, in the County of New York, City and State of New York" (*id.* ex D at 84).

It does not matter that plaintiff may have been justified in recording the mortgage against Lot 56 at the time Giwa obtained the mortgage. Rather, the documents cited above demonstrate that plaintiff should have known that the building had just been converted to condos and that new tax lots were assigned and being formed. It was plaintiff's responsibility to ensure its initial recording was correct or to modify its recording when the new tax lots were created. It was also plaintiff's responsibility to record the loan modification on the condo's lot, but it did not. Instead, plaintiff recorded the modification on the *Base Lot* more than five years after the condo lots were formed. Plaintiff failed to sufficiently explain why it made that mistake again.

Plaintiff had a third opportunity to correct its mistake. As discussed above, by the time it started this litigation in 2016, it knew about the problem and the complaint seeks to correct the legal description. Plaintiff's lack of urgency and its failure to file a lis pendens against Lot 1307 failed to put anyone on notice that it claimed to have a mortgage on Lot 1307.

These failures—to fix the misrecorded mortgage in 2007 (when the Condo Declaration was recorded), in 2014 (when the Loan Modification was recorded) or in 2016 (when plaintiff filed the instant action)—are only magnified by the fact that City West acquired the property in 2018. Plaintiff sat on this case for nearly a year until it sought an ex-parte order for service by publication in May 2017; the Court granted that application in June 2017 (NYSCEF Doc. No. 26). Defendant Giwa eventually answered in July 2017 (NYSCEF Doc. No. 32).

While plaintiff delayed this case, the condo sold the property at the sheriff's sale. Even today, twelve years after the mortgage, five years after the modification and three years after this case started, there is no indication that the plaintiff has anything to do with Lot 1307. The same

was the case when City West purchased the property in 2018. The simple fact is that plaintiff had many chances to correct its mistake in the past twelve years but did nothing to put anyone on notice that it claimed an interest in this condominium unit. Had plaintiff taken any action, this situation could have been avoided.

Summary

Stripped to its basic concern, this motion is about burdens. Was it plaintiff's burden to fix its recording so the mortgage was recorded against the correct tax lot or was it City West's burden to know that it should not rely on only an ACRIS search? In hindsight, it is easy for plaintiff to point out the supposed red flags that should have alerted City West to look beyond an ACRIS search of Tax Lot 1307. But the Court must evaluate this claim from the perspective of a reasonable purchaser in City West's position.

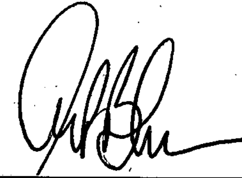
The fact that there was no deed is not enough to compel a further search; City West had just acquired a deed to the property at the Sheriff's sale. If there were issues with ownership, then that was a risk City West was entitled to take (or not take). But that has nothing to do with the existence of a mortgage and the instant dispute is not about who owns the property. And City West performed the requisite search to discover mortgages and it found none. City West was entitled to rely on that search.

To impose the additional obligation on City West to search the Base Lot or do a title search is not supported in the case law cited by plaintiff nor does it come close to what a reasonable purchaser should have done. City West checked the tax lot for the condo—the only place where a mortgage against that tax lot should be found—and found nothing. The Court is unable to find that City West was on inquiry notice that there was a possible mortgage recorded on the property because the deed was not recorded on this tax lot.

An extremely cautious purchaser might have considered looking at the Base Lot. But that type of purchaser might also do searches on the neighbors' condo units or on the surrounding buildings. The fact is that plaintiff attempts to blame City West for not discovering *plaintiff's* mistake. Apparently, plaintiff did not realize this mistake for nearly a decade and yet it claims City West should have somehow realized it.

The motion by plaintiff is ~~granted~~ denied and the cross-motion by City West is granted. City West is directed to submit an order consistent with this decision directly to the Courtroom on or before January 9, 2020.

12/13/19
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
		GRANTED		DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			X	SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE