Rodriguez v Federal Natl. Mtge. Assn.
2020 NY Slip Op 31632(U)
May 29, 2020
Supreme Court, Kings County
Docket Number: 508453/2019
Judge: Edgar G. Walker
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At an IAS Term, Part 90, of the Supreme Court of the State of New York, held in and for the County of Kings, on the 29th day of May, 2020

PRESENT:

HON. EDGAR WALKER

Justice

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JOSE RODRIGUEZ

DECISION and ORDER

Index No. 508453/2019

Plaintiff, Motion Sequence No. 1

-against-

FEDERAL NATIONAL MORTGAGE ASSOCIATION

AND CIT BANK, NATIONAL ASSOCIATION,

Defendants.

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The following e-filed papers numbered read herein: NYSCEF Doc. Nos.[1]

Notice of Motion/Order to Show Cause/ Papers Numbered

Petition/Cross Motion and

Affidavits (Affirmations) Annexed----------15-16, 17-21

Opposing Affidavits (Affirmations)----------25, 26-27

Reply Affidavits (Affirmations)----------29, 30-31

Affirmation in Support----------

Memorandum of Law----------

[1] New York State Courts Electronic Filing Docket Numbers

Upon the foregoing papers in this action to cancel and discharge a mortgage, plaintiff Jose Rodriguez (plaintiff) moves for an order pursuant to CPLR §3211 (a)(5) dismissing the counterclaims of defendant Federal National Mortgage Association (defendant or FNMA) and discontinuing the action as against defendant CIT Bank, National Association (CIT). FNMA opposes that portion of the motion seeking dismissal of its counterclaims.

On December 30, 2005, plaintiff purchased the parcel of property located at 1271 Hancock Street, Brooklyn, New York, Block 3391, Lot 49 (the subject property) by executing a note in the amount of three hundred ninety-seven thousand six hundred dollars ($397,600.00) in favor of Indymac Bank, FSB (IndyMac). The note was secured by a first mortgage on the subject property. Plaintiff defaulted on his payments beginning June 1, 2009. By assignment dated November 24, 2009, the mortgage was assigned from Indymac to Onewest Bank (Onewest). On December 6, 2009, Onewest commenced a foreclosure action with respect to the subject property under Index Number 32064/2009 (*see* NYSCEF Doc. No. 17 annexed to plaintiff counsel's affirmation in support). Onewest moved for an order of reference on March 6, 2012. By order of this court (Justice Jack Battaglia), the motion was denied as premature with leave to renew upon the completion of a mandatory settlement conference scheduled for July 11, 2012. On March 10, 2015, this court (Justice Lawrence Knipel) held a status conference resulting in the issuance of a conditional order pursuant to CPLR §3216 dismissing the action and cancelling the notice of pendency unless Onewest either filed a note of issue or moved for entry of judgment within ninety (90) days (see document filed March 11, 2015 Minutes of the Kings County Clerk's Office). On May 7, 2015, the mortgage was assigned to FNMA (*see* NYSCEF Doc. No. 6). On October 21, 2015, Onewest filed a motion seeking to vacate the dismissal. On February 14, 2017, this court (Justice Ellen Spodek) denied the motion due to Onewest's failure to

demonstrate a reasonable excuse for the delays in prosecuting the action (*see* NYSCEF Doc. No. 18 annexed as exh B to plaintiff counsel's affirmation in support). A second motion to vacate the dismissal was also denied by order of this court (Justice Ellen Spodek) on May 15, 2018 (*see* NYSCEF Doc. No. 19 annexed as exh C to plaintiff counsel's affirmation in support).

On April 15, 2019, plaintiff commenced this action pursuant to Article 15 of the Real Property Actions and Proceedings Law seeking to cancel and discharge the mortgage and for an award of legal fees pursuant to RPL §282. On July 29, 2019, FNMA interposed an answer asserting twenty (20) affirmative defenses and five (5) counterclaims for unjust enrichment, equitable mortgage, equitable lien, constructive trust, and equitable subrogation. Shortly thereafter, plaintiff filed the instant motion.

Plaintiff (defendant on the counterclaim) now moves to dismiss FNMA's counterclaims pursuant to CPLR §3211 (a)(5) on the grounds that they are time-barred by the statute of limitations, to discontinue the action against CIT, and for such other and further relief as this court deems just and proper. FNMA opposes that portion of the motion that seeks dismissal of its counterclaims. CIT did not file an answer or respond to this motion.

Pursuant to CPLR §3211 (a)(5), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that...the cause of action may not be maintained because of...the statute of limitations." '[A] defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired" (*Wells Fargo Bank, N.A. v Burke*, 155 AD3d 668, 669 citing *Bill Kolb., Jr. Subaru, Inc., v JL Rabinowitz, CPA*, 117 AD3d 978, 979 (2nd Dept 2014); *Kennedy v H. Bruce Fischer, Esq.*, 78 AD3d 1016, 1017 (2nd Dept 2010]). Once satisfied, the burden shifts to plaintiff to establish that the statute of limitations has not expired, that it is tolled, or that an exception applies (*Wells Fargo Bank, N.A. v Burke*, 155

AD3d at 670 quoting *Lake v. New York Hosp. Med. Ctr. Of Queens*, 119 AD3d 843, 844 [2nd Dept 2014]).

Defendant's first counterclaim seeks to recover amounts paid for real estate taxes and hazard insurance premiums on a theory of unjust enrichment. In support of the motion, plaintiff argues that the statute of limitations on the unjust enrichment claim accrued on December 30, 2005 (the date the loan originated) and it became time barred six years later on December 31, 2011(*see* NYSCEF Doc. No. 29, plaintiff counsel's affirmation in reply at 4, ¶18). Alternatively, plaintiff argues that defendant voluntarily made payments for real estate taxes and insurance and is barred from collecting them under a theory of unjust enrichment (*see* NYSCEF Doc. No. 29, plaintiff counsel's affirmation in reply at 8-9, ¶¶ 34-37). In opposition to the motion, defense counsel claims that the statute of limitations begins to accrue each time a payment is made and plaintiff receives the benefit of that payment. Defense counsel avers that "…[w]ithout paying the real property taxes Rodriguez could lose title to the Premises and the Mortgage could be lost" (*see* NYSCEF Doc. No. 25, defense counsel's affirmation in opposition at 2-3, ¶9). Attached to the affirmation in opposition is a printout of the account history for the subject property showing a total of ten (10) quarterly payments for real estate taxes beginning June 27, 2017 through September 19, 2019 (*see* NYSCEF Doc. No. 27 annexed as exh 2 to defense counsel's affirmation in opposition to the motion).

"…[T]he unjust enrichment cause of action is subject to a six-year statute of limitations (*Mannino v Passalacqua*, 172 AD3d 1190, 1194 [2nd Dept 2019] citing CPLR 213[1]). "Such a cause of action accrues upon the occurrence of the act that gives rise to a duty of restitution" Mannino v Passalacqua, 172 AD3d 1194 quoting *U.S. Bank N.A. v Salem*, 164 AD3d 1289, 1290 [2nd Dept 2018][internal quotations omitted). "To prevail on a claim of unjust enrichment, a

party must show that (1) the other party was enriched, (2) at that party's expense, and (3) that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*Suntrust Mtge., Inc. v Mooney*, 113 AD3d 836 [2nd Dept 2014] quoting *Citibank v Walker*, 12 AD3d 480, 481 [2nd Dept 2004]; *Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972], [cert denied]). However, the recovery of payments voluntarily made with full knowledge of the facts and in the absence of fraud or mistake of material fact or law are barred by the voluntary payment doctrine (see *Wells Fargo Bank, N.A. v Burke*, 155 AD3d at 671 [2nd Dept 2017] quoting *Dillon v U-A Columbia Cablevision of Westchester*, 100 NY2d 525, 526 [2003].

The acts that give rise to the duty of restitution herein are defendant's payments of quarterly real estate taxes on plaintiff's behalf. Plaintiff has failed to demonstrate, prima facie, that the amounts advanced for real estate taxes from July 2017 through September 2019 were untimely as they did not occur more than (6) years prior to commencement of this action. However, it is also clear that the payments were made voluntarily. While preserving plaintiff's title to the property, defendant also secured its own interest by avoiding the placement of a superior lien by New York City for the payment of real estate taxes. As defendant does not allege any fraud or mistake of material fact or law, the recovery of those payments would be barred by the voluntarily payment doctrine.

General relief clauses enable the court to grant appropriate relief not specifically sought by the movant if that relief is warranted by the facts plainly appearing on the papers on both sides, if it's not too dramatically unlike the relief sought, if the proof offered supports it, and if there is no prejudice to any party' " (*Matter of Velez v City of New York*, 174 AD3d 813, 814 [2nd Dept 2019] citing *Evans v Argent Mtge. Co., LLC*, 120 AD3d 618 [2nd Dept 2014], *Frankel v*

Stavsky, 40 AD3d 918 [2nd Dept 2007]). The presence of a general relief clause in the notice of motion permits this court to consider granting plaintiff's motion to dismiss on the alternative ground of failure to state a cause of action. When reviewing a motion to dismiss a complaint for failure to state a cause of action, a court must give the complaint a liberal construction, accept the allegations as true and provide plaintiffs with the benefit of every favorable inference (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018] citing *Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc*., 30 NY3d 572, 582 [2017] [internal quotation marks omitted]). 'Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss' (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d at 38 [2018] quoting *EBC I, Inc. v Goldman, Sachs & Co*., 5 NY3d 11, 19 [2005]). "Furthermore, [u]nlike on a motion for summary judgment where the court searches the record and assesses the sufficiency of the parties' evidence, on a motion to dismiss the court merely examines the adequacy of the pleadings" (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d at 38 [2018] quoting *Davis v Boeheim*, 24 NY3d 262, 268 [2014] [internal quotations omitted]). Applying those principles to the facts presented, plaintiff's motion to dismiss the first counterclaim for unjust enrichment is granted pursuant to CPLR §3211 (a)(7) upon defendant's failure to state a cause of action.

Defendant's second counterclaim seeks to declare an equitable mortgage on the subject property in an amount representing all unpaid loan payments and sums advanced for real estate taxes and hazard insurance. Plaintiff argues that the statute of limitations on the equitable mortgage claim began to accrue on the date the loan originated (December 30, 2005) and that it became time-barred on December 31, 2011 (see NYSCEF Doc. No. 29, plaintiff counsel's affirmation in reply at 9 ¶ 21). Alternatively, plaintiff argues that the doctrine of equitable

mortgage is inapplicable because the parties executed a written mortgage (see NYSCEF Doc. No. 29, plaintiff counsel's affirmation in reply at 10, ¶ 43). In opposition to the motion, defendant argues that the statute of limitations accrues separately for each missed loan payment and amount advanced for real estate taxes and insurance and, therefore, the claims for the most recent tax payments are timely (see NYSCEF Doc No. 25, defense counsel's affirmation in opposition at 5 ¶16).

A cause of action seeking to establish a lien pursuant to the doctrine of equitable mortgage…is governed by a six (6) year statute of limitations (*Wells Fargo Bank, N.A. v Burke*, 155 AD3d at 670 *citing* CPLR 213[1]; *US Bank v Gestetner*, 103 AD3d 962 [3rd Dept 2013]). "An equitable mortgage may also be constituted by any writing from which the intention may be gathered; and an attempt to make a legal mortgage, which fails for want of some solemnity, is valid in equity." (see *Sullivan v Corn Exch. Bank*, 154 AD 292, 296 [2nd Dept 1912] citing Miller Eq. Mort. 1; *Payne v. Wilson*, 74 NY 348 [1878]). Where a legal, written mortgage exists, the doctrine of equitable mortgage is inapplicable (see *21st Mtge. Corp. v Nweke*, 165 AD3d 616, 619 [2nd Dept 2018] citing *Payne v Wilson*, 74 NY at 351; *Allen v Union Fed. Mtge. Corp*., 204 F Supp 2d 543, 546 [EDNY 2002]).

The parties do not dispute that on December 30, 2005, plaintiff borrowed three hundred ninety-seven thousand six hundred dollars ($397,600.00) from defendant's predecessor-in-interest, IndyMac, and secured by the subject property. As more than six (6) years have passed since they entered into that agreement, plaintiff has established, prima facie, that a claim for equitable mortgage would be untimely. However, the parties' intention to encumber the property is clear from the written mortgage entered into between IndyMac and plaintiff (see NYSCEF Doc. No. 3 annexed as exh B to the summons and complaint). Therefore, the doctrine of

equitable mortgage is inapplicable to the facts of this case. Accordingly, plaintiff's motion to dismiss defendant's second counterclaim for equitable mortgage is granted pursuant to CPLR §3211 (a)(7) for failure to state a cause of action.

Defendant's third counterclaim is for imposition of an equitable lien in the amount of all unpaid loan payments and amounts advanced for real estate taxes and hazard insurance. Plaintiff argues that the statute of limitations on the equitable lien claim began to accrue on the date the loan originated (December 30, 2005) and that it became time-barred on December 31, 2011 (see NYSCEF Doc. No. 29, plaintiff counsel's affirmation in reply at 9 ¶20). In opposition to the motion, defendant argues that the statute of limitation accrues separately for each missed loan payment and amount advanced for real estate taxes and insurance and, therefore, the claims for the most recent tax payments are timely (see NYSCEF Doc No. 25, defense counsel's affirmation in opposition at 5 ¶17).

A cause of action for equitable lien is also subject to a six (6) year statute of limitations (see *Collucci v Collucci*, 58 NY2d 834 [1983]). An equitable lien may be imposed where one in a confidential relationship with the owner has expended money for improvement of the property based on a promise to convey, reimburse, or grant a lesser interest in the property (*Bolender v Ronin Prop. Partners, LLC*, 168 A.D.3d 1032, 1035 [2nd Dept 2019]; citing *Scivoletti v Marsala*, 61 NY2d 806, 808-809 [1984]; *Farr v Covert*, 34 AD3d 1204, 1205 [4th Dept 2006]; *Shanley v Crisafulli*, 292 AD2d 827, 827, [4th Dept 2002]; *Johnston v Martin*, 183 AD2d 1019, 1020 [3rd Dept 1992]). One of the essential elements of an equitable lien upon real property is that the improver of the property made such improvements in good faith and under a color of right; for example, where the legal title was in the one improving the real property and the equitable title was in someone else (see *Mickles v. Dillaye*, 17 N.Y. 80 [1858]).

Clearly the doctrine of equitable lien is inapplicable to this case. There are no allegations that defendant made any improvements to the property as a result of the plaintiff's promise to convey, reimburse or grant a lesser interest in the property. Further, defendant has not alleged a confidential relationship between the parties that resulted in reliance on such a promise. Accordingly, plaintiff's motion to dismiss the third counterclaim for equitable lien is granted pursuant to CPLR §3211 (a)(7) upon defendant's failure to state a cause of action.

Defendant's fourth counterclaim seeks to impose a constructive trust and transfer ownership of the property to FNMA. Plaintiff argues that the statute of limitations on the constructive trust claim began to accrue on the date the loan originated (December 30, 2005) and that it became time-barred on December 31, 2011 (*see* NYSCEF Doc. No. 16, plaintiff counsel's affirmation in support of the motion at 2 ¶4 [d],[e]). Defendant argues that the claim for constructive trust will not accrue unless and until plaintiff prevails in this action and receives title to the property unencumbered by any obligation to repay the loan and amounts advanced for taxes and insurance (*see* NYSCEF Doc. No. 25, defense counsel affirmation in opposition at 6, ¶ 19).

The cause of action for constructive trust is also subject to a six-year statute of limitations which begins to run upon the occurrence of the alleged wrongful act giving rise to the duty of restitution (see *Ponnambalam v. Sivaprakasapillai*, 35 AD3d 571, 574 [2nd Dept 2006] citing *Mazzone v Mazzone*, 269 AD2d 574, 574-575 [2nd Dept 2000]); *Mattera v Mattera*, 125 AD2d 555, 556 [2nd Dept 1986]). The elements of a cause of action to impose a constructive trust include (1) the existence of a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment (see *Mazzei v Kyriacou,* 139 AD3d 823 [2nd Dept 2016] quoting *Quadrozzi v Estate of Quadrozzi*, 99 AD3d 688,691 [2nd Dept 2012]. "[A]

conventional business relationship, without more, is insufficient to create a fiduciary relationship. Rather, a plaintiff must make a 'showing of "special circumstances" that could have transformed the parties' business relationship to a fiduciary one …, such as control by one party of the other for the good of the other' (*AHA Sales, Inc. v Creative Bath Prods., Inc*. 58 AD3d 6, 21-22 [2nd Dept 2008] quoting *L. Magarian & Co. v Timberland Co.,* 245 AD2d 69, 70 [1st Dept 1997]).

The doctrine of constructive trust is also inapplicable to this case. Defendant has not alleged the existence of a confidential or fiduciary relationship and, as previously discussed, cannot demonstrate unjust enrichment. Accordingly, plaintiff's motion to dismiss defendant's fourth counterclaim for constructive trust is granted pursuant to CPLR §3211(a)(7) for failure to state a cause of action.

Defendant's fifth counterclaim seeks to impose a lien on the property for amounts paid by its predecessor-in-interest to satisfy any liens and judgments that existed on the subject property at the time of closing and any subsequent advances for charges against the property by municipal, state or quasi-governmental authorities, and to have that lien subrogated to any existing liens. Plaintiff argues that the statute of limitations on the equitable subrogation claim began to accrue on the date the loan originated (December 30, 2005) and that it became time-barred on December 31, 2011 (*see* NYSCEF Doc. No. 16, plaintiff counsel's affirmation in support of the motion at 2 ¶4[d], [e]. Defendant claims that the statute of limitations accrues separately for each payment of real estate taxes and insurance (see NYSCEF Doc. No.25. defense counsel's affirmation in opposition to the motion at 6-7 ¶21).

'The doctrine of equitable subrogation applies in New York 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 which is senior to his but junior to the one satisfied with his funds. In order to avoid the unjust enrichment of the intervening, unknown lienor, the mortgagee is entitled to be subrogated to the rights of the senior incumbrance' (*Filan v Dellaria*, 144 AD3d 967 [2nd Dept 2016] [internal quotations omitted] quoting *Arbor Commercial Mtge., LLC v Associates at the Palm, LLC*, 95 AD3d 1147, 1149 [2nd Dept 2012]; *King v Pelkofski*, 20 NY2d 326, 333-334, [1967]). "The doctrine operates to erase the lender's mistake in failing to discover intervening liens, and grants him the benefit of having obtained an assignment of the senior lien that he caused to be discharged" (*Filan v Dellaria*, 144 AD3d at 972 quoting *United States v Baran*, 996 F2d 25, 29 [2d Cir 1993]). In this manner, 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 [or herself]' (*Filan v Dellaria*, 144 A.D3d at 972 quoting *Arbor Commercial Mtge., LLC v Associates at the Palm, LLC*, 95 AD3d at 1149 [internal quotations omitted]).

In the instant matter, defendant does not specifically allege that the funds of its predecessor-in-interest were used to satisfy any existing lien that was junior to the rights of an unknown, more senior incumbrance, at the time the transaction occurred. Even assuming those facts, that portion of the claim would be time-barred as the statute of limitations would have accrued on December 30, 2005 (the date the note and mortgage were executed) and expired on December 31, 2011. The doctrine of equitable subrogation does not apply in these circumstances where defendant is attempting to recover payments advanced to prevent an assessing authority from placing a lien on property that would be senior to other liens. Accordingly, plaintiff's

motion to dismiss defendant's fifth cause of action for equitable subrogation is granted pursuant to CPLR §3211(a)(7) for failure to state a cause of action.

That portion of plaintiff's motion to "withdraw and dismiss" the causes of action against CIT is essentially a motion for voluntary discontinuance. The determination of a motion for leave to voluntarily discontinue an action pursuant to CPLR §3217 (b) rests within the sound discretion of the court (*Wells Fargo Bank, N.A. v Chaplin*, 107 A.D.3d 881 [2nd Dept 2013] citing *Expedite Video Conferencing Servs., Inc. v Botello*, 67 AD3d 961 [2nd Dept 2009] . 'In the absence of special circumstances, such as prejudice to a substantial right of the defendant, or other improper consequences, a motion for a voluntary discontinuance should be granted' (*Wells Fargo Bank, N.A. v Chaplin*, 107 A.D.3d at 881 quoting *Blackwell v Mikevin Mgt. III, LLC*, 88 AD3d 836, 837 [2nd Dept 2011]; *Expedite Video Conferencing Servs., Inc. v Botello*, 67 AD3d at 961). As the motion is unopposed and there is no showing that defendant would be prejudiced, that portion of plaintiff's motion seeking to discontinue the action against CIT is granted.

For the foregoing reasons, plaintiff's motion to dismiss FNMA's counterclaims and to discontinue the action against CIT is granted.

This constitutes the decision and order of the court.

E N T E R,

J.S.C.