

Barrett v Pellerano
2020 NY Slip Op 32026(U)
May 29, 2020
Supreme Court, Bronx County
Docket Number: 28875/2019
Judge: Wilma Guzman
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 7**

Index No. 28875/ 2019
Motion Calendar No. 3
Motion Date:

MILLICENT BARRETT,

Plaintiff(s),

-against-

**DECISION/ ORDER
Present:
Hon. Wilma Guzman**

TERESITA PELLERANO a/k/a TERESA PELAEZ, MIKE
PELLERANO, RHONDA PELLERANO, THE BANK OF
NEW YORK MELLON f/k/a THE BANK OF NEW YORK and MORTGAGE ELECTRONIC
REGISTRATION SYSTEM, INC.

Defendant(s).

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Motion to:

Papers	Numbered
Notice of Motion, Affidavits Annexed And Exhibits Thereto	1
Affirmation in Opposition and Exhibits Thereto.....	2

Upon the foregoing papers, the Decision/Order on this Motion is as follows:

Defendants BANK OF NEW YORK MELLON f/k/a THE BANK OF NEW YORK (hereinafter referred to as “BONY”) and MOTRGAGE ELECTRONIC REGISTRATION SYSTEM, INC. (hereinafter referred to as “MERS”) moves this court for an order pursuant to CPLR § 3211(a) (1)and (7) seeking to dismiss plaintiff MILLICENT BARRETT’s (hereinafter referred to as “plaintiff”) claims. Plaintiff has submitted an affirmation in opposition. After due deliberation, the decision of the court is as follows.

“In order to prevail on a motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a) (1), the document relied upon must definitively dispose of plaintiff’s claim.” Bronxville v. Webster Town Ctr. Pshp., 634 N.Y.S. 2d 62 (1st Department 1995). “Pursuant to CPLR § 3211(a) (1), a motion to dismiss on the basis of a defense founded on documentary factual allegations, conclusively establishing a defense as a matter of law.” Lopez v. Fenn, 90 A.D. 3d 569 (1st Department 2011).

CPLR § 3211(a) (7) grants a party to move for judgement dismissing one or more causes of action asserted against him/her on the grounds that the pleading fails to state a cause of action for bringing forth the complaint. “It is well settled that on a motion to dismiss a pleading for failure to state a cause of action pursuant to CPLR §3211(a) (7), the pleading is to be liberally construed, accepting all

the facts alleged therein to be true and according the allegations the benefit of every possible favorable inference.” Taverna v. Mircochip Technology, Inc., 268 A.D. 2d 520 , 702 N.Y.S. 2d 104 (2nd Department 2000).

The underlying mortgage and foreclosure proceedings stems on or about October 27, 2006 when the defendant TERESITA PELLERANO a/k/a TERESA PELAEZ (hereinafter referred to as “Pellerano”), borrowed a principal sum of \$424,000.00 (hereinafter referred to as “the loan”) from Decision One Mortgage Company, LLC. This loan was memorialized in a Note in the principal amount. As security, Pellerano then executed and delivered a mortgage in favor of MERS, encumbering the premises. Pellerano then entered into a Loan Modification Agreement on April 28, 2009, which increased the principal balance of the loan to \$471, 847.52. The mortgage was assigned by MERS to BONY pursuant to an Assignment of Mortgage on March 13, 2012. Pellerano defaulted on the loan by failing to make a payment on February 1, 2012 and a foreclosure action commenced against Pellerano in the Supreme Court of Bronx County on October 28, 2014. BONY moved for a Judgement of Foreclosure and Sale, which was granted to them on April 6, 2018 by Hon. Kenneth L. Thompson, Jr. Following this, a foreclosure sale was held, and BONY was the successful bidder. The Referee’s Deed in Foreclosure to BONY was executed on March 15, 2019. BONY thereafter sold the premises to Select Properties 101 Corp on June 10, 2019.

This is an action commenced by plaintiff seeking damages from an injury sustained as a result of a slip and fall on or about February 13, 2019 on a sidewalk in front of or adjacent to the premises located at 740 East 240th Street, Bronx, NY (hereinafter referred to as the “ subject premises”).

Defendants BONY and MERS move this court for an order dismissing these claims, pursuant to CPLR § 3211 (1) (7) claiming that, on February 13, 2019, the date of the alleged slip and fall accident which resulted in plaintiff’s injuries, Pellerano still retained the title to the premises, and was still liable for the maintenance of sidewalks and surrounding areas. Defendants produced documentary evidence of the final sale of the premises to BONY on March 15, 2019 as well as another copy of the title and deed in which defendant Pellerano is listed as having ownership of the premises.

In opposition, plaintiff claims that even prior to the finalization of the foreclosure proceedings in favor of BONY on March 15, 2019, that BONY did have control over the premises, and that the fact that BONY moved for a foreclosure on the property is an indication of the facts that they had financial interest and ownership interest in the premises. Therefore, plaintiff alleges that it was incumbent upon BONY to protect their ownership interest and secure said property by maintaining the condition of the

premises in a way that would not pose a hazard to pedestrians. However, although BONY and Pellerano had been engaged in a foreclosure action at the time of the alleged incident, Pellerano retained the title of ownership and interest in the premises. The purpose of judgement of foreclosure and sale is to divest the mortgagor of title which does not occur upon issuance of judgement, but rather upon competition of a sale authorized by judgement. Forbes v. Aaron, 81 A.D.3d 876 (2nd Department, 2011). The final sale of the premises to BONY subsequent to the judgement of the foreclosure proceedings did not occur until March 15, 2019, which was approximately one month after February 13, 2019, the date on which the alleged incident occurred. Thereby, the court finds that the claims made in plaintiffs' opposition to defendants BONY and MERS motions to be without merit. Further, this court finds that, based on documentary evidence provided by defendants BONY and MERS and plaintiff's failure to state a cause of action, there is no viable defense to deny defendants' motion.

Accordingly, it is,

ORDERED and ADJUDGED that the Defendants' BANK OF NEW YORK MELLON f/k/a THE BANK OF NEW YORK and MOTRGAGE ELECTRONIC REGISTRATION SYSTEM, INC. to dismiss the plaintiff's complaint pursuant to CPLR 7211 (a) (1) and (7) is hereby granted in its entirety. And it is further

ORDERED and ADJUDGED that the plaintiff MILLICENT BARRETT's complaint is hereby dismissed. And it is further

ORDERED and ADJUDGED upon service of a copy of this Order with Notice of Entry upon the Clerk of the Court, the Clerk shall mark the complaint dismissed. And it is further

ORDERED and ADJUDGED that Defendants BANK OF NEW YORK MELLON f/k/a THE BANK OF NEW YORK and MOTRGAGE ELECTRONIC REGISTRATION SYSTEM, INC. serve a copy of this order with Notice of Entry upon plaintiff within thirty (30) days of the entry of this order.

This constitutes the decision and order of the Court.

May 29, 2020

DATE



HON. WILMA GUZMAN, J.S.C.