

Bayview Loan Servicing, LLC v Laper
2020 NY Slip Op 32039(U)
June 24, 2020
Supreme Court, Suffolk County
Docket Number: 11727/2015
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX NO. 11727/2015

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
 Acting Justice Supreme Court

BAYVIEW LOAN SERVICING, LLC,
 successor-in-interest to The New York
 Mortgage Company, LLC,

Plaintiff,

-against-

ROBERT G. LAPER, SR., TRUSTEE OF
 THE ROBERT G. LAPER, SR. TRUST
 AGREEMENT DATED SEPTEMBER 12,
 2002; DEBORAH AMATO LAPER, TRUSTEE
 OF THE DEBORAH AMATO LAPER TRUST
 AGREEMENT DATED SEPTEMBER 12,
 2002; JUDITH A. PASCALE, in her official
 capacity of the Clerk of the County of Suffolk;
 CHAMPION MORTGAGE COMPANY;
 SECRETARY OF HOUSING AND URBAN
 DEVELOPMENT; and "JOHN DOE #1"
 through "JOHN DOE #10," the last ten names
 being fictitious and unknown to the Plaintiff,
 the persons or parties intended being the
 persons or parties, if any, having or claiming
 an interest in or lien upon the premises
 described in the complaint,

Defendants.

ORIG. RETURN DATE: JUNE 2, 2017
 FINAL SUBMISSION DATE: NOVEMBER 1, 2018
 MTN. SEQ. #: 001
 MOTION: MD

ORIG. RETURN DATE: JULY 3, 2017
 FINAL SUBMISSION DATE: NOVEMBER 1, 2018
 MTN. SEQ. #: 002
 MOTION: MD

ORIG. RETURN DATE: JULY 3, 2017
 FINAL SUBMISSION DATE: NOVEMBER 1, 2018
 MTN. SEQ. #: 003
 MOTION: MD

ORIG. RETURN DATE: JULY 13, 2018
 FINAL SUBMISSION DATE: NOVEMBER 1, 2018
 MTN. SEQ. #: 004
 MOTION: MG

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Upon the following motions FOR SUMMARY JUDGMENT AND TO EXTEND
NOTICE OF PENDENCY; it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that this motion (seq. #001) by Plaintiff for an Order, pursuant to CPLR 3212, granting summary judgment to Plaintiff on its First through Fourth causes of action and denying defendants' cross-claims, is hereby **DENIED**; and it is further

ORDERED that this cross-motion (seq. #002) by defendants Robert Laper and Deborah Laper for an Order denying Plaintiff's motion for summary judgment is **GRANTED**, and for summary judgment in their favor dismissing Plaintiff's complaint against them, is hereby **DENIED**; and it is further

ORDERED that the cross-motion (seq. #003) by defendant Champion Mortgage Company for summary judgment in its favor and declaring Champion's mortgage to be senior to any lien the court may grant Plaintiff, is hereby **DENIED**; and it is further

ORDERED that the motion (seq. #004) by Plaintiff for an Order, pursuant to CPLR 6513, extending the Notice of Pendency that was filed in this action on July 7, 2015, by a period of three additional years or such other period as the Court deems appropriate, is hereby **GRANTED** as set forth hereinafter.

This is an action under Article 15 of the Real Property Actions and Proceedings Law ("RPAPL") to quiet title and a declaration of equitable subrogation for the subject property known as 7 Gaton Lane, Coram, New York, Suffolk County Tax Map No. 0200-314.00-04.00-038.000 (hereinafter "the Property"). The defendants, Robert G. Laper, Sr., Trustee of the Robert G. Laper, Sr. Trust Agreement dated September 12, 2002, and Deborah Amato

Laper, Trustee of the Deborah Amato Laper Trust Agreement dated September 12, 2002, became the owners in fee of the Property, each as a 50% tenant in common by deed from Robert G. Laper and Deborah A. Laper. On or about January 10 2006, defendants Robert and Deborah Laper (hereinafter "the Borrowers"), executed a mortgage against the Property in the amount of \$300,000 with Plaintiff's predecessor-in-interest, The New York Mortgage Company, LLC. However, the original mortgage was lost and never recorded against the Property. On or about March 5, 2015, the missing mortgage was assigned first to JP Morgan Chase Bank, and then to Plaintiff. Proceeds from that mortgage, in the amount of \$102,105.93, were used to pay off the prior mortgage on the Property, which was held by Teachers Federal Credit Union ("TFCU") and recorded on January 26, 2002 with the Suffolk County Clerk's Office. On January 31, 2006, TFCU issued a Satisfaction of Mortgage, confirming that its mortgage was paid off, and said Satisfaction was recorded with the Suffolk County Clerk's office on April 9, 2008.

Thereafter on March 26, 2011, defendant Champion's predecessor, MetLife Home Loans ("MetLife"), loaned the Laper Trust \$622,000 for a reverse mortgage on the Property, and took back a first mortgage in that sum which was assigned to Champion on February 27, 2013. The reverse mortgage was recorded with the Suffolk County Clerk's Office on April 28, 2011, and the assignment of that mortgage to Champion was recorded with the Suffolk County Clerk's Office on May 1, 2013. On May 5, 2015, the subject Mortgage sought to be recorded was assigned by the original lender, the New York Mortgage Company, LLC to JPMorgan Chase Bank, National Association; the mortgage was then assigned to Plaintiff that same date, to be recorded in the Suffolk County Clerk's Office.

The Plaintiff subsequently commenced the instant action as a successor-in-interest to compel the determination of claims to the subject Property pursuant to RPAPL Article 15. The Plaintiff seeks an Order declaring that the subject Mortgage fully encumbers the Property as a valid first mortgage lien, *nunc pro tunc* as of the date of the mortgage, January 10, 2006, to conform the public records to reflect the actual transactions and further declaring that the interests of all other defendants in the Property, if any, are subject to, subordinate to, and encumbered by the subject Mortgage. Plaintiff seeks a declaration that the defendants have ratified the Plaintiff's Mortgage in each and every provision herein because the proceeds of Plaintiff's Mortgage were used to pay off and satisfy, in-full, the prior mortgage.

Plaintiff now moves for summary judgment in its favor on its First through Fourth causes of action contained in its complaint, striking Defendants' affirmative defenses and dismissing any counterclaims against it as lacking merit. The Plaintiff argues that its First and Second Claims seeking an equitable lien against the Property in the amount of \$300,000 should be granted because its Mortgage, which the Laper defendants signed, specifically identified the Property as the collateral security for the Mortgage, and it would be unjust for them to escape responsibility for their contractual commitments. The Plaintiff argues that its Third claim for equitable subrogation should be granted, because the evidence proves that the TFCU mortgage was paid off and satisfied with the proceeds of Plaintiff's mortgage. In addition, Plaintiff argues that the recorded Satisfaction of the TFCU mortgage should have triggered the duty to inquire when issuing the Metlife mortgage, and discovered that the Borrowers misrepresented the status of the Property, concealing the existence of Plaintiff's Mortgage. Lastly, Plaintiff argues that the Borrowers, by their actions, have ratified the Plaintiff's Mortgage by their failure to respond to Plaintiff's Notice to Admit, and by virtue of the fact that they have resided there continuously since January 10, 2006.

In support of its motion, Plaintiff submits copies of the pleadings, a copy of the Answer and counter-claims of defendant Robert G. Laper, Sr., defendant Champion Mortgage Company, and Plaintiff's reply to counterclaims, the Notice to Admit to the Laper defendants, an affidavit of Gerardo Trueba, a copy of the Suffolk County Clerk Records Office Recording Page, a copy of the January 10, 2006 Note between The New York Mortgage Company, LLC., and Borrowers, a copy of the Suffolk County Recording and Endorsement Page for the subject Property, and a copy of defendant Robert G. Laper's Response to Notice of Discovery and Inspection.

In opposition to the Motion, defendants Robert Laper, Sr. and Deborah Amato Laper submit their own cross-motion (seq. #002) and counter-claim seeking an Order denying Plaintiff's Motion for Summary Judgment, as well as an Order, pursuant to CPLR 3212, granting dismissal of Plaintiff's complaint in its entirety with prejudice. In support of its motion to dismiss, the Laper defendants argue that Plaintiff lacks standing to maintain the current action; that Plaintiff failed to produce business records or an affidavit to support that it is the rightful party to receive equitable subrogation because Plaintiff is a successor-in-interest and failed to produce any evidence that the Note was transferred to Plaintiff; and that Plaintiff failed to produce a valid allonge prior to commencement of the instant action. Lastly, the Laper defendants argue that since New York State is a race recording state, the first lien on record for the property takes

priority over all others. In support of its motion to dismiss and counter-claims, the Laper Defendants submit, among other things, a copy of Gerardo Trueba's affidavit.

Champion Mortgage also opposes Plaintiff's motion and cross-moves (seq. #003) for an Order granting it summary judgment declaring that Champion's mortgage is senior to any lien the Court may finally grant Plaintiff. Champion argues that Plaintiff's lien is not entitled to be subordinated to the TFCU lien, because there was no unjust enrichment to MetLife since the timing of Plaintiff and Champion ("MetLife") liens and the satisfaction of the TFCU lien do not comply with the subrogation doctrine, and that MetLife was not legally obligated to inquire into the source of funds for the TFCU mortgage satisfaction. In support of its cross-motion, Champion submits a copy of the First Notice of Discovery and Inspection to Defendant Champion Mortgage Company and its Response to the First Notice.

Subsequently, Plaintiff moves (seq. #004) for an Order, pursuant to CPLR 6513, extending the Notice of Pendency that was filed in this action on July 7, 2015, for a period of time as the Court deems appropriate. By Order to Show Cause dated June 20 2018, the Hon. Howard H. Heckman, Jr., granted an order extending the Notice of Pendency through and including the hearing date and determination of the instant motions. In support thereof, Plaintiff submits copies of the prior Order and copies of the pleadings.

It is well-settled that the party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (see, **Alvarez v Prospect Hosp.**, 68 NY2d 320, 508 NYS2d 923 [1986]; **Zuckerman v City of New York**, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see, **Winegrad v New York Univ. Med. Ctr.**, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (**Alvarez v Prospect Hosp.**, 68 NY2d at 324 [1986], citing **Zuckerman v City of New York**, 49 NY2d at 562).

New York has a "race-notice" recording statutory scheme whereby the mortgage or deed recorded first in the County Clerk's Office in which the real

property is located by a mortgagee or purchaser without notice of any other mortgages or conveyances will maintain priority over such other mortgages or conveyances (see Real Property Law § 291; **Alliance Funding Co. v Taboada**, 39 AD3d 784, 832 NYS2d 814 [2d Dept 2007]; **In re Hojnoski**, 335 BR 282, 288 [Bankr WDNY 2006]). The New York Recording Act (Real Property Law § 290 *et seq.*) protects a good faith purchaser for value from a prior unrecorded interest in real property provided, *inter alia*, that the subsequent purchaser's interest is the first to be duly recorded (see, Real Property Law § 291; **Transland Assets, Inc. v Davis**, 29 AD3d 679, 813 NYS2d 675 [2d Dept 2006]; **Yen-Te Hsueh Chen v Geranium Dev. Corp.**, 243 AD2d 708, 709, 663 NYS2d 288 [2d Dept 1997], *lv to appeal* 91 NY2d 921, 669 NYS2d 263 [1998]; **Morrocoy Marina v Altengarten**, 120 AD2d 500, 501 NYS2d 701 [2d Dept 1986]). In addition, a bona fide purchaser or encumbrancer for value is protected in its title unless it had previous notice of the fraudulent intent of its immediate grantor (see Real Property Law § 266).

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 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" (**King v Pelkofski**, 20 NY2d 326, 333-334, 282 NYS2d 753 [1967]; see **Arbor Commercial Mtge., LLC v Associates at the Palm, LLC**, 95 AD3d 1147, 1149, 945 NYS2d 694 [2d Dept 2012]). 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" (**United States v Baran**, 996 F 2d 25, 29 [2d Cir 1993]; see **Arbor Commercial Mtge., LLC v Associates at the Palm, LLC**, *supra*). "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" (see **Arbor Commercial Mtge., LLC v Associates at the Palm, LLC**, *supra* [internal citations and quotations omitted]).

Whether this Court should follow the "race-notice" or find equitable subrogation in favor of Petitioner is the crux of the matter before the Court. Here, while it would appear that the Laper defendants knew about the existence of the prior mortgage, there are issues of fact whether defendant MetLife, Champion's predecessor-in-interest, knew, should have known, or made further inquiry into

the existence of the original mortgage lien prior to the issuance of the reverse mortgage. Moreover, issues of fact remain as to whether MetLife was enriched at Plaintiff's expense, and as to which lien to afford priority. Accordingly, inasmuch as both Plaintiff and defendants have failed to meet their respective burdens of proof showing entitlement to summary judgment, those prongs of their motions seeking summary judgment in their favor are hereby **DENIED**. Similarly, the Laper defendants' motion to dismiss Plaintiff's complaint against them in its entirety is also **DENIED**, as the complaint sufficiently sets forth causes of action as well as triable issues of fact to quiet title to the subject Property.

Pursuant to CPLR 6513, a Notice of Pendency is effective for a period of three years from the date of filing, and a court may extend it for an additional three-year period upon "good cause shown," provided that the extension is requested prior to the expiration of the original three-year period (*accord Matter of Sakow*, 97 NY2d 436, 741 NYS2d 175 [2002]; *Aames Funding Corp. v Houston*, 57 AD3d 808, 872 NYS2d 134 [2008]; *Petervary v Bubnis*, 30 AD3d 498, 819 NYS2d 267 [2006]).

The Plaintiff moves, by order to show cause dated June 19, 2018, to extend the Notice of Pendency that was filed on July 7, 2015. Plaintiff's motion to extend the Notice of Pendency is unopposed by defendants, and was filed prior to the expiration date of the original order. The order to show cause provides that the Notice of Pendency is extended pending the hearing and determination of the motion, and requires that the order be filed, recorded, and indexed prior to the expiration date. Service upon defendants was properly effectuated, and there being no opposition thereto, the Court finds, therefore, that the plaintiff met the requirements of the order to show cause prior to the expiration date (*see RKO Props. v Boymelgreen*, 31 AD3d 625, 818 NYS2d 918 [2006]; *see also Sanders & Assoc. v Hague Dev. Corp.*, 131 AD2d 462, 516 NYS2d 93 [1987]). Additionally, pursuant to the order to show cause signed by Hon. Howard H. Heckman, Jr., the Notice of Pendency was temporarily extended "through and including the hearing date and determination of this motion," thereby preventing the original notice from expiring and ensuring the timeliness of Plaintiff's request.

The Court further finds that Plaintiff demonstrated the requisite "good cause" to warrant the requested extension of the Notice of Pendency in light of this Court's determination that triable issues of fact exist as to the priority of liens on the subject Property (*see, In re Sakow*, 97 NYS2d 936 [2002]; *Aames*

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Funding Corp. v Houston, 57 AD3d 808, 872 NYS2d 134, 741 NYS2d 175 [2d Dept 2008]). Accordingly, it is

ORDERED that this motion by Plaintiff for an Order, pursuant to CPLR 6513, extending the Notice of Pendency that was filed in this action on July 7, 2015, by a period of three additional years or such other period as the Court deems appropriate, is hereby **GRANTED** to the extent that the period of effectiveness of said Notice of Pendency affecting the Property is hereby continued and extended for a period of three (3) years from the date of the within Order; and it is further

ORDERED that Clerk of the County of Suffolk is hereby directed to re-docket said Notice of Pendency accordingly as of the date of this Order and to indicate on the Clerk's records that said Notice of Pendency is continued for a period of three (3) years from the date hereof.

The foregoing constitutes the decision and Order of the Court.

Dated: June 24, 2020



HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ FINAL DISPOSITION

 X NON-FINAL DISPOSITION