

Haider v Mashriqi

2020 NY Slip Op 32493(U)

June 1, 2020

Supreme Court, Queens County

Docket Number: 710592/2017

Judge: Marguerite A. Grays

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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IAS PART 4
Justice

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RENUKA HAIDER, as Administrator of the Estate of
MOHAMMED HAIDER, a/k/a MOHAMMED HAROON
HAIDER a nd RENUKA HAIDER
Plaintiff(s),

Index
No.: 710592/2017
Motion
Date: January 28, 2020

-against-

KHALID MASHRIQI; PHILIP W. LEE, ESQ.; KAPLAN,
KAPLAN, DITRIPANI, LLP; FAIRWAY INDEPENDENT
MORTGAGE CORPORATION; and MORTGAGE
ELECTRONIC REGISTRATION SYSTEMS, INC.,

Motion
Cal. No.:
Motion
Seq. No.: 12

FILED
6/2/2020
12:56 PM

Defendant(s).

COUNTY CLERK
QUEENS COUNTY

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The following papers numbered EF217-EF282 read on this motion by defendants Fairway Independent Mortgage Corporation (Fairway) and Mortgage Electronic Registrations Systems, Inc. (MERS), dismissing the Fifth Cause of Action in the Complaint pursuant to CPLR §3211(a)(7), and for summary judgment pursuant to CPLR §3212 against plaintiffs Renuka Haider, as Administrator of the Estate of Mohammed Haider, also known as Mohammed Haroon Haider, and Renuka Haider (collectively referred to as plaintiffs).

Papers
Numbered

Notice of Motion - Affidavits - Exhibits EF217-EF244
Answering Affidavits - Exhibits EF262-EF279
Reply Affidavits EF280-EF282

Upon the foregoing papers it is ordered that the motion by defendants Fairway Independent Mortgage Corporation (Fairway) and Mortgage Electronic Registrations Systems, Inc. (MERS) is determined as follows:

Plaintiff Mohammed Haroon Haider and plaintiff Renuka Haider were the owners of premises located at 73-06 164 Street, in the County of Queens. As is relevant upon the instant motion, Plaintiffs commenced the instant action alleging, among other things, that defendants Khalid Mashriqi (Mashriqi), Philip W. Lee, Esq. (Lee), Kaplan, Kaplan, Ditripani, LLP, Fairway and MERS deprived plaintiffs of their ownership interest in the subject premises for no consideration. Plaintiffs have alleged that MERS acted as a nominee for Fairway, that Mashriqi borrowed \$598,200.00, from Fairway against the subject premises and that Fairway and MERS claim an interest in the premises.

Fairway and MERS have now moved to dismiss the Fifth Cause of Action asserted in the complaint pursuant to CPLR §§3211(a)(7) and 3212. CPLR§3211 (a)(7) provides that a party may move to dismiss an action on the ground that “the pleading fails to state a cause of action.” “On a motion to dismiss pursuant to CPLR§3211(a)(7), the complaint is to be afforded a liberal construction, the facts alleged are presumed to be true, the plaintiff is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory” (*Gorbatov v Tsirelman*, 155 AD3d 836 [2017]; CPLR §3026; see *Feldman v Finkelstein & Partners, LLP*, 76 AD3d 703, 704 [2010]).

Fairway and MERS have argued that this cause of action should be dismissed based upon the doctrine of law of the case. “The doctrine of the law of the case is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and Courts of co-ordinate jurisdiction are concerned” (*Matter of Chung Li*, 165 AD3d 1105, 1106 [2018], *lv to appeal denied*, 32 NY3d 915 [2019][internal quotes and citation omitted]; see *Martin v City of Cohoes*, 37 NY2d 162, 165 [1975]). “The doctrine applies only to legal determinations that were necessarily resolved on the merits in [a] prior decision, and to the same questions presented in the same case” (*Matter of Chung Li*, 165 AD3d at 1106, quoting *RPG Consulting, Inc. v Zormati*, 82 AD3d 739, 740 [2011]).

Based upon the evidence in the record, including a copy of an Order of this Court dated July 3, 2018, and entered on July 17, 2018, in which this Court found that the provisions of the Home Equity Theft Prevention Act were not applicable to this action, Fairway and MERS have sufficiently demonstrated that the doctrine of law of the case applies to plaintiff’s fifth cause of action to the extent that plaintiffs have asserted that Fairway and MERS violated the Home Equity Theft Prevention Act.

With regard to the allegations set forth in the remainder of the Fifth Cause of Action, to wit, that Fairway and MERS have also violated the Home Ownership and Equity Protection Act which is a part of the Truth In Lending Act (TILA), since a mortgage was

placed on plaintiffs' property without their knowledge or understanding, Fairway and MERS have also moved for summary judgment pursuant to CPLR §3212 dismissing this cause of action. "To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented" (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25 [2019], quoting *Glick & Dolleck, Inc. v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]).

"Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable" (*Matter of New York City Asbestos Litig.*, 33 NY3d at 25, quoting *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). On summary judgment, "facts must be viewed in the light most favorable to the non-moving party" (*Matter of New York City Asbestos Litig.*, 33 NY3d at 25]), and "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*id.*, at 25-26, quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Based upon the evidence in the record, the court finds that Fairway and MERS have demonstrated that plaintiffs have no basis to assert claims under the TILA because they are not original mortgagors in the Fairway mortgage, and cannot assert the rights of a borrower (*see Nash v Duroseau*, 39 AD3d 719, 720 [2007]). In opposition, plaintiffs have failed to point to sufficient evidence to raise a triable issue of fact as to this cause of action. Therefore, in light of the above determinations, Fairway and MERS are entitled to the dismissal of the Fifth Cause of Action.

With regard to the remaining branch of Fairway's and MERS's motion for summary judgment, they contend that they are bona fide encumbrancers for value since they had no actual or constructive notice of any defects in title to the subject property, and that Fairway holds a valid and enforceable mortgage with a first priority lien encumbering the subject property pursuant to the doctrine of equitable subrogation.

Based upon this court's review of the evidence in the record, including, but not limited to copies of the pleadings, Mashriqi's affidavit, the affidavit of Cynthia Porterfield, Fairway's employee, transfer document RP-521NYC, a copy of an "Agreement, Promissory Note" dated December 23, 2015, and copies of a deed and mortgage document both dated April 21, 2017, Fairway and MERS have failed to satisfy their prima facie burden (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324). The record has demonstrated that genuine issues of material fact exist as to whether Fairway and MERS are bona fide encumbrancers for value, whether they had actual or constructive notice of any defects in title, and whether Fairway holds a valid and enforceable mortgage with a first priority lien. The parties' remaining contentions have been considered and found to be without merit. Therefore, Fairway and MERS are not entitled to the relief sought on this branch of their motion.

Accordingly, the branch of Fairway's and MERS's motion to dismiss the Fifth Cause of Action is granted and that cause of action is, hereby, dismissed. The motion is denied in

all other respects.

Dated:

6/1/20



MARGUERITE A. GRAYS
J.S.C.

FILED

**6/2/2020
12:56 PM**

**COUNTY CLERK
QUEENS COUNTY**