

U.S. Bank Natl. Assn. v Cohen
2020 NY Slip Op 34396(U)
December 22, 2020
Supreme Court, Kings County
Docket Number: 505487/2019
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 22nd day of December, 2020.

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X
U.S. BANK NATIONAL ASSOCIATION as Trustee,
successor in interest to Bank of America National Association
as Trustee as successor by merger to LaSalle Bank National
Association as Trustee for Residential Asset Mortgage
Products, Inc., Mortgage Asset-Backed Pass-Through
Certificates, Series 2007-RSI,

Plaintiff,

Index No.: 505487/2019

DECISION AND ORDER

-against-

Motions Sequence #2, #3

ABRAHAM COHEN, ESTHER COHEN, SION SALEM,
HSBC MORTGAGE CORPORATION (USA), JP MORGAN,
CHASE BANK, N.A., and ANETTE M. HILL, CITY
REGISTER OF THE CITY OF NEW YORK,

Defendants.

-----X
Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and

Affidavits (Affirmations) Annexed 24-29, 32, 34-40

Opposing Affidavits (Affirmations)..... 41-65, 72, 73

Reply Affidavits (Affirmations) 75, 76

Memorandum of Law 30, 66, 71, 77

After a review of the papers and oral argument the Court finds as follows:

The Plaintiff U.S. Bank National Association as Trustee, successor in interest to Bank of America National Association, as Trustee as successor by merger to LaSalle Bank National Association as Trustee for Residential Asset Mortgage Products, Inc., Mortgage Asset-Backed Pass-Through Certificates, Series 2007-RSI, (hereinafter the "Plaintiff") has commenced this action pursuant to New York Real Property Actions and Proceedings Law for a determination of claims to the real property

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commonly known as 1966 East 14th Street, Brooklyn, New York, Block 7292, Lot 34 of the Tax Map of Kings County (the "Property").

Specifically, the Plaintiff claims that by deed dated June 23, 2005 and recorded on August 2, 2005 Defendant Abraham Cohen conveyed the Property to Defendant Sion Salem (hereinafter "Salem"). After having mortgaged the property, Salem purportedly sold the property to non-party Samuel Engelsberg (hereinafter "Engelsberg") by deed dated October 6, 2006 and recorded on January 17, 2007. The purchase price was apparently \$3,200,000. Upon that transaction Engelsberg allegedly signed a note (the "Note") in favor of SunTrust, the Plaintiff's apparent predecessor in interest, in the principal amount of \$2,000,000. The Note was purportedly secured by a mortgage given to Sun Trust.

The Plaintiff contends that Engelsberg is in default of payment of the Note, sums due and owing in the total amount of \$4,250,374.09. The Plaintiff further alleges that shortly after this transaction, a series of fraudulent or forged deeds were recorded involving Defendants Abraham Cohen and Esther Cohen (hereinafter referred collectively, the "Cohen Defendants") and Salem, all prior to the recording of the Salem/Engelsberg transaction. First, on the same date that the Deed from Defendant Abraham Cohen to Defendant Salem was purportedly executed (June 23, 2005), thereafter recorded on August 2, 2005, another Deed naming Defendant Abraham Cohen as grantor and Defendant Salem as grantee was purportedly executed by Salem (See Plaintiff's Motion, Document 50), and recorded some sixteen months later on October 20, 2006. The Plaintiffs also point to a "correction deed" that purports to correct that deed (Document 50) and states that the "[p]arties were reversed on the original deed recorded CRFN 200600587725". This "correction deed" was recorded on October 18, 2006. Finally, the Plaintiffs point to yet another Deed dated June 30, 2005 and recorded on October 20, 2006, that purports to convey the Property from Defendant Abraham Cohen to his mother Defendant Esther Cohen for no consideration. Plaintiff contends that this was all accomplished so that Engelsberg's ownership would "not to be of record at the time of the sale of the Property from Salem to Engelsberg and the date Engelsberg executed the SunTrust Mortgage, both of which occurred on October 6, 2006." (See Plaintiff's Complaint, Paragraph 35). What is more, the Plaintiff alleges that "the Purported Salem-Cohen Deed and the Purported Correction Deed, with their inexplicable discrepancies with respect to the date of execution are either fraudulent and of no force and effect or forgeries, void *ab initio*, and of no force and effect." (See Plaintiff's Complaint, Paragraph 50). The Plaintiff seeks a declaratory judgment, *inter alia*, declaring and adjudging that Plaintiff, as trustee, holds a valid mortgage superior to any interest or lien claimed by any of the Defendants.

Defendants Abraham Cohen and Esther Cohen (hereinafter referred collectively as the “Cohen Defendants”) now move (motion sequence #2) for an order pursuant to CPLR 3211(a)(4), 3211(a)(5) and in the alternative 3211(a)(8) (in relation solely to Defendant Abraham Cohen) dismissing the Complaint as against them. The Cohen Defendants contend that the purported transactions involving the Property and alleged borrowed funds at issue, occurred in 2006, and as a result Plaintiff’s action is barred by a ten year statute of limitations and should be dismissed pursuant to CPLR 3211(a)(5). In addition, the Cohen Defendants contend that the matter should be dismissed pursuant to CPLR 3211(a)(4). The Defendants argue that the Plaintiff commenced a prior action against the same Defendants that related to the exact same occurrences as described in the prior complaint captioned *U.S. Bank National Association v. Sion Salem, et al.*, Supreme Court Kings County (Index Number 5220/2014). Finally, the Cohen Defendants contend that service of process upon Defendant Abraham Cohen was not properly made and they move pursuant to CPLR 3211(a)(8) contending that the Complaint should be dismissed as against Abraham Cohen.

The Plaintiff opposes the motion and cross-moves (motion sequence #3) for separate relief. In opposition to Defendants’ motion, the Plaintiff contends that the Cohen Defendants’ motion should be denied in relation to CPLR 3211(a)(5), as the statute of limitations has not expired. The Plaintiff also contends that the instant matter should not be dismissed pursuant to CPLR 3211(a)(4) given that the afore-referenced prior proceeding has been dismissed. As part of their motion (motion sequence #3) the Plaintiff seeks an order: a) directing a traverse hearing to determine whether Defendant Abraham Cohen was properly served or, in the alternative, if the traverse hearing determines that service was not proper as against Defendant A. Cohen, b) pursuant to CPLR §§ 2004, 306-b and 308(5), granting Plaintiff an extension of time to effectuate service upon Defendant Abraham Cohen, for a period of one hundred and twenty days after entry of an order granting the motion. Plaintiffs also seek leave to serve Abraham Cohen by means of an alternate method of service.

Turning to the merits of the Cohen Defendant’s application (motion sequence #2) to dismiss the instant complaint pursuant to CPLR 3211(a)(5), the Court finds that the Cohen Defendants have not provided sufficient proof that the ten year statute of limitations serves to bar commencement of this action and their motion on this ground is therefore denied. See *Strough v. Inc. Vill. of W. Hampton Dunes*, 167 AD3d 800, 801, 91 N.Y.S.3d 488 [2d Dept 2018]. The Cohen Defendants contend that the Plaintiff’s action is untimely because it was not commenced within ten years from October 20, 2006, when the deed from Defendant Abraham Cohen to Defendant Esther Cohen was recorded. The Plaintiff

claims that the instant matter is timely as its borrower, Engelsberg, acquired title to the Property by virtue of the Salem-Engelsberg Deed on October 6, 2006, and was in legal possession of the Property within ten years of the commencement of this action. Further, the Plaintiff alleges that the afore-referenced series of deeds were forgeries and as such were *void ab initio*.

The Plaintiff alleges that the Salem-Cohen Deed and the Correction Deed are “either fraudulent and of no force and effect or forgeries, *void ab initio*, and of no force and effect.” As a result, the Plaintiff contends that since Defendant Esther Cohen “...did not obtain valid title to the Property she was incapable of lawfully encumbering the Property.” (See Plaintiff’s Complaint Paragraphs 42 through 53). In *Faison v. Lewis*, the Court held that “under well-established real property principles, because only a holder of legal title may convey an interest in real property, no property interest can be conveyed by a forged deed, and no person may be a *bona fide* purchaser of real estate on the force of such deed.” The Court further stated that “our recording statute does not apply to a forged deed, with the consequence that recording a forged deed cannot transfer title.” “Therefore, a void deed is not subject to a statutory time bar.” See *Faison v. Lewis*, 25 N.Y.3d 220, 32 N.E.3d 400 [2015]. Accordingly, the application by the Cohen Defendants to dismiss the complaint pursuant to CPLR 3211(a)(5) is denied, at this time.

The Court also denies the Cohen Defendants’ application made pursuant to CPLR 3211(a)(4). “Pursuant to CPLR 3211(a)(4), a court has broad discretion in determining whether an action should be dismissed on the ground that there is another action pending.” *In re Willnus*, 101 A.D.3d 1036, 1037, 957 N.Y.S.2d 229, 230 [2nd Dept 2012]. “The critical element is whether both suits arise out of the same subject matter or series of alleged wrongs.” *Jadron v. 10 Leonard St., LLC*, 124 A.D.3d 842, 843, 2 N.Y.S.3d 563, 565 [2nd Dept 2015]. However, a Court is within its discretion to deny such an application when the prior proceeding has been dismissed. See *Diaz v. Philip Morris Companies, Inc.*, 28 A.D.3d 703, 705, 815 N.Y.S.2d 109, 111 [2nd Dept 2006]. In the instant proceeding, the prior action was dismissed and has not been restored. As a result, the Court finds that the instant matter should proceed and not be dismissed pursuant to CPLR 3211(a)(4). This determination is without prejudice and may be renewed on good cause shown, after the appeal pending at the Appellate Division, Second Department has been handed down.

Finally, the Court denies that aspect of the Cohen Defendants’ motion seeking to dismiss the complaint as against Defendant Abraham Cohen pursuant to CPLR 3211(a)(8), and grants the Plaintiff’s application (motion sequence #3), solely to the extent that it directs that a traverse hearing be conducted

to determine whether Defendant Abraham Cohen was served properly. In his affidavit, Defendant Abraham Cohen states that the Plaintiff indicates that he was served at 811 Avenue S, Brooklyn, NY, but that this address was not his dwelling place, or his actual place of business. The Plaintiff contends that it conducted a diligent search for a current service address for Defendant Abraham Cohen and served the pleading on him personally by delivering a copy of same upon Defendant Esther Cohen, his mother, a person of suitable age and discretion at 811 Avenue S, Brooklyn, New York. The Plaintiff further contends that prior to serving Defendant Abraham Cohen the process server asked Defendant Esther Cohen whether her son was home, to which she allegedly responded that "he is not home right now." The Plaintiff also alleges that it made three other attempts to serve Defendant Abraham Cohen at 41 Ponderosa Drive in Lakewood New Jersey. The Court finds that the Plaintiff has sufficiently alleged that it made a diligent and good faith effort to serve Defendant Abraham Cohen and as a result a traverse hearing will be conducted to determine whether Defendant Abraham Cohen was properly served. As a result, the Court directs a traverse hearing on the issue of whether service of process was effectuated. *See U.S. Bank v. Arias*, 85 A.D.3d 1014, 927 N.Y.S.2d 362 [2nd Dept 2011]; *Washington Mut. Bank v. Holt*, 71 A.D.3d 670, 670, 897 N.Y.S.2d 148, 149 [2nd Dept 2010].

Based upon the foregoing, it is hereby ORDERED as follows:

The Cohen Defendants' motion pursuant to CPLR 3211(a)(4),(5) and (8) (motion sequence #2) is denied.

The Plaintiff's motion (motion sequence #3) is granted solely to the extent that a traverse hearing will be directed by separate order.

The foregoing constitutes the Decision and Order of the Court.

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Carl J. Landicino, J.S.C.

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