Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

PEDRO LOPEZ x

- against -

IRVING BISONO, et al. x

Index Number 6147 2004

Motion Date October 23, 2007

Motion Cal. Number 19

Motion Seq. No. 6

The following papers numbered 1 to 26 read on this motion by plaintiff for summary judgment, to set aside and nullify the deeds dated March 1, 1996 and July 15, 2005, and to set aside and nullify the mortgage dated July 15, 2005; this cross motion by defendant Gladys Ramirez for summary judgment dismissing the amended complaint as against her; and this cross motion by defendant First Continental Mortgage and Investment Corp. (First Continental) for summary judgment dismissing the complaint asserted against it, or in the alternative, for partial summary judgment in its favor on its counterclaim for equitable subrogation.

	Papers Numbered
Order to Show Cause - Affidavits - Exhibits.....	1-8
Notices of Cross Motion - Affidavits - Exhibits..	9-18
Answering Affidavits - Exhibits.....	19-20
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Upon the foregoing papers it is ordered that the motion and cross motions are determined as follows:

Plaintiff commenced this action by filing a copy of the summons with notice on March 16, 2004, claiming he is the true owner in fee simple of the real property known as 33-26 104th Street, Corona, New York, having acquired the property pursuant to a deed dated March 1, 1996, and recorded on April 4, 1996, from GST Properties, Inc., a corporation allegedly controlled by defendant Irving Bisono (the GST deed). Plaintiff alleged that he learned another deed, also dated March 1, 1996, had been recorded against the property on August 16, 2002, which purportedly conveyed plaintiff's ownership interest in the property to defendant Bisono, thereby vesting fee simple title in defendant Bisono (the Bisono deed). Plaintiff further alleged that his signature on the Bisono deed is a forgery. Plaintiff thereafter served a supplemental summons and amended complaint dated January 25, 2006, adding Gladys Ramirez and First Continental as party defendants and allegations that defendant Bisono, without plaintiff's authority, wrongfully tendered a deed dated July 15, 2005 to the subject premises, to defendant Ramirez (the Ramirez deed), and that defendant Ramirez, in turn encumbered the property by executing and delivering a mortgage in the principal amount of $567,000.00 plus interest, in favor of defendant First Continental.

Plaintiff seeks to obtain a judgment declaring he is the owner of the property, and rescinding the Bisono deed as null and void, as a product of forgery, and the Ramirez deed and First Continental mortgage as null and void, having appeared in the chain of title proceeding forth from the forged Bisono deed. Plaintiff also seeks an award of punitive damages and costs and disbursements, together with attorneys' fees. It is undisputed that plaintiff did not file a notice of pendency with respect to this action.

Defendant Ramirez served an answer asserting various affirmative defenses, including one based upon her claim that she is a bona fide purchaser for value, who is entitled to the protections of Real Property Law § 291. She also interposed counterclaims based upon unjust enrichment and equitable subrogation, and cross claims against defendant Bisono.

Defendant First Continental served an answer asserting various affirmative defenses, including ones based upon the doctrine of laches, unclean hands and estoppel, and its claim that it is a bona fide encumbrancer for value. Defendant First Continental also asserted cross claims against defendant Bisono and interposed a counterclaim for equitable subrogation.

Plaintiff filed a note of issue on May 16, 2007.

It is well established that 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" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]).

The Bisono deed, on its face, is properly subscribed and bears the acknowledgment of Begino J. Ciancia, a notary public. There is a "presumption of due execution, which may be rebutted only upon a showing of clear and convincing evidence to the contrary" (Spilky v Bernard H. La Lone Jr., P.C., 227 AD2d 741, 743 [1996]; see Singh v Kaur, 294 AD2d 562 [2002]; Midfirst Bank v Rath, 270 AD2d 932 [2000]). Plaintiff, in an effort to demonstrate his signature on the Bisono deed is a forgery, has submitted, among other things, the affidavits of Robert Baier, plaintiff's forensic document examiner, and Begino J. Ciancia, who avers that his signature, as the notary public on the Bisono deed, is a forgery. Given the acknowledgment of plaintiff's signature before a notary public (see Son Fong Lum v Antonelli, 102 AD2d 258 [1984], affd 64 NY2d 1158 [1985]; see also Federal Nat. Mortg. Assn. v Woodbury, 254 AD2d 182 [1998]), such evidence does not, in and of itself, warrant a finding that plaintiff's signature is a forgery. Rather, it raises a question of fact concerning the alleged forgery. In addition, questions of fact remain as to circumstances surrounding execution of the Bisono deed, including whether plaintiff consented to and authorized, or adopted the alleged false signature thereon (see Rothschild v Title Guarantee & Trust Co., 204 NY 458 [1912]; Tok Hwai Koo v Robert Koo Wine & Liquor, Inc., 170 AD2d 360 [1991]; cf. Filowick v Long, 201 AD2d 893 [1994]). Under such circumstances, summary judgment is unwarranted (see Fed. Natl. Mtge. Assn. v Woodbury, 254 AD2d 182, supra; see also Great Eastern Bank v Chang, 227 AD2d 589 [1996], lv dismissed 88 NY2d 1064 [1996]). The motion by plaintiff is denied.

Defendants Ramirez and First Continental assert that plaintiff should have filed a notice of pendency, and settled an order to enjoin the sale of the property (in accordance with the direction in the memorandum decision dated August 19, 2004 of Justice Joseph G. Golia). Defendants Ramirez and First Continental further assert that because plaintiff failed to take either step, they did not learn, in time, of plaintiff's claim that he was a victim of a fraudulent scheme perpetrated by defendant Bisono. Defendant Ramirez and First Continental argue

that defendant Ramirez would not have entered into the sales transaction with defendant Bisono and that defendant First Continental would not have entered into the mortgage transaction with defendant Ramirez, respectively, had they been aware of this litigation by means of a notice of pendency, or an order granting a preliminary injunction. Thus, they argue that plaintiff should be estopped from rescinding the Ramirez deed and voiding the First Continental mortgage, due to the prejudice he caused them.

In accordance with "Real Property Law § 266, a bona fide purchaser or encumbrancer for value is protected in his or her title unless he or she had previous notice of the alleged prior fraud by the seller" (Karan v Hoskins, 22 AD3d 638 [2005]; see Anderson v Blood, 152 NY 285 [1897]; Miner v Edwards, 221 AD2d 934 [1995]; Emerson Hills Realty v Mirabella, 220 AD2d 717 [1995]). "[A] person cannot be a bona fide purchaser or encumbrancer for value through a forged deed, as such a deed is void and conveys no title" (Karan v Hoskins, 22 AD3d at 639; see Marden v Dorthy, 160 NY 39 [1899]; Kraker v Roll, 100 AD2d 424, 430-431 [1984]; see also Yin Wu v Wu, 288 AD2d 104 [2001]).

A prospective purchaser is not entitled to rely solely on record title in the event he or she has knowledge of a fact, sufficient to put him or her on inquiry as to the existence of some right or title in conflict with that the purchaser is about to buy (see Williamson v Brown, 15 NY 354, 362 [1857]). Under such circumstance, the purchaser is presumed either to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his or her claim to be considered as a bona fide purchaser (see Williamson v Brown, id.; Vitale v Pinto, 118 AD2d 774 [1986]). "Actual possession of real estate is sufficient notice to a person proposing to take a mortgage on the property, and to all the world, of the existence of any right which the person in possession is able to establish" (Phelan v Brady, 119 NY 587, 591-592 [1890]).

In this instance, defendants Ramirez and First Continental were aware the property was not vacant, and instead, was occupied by "tenants." Thus, although plaintiff failed to file a notice of pendency or settle a preliminary injunction order, (which presumably would have worked to preserve the status quo), the papers submitted herein raise a triable issue of fact as to whether plaintiff was in open possession of the subject premises, and whether defendants Ramirez and First Continental were free from negligence in acting to inquire as to his interest in the

property (see Real Property Law § 291; Phelan v Brady, 119 NY at 591-592; Doyle v Siddo, 31 AD3d 697 [2006]; Vitale v Pinto, 118 AD2d at 776). Additionally, defendants Ramirez and First Continental were aware that a mortgage existed on the property which was in the name of plaintiff, as opposed to defendant Bisono, and that although the GST and Bisono deeds were dated on the same date, the Bisono deed was not recorded until over six years later. Again, a question of fact exists as to whether this unusual circumstance, regarding the recording of the GST and Bisono deeds, should have put defendants Ramirez and First Continental on notice that there might be a cloud on the record title (see Roth v Porush, 281 AD2d 612 [2001]; R.C.P.S. Associates v Karam Developers, 238 AD2d 492 [1997]). Summary judgment dismissing the amended complaint as against defendants Ramirez and First Continental therefore is unwarranted (see Zuckerman v City of New York, 49 NY2d 557, supra).

The cross motion by defendant Ramirez for summary judgment dismissing the amended complaint asserted against her is denied. That branch of the cross motion by defendant First Continental for summary judgment dismissing the amended complaint asserted against it is also denied.

With respect to the alternative branch of the cross motion by defendant First Continental for partial summary judgment in its favor on its counterclaim for equitable subrogation, defendant First Continental asserts that at closing, the sum of $192,568.48, representing a portion of the proceeds of its mortgage loan to defendant Ramirez, was used to satisfy the outstanding mortgage lien held by Washington Mutual Bank. Defendant First Continental, however, has failed to demonstrate that issue has been joined with respect to the counterclaim (see CPLR 3212). Furthermore, insofar as issue, in fact has been joined, questions in relation to the counterclaim, of whether the Bisono deed should be rescinded and whether First Continental is a bona fide encumbrancer remain unresolved. Thus, summary judgment on the counterclaim for equitable subrogation necessarily would have to be conditional. The branch of the cross motion by defendant First Continental for partial summary judgment on its counterclaim for equitable subrogation is denied.

Dated: January 8, 2008

AUGUSTUS C. AGATE, J.S.C.