

Wavecrest (UK) Ltd. v Venture Telecom, L.L.C.

2010 NY Slip Op 30474(U)

January 13, 2010

Supreme Court, Queens County

Docket Number: 17841/2005

Judge: Augustus C. Agate

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

WAVECREST (UK) LIMITED	x		Index Number <u>17841</u> 2005
- against-			Motion Date <u>September 15,</u> 2009
VENTURE TELECOM, L.L.C., et al.			Motion Cal. Number <u>35</u>
	x		Motion Seq. No. <u>7</u>

The following papers numbered 1 to 13 read on this motion by defendant Michael E. Herskowitz i/s/h/a Michael E. Hershkowitz pursuant to CPLR 3212 for summary judgment dismissing the amended complaint asserted against him; and this cross motion by plaintiff for summary judgment in its favor as against defendant Herskowitz.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-6
Notice of Cross Motion - Affidavits - Exhibits.....	7-11
Answering Affidavits - Exhibits.....	12-13

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff Wavecrest (UK) Ltd. (Wavecrest) obtained a foreign country judgment against Venture Telecom, LLC (Venture) on April 25, 2003 from the High Court of Justice, Queens Bench Division, in London, England in the amount of \$618,951.75, together with interest. With the intention of enforcing its rights as a creditor, plaintiff Wavecrest originally commenced this action on May 28, 2003, pursuant to various provisions of the Debtor and Creditor Law. It sought to void, as fraudulent, three mortgages given by defendant Venture, the then record owner, to defendant Rebecca Goodman (the Goodman mortgages)

encumbering the real property known as 110-2 Corona Avenue, Queens, New York, and a subsequent deed dated April 10, 2003, and recorded on August 19, 2003, conveying the property, subject to the Goodman mortgages, from defendant Venture to defendant M&UBC, LLC (M&UBC), a purported “shell corporation.” Plaintiff also sought an award of money damages and attorneys’ fees pursuant to Debtor and Creditor Law § 276-a. Plaintiff Wavecrest alleged that defendant Venture’s encumbrance of the premises with the Goodman mortgages, and conveyance of the property, subject to the Goodman mortgages, to defendant M&UBC were part of a fraudulent scheme by defendants Venture and M&UBC to avoid the debts owing to plaintiff by defendant Venture, and frustrate enforcement of the foreign country (England) judgment.

By order dated April 13, 2006 in this action, plaintiff Wavecrest obtained a default judgment against defendants Venture, Rebecca L. Goodman, Philip Goodman, New York State Department of Taxation and Finance, City of New York Environmental Control Board and Al Walk. Defendants M&UBC and James Lorisa appeared and answered the complaint, but subsequently, by order dated January 24, 2007, their answer was stricken due to their failure to appear for depositions and respond to a notice of discovery and inspection.

By order dated November 21, 2007, plaintiff Wavecrest obtained leave to serve a supplemental summons and amended complaint, naming Tanya Blackwood and Michael Herskowitz as additional defendants and adding causes of action for declaratory relief under RPAPL, article 15. In the amended complaint, plaintiff Wavecrest asserted an additional allegation that it obtained an ex parte, prejudgment order of attachment dated June 4, 2003, in a federal court action, entitled *Wavecrest (UK) Ltd. v Venture Telecom, LLC* (Docket No. 03 CV 2679) (Federal Action), which Wavecrest had commenced, under both the New York Uniform Foreign County Money-Judgment Act (CPLR article 53) and common law, for the purpose of obtaining recognition and enforcement of the judgment issued by the English court. Plaintiff Wavecrest alleged that it had filed a notice of the Federal Court order of attachment on July 29, 2003 with the clerk of Queens County, and that the notice was indexed against the property. Plaintiff Wavecrest also alleged that notwithstanding the filing and indexing of the notice of the Federal Court order of attachment, defendant M&UBC conveyed the property on August 1, 2006 to defendant Blackwood subject to the Goodman mortgages. Plaintiff Wavecrest further alleged that the Goodman mortgages were assigned to Herskowitz by assignments dated September 20, 2006. Defendant Blackwood, in turn, allegedly gave defendant Herskowitz an additional mortgage on the property in the principal amount of \$137,1010.40, plus interest and that on the same day, the Herskowitz mortgage was consolidated with the balance due and owing on the Goodman mortgages, for a total single mortgage lien in the principal amount of \$300,000.00, plus interest. Plaintiff Wavecrest further alleged that it ultimately obtained a default judgment dated November 19,

2003, in the Federal Action against defendant Venture in the amount of \$618,951.75, not including costs and attorneys' fees.

Defendant Herskowitz served an answer dated March 20, 2008, admitting certain allegations of the complaint, and denying others. Defendant Herskowitz asserted four affirmative defenses based upon his claim that he obtained assignment of the Goodman mortgages, and made the consolidated mortgage loan to defendant Blackwood, in good faith and without notice of plaintiff Wavecrest's claims.

By order dated December 16, 2008, plaintiff Wavecrest was granted leave to enter a default judgment against defendants M&UBC and Blackwood.

Defendant Herskowitz moves for summary judgment dismissing the amended complaint. Defendant Herskowitz contends that his consolidated mortgage is superior to any right, title or interest that plaintiff Wavecrest may have in the property, and plaintiff Wavecrest is estopped from asserting its claims against him pursuant to Real Property Law § 266. He asserts that he lacked any actual knowledge, prior to the filing and service of the amended complaint, of the fraud allegedly perpetrated by defendants Goodman, Blackwood, Venture and M&UBC. Defendant Herskowitz further asserts that plaintiff Wavecrest may not assert reliance upon the protections of the Recording Act (Real Property Law § 291) to establish that he was on constructive notice of Wavecrest's claims. In support of his motion, defendant Herskowitz offers, among other things, a copy of the pleadings, the affirmation of his counsel, his own affidavit, a copy of the Goodman mortgages and assignments dated September 20, 2006, the deeds dated April 10, 2003 and August 1, 2006, the \$137,010.40 mortgage, and consolidation, extension and modification agreement (CEM agreement), and the Federal Court judgment. In his affidavit, defendant Herskowitz states that he had no actual or constructive notice or knowledge of any fraud perpetrated by defendants Goodman, Blackwood, Venture and M&UBC prior to the commencement of this action against him, and that he acquired the Goodman mortgages by assignment in good faith and as an investment, and for valuable consideration, and likewise, provided Blackwood with an additional loan in the principal amount of \$137,010.40, plus interest and executed the CEM agreement in good faith and for valuable consideration.

Plaintiff Wavecrest opposes the motion and cross-moves for summary judgment in its favor against defendant Herskowitz. Plaintiff Wavecrest claims defendant Herskowitz is not a bona fide encumbrancer for value and without notice of fraud, and therefore, cannot rely upon Real Property Law § 266 to avoid having his consolidated mortgage set aside. Plaintiff Wavecrest asserts that the Goodman mortgages, and the transfers from defendant Venture to defendant M&UBC, and from defendant M&UBC to defendant Blackwood, have been determined to have been fraudulent conveyances by virtue of the default judgment

previously obtained in this action against defendants Venture, Goodman, M&UBC and Blackwood. According to plaintiff, such determination is binding upon defendant Herskowitz and therefore, the consolidated Herskowitz mortgage may be set aside as appearing in the chain of title proceeding from the fraudulent conveyances. Plaintiff asserts that defendant Herskowitz had constructive notice of its claims in the Federal Action, including the existence of the foreign country (England) judgment, by virtue of its filing of the notice of the Federal Court order of attachment, and hence, Herskowitz took assignment of the Goodman mortgages and made the consolidated mortgage loan subject to those rights which Wavecrest subsequently was able to establish in the Federal Action. In support of its cross motion, plaintiff presents an affirmation of its counsel, an affidavit of Graham David Packer, the vice-president of contracts for plaintiff, the Federal Court order of attachment, and the notice of the Federal Court order of attachment.

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]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of its position (*see Zuckerman v City of New York*, 49 NY2d 557, *supra*).

Here, defendant Herskowitz has made his prima facie showing that he was a bona fide encumbrancer for value by showing that he received assignment of the Goodman mortgages and underlying notes, and that Blackwood was the record owner of the subject property at the time of the closing of the Herskowitz mortgage loan transaction.

Plaintiff Wavecrest concedes that the premises were conveyed from defendant Venture to defendant M&UBC prior to the filing of the notice of the Federal Court order of attachment, and makes no claim that defendant Venture retained any legal interest in the property. Thus, plaintiff cannot establish that at the time of the conveyance from defendant Venture to defendant M&UBC the property was subject to the provisional remedy of attachment which had been granted by the Federal Court (*see Leonardo v Siegal*, 150 AD2d 760 [1989]).

The default judgment against defendant Venture and order striking the answer of defendant M&UBC were obtained by plaintiff prior to the joinder of defendant Herskowitz as a named defendant in this action. Generally, a judgment obtained by a plaintiff as against a defaulting defendant is not entitled to collateral estoppel effect against a nondefaulting defendant, who would otherwise be denied a full and fair opportunity to litigate issues of

liability (*see Holt v Holt*, 262 AD2d 530, 531 [1999]; *see also Chambers v City of New York*, 309 AD2d 81 [2003]). Plaintiff argues, however, that because the Herskowitz mortgage was recorded after the filing of the notice of the Federal Court order of attachment, defendant Herskowitz is bound by all the proceedings taken in this action after such filing to the same extent as if he was a party at the time.

Although a levy made by a sheriff (or a United States marshal) by filing a notice of attachment in the county clerk's office has the same effect as the filing of a notice of pendency, i.e. it places all subsequent purchasers or mortgagees of the land on notice they will take subject to the plaintiff's pre-existing rights (*see* McLaughlin, 2010 Supp Practice Commentaries, McKinney's Cons Laws of New York, Book 7B, CPLR 6216, 2010 Pocket Part, at 76), plaintiff Wavecrest makes no claim that the Sheriff or United States Marshall levied against the subject property. Moreover, the notice of the Federal Court order of attachment did not provide constructive notice to defendant Herskowitz of the instant action, but rather only of the Federal Action, and thus, cannot serve to bind defendant Herskowitz to all of the proceedings previously taken herein prior to his joinder. Defendant Herskowitz, therefore, is not precluded from litigating the issue of whether the "conveyances" to defendants Goodman, M&UBC, Blackwood and himself were fraudulent, and plaintiff must still meet its burden of proving, over Herskowitz's defenses, that the consolidated mortgage should be set aside as a consequence of the alleged fraud (*see Holt v Holt*, 262 AD2d 530, 531 [1999]).

A mortgagee which relies for protection upon the doctrine of being a bona fide encumbrancer must show that at the time of the mortgage, it paid valuable consideration upon the belief and the validity of the mortgagor's claim of title without notice, actual or constructive, of any outstanding claim of fraud (*see* Real Property Law § 266). If a mortgagee provides a mortgage loan with sufficient knowledge to put a reasonably prudent person on inquiry as to fraud, the mortgagee is not a bona fide encumbrancer. However, it is only if the "facts within the knowledge of the [lender] are of such a nature, as, in reason, to put him upon inquiry, and to excite the suspicion of an ordinarily prudent person and he fails to make some investigation, [that] he will be chargeable with that knowledge which a reasonable inquiry, as suggested by the facts, would have revealed" (*Anderson v Blood*, 152 NY 285, 293 [1897], *rearg denied* 153 NY 649 [1987]; *see Miner v Edwards*, 221 AD2d 934 [1995]).

Plaintiff Wavecrest has failed to offer any evidence of actual notice on the part of defendant Herskowitz of the alleged fraudulent activities of defendants Venture, Goodman, M&UBC and Blackwood. Contrary to the further argument of plaintiff, the notice of the Federal Court order of attachment, without more, cannot be said to have provided defendant Herskowitz with constructive notice of the fraudulent intent on the part of defendant Venture

to avoid its creditors. Again, the notice advised defendant Herskowitz that a foreign country judgment had been obtained against defendant Venture, and plaintiff Wavecrest was seeking its recognition and enforcement in the Federal Action. Thus, it informed defendant Herskowitz that defendant Venture was indebted to plaintiff Wavecrest. It did not alert him that defendant Venture was insolvent or had conveyed the property with the intent to avoid paying the just debt to Wavecrest. Nor can such notification alone be said “to excite the suspicion of an ordinarily prudent person” (*Anderson v Blood*, 152 NY at 293 [1897]). Hence, defendant Herskowitz was under no duty to conduct an investigation into the possibility that the property had been fraudulently conveyed before taking assignment of the Goodman mortgages or making the mortgage loan to defendant Blackwood.

Under such circumstances, defendant Herskowitz has made a prima facie case that he took good title as a bona fide mortgagee, for value and without constructive or actual notice of any purported fraud, and plaintiff Wavecrest has failed to come forward with any evidence showing the existence of a triable issue of fact. Defendant Herskowitz, therefore, is entitled to summary judgment dismissing the amended complaint asserted against it. The motion by defendant Herskowitz is granted, and the cross motion by plaintiff Wavecrest is denied.

Dated: January 13, 2010

AUGUSTUS C. AGATE, J.S.C.