

Dave Bofill Mar. Inc v BNY Mellon, N.A.

2011 NY Slip Op 31437(U)

May 20, 2011

Sup Ct, Suffolk County

Docket Number: 7804-2010

Judge: Emily Pines

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SHORT FORM ORDER

INDEX NUMBER: 7804-2010

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
 J. S. C.

Original Motion Date: 10-19-2011 &
 11-30-2010
 Motion Submit Date: 02-15-2011
 Motion Sequence No's.: 001 MD
 002 MG
 CASEDISP

FINAL
 NON FINAL

DAVE BOFILL MARINE INC., and DAVID BOFILL
a/k/a DAVE BOFILL

Plaintiff,

-against-

**BNY MELLON, N.A., as Successor in Interest to
 Mellon Bank, N.A., MELLON CORPORATION, N.A.
 as Successor in Interest to Mellon Financial
 Corporation, CAPITOL ONE BANK, N.A. d/b/a
 CAPITAL ONE BANK USA, NA as Successor in
 Interest to North Fork Bancorporation, Inc.,**

Defendant.

_____X

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ORDERED, that the cross-motion (motion sequence # 002) by Defendants for summary judgment dismissing the Amended Verified Complaint is granted; and it is further

ORDERED, that the motion (motion sequence #001) by Plaintiffs for summary judgment is denied as moot.

FACTUAL AND PROCEDURAL BACKGROUND

In this action for conversion and breach of contract, the plaintiffs, Dave Bofill Marine, Inc. and David Bofill (“Plaintiffs”) move for summary judgment and the defendants, Capital One, N.A., sued herein as Capital One Bank, N.A. d/b/a Capital One Bank USA, NA, Successor in Interest to North Fork Bancorporation (“Capital One”), and the Bank of New York Mellon formerly known as Mellon Bank, N.A., sued herein as BNY Mellon, N.A. (“BNY Mellon”) and the Bank of New York Mellon Corporation (“BNY Mellon Corp.”) cross-move for summary judgment dismissing the complaint.

The Amended Verified Complaint dated March 17, 2010, alleges, among other things, that on or about April 25, 2007, Chubb Federal Insurance Company issued a check in the amount of \$300,000 payable to Plaintiffs and Kydds Marine Center, Inc. (“Kydds”) in payment of an insurance claim; that the check was delivered to Kydds and constructively delivered to Plaintiffs as co-payees; that “Mellon” was the drawee bank; that on or about April 25, 2007, the check was presented to Capital One by Kydds, which had secured the check from Chubb without the knowledge or consent of the Plaintiffs; that an unknown person on behalf of Kydds forged the Plaintiffs’ endorsements on the check and presented it to Capital One for deposit into Kydds’ account; that the check was thereafter paid by Mellon; that the person or persons who presented the check on behalf of Kydds for payment did not have the authority or right to endorse Plaintiffs’ signatures.

The Amended Verified Complaint contains two causes of action. The first alleges that by honoring the check, Mellon converted the proceeds to Plaintiffs’ detriment and that Mellon is liable to Plaintiffs in the face amount of the check pursuant to UCC 3-419. The second cause of action alleges that Capital One breached its contractual obligation to hold the proceeds of the check for the benefit of the Plaintiffs. Defendants served Answers to the Amended Verified Complaint and asserted numerous affirmative defenses including: failure to state a cause of

action, ratification, payment in good faith and in accordance with reasonable commercial standards, lack of delivery/possession, Plaintiffs' breach of contract and/or negligence, waiver and/or estoppel, laches, failure to mitigate damages, and that BNY Mellon Corp., the parent corporation of BNY Mellon, did not pay the check at issue. Capital One interposed a counterclaim against Plaintiffs for contribution and/or indemnification.

Plaintiffs now move for summary judgment. In support of the motion the Plaintiffs submit an affidavit of Plaintiff David Bofill. Mr. Bofill repeats many of the allegations in the Amended Verified Complaint and further states, in relevant part, as follows:

(a) In January, 2007, I was the mortgagee of a business property, which was operating as "Kydds Marine Center" in Massapequa, New York . . . The mortgagor was required by the terms of the mortgage to provide me with insurance, and therefore, as mortgagee, I was a named insured on a certificate of insurance on the property . . .

(b) On January 8, 2007, a fire occurred at Kydd's Marine Center, causing extensive damage.

(c) On or about April 25, 2007, Chubb approved a fire insurance claim submitted by Kydd's, and issued a check in the amount of \$300,000 in payment of the claim. The check . . . was drawn upon Mellon Bank, N.A. and made payable to the insureds, Kydd's Marine Center, Inc., Dave Bofill Marine, Inc. and Dave Bofill.

(d) Upon information and belief, the check was delivered to Kydd's Marine Center, Inc.

(e) The check was presented to North Fork Bank for deposit to

the account of Kydds Marine Center. The back of the check exhibits the apparent indorsement of all three beneficiaries; the signature of my name and that of Dave Bofill Marine, Inc. are forgeries. Neither I, individually, nor an officer of Dave Bofill Marine authorized the forged indorsements or the deposit of the check to Kydd's Marine account.

(f) Approximately six months after the issuance date of the check, at which time the insured structure had not been repaired or rebuilt, I made inquiries of a person whom I knew to be the insurance agent for a principal of Kydd's Marine Center. At that time, the agent informed me that the insurance check had been issued.

(g) When I received a copy of the check, it was immediately apparent to me that the check had been negotiated, and that my signature and that of the corporate plaintiff had been forged as an endorsement.

(h) I made demand of Dennis Smigiel, principal of Kydd's Marine Center, for the insurance proceeds. I never received any part of the proceeds.

(i) Kydd's Marine Center, the mortgagor, surrendered the property in or about December, 2008 or January 2009, in lieu of foreclosure. The balance of the mortgage at that time was \$525,000.00; in addition, real estate taxes were not paid by Kydd's as required by the mortgage. I sold the subject property, with the fire damaged building remaining unimproved, on or about April 15, 2009 for \$350,000.00. Payment was made by the new purchaser by the assumption of the modified mortgage agreement . . . The purchasers of the property assumed a modified mortgage in the sum of \$350,000.00.

Plaintiffs argue that they are entitled to summary judgment against the Mellon defendants on their conversion claim because UCC § 3-419(1)(c) provides that a check is converted when “it is paid on a forged indorsement.” Plaintiffs contend that a payor bank which pays on a forged instrument is absolutely liable to the payee for conversion and that the measure of damages is the face amount of the check. Additionally, Plaintiffs argue that because Capital One failed to act in accordance with reasonable commercial standards when it negotiated a check with a forged indorsement.

Defendants oppose the Plaintiffs motion and cross-move for summary judgment dismissing the Amended Verified Complaint. The primary argument advanced by the Defendants in support of their cross-motion is that any rights the Plaintiffs had in the check terminated upon their acceptance of a deed in lieu of foreclosure on the property and their subsequent sale of the property to a buyer who assumed the mortgage in a modified amount. Defendants note that Plaintiffs admit that they accepted the surrender of the property in or about December 2008 or January 2009 in lieu of foreclosure and point out that Plaintiffs failed to offer any evidence that the mortgage debt survived the conveyance in lieu of foreclosure. Rather, Defendants stress that the Assumption and Modification of Mortgage Agreement expressly provides that the purchasers assumed the mortgage with a modification of the principal amount to \$350,000. Thus, Defendants contend that the satisfaction and termination of Kydd’s original mortgage debt terminated Plaintiffs’ interest in the insurance proceeds and their rights in the check, thereby precluding the causes of action asserted against Defendants.

In opposition to Defendants’ cross-motion, Plaintiffs argue, among other things, that UCC § 3-419(2) imposes absolute liability upon a drawee bank for paying over a forged instrument and precludes inquiry into whether the payee has recovered the funds or benefitted from the proceeds of the forged check.

DISCUSSION

A party moving for summary judgment has the burden of making a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence demonstrating the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 85 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). Summary judgment should not be granted where there is any doubt as to the existence of a triable issue; however, once a prima facie showing has been made by the movant, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial (*see, Zayas v. Half Hollow Hills Cent. School Dist.*, 226 AD2d 713 [2nd Dept. 1996]). Speculative and conclusory allegations are insufficient to defeat summary judgment (*see, Boone v. Bender*, 74 AD3d 1111, 1113 [2nd Dept. 2010]).

Here, the Defendants made a prima facie showing of entitlement to judgment as a matter of law. Mr. Bofill admits in his affidavit that the mortgagor, Kydd's Marine Center, surrendered the property in lieu of foreclosure in December 2008 or January 2009, that he sold the property on or about April 15, 2009, and that the purchaser assumed the mortgage in a modified amount. The Court agrees with the Defendants' contention that the surrender of property to the Plaintiffs by the mortgagor, after the fire, the subsequent sale of the property and assumption of the mortgage by the purchaser is fatal to the causes of action for conversion and breach of contract asserted against the Defendants.

The holding of the Appellate Division, Third Department in *Bellusci v. Citibank N.A.* (204 AD2d 843 [3rd Dept 1994]) is applicable here. In *Bellusci*, the owner of a real property submitted a claim to an insurance company after a fire caused damage to the premises. The insurer paid the claim by issuing a check made payable to the owner, the mortgagee of the premises and others. After receiving the check from the insurance broker, the owner presented the check to Citibank which accepted the check, credited the owner's account and negotiated the check to Shawmut Bank, the drawee bank. Shawmut paid the check and debited the insurance company's

account. Thereafter, the mortgagee obtained a judgment of foreclosure and sale against the owner and purchased the premises at the foreclosure sale but failed to obtain a deficiency judgment. The mortgagee commenced an action against Citibank and Shawmut alleging, among other things, conversion and breach of contract by paying the check over a forged endorsement. Citibank and Shawmut moved for summary judgment and the motions were granted. In affirming the order granting the motions for summary judgment, the Appellate Division stated, in relevant part:


“Because a mortgagee is entitled to one satisfaction of his debt and no more, the bidding in of the debt to purchase the property . . . constitute[s] a satisfaction of the debt . . .” (*Whitestone Sav. & Loan Assn. v. Allstate Ins. Co.*, 28 N.Y.2d 332, 335, 321 N.Y.S.2d 862, 270 N.E.2d 694 [citations omitted]), and the satisfaction of the debt terminates the mortgagee’s insurable interest (*id.*, at 334-335, 321 N.Y.S.2d 862, 270 N.E.2d 694). If the foreclosure sale produces a deficiency and the mortgagee fails to procure a deficiency judgment, the proceeds of the sale, regardless of amount, are deemed to be in full satisfaction of the mortgage debt (see, RPAPL 1371[3]). Because “only a person with rights in the instrument may claim conversion” under UCC 3-419 (*State of New York v. Barclays Bank of N.Y.*, 76 N.Y.2d 533, 537, 561 N.Y.S.2d 697, 563 N.E.2d 11, quoting Bailey, Brady on Bank Checks § 27.8, at 27-23), the termination of plaintiff’s interest in the insurance proceeds concomitantly terminates his rights in the check and is fatal to the cause of action against Citibank and Shawmut.

Similarly, here, the surrender of the premises by Kydd’s Marine Center to Plaintiffs in lieu of foreclosure and the subsequent sale of the premises by Plaintiffs to a purchaser who assumed the mortgage in a modified amount, constitutes a satisfaction of Kydd’s debt, and the satisfaction of the debt terminates Plaintiffs’

insurable interest. In opposition to the defendants' cross-motion for summary judgment, Plaintiffs have not demonstrated that the transfer was not in full satisfaction of Kydd's debt. Thus, the termination of Plaintiffs' interest in the insurance proceeds also terminated Plaintiffs' rights in the check. Contrary to Plaintiffs' contention, this conclusion is not reached by analyzing whether Plaintiffs recovered the funds or benefitted from the proceeds of the forged check. Rather, it is reached by determining whether Plaintiffs have any rights in the instrument in the first place. Because they do not, Defendants' cross-motion for summary judgment is granted and the Amended Verified Complaint is dismissed. The Plaintiffs' motion for summary judgment is denied as moot.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: May 20, 2011
Riverhead, New York



EMILY PINES
J. S. C.

FINAL
 NON FINAL