

HSBC Mortgage Corp. v Oberlander

2004 NY Slip Op 30263(U)

September 9, 2004

Supreme Court, Kings County

Docket Number: 10636/02

Judge: Melvin S. Barasch

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At an IAS Term, Part 26 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 9th day of September, 2004

P R E S E N T:

HON. MELVIN S. BARASCH,
Justice.

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HSBC MORTGAGE CORP. F/K/A
MARINE MIDLAND MORTGAGE CORP,

Plaintiff,

- against -

Index No. 10636/02

DAVID OBERLANDER,

Defendant.

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The following papers numbered 1 to 3 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-2 _____
Opposing Affidavits (Affirmations) _____	3 _____
Reply Affidavits (Affirmations) _____	_____ _____
_____ Affidavit (Affirmation) _____	_____ _____
Other Papers _____	_____ _____

Upon the foregoing papers, defendant David Oberlander moves for an order, pursuant to CPLR 2221, granting leave to reargue a decision of this court, dated February 9, 2003, which granted reargument on and vacated a prior order issued on June 13, 2003* and granted

*Due to a typographical error, the order was dated June 13, 2002.

plaintiff's motion for a declaratory judgment that defendant has no interest in the subject property.

Plaintiff brought this action pursuant to article 15 of the RPAPL for a declaratory judgment barring defendant from claiming any right, title or interest in and to the subject premises at 36 Taylor Street, Unit 181, in Brooklyn. The unit was formerly owned by Zissy Mittleman, who executed a mortgage thereon to secure a loan in the amount of \$134,700.00. The mortgage and note were assigned to plaintiff on February 26, 1992. Ms. Mittleman subsequently defaulted on the mortgage and foreclosure proceedings were commenced on March 30, 1993. In conjunction with the foreclosure action, a notice of pendency was filed on April 2, 1993. In the mean time, on January 5, 1993, Ms. Mittleman deeded the property to defendant, which was recorded on May 3, 1993, subsequent to the date of the filing of the notice of pendency. Plaintiff thereafter joined defendant in the foreclosure proceedings.

The initial notice of pendency expired by operation of law on April 1, 1996. Plaintiff filed a successive notice of pendency on September 30, 1996. On October 13, 1998, a judgment of foreclosure and sale was issued. A foreclosure sale was held on June 6, 2000 at which Samuel Schwartz was the successful bidder. Transfer of the deed was held in abeyance pending determination of an August 16, 2000 order to show cause by defendant challenging service of the summons and complaint. The order to show cause was resolved by stipulation whereby the foreclosure action would be discontinued as to defendant and that the judgment of foreclosure and sale "shall not be binding on defendant Oberlander as if he was never made a party defendant to the action." By order dated May 1, 2001, the

Hon. Richard D. Huttner denied plaintiff's motion for a declaratory judgment against defendant in the underlying foreclosure proceedings since defendant was released as a party and directed that plaintiff commence a separate action. Plaintiff thereafter commenced this action against defendant to quiet title to the premises.

Plaintiff subsequently moved for summary judgment on its complaint and for a declaratory judgment against defendant with respect to title to the subject premises. Defendant cross-moved seeking leave to amend his answer and dismiss the complaint. The amendment sought by defendant added a fourth affirmative defense claiming that the underlying judgment of foreclosure was invalid because the first notice of pendency had expired without extension and that, pursuant to the caselaw then in effect, the subsequent September 30, 1996 filing of a notice of pendency was a nullity. The decision relied on by this court in determining that an expired notice of pendency may not be revived, even in a foreclosure action, has since been recalled and vacated by the Appellate Division, First Department (*Campbell v Smith*, 309 AD2d 581 [2003]). As a result, this court granted plaintiff's motion to reargue the June 13, 2003 order by decision dated February 9, 2004. On said motion to reargue, defendant urged this court to adhere to its original decision on other grounds, that he was not bound by the original lapsed notice of pendency and that the commencement of this action was beyond the six year statute of limitations. In the February 9, 2004 decision, this court found defendant's claims to be without merit, stating, in part:

. . . As pointed out above, the lapse of a notice of pendency [] is not fatal in a foreclosure action. It is further clear that pursuant to CPLR 6501, a person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as a party. In this case, defendant's deed to the subject property was recorded after the initial notice of pendency was filed. It was therefore unnecessary to make him a party to the underlying proceeding and he was bound by the foreclosure proceedings regardless of plaintiff's attempt to make him a party. Hon. Richard D. Huttner, who presided over the underlying foreclosure action, explicitly made such a finding. . . However, because of the stipulation which expressly removed defendant in that underlying proceeding and, instead, directed plaintiff to commence a declaratory judgment action against defendant for an adjudication of his rights, title and interest, if any, in the property. This is that action. Since, in fact, defendant was not an indispensable party to the foreclosure proceeding, the stipulation removing him as a party defendant - which was negotiated based upon defendant's contesting the service of the summons and complaint in the underlying action - is not binding upon this proceeding.

CPLR 2221 (d) provides:

- (d) A motion for leave to reargue:
1. shall be identified specifically as such;
 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and
 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.

On the instant motion to reargue the February 9, 2004 decision, defendant contends that this court misapprehended the language of the stipulation between the parties and the May 1, 2001 order of Judge Huttner, overlooked the law with regard to the effect of an expired notice of pendency, overlooked plaintiff's willful neglect precluding relief under RPAPL § 1523 and overlooked case law with respect to the statute of limitations. This court finds these arguments to be without merit.

RPAPL 1311 requires the plaintiff in a mortgage foreclosure action to join, as a party defendant, any person "whose interest is claimed to be subject and subordinate to the plaintiff's lien." Under the statute, these necessary parties include "[e]very person having an estate or interest in possession ... in the property as tenant in fee," as well as all junior lienholders (RPAPL 1311 [1]); *see 6820 Ridge Rlty.v Goldman*, 263 AD2d 22, 25 [1999]). The absence of a necessary party in a foreclosure action leaves that party's rights unaffected by the judgment and sale, and the foreclosure sale may be considered void as to the omitted party (*6820 Bay Ridge Rlty.*, 263 AD2d at 26). The language of the stipulation mirrors these principles by providing that the judgment of foreclosure and sale "shall not be binding on defendant Oberlander as if he was never made a party defendant to the action." Thus if defendant had record title to the property or was a tenant thereof at the time the notice of pendency was filed and the foreclosure action commenced, his interest would be unaffected by the judgment of foreclosure and sale. However, it is undisputed that defendant recorded his deed to the property after the notice of pendency was filed. Therefore, defendant, by

statute, was “bound by all proceedings taken in the action after such filing to the same extent as a party” (CPLR 6501). Moreover, the scope of Judge Huttner’s order was limited to the finding that since plaintiff stipulated to release defendant from the foreclosure action, the foreclosure court could not adjudicate defendant’s rights, title or interest in the subject property. The order made no finding that defendant was not bound under CPLR 6501.

Further, the court finds no merit in defendant’s argument that the expiration of the first notice of pendency somehow unbinds defendant from the foreclosure proceedings. The case cited by defendant to support this argument, *Polish National Alliance v White Eagle Hall Company* (98 AD2d 400 [1983]), is distinguishable in that the notice of pendency in said case had expired at the time the contract vendees of the mortgaged property recorded their interest, while defendant here recorded title to the property while the notice of pendency was still in effect.

Defendant contends that the instant action is untimely. In general, a cause of action accrues, triggering commencement of the limitations period, when all of the factual circumstances necessary to establish a right of action have occurred, so that the plaintiff would be entitled to relief (*see Gaidon v Guardian Life Ins. Co.*, 96 NY2d 201, 210 [2001]). The statute of limitations does not begin to run until a cause of action accrues and in any action for declaratory judgment no cause of action accrues until a controversy exists (*see Ernst v Ernst*, 40 Misc 2d 934, 941 [1963]). Even where a justiciable controversy may already be in existence, the limitation period on commencement of a declaratory judgment


action should not begin until the right to bring an action for coercive relief accrues (*see Charney v North Jersey Trading Corp.*, 172 AD2d 390 [1991]). While foreclosure proceedings against the subject property were commenced in 1993, plaintiff could not obtain “coercive relief” until, at the earliest, it obtained a judgment of foreclosure and sale on October 13, 1998. The instant action was commenced in 2002, within the six-year statute of limitations for a declaratory judgment. The case cited by defendant in support of his argument, *Rols Capital Company v Beeten* (264 AD2d 724), is distinguishable in that said case involved a plaintiff’s failure to timely commence a new foreclosure action against defendants who had been released from a prior action. Plaintiff here is not attempting to commence a new foreclosure action against defendant but rather a declaratory judgment action under article 15 of the RPAPL.

Finally, relief under RPAPL 1523 is unavailable to defendant since the instant action is not one for reforeclosure brought by the purchaser of the property under RPAPL 1503.

Accordingly, defendant’s motion for reargument is, in all respects, denied.

The foregoing constitutes the decision and order of the court.

E N T E R,



J. S. C.

MELVIN S. BARASCH