

Mortgage Elec. Registration Sys., Inc. v Clark

2007 NY Slip Op 30036(U)

March 8, 2007

Supreme Court, Ulster County

Docket Number: 0023162

Judge: George B. Ceresia

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,
As Nominee for INGOMAR LIMITED PARTNERSHIP,

Plaintiff,

-against-

DIONE CLARK, HOUSEHOLD FINANCE REALTY
CORPORATION OF NEW YORK, OPTION ONE
MORTGAGE CORPORATION, UNITED STATES OF
AMERICA, BENEFICIAL NEW YORK, INC.,
BENEDICTINE HOSPITAL, "JOHN DOE # 1'
THROUGH "JOHN DOE # 10" INCLUSIVE,
the names of the last ten named Defendants being fictitious,
real names unknown to the Plaintiff, the parties intended
being persons or corporations having an interest in,
or tenants or persons in possession of, portions of the
mortgaged premises described in the Complaint.

Defendants.

All Purpose Term

Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJ: 55-06-01008 Index No. 02-3162

Appearances: Knuckles & Komosinski, PC
Attorneys For Plaintiff
320 White Plains Road, 6th Floor
Tarrytown, New York 10591
(Kenneth J. Flickinger, Esq.,
of Counsel)

McCabe & Mack LLP
Attorneys For Defendant Option One Mortgage Corporation
63 Washington Street PO Box 509
Poughkeepsie, New York 12602-0509
(Richard DuVall, Esq., of counsel)

Catherine Charuk, Esq.
Attorney For Defendant Dione Clark
26 Pearl Street UPO Box 4011
Kingston, New York 12402

**SUPPLEMENTAL
DECISION/ORDER**

George B. Ceresia, Jr., Justice

This mortgage foreclosure action has been re-assigned to this Court following the untimely death of the IAS Judge, Hon. Vincent G. Bradley, JSC, on November 24, 2006. By way of background, plaintiff is the current holder of a first mortgage (dated September 18, 1998, in the principal sum of \$93,000.00) on certain real property owned by defendant Clark. On June 30, 2000 defendant Clark, in an apparent attempt to re-finance the mortgage loan through a different mortgage lender, borrowed the sum of \$102,050.00 from defendant Option One Mortgage Corporation (“Option One”). It is evident that Option One intended that plaintiff’s mortgage be fully satisfied at closing, so that Option One would receive a first mortgage lien on the premises. In determining the amount needed to pay off plaintiff’s mortgage Option One relied, in part, upon a letter addressed to defendant Clark dated May 23, 2000 from Advanta Mortgage (“Advanta”), the servicing agent for plaintiff’s predecessor¹. The letter indicated that the “total due” on the mortgage was the sum of \$21,753.89, with additional per diem interest. At the closing of the Option One mortgage,

¹The holder of the mortgage at that time was Parkway Mortgage Inc. (“Parkway”).

Option One's attorney telephoned Advanta to confirm the "payoff" amount of plaintiff's mortgage. The amount so confirmed was the sum of \$22,409.71. As it turned out, the amount of \$22,409.71 was not a pay off figure to satisfy plaintiff's mortgage. Instead, it was the amount needed to bring the mortgage current. The amount required to satisfy the mortgage was approximately \$92,354.91.

Although plaintiff received the sum of \$22,409.71 soon after the closing (and applied it to defendant Clark's indebtedness), no further payments were received. Plaintiff thereafter commenced the instant action to foreclose its mortgage. Option One served an answer which included a counterclaim on a cause of action alleging it relied upon the "payoff" letter it received from Advanta. Option One made a motion for summary judgment to dismiss plaintiff's complaint, and for judgment on its counterclaim. Plaintiff made a cross-motion for summary judgment. As a part of the cross-motion, plaintiff also requested an order amending the caption of the action, and an order appointing a referee to compute the amount due on the mortgage. By decision/order dated October 27, 2006, Justice Bradley denied defendant Option One Mortgage Corporation's summary judgment motion to dismiss the plaintiff's complaint, but granted Option One's motion for summary judgment against defendant Household Realty Corporation of New York and defendant mortgagor Clark on the basis of no opposition. Justice Bradley also denied Ms. Clark's summary judgment motion dismissing the plaintiff's complaint against her, but granted her motion for summary judgment against Household Finance on the basis of no opposition.

Subsequent to the issuance of the October 27, 2006 decision/order, Mr. Flickinger, the attorney for the plaintiff mortgagee, informed Justice Bradley by letter dated November 8, 2006 that the October 27, 2006 decision/order failed to decide the plaintiff's motion for summary judgment against Option One and Ms. Clark and also the plaintiff's motion for an order of reference. Unfortunately, Justice Bradley passed away before he could correct this apparently inadvertent omission, and this Court will now decide these motions.

The primary argument advanced by Option One in its motion papers was that plaintiff should be equitably estopped from asserting rights under its mortgage. Justice Bradley addressed this argument in his decision as follows:

“To succeed in its estoppel argument, Option One must show with regard to the plaintiff: 1) conduct which amounts to a false representation or concealment of material facts; 2) intention that such conduct will be acted upon by the other party, and 3) knowledge of the real facts; and with regard to itself, the defendant must show: 1) lack of knowledge of the true facts, 2) that it relied on the plaintiff's conduct, and 3) a prejudicial change in its position. (see, e.g. *First Union Bank v Tecklenburg*, 2 AD3d 575 [2nd Dept., 2003]). The crux of the estoppel issue in this case appears to be whether defendant Option One can show that it lacked knowledge of the true facts and whether it justifiably relied on the written communications from Advanta, the servicing agent for the plaintiff's predecessor in interest. Although the partes have not addressed this matter in their submissions, it is well established that whether estoppel should apply in a particular case is generally a question of fact for the jury to resolve. (see, e.g., *Reeve v General Accident Insurance Co. of New York*, 239 AD2d 759 [3rd Dept. 1997]). *In this Court's opinion, however, the undisputed facts indicate that Option One was in a position to ascertain the true facts and that it unjustifiably relied on Advanta's communications, specifically, the letter from*

Advanta to the mortgagor, Ms. Clark, dated May 23, 2000.”

“* * *

“Based on the foregoing, Option One’s motion for summary judgment estopping the plaintiff from foreclosing its mortgage must be denied....” (emphasis supplied)

The Court concludes that Justice Bradley found, as a matter of law, that Option One’s defenses predicated on a theory of equitable estoppel have no merit. The Court finds that it is bound by Justice Bradley’s determination, which must now be deemed law of the case (see Gould v. International Paper Company, 223 AD2d 964, 965 [3rd Dept., 1996]). As an extension of the foregoing, inasmuch as the issue regarding Option One’s reliance upon representations made by Advanta (regarding the amount due on plaintiff’s mortgage) is central to Option One’s counterclaim, the Court finds that Option One’s counterclaim against the plaintiff must be dismissed, as well as Option One’s fourth affirmative defense².

Turning to plaintiff’s cross-motion for summary judgment, a prima facie case in a mortgage foreclosure action is established by demonstrating the existence of a valid promissory note and mortgage, defendants’ failure to make the required payments thereon (see La Salle Bank National Association v Kosarovich, 31 AD3d 904, 905 [3rd Dept., 2006]; HSBC Bank USA v Merrill, ___ AD3d ___ [3rd Dept., February 1, 2007]; Cohen v Colistra, 233 AD2d 542, 542 [3rd Dept., 1996]; Gerrity Company, Inc. v Riscica, 214

²Justice Bradley found that Option One’s third affirmative defense, predicated on a theory of equitable subrogation, had no merit.

AD2d 866 [3rd Dept., 1995]; Marine Midland Bank v. Cafferty, 174 AD2d 932, 934-935 [3rd Dept., 1991]; Travelers Insurance Company v 633 3rd Associates, 194 AD2d 418 [First Dept., 1993]; Chase Natl. Sales Co. [Delaware], 159 AD2d 918 [3rd Dept. 1990]), and, where appropriate, assignment of the mortgage documents to plaintiff (see, Votta v Votta Enterprises, Inc., 249 AD2d 536 [2nd Dept., 1998]).

Plaintiff has adequately demonstrated, through submission of documentary evidence, the existence of a valid promissory note and mortgage, and defendant's failure to make the requirement payments thereon. Plaintiff has also submitted copies of the assignments of the mortgage, sufficient to demonstrate ownership thereof.

The Court finds that the plaintiff, by demonstrating ownership of the mortgage, adequately demonstrated, prima facie, that it has standing to maintain the instant action. Option One, on the other hand, failed to tender evidence in admissible form to demonstrate the existence of a triable issue of fact. The Court finds that Option One's first affirmative defense must be dismissed.

Option One's second affirmative defense alleges that plaintiff has unclean hands, and is not entitled to the equitable remedy of foreclosure. Under this doctrine "[w]here a litigant has himself been guilty of inequitable conduct with reference to the subject matter of the transaction in suit, a court of equity will refuse him affirmative aid" (Tepfer v Berger, 119 AD2d 668, 669 [2nd Dept., 1986], quoting Levy v Braverman, 24 AD2d 430). "When equitable relief is sought, moral considerations of fundamental importance require

that the litigant come into court with ‘clean hands’” (id., citing Pecorella v Greater Buffalo Press, 107 AD2d 1064, 1065).

The Court finds that the plaintiff demonstrated, prima facie, that neither it, nor its predecessors, engaged inequitable conduct. Accepting the arguments advanced by Option One as true they would, at most, demonstrate that there was a mis-communication between Option One’s closing attorney, Mr. Pisanelli, and the agent or employee of Advanta, when he telephoned Advanta on June 30, 2000 to confirm the amount due. Option One’s arguments (and supporting evidence) do not rise to such a level as to demonstrate any form of inequitable conduct on the part of Advanta. In the absence of a triable issue of fact, the Court finds that Option One’s second affirmative defense must be dismissed.

The Court finds that the plaintiff demonstrated, prima facie, its entitlement to summary judgment as against defendant Option One and defendant Clark, and that neither defendant demonstrated the existence of a triable issue of fact. Defendant Clark’s assertions that she relied upon the representations of the title company, her mortgage broker, and her own attorney, are conclusory, and otherwise insufficient to create a triable issue of fact.

Upon review of the papers submitted by the plaintiff, the Court concludes that plaintiff is entitled to the grant of its cross-motion for summary judgment. It is also entitled to an order of reference, and an order amending the caption as requested in the cross-motion.

Lastly, the Court finds that that portion of plaintiff’s motion which seeks to sever its complaint from the counterclaims of defendant Clark pursuant to CPLR 3212 (e) should be

granted³.

Accordingly, it is

ORDERED, that the plaintiff's cross-motion for summary judgment against defendant Dione Clark and defendant Option One Mortgage Corporation is hereby granted; and it is further

ORDERED, that the counterclaim of defendant Option One Mortgage Corporation be and hereby is dismissed; and it is further

ORDERED, that the answers of Option One Mortgage Corporation and Dione Clark are stricken as they relate to plaintiff's complaint; and it is further

ORDERED, that defendants Option One Mortgage Corporation and Dione Clark shall henceforth be deemed to have entered a general notice of appearance, entitling them to notice of all further proceedings herein; and it is further


ORDERED, ADJUDGED AND DECLARED, that plaintiff has a valid and enforceable first mortgage lien on the subject premises; and it is further

ORDERED, that the plaintiff's motion for an order of reference to compute the amount due on its mortgage is hereby granted; and it is further

ORDERED, that this action be and the same hereby is referred to

 REBECCA MILLOURAS-LETTYRE, ESQ., with offices located
763 BROADWAY
KINGSTON, N.Y. 12401

³Defendant Clark asserts counterclaims against defendants Household Finance Realty Corporation of New York, the United States of America and Benedictine Hospital.



at _____, who is hereby appointed referee to ascertain and compute the amount due the plaintiff upon the note and mortgage set forth in the complaint in this action, with interest to the date of his or her report, and to examine and report the situation of the mortgaged premises and whether the mortgaged premises can in his or her opinion be sold in parcels without material injury to the parties interested and to state his or her reasons therefor, and whether if, in his or her opinion, a sale of the whole of said mortgaged premises in one parcel will be most beneficial to all the interests of all of the parties concerned and to report to this court with all convenient speed.

ORDERED, that plaintiff's motion for an order substituting Christiana Bank & Trust Company, as trustee of the Sequoia Funding Trust, as plaintiff in place and instead of Mortgage Electronic Registration Systems, Inc., as nominee for Ingomar Limited Partnership, and amending all papers heretofore filed herein to reflect same is hereby granted; and it is further

ORDERED, that the plaintiff's motion to strike out the names of the Defendants sued herein as "John Doe #1" through "John Doe #10" is hereby granted.; and it is further

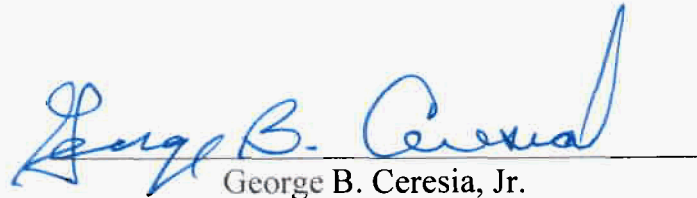
ORDERED, that plaintiff's complaint is severed from the counterclaims of defendant Dione Clark against United States of America, Beneficial New York, Inc. and .Benedictine Hospital.

This shall constitute the decision and order of the Court. All papers are returned to

the attorney for the plaintiff, who is directed to enter this Decision/Order without notice and to serve all attorneys of record with a copy of this Decision/Order with notice of entry.

ENTER

Dated: March 8, 2007
Troy, New York



George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Motion dated June 14, 2006, DuVall supporting affirmation dated June 14, 2006, Pisanelli supporting affidavit dated June 19, 2006 and annexed exhibits A to G.
2. Notice of cross-motion dated July 14, 2006, Flickinger supporting/opposing affirmation dated July 14, 2006, Duxbury affidavit dated July 13, 2006, annexed unlabeled exhibits, annexed exhibits A to J and memorandum of law dated July 14, 2006.
3. Lindars opposing/reply affirmation dated August 14, 2006, Olson affidavit dated August 11, 2006 and annexed exhibits A and B.
4. Notice of motion dated July 10, 2006, Charuk supporting affirmation dated July 10, 2006 and Clark affidavit dated July 6, 2006.
5. Flickinger opposing affirmation dated August 4, 2006.