

Citibank (N.Y. State) v USR Group, Inc.

2007 NY Slip Op 31712(U)

May 9, 2007

Supreme Court, Albany County

Docket Number: 0026692/0051

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

CITIBANK (NEW YORK STATE),

Plaintiff,

-against-

DECISION and ORDER
RJI NO.: 0105082724
INDEX NO.: 2669-05

USR GROUP, INC., and "JOHN DOE," "MARY DOE," and "JANE DOE," the names of the last three defendants being fictitious, their true names being unknown to the plaintiff, persons intended being in possession of portions of the premises described in the complaint in this action,

Defendants.

Albany County Supreme County All Purpose Term, April 10, 2007
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Plaintiff brings this motion to strike the answer interposed by Defendant, USR Group,

Inc., awarding summary judgment to Plaintiff, appointing a Referee to ascertain and compute the amount due to Plaintiff herein for principal and to commute the amount due to Plaintiff herein for principal and interest and otherwise upon the mortgage and to set examine and report whether the mortgaged premises can be sold in parcels, vacating the Order of this Court, signed on August 1, 2005, discontinuing this action against “John Doe,” “Mary Doe,” and “Jane Doe” without prejudice to the proceedings had and taken herein against the remaining Defendants and amending accordingly the captions of the summons and complaint, notice of pendency and all other papers filed in this action. Defendants bring a cross-motion for summary judgment, for attorney’s fees pursuant to the terms and conditions of the underlying promissory note and mortgage and for an Order pursuant to CPLR § 602(a) to consolidate this action with another, entitled *USR Group, Inc. v. Wells Fargo Home Mortgage, Inc.* (Index No. 2316-05, RJI No. 01-05-083243) and the lawsuit entitled *Wells Fargo Bank, NA v. USR Group, et al.* (Index No. 2726-05, RJI No. 01-05-082693). Plaintiff opposes Defendant’s cross-motion.

After fully reviewing the record, this Court grants Plaintiff’s motion to discontinue action against “John Doe,” “Mary Doe,” and “Jane Doe” without prejudice to the proceedings had and taken herein against the remaining Defendants and amending accordingly the captions of the summons and complaint, notice of pendency and all other papers filed in this action and Grants Defendant’s cross motion for an Order pursuant to CPLR § 602(a) to consolidate this action with another, entitled *USR Group, Inc. v. Wells Fargo Home Mortgage, Inc.* (Index No. 2316-05, RJI No. 01-05-083243) and the lawsuit entitled *Wells Fargo Bank, NA v. USR Group, et al.* (Index No. 2726-05, RJI No. 01-05-082693). This Court denies Plaintiff’s motion to strike the answer interposed by Defendant, USR Group, Inc., award summary judgment to Plaintiff, appoint a

Referee to ascertain and compute the amount due to Plaintiff herein for principal and to commute the amount due to Plaintiff herein for principal and interest and otherwise upon the mortgage and to set examine and report whether the mortgaged premises can be sold in parcels and vacate the Order of this Court, signed on August 1, 2005. This Court also denies Defendant's cross-motion for summary judgment and for attorney's fees pursuant to the terms and conditions of the underlying promissory note.

Dennis L. Williams, the original owner of the 318 Osborne Street property, entered into an agreement with Homestead Funding Corporation to refinance the property on October 15, 2003. This transaction created the Wells Fargo mortgage on the above property. As part of this transaction, Plaintiff, Citibank, subordinated its existing mortgage (executed on July 7, 2003 for \$67,000.00 and recorded on September 3, 2003) on the property to the Wells Fargo mortgage. On October 31, 2003, Mr. Williams filed a Chapter 7 Bankruptcy Petition in the United States Bankruptcy Court for the Northern District of New York (hereinafter Bankruptcy Court). Thereafter, the Wells Fargo mortgage, along with the subordination agreement, were recorded on December 26, 2003. In Schedule D to the petition, however, Mr. Williams identified Citibank as holding a secured claim of \$67,000.00 and Wells Fargo Home Mortgage, Inc. as holding a secured claim of \$102,000.00. The Bankruptcy Court appointed Gregory Harris, Esq. as Bankruptcy Trustee. The Trustee made a motion to approve transfer of title of the 318 Osborne Road property (valued at \$160,000.00 in the Bankruptcy Petition) to the Defendant on October 1, 2004. Judge Littlefield approved the sale on November 22, 2004 to be effective after January 31, 2005. The deed was recorded on March 24, 2005. Defendant paid \$12,500.00 for the property, but specifically took it subject to all existing liens.

Citibank filed to foreclose on its mortgage on May 3, 2005. Wells Fargo has similarly moved for foreclosure. Defendant opposes both motions and has cross moved for summary judgment or, in the alternative, for the motions to be consolidated. Defendant contends that because the Wells Fargo mortgage and the subordination agreement were not recorded until after Mr. Williams declared Bankruptcy, the Trustee obtained title free of those liens as a bona fide purchaser pursuant to 11 USC § 544(a)(3) and transferred that status to defendant. Further, Defendant contends that because the Wells Fargo lien was not recorded and the Citibank lien is subordinate to that unrecorded lien, they are not valid liens of the type to which Defendant's interest in the 318 Osborne property is subject.

This Court declines to reach the merits of the summary judgment motions of either Plaintiff or Defendant and denies them without prejudice. "Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue" (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept 1996]). The court's main function in granting summary judgment is issue identification, rather than issue determination (See Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]). The party seeking summary judgment has the burden of establishing its entitlement thereto as a matter of law (See Wingrad v. New York University Medical Center, 64 NY2d 851 [1985]). The party opposing the motion will be given the benefit of every reasonable inference (See Boyce v. Vazquez, 249 AD2d 724; see also Dykestra v. Winridge Condominium One, 175 AD2d 482 [3d Dept 1991]). In the current case, there appear to be no factual disputes between the parties who disagree on the application of the law. The case is not ripe for summary judgment, however, because it appears from the papers that the resolution of this matter could have implication for the Wells Fargo mortgage and the

rights and liabilities of non-party Wells Fargo.

As an exercise of discretion this Court Orders that the above action be consolidated with two existing actions, entitled *USR Group, Inc. v. Wells Fargo Home Mortgage, Inc.* (Index No. 2316-05, RJI No. 01-05-083243) and the lawsuit entitled *Wells Fargo Bank, NA v. USR Group, et al.* (Index No. 2726-05, RJI No. 01-05-082693), pursuant to CPLR § 602(a) which allows for consolidation:

[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Each of the three actions involve the validity of two mortgages (one held by Wells Fargo Home Mortgage, Inc and the other by Plaintiff, Citibank) as related to Defendant's fee interest in the 318 Osborne Road property. *USR Group, Inc. v. Wells Fargo Home Mortgage, Inc.* (Index No. 2316-05, RJI No. 01-05-083243) is an action to quiet title for 318 Osborne Road. *Wells Fargo Bank, NA v. USR Group, et al.* (Index No. 2726-05, RJI No. 01-05-082693) is an action on behalf of Wells Fargo to foreclose on the 318 Osborne Road property. It is worth noting that Plaintiff's mortgage interest in the property is rendered contractually subordinate to the Wells Fargo mortgage interest in 318 Osborne Street property. Thus, despite Plaintiff's claims that its separate mortgage interest should be adjudicated without reference to the Wells Fargo mortgage, the two mortgages are inter-related because if the Wells Fargo mortgage is deemed valid and foreclosure is granted it could effect the ultimate outcome of this action for foreclosure, which is based on a subordinate mortgage. Accordingly, the actions are consolidated in the interest of

judicial economy, simplicity and uniformity. “Where complex issues are intertwined, albeit in technically different actions, it would be better not to fragment trials, but to facilitate one complete and comprehensive hearing and determine all the issues involved between the parties at the same time.” (*Shanley v. Callanan Industries, Inc.*, 54 N.Y.2d 52 [1981]).

Therefore, this Court grants Plaintiff’s motion to discontinue action against “John Doe,” “Mary Doe,” and “Jane Doe” without prejudice to the proceedings had and taken herein against the remaining Defendants and amending accordingly the captions of the summons and complaint, notice of pendency and all other papers filed in this action and Grants Defendant’s cross motion for an Order pursuant to CPLR § 602(a) to consolidate this action with another, entitled *USR Group, Inc. v. Wells Fargo Home Mortgage, Inc.* (Index No. 2316-05, RJI No. 01-05-083243) and the lawsuit entitled *Wells Fargo Bank, NA v. USR Group, et al.* (Index No. 2726-05, RJI No. 01-05-082693). This Court denies Plaintiff’s motion to strike answer interposed by Defendant, USR Group, Inc., award summary judgment to Plaintiff, appointing a Referee to ascertain and compute the amount due to Plaintiff herein for principal and to commute the amount due to Plaintiff herein for principal and interest and otherwise upon the mortgage and to set examine and report whether the mortgaged premises can be sold in parcels and vacate the Order of this Court, signed on August 1, 2005. This Court also denies Defendant’s cross-motion for summary judgment and for attorney’s fees pursuant to the terms and conditions of the underlying promissory note.

All papers, including this Decision and Order, are being returned to the attorney for the Defendant. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting

filing, entry and notice of entry.

SO ORDERED!

Dated: May 9 2007

Albany, New York



JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Plaintiff's Notice of Motion, dated December 6, 2005 with Attached Exhibits A-F.
2. Plaintiff's further Exhibits G-M.
3. Defendant's Notice of Cross-Motion, dated December 22, 2005
4. Defendants Exhibits A-N.
5. Plaintiff's Affidavit in Reply, dated April 26, 2006.