

Polanco v SMJ Enters.

2007 NY Slip Op 31855(U)

June 22, 2007

Supreme Court, Suffolk County

Docket Number: 0018732/2006

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

-----x
ROBERT M. POLANCO,

Plaintiff,

-against-

SMJ ENTERPRISES,

Defendant.
-----x

CALENDAR DATE: January 31, 2007
MNEMONIC: MG; C/Disp.; S/J

PLTF'S/PET'S ATTORNEY:

Teresa M. Grant-Stoeth
3336 Giles Place
Bronx, NY 10463

DEFT'S/RESP ATTORNEY:

Sipsas & Nazrisho
33-19 30th Ave.
Astoria, NY 11103

Upon the following papers numbered 1 to 20 read on this motion for summary judgment _____; Notice of Motion/Order to Show Cause and supporting papers 1-11; Notice of Cross-Motion and supporting papers _____; Answering Affidavits and supporting papers 12-16; Replying Affidavits and supporting papers 17-20; Other _____; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by the plaintiff, Robert M. Polanco, for summary judgment pursuant to CPLR §3212 on his complaint seeking to discharge an ancient mortgage on his property is hereby granted in its entirety and the mortgage is discharged. The Suffolk County Clerk, upon service of a copy of this order with notice of entry thereon, is directed to remove the ancient mortgage recorded and appearing in Liber 18995, p. 27.

The plaintiff instituted this action against the defendant, SMJ Enterprises, seeking to discharge an ancient mortgage made between the parties in the amount of \$30,000 dated September 30, 1993 and recorded on October 30, 1995 at Liber 18995, page 27 in the office of the Suffolk County Clerk. The mortgage and note by its terms required monthly payments starting in November 1993 and continuing to and concluding on September 30, 1998. This mortgage and note were issued against the plaintiff's property located at 19 Willen Lane in Brentwood, Suffolk County on Long Island, New York. Plaintiff claims that, on October 12, 1995, the defendant, SMJ Enterprises by its principal, Sadique M. Jaffer, executed a satisfaction of this mortgage which was presented for recording but, for inexplicable reasons, was not recorded. Plaintiff possesses a copy of the mortgage satisfaction bearing the defendant's signature but not the original mortgage satisfaction.

The defendant claims that the plaintiff never made any payments under the mortgage or note but fails to satisfactorily explain either the mortgage satisfaction or its failure to institute a lawsuit within the applicable time to enforce the provisions of the note and mortgage. This lawsuit thereafter ensued.

The plaintiff now moves for summary judgment pursuant to CPLR §3212 for a discharge of the recorded mortgage on the grounds that there was issued a valid satisfaction of mortgage by the defendant, dated October 12, 1995, and that the statute of limitations would apply, in any event, since the mortgage note by its terms would have concluded on September 30, 1998 and no action was commenced within the six (6) year statute of limitations provided in CPLR §213. The defendant, in opposition to the motion, claims the satisfaction of mortgage is either fraudulent or that it was procured under false pretenses and that Sadique M. Jaffer does not recall ever signing the mortgage satisfaction.

For the following reasons, the plaintiff's motion for summary judgment pursuant to CPLR §3212 seeking to discharge an ancient mortgage recorded on October 30, 1995 at Liber 18995, page 27 is hereby granted in its entirety and the ancient mortgage is declared discharged and will be removed as an encumbrance on the property.

CPLR §213 deals with actions which must be commenced within six (6) years and provides under paragraph four (4):

“an action upon a bond or note, the payment of which is secured by a mortgage upon real property, or upon a bond or note and mortgage so secured, or upon a mortgage of real property, or any interest therein;”

Here in the case at bar, the terms of the mortgage and note provided for repayment of the mortgage on September 30, 1998 and therefore the defendant had six (6) years or until September 30, 2004 to commence an action to either foreclosure on the property for non-payment or seek payment on the note securing the mortgage. Zinker v. Makler, 298 AD2d 516, 748 NYS2d 780 (2nd Dept. 2002). The defendant did neither and therefore any defenses asserted by the defendant to the plaintiff's present action are time barred. CPLR §213(4). The fact that there is a copy of a satisfaction of mortgage, dated September 30, 1995, from the defendant to the plaintiff provides some explanation for the non-commencement of a lawsuit to foreclosure the mortgage or seek payment under the note by the defendant.

While summary judgment is a drastic remedy, depriving as it does a litigant of his day in court [VanNoy v. Corinth Central School, District, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985)], appellate courts have nonetheless cautioned against undue timidity in refusing the remedy. The inquiry must be directed to ascertain whether the defense interposed is genuine or unsubstantiated. A shadowy semblance of an issue is not sufficient. If the issue claimed to exist is not genuine but feigned, summary judgment is properly granted. DiSabato v. Soffee, 9 AD2d 297, 299-300, 193 NYS2d 184, 189 (1st Dept. 1959); Usefof v. Yamali, NYLJ 10/10/80, p.5, col.4 (App. Term 1st Dept. 1980). A review of the defendant's alleged claims in opposition to the plaintiff's motion seeking to discharge the mortgage finds them to be conclusory and vague. The defendant appears to argue, in an attempt to raise a factual issue, alternative actions that its principal Sadique M. Jaffer either did not sign the satisfaction and his signature was a forgery or

he did sign the mortgage satisfaction and that the satisfaction was procured by fraud. In neither case does the defendant set forth a factual pattern or basis with evidentiary support to reach the conclusions which it asserts so as to raise a factual issue warranting a denial of summary disposition to the plaintiff.

The proponent of a motion for summary judgment 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. If the movant fails to make such a showing, then the motion must be denied, regardless of the sufficiency of the opposing papers. However, once a showing has been made, as in this case, the burden then shifts to the party opposing the motion to produce evidentiary proof, in admissible form sufficient to establish or raise the existence of material issues of fact which would require a trial of the action and preclude summary disposition. ***Romano v. St. Vincent's Medical Center of Richmond***, 178 AD2d 467, 577 NYS2d 311 (2nd Dept. 1991); ***Barrett v. General Electric Company***, 144 AD2d 983, 534 NYS2d 632 (4th Dept. 1988); ***McCormack v. Graphic Machinery Services, Inc.***, 139 AD2d 631, 527 NYS2d 271 (2nd Dept. 1988). Here, in the instant case, the plaintiff establishes not only that the action is time barred pursuant to CPLR §213(4) but that needed support for the discharge of the ancient mortgage is found in the mortgage satisfaction issued by the defendant on October 12, 1995.

The defendant in its opposition rather than setting forth factual evidence with regard to the mortgage satisfaction asserts that it's a forgery or that it was procured by fraud. Sadique M. Jaffer, the defendant's principal, alleges either **I didn't sign it and it's a forgery or I did sign it but I didn't mean to and it was procured by fraud.** Such a defense is unwarranted and legally insufficient to defeat plaintiff's entitlement to summary disposition. Further, the defendant ignores the statute of limitations defense except to discuss the rights of the defendant upon an acceleration of the mortgage and when the statute of limitations runs. Neither event occurred in this case since there was no right of acceleration or evidence that such a demand was made and there was an end date to the mortgage and note referenced and contained within the note of September 30, 1993. ***Notarnicola v. Lafayette Farms, Inc.***, 288 AD2d 198, 733 NYS2d 91 (2nd Dept. 2001).

As has been stated so many times in the past, mere conclusions, expressions of hope or **unsubstantiated** allegations or assertions are insufficient to defeat a party's request for summary disposition. ***V. Savino Oil and Heating Co. Inc. v. Rana Management Corp.***, 161 AD2d 635, 555 NYS2d 413 (2nd Dept. 1990); ***Dabney v. Ayre***, 87 AD2d 957, 451 NYS2d 218 (3rd Dept. 1982). See, also, ***Marine Midland Bank N.A. v. Idar Gem Distributors, Inc.***, 133 AD2d 525, 519 NYS2d 898 (4th Dept. 1987). The plaintiff having met his burden and entitlement to summary judgment, it was imperative that the defendant come forward with evidentiary support for its conclusory claims and its failure to provide or raise a factual issue is fatal to its claim. The plaintiff has established that the defendant's ancient mortgage is subject to discharge as no action was commenced to enforce its provisions within the applicable statutory period of time and therefore any claims by the defendant are time barred. Further, the mortgage satisfaction proffered to support plaintiff's application to discharge the mortgage was sufficient to require an

explanation by the defendant rather than alternative "ideas" in an attempt to generate a factual issue.

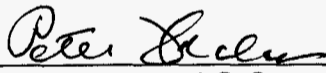
As the Court noted in **Andre v. Pomeroy**, 36 NY2d 131, 362 NYS2d 131, 133 (1974):

"[1-3] Summary judgment is designed to expedite all civil cases by eliminating from the trial calendar claims which can properly be resolved as a matter of law. Since it deprives the litigant of his day in court it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (**Millerton Agway Co-op v. Briarcliff Farms**, 17 N.Y.2d 67, 268 N.Y.S.2d 18, 215 N.E.2d 341). But when there is no genuine issue to be resolved at trial, the case should be summarily decided and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated."

Accordingly, plaintiff's motion for summary judgment pursuant to CPLR §3212 seeking to discharge an ancient mortgage executed by the plaintiff on September 30, 1993 in favor of the defendant is hereby granted in its entirety and the mortgage is discharged. The Suffolk County Clerk is directed, upon service of a copy of this order with notice of entry thereon, to remove the ancient mortgage and note executed by the plaintiff, Robert M. Polanco, in favor of the defendant, SMJ Enterprises, on property located at 19 Willen Lane, Brentwood, New York, recorded on October 30, 1995 and appearing in Liber 18995, p. 27.

The foregoing constitutes the decision of the Court.

Dated: June 22, 2007



J.S.C.