

**U.S. Bank Natl. Assn. v Badillo**

2007 NY Slip Op 33130(U)

June 18, 2007

Supreme Court, Nassau County

Docket Number: 0253-06/

Judge: Joel K. Asarch

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU : I.A. PART 27

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**U.S. BANK NATIONAL ASSOCIATION AS  
TRUSTEE FOR CREDIT SUISSE FIRST BOST  
HEAT 2004-4 C/O AMERICA'S SERVICING  
COMPANY,**

Plaintiff,

- against -

Index No. 253/2006

Motion Return Date:

02/08/07

Motion Sequence Nos.:

001 & 002

**TODD BADILLO, FRANK BENDE, SR.,  
FRANK BENDE, REGINA BENDE,**

Defendants.  
-----X

**P R E S E N T :**

**HON. JOEL K. ASARCH**

**Justice of the Supreme Court.**

The following named papers numbered 1 to 6 were submitted on the within two (2) Motions on February 8, 2007:

	<i>Papers numbered</i>
Order to Show Cause and Petition to Stay	
Foreclosure Sale	1-2
Affirmation in Opposition	3
Order to Show Cause and Petition	
in Support of Motion to Reconvey	4-5
Affirmation in Opposition	6

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The Court has before it what has become an all too familiar story – an elderly couple loses ownership of their home through the alleged fraud of a family member. What makes this story particularly troubling is that the Defendant herein, FRANK BENDE, SR., was adjudicated an Incapacitated Person by this Court approximately EIGHTEEN (18) MONTHS subsequent to the purported conveyance of such real property and a Guardian was appointed for both his personal needs and his property management by Order and Judgment of the Court dated December 27, 2005.

On or about April 15, 2005, ROBERT SHERMAN, then Commissioner of the Nassau County Department of Social Services, commenced a proceeding pursuant to Article 81 of the Mental Hygiene Law to adjudicate FRANK BENDE (SR.) to be an Incapacitated Person. MR. BENDE was 89 years old at the time, recently widowed, and was living at 2577 Alder Avenue, East Meadow, New York (hereinafter referred to as "East Meadow property"), with his two adult children.

MR. BENDE (SR.) and his late wife purchased the home in East Meadow, New York in 1987 and resided there continuously thereafter. However, on or about February 26, 2004, the BENDES conveyed ownership of the real property to one, TODD BADILLO, although MR. BENDE (SR.) allegedly retained the right to remain in occupancy for a period of ONE (1) YEAR with a buy-back provision to be exercised within such time. Notwithstanding the foregoing, the Guardian alleges that as the conditions of the East Meadow property were unsafe, MR. BENDE (SR.) was relocated to Long Island Living Center, Far Rockaway, New York, an assisted living facility in which he resides to date.

The aforesaid Order and Judgment authorized FRANK G. D'ANGELO, JR., ESQ., as Guardian, *inter alia*, to "investigate the sale of the Incapacitated Person's interest in [the East Meadow property], the receipt of any consideration therefor[], the disposition of the sale proceeds, including any escrow, and any facts relating thereto, and report same to the Court and the Court Examiner assigned herein[]".

In the interim and following the purported conveyance, it appears that the Purchaser fell into arrears with his monthly obligation(s), and a foreclosure proceeding was commenced by the lender. This turn of events was discovered by the Guardian upon publication of a Notice of Sale. The Guardian promptly moved for a stay of the foreclosure sale of the subject East Meadow property

in hopes of preserving same for the benefit of FRANK BENDE (SR.). By Order to Show Cause granted on July 10, 2006 by the Hon. F. Dana Winslow, a stay was granted pending the hearing or further order of the Court. The matter was subsequently transferred to the undersigned by Short Form Order of Hon. Daniel Palmieri, dated September 21, 2006.

In addition, the Guardian moved the Court for certain relief by Order to Show Cause granted on December 11, 2006, including reconveying title to the subject real property back to FRANK BENDE (SR.) based upon the purported fraud tainting such transaction.

As a result of the Guardian's investigation, he alleges that on February 26, 2004, MR. BENDE (SR.) and his now deceased wife, VIOLET BENDE, appeared at the offices of High Tech Funding in New Hyde Park, New York, with the understanding that they were refinancing their home. However, in lieu of a contemplated refinance, a Deed was executed by FRANK BENDE (SR.) and VIOLET BENDE conveying their interest in the real property to TODD BADILLO for the purchase price of \$500,000.00. The Guardian further alleges that at the closing of title, MR. BENDE (SR.) was represented by KENNETH D. LAW, ESQ., an attorney who may have been retained that day as he was physically present in the building where the lender maintains its offices.

The Guardian has advised that KENNETH D. LAW, ESQ. has failed to cooperate with the Guardian's investigation, and is allegedly holding some \$40,000.00 of the net proceeds of the sale in escrow, and that STEWART TITLE COMPANY, the title company insuring title to said premises, has also failed to respond to the Guardian's request for documents concerning the closing.

In opposition to the relief sought herein, counsel for the Plaintiff has submitted a copy of the Settlement Statement indicating that the "Contract Sales Price" of \$500,000.00 was allocated as follows: (a) \$336,940.02 was utilized to satisfy the BENDES' existing mortgage with Mortgage Source; (b) \$40,543.16 was paid for outstanding tax liens and unpaid real estate taxes; (c) \$850.00

was paid to KENNETH LAW, ESQ. as and for his legal fee; and (d) \$2,090.00 was paid in transfer fees and charges. There does not appear to be any adjustment for real estate taxes. In addition to the foregoing charges, the Sellers were charged an unexplained \$109,000.00, cryptically labeled “excess deposit”, and were to have received a balance at closing equal to \$10,576.80. The basis of this substantial debit of \$109,000.00 is unclear to both the Guardian and to this Court. In further support of this “arms-length” transaction, counsel for Plaintiff has also submitted a Single Family Summary Appraisal Report, indicating that as of December 5, 2003, the East Meadow property had an estimated market value of \$495,000.00. The principal amount of the new loan on the real property was \$420,750.00.

The transfer documents presented indicate that FRANK BENDE (SR.) and VIOLET BENDE each signed the Deed and Settlement Statement. The role that FRANK BENDE, JR. may have had in this transaction, if any; the purported use of a certain Power of Attorney appointing him Attorney-in-Fact for either or both of his parents; and his relationship or affiliation with the mortgage broker and/or the Purchaser are not clear from the pleadings submitted herein.

The Guardian alleges that “[b]ecause the property was fraudulently transferred by Mr. Bende’s attorney-in-fact coupled with Mr. Bende’s lack of capacity, the transfer should be voided and title returned to him”. The burden of demonstrating that a conveyance was fraudulent is upon the party challenging the conveyance. *See Joslin v. Lopez*, 309 A.D.2d 837, 765 N.Y.S.2d 895 (2nd Dept. 2003). From the documents submitted and reviewed, the conveyance appears to have been for fair market value, provided, of course, that all consideration was actually proffered to the Sellers. In any event, there is no proof that the *lender* was a party to any scheme to defraud FRANK BENDE (SR.) and VIOLET BENDE of their home and therefore, its position as a secured creditor and lienholder acting upon the default of the borrower will not be set aside by this Court. Moreover, the

motion papers do not confirm, by medical affidavit or otherwise, that FRANK BENDE, SR. was incapacitated and/or did not have contractual capacity at the time of the conveyance. While this Court adjudicated FRANK BENDE, SR. as an incapacitated person the following year, additional proof is required to set aside a prior conveyance of real property for fair market value by parties apparently represented by counsel.

Accordingly, the motions are denied in all respects and the Temporary Restraining Order against foreclosing upon the East Meadow, New York property is vacated, effective FIFTEEN (15) DAYS from the date of the within Order. The Guardian herein shall be notified of any surplus funds resulting from any foreclosure sale.

Notwithstanding the foregoing, however, the Guardian is hereby authorized pursuant to Mental Hygiene Law Section 81.43 to commence a discovery proceeding against relevant individuals, including but not limited to TODD BADILLO; FRANK BENDE, JR.; KEVIN D. LAW, ESQ.; HIGH TECH FUNDING; and STEWART TITLE COMPANY, to determine the basis for and the disposition of the unexplained \$109,000.00 deduction from the sales proceeds, and the location of other funds purportedly delivered or to be delivered to the BENDES as a result of the closing of title.

This constitutes the Decision and Order of this Court.

Dated: Mineola, New York  
June 18, 2007

ENTER:

  
JOEL K. ASARCH, J.S.C.

Copies mailed to:

Frank G. D'Angelo, Jr., Esq.  
Solomon & Siris, P.C.  
John C. DeLeonardis, Esq.  
Todd Badillo  
Steven J. Baum, Esq.  
Peter Levy, Esq.

**ENTERED**  
JUN 21 2007  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE