SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

In re:

Drew S. Krautman & Theresa A. Krautman,

Plaintiff(s),

INDEX No. 10293/07

-against-

MOTION DATE: 8/22/07

IPE Asset Management, LLC.,
Island Properties & Equities, LLC.,
d/b/a Island Properties Realty,
David DeRosa, Joseph L. Grosso, Esq.,
Tri State Solutions, Inc., Kamal Zafar,
Zenaida F. Marino, JP Morgan Chase Bank,

MOTION SEQ. No. 1-MD

Defendant(s).

The following papers read on this motion:
Order to Show Cause/Affirmation/Exhibits
Affidavit in Opposition/Memorandum of Law/Exhibits
Affirmation in Opposition
Affidavit in Opposition
Reply/Exhibits

Plaintiffs seek an Order permitting them to void an allegedly fraudulent deed and transaction for the premises commonly known as 310 North Baldwin Drive, North Massapequa; to void and stay any unauthorized mortgages on the property; to seek information from the mortgage holder as to the status of those mortgages; damages; and a stay of any transfer of the deed.

In his affidavit plaintiff claims that he has owned and resided in the subject property, located at 310 North Baldwin Drive, North Massapequa, New York since 1995. He states that in January 2005 he entered

into an agreement with defendant IPE ASSET MANAGEMENT to assist the plaintiffs in financing them "to reinstate our two (2) mortgages, which were in arrears at the time . . . ."

According to the plaintiff IPE agreed to lend the plaintiffs $10,000.00 which had to be returned within sixty days with a $500.00 legal fees and interest. This loan would permit the plaintiff to have a down payment to enter into a forbearance agreement with their existing mortgage holders. According to the agreement if plaintiffs missed or were late in their payments, they would be required to market the premises to pay IPE back. Pursuant to the agreement, Properties & Equities d/b/a Island Properties Realty would market the property.

Plaintiff concedes that he and his wife executed the agreement. They stated that they did this without an attorney. Plaintiff claims that the combined mortgages would require a $280,000.00 payoff. He claims that the house had an appraised market value of approximately $565,000.00.

Plaintiff concedes that although he was trying to refinance, it did not happen, and he was "slightly late" on his mortgage payments, which caused a default on his forbearance agreements and triggered a default of his agreement with IPE.

Plaintiff states that in late 2005 he was notified that IPE required him to list his property for sale with Island Properties Realty. Thereafter the plaintiff and his wife filed for bankruptcy and believed that they were making the proper mortgage payments pursuant to the Bankruptcy plan.

Plaintiff states that in December 2006 his mortgage payments were returned, and he learned for the first time that he was no longer the titled owner of the home, that his mortgages had been paid by IPE and the Clerk had a title indicating that his property was purchased on December 15, 2006 by a Zenaida Marino, who had taken out approximately $500,000.00 in mortgages on the property. The plaintiff claims he did not know of any such transfer, and that any transfer was in violation of the Chapter 13 Bankruptcy stay.

The plaintiff states that the title report indicates that Ms. Zenaido purchased the property from TriState Solutions, an entity which purchased the premises from IPE. He claims that IPE paid off his mortgages for a discount of $217,000.00 and sold it for a fraudulent profit of $283,000.00.

The plaintiffs seek an Order setting aside the transfers of the property as fraudulent.

JP MORGAN CHASE ("CHASE") opposes. CHASE notes that the plaintiffs concede that CHASE was not engaged in any fraudulent scheme in connection with the transfer of the property. CHASE further notes that there is no evidence that it was a party or privy to the negotiations or agreements between the plaintiffs and IPE, or any other related entities.

CHASE contends that it is a lender to defendant ZENAIDA MARIANO, and that its interest is confined to that of mortgagee. CHASE contends that on or about December 15, 2006 MARIANO executed a mortgage with CHASE for the sum of $396,000.00 and a home equity line of credit mortgage in the principal sum of $99,000.00. CHASE offers evidence that the mortgages were properly filed and payments on both loans are current through July 2007.

CHASE claims that it had no knowledge of the agreements or claims now asserted by the plaintiffs and that a title search indicated that MARIANO had proper title to the property. CHASE offers evidence that the funds from its loans were used to purchase the subject property from Tri State Solutions, Inc. and to satisfy significant tax liens and existing mortgages on the property. CHASE also notes that the deed to MARIANO for the property was previously accepted and recorded by the County Clerk. (Motion, Exh. H)

CHASE seeks a dismissal of the only cause of action asserted against it, the third cause of action, which alleges in part that CHASE negligently allowed the other defendants to fraudulently encumber the property with such unauthorized liens. CHASE argues that there is no evidence that it was negligent in processing the loan to MARIANO. CHASE contends instead that the plaintiffs were negligent in executing the deed transferring the property to IPE. Counsel for CHASE notes that the plaintiffs do not contest that their signatures appear on the deed dated January 18, 2005, and do not claim that they are forged. Nor do they contest that on November 10, 2005 they executed an additional "Sellers Affidavit" to facilitate the transfer. This deed and related documents contradict the statements now made by the plaintiffs in their supporting affidavits. He also notes that the plaintiffs profited from the transaction, in that a large portion of the mortgage proceeds (more than $265,000) was used to pay off existing mortgage loans and real estate taxes due on the property. Counsel also notes that the payoff letter from Wilshire Credit Corporation was issued directly to the plaintiffs at the property address.

Based on this CHASE opposes any Order voiding or staying CHASE's mortgage liens on the premises.

IPE also opposes the application including the staying or transfer of the Deed to the subject property. Counsel for IPE argues that the plaintiffs have failed to file any Notice of Pendency pursuant to Article 65 of the CPLR. Counsel argues that the plaintiffs arguments alleging fraud must fail in light of the documentary evidence, including the proof that the plaintiffs financially benefitted from the transfer of the deed to the property.

As to the plaintiffs' filing for Bankruptcy, counsel for IPE notes that the plaintiffs failed to list the defendants as creditors or parties with whom they contracted with to transfer the property, thus any stay should not affect them.

The records presented demonstrate that the plaintiffs filed for voluntary bankruptcy on April 6, 2006. The Petition was discharged, with no reference to the claims in this proceeding, on July 16, 2007. (Plaintiff Reply)

As noted by defendant CHASE, there is a strong presumption that a deed absolute on its face is what it purports to be, *Bielawski v. Bazar*, 47 AD2d 435 (3rd Dept 1996); *Thomson v. Daisy's Luncheonette Corp.*, 13 Misc.3d 1243(A) (2006). A Party can only overcome that presumption by a showing of clear and convincing evidence proving to the contrary. *Uni-Rty Corp. v. Guandong Building Inc.*, 191 B.R. 595 (SDNY 1996).

The burden of establishing that a deed was not intended as a transfer of title is onerous and rests on the party seeking to recharacterize the transaction. *Bielawski v. Bazar, supra.*

In this instance there is proof that the plaintiffs executed and delivered a deed transferring the title from the plaintiffs to IPE, and executed an accompanying affidavit. Further, their drivers' licenses were produced at the time of the transaction, and they acknowledge that they received funds from IPE in exchange to use to pay creditors. There is no allegation that the documents were forged. The Deed transferring the title from the plaintiffs meets all the necessary requirements for a deed, in that it was in writing, duly acknowledged in the presence of a notary public, specified a grantor and grantee, contained proper description of the real property being conveyed and contained words exhibiting an intent to transfer title. *Cohen v. Cohen*, 188 AD 933 (2nd Dept 1919).

Krautman v. IPE Asset Management, LLC, et al.

The plaintiffs have not demonstrated that they were the victims of a fraudulent scheme, nor have they demonstrated that they did not execute the deed transferring the property. In addition, there is no showing of any breach of a duty to the plaintiffs on the part of CHASE in connection with its mortgage transactions. *Palka v. Servicemaster Management Services Corp.*, 83 NY2d 579 (1994); *Darby v. Compagnie National Air France*, 96 NY2d 343 (2001). There is no evidence that CHASE had any knowledge of the claims now being asserted by the plaintiff.

Based on the proof presented, the application for an Order setting aside the deed is Denied. Plaintiffs have failed to offer proof or law demonstrating that they are entitled to such dispositive relief.

It is, SO ORDERED.

Dated: Oct 31, 2007

HON. GEOFFREY J. O'CONNELL, J.S.C.