

George v Grand Bay Assocs. Enter. Inc.

2007 NY Slip Op 34540(U)

March 22, 2007

Supreme Court, Bronx County

Docket Number: 6320/04

Judge: Nelson S. Roman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

FERNELLA GEORGE AND RUEL TURNER,

Plaintiff(s),

- against -

GRAND BAY ASSOCIATES ENTERPRISE
INCORPORATED, ALVIN MERRIFIELD, JANELLE
PETERS,

Defendant(s).

DECISION AND ORDER

Index No: 6320/04

FILED
MAR 26 2007
BRONX COUNTY CLERK'S OFFICE

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Plaintiffs move seeking an order rearguing this Court's order dated May 4, 2006, which granted, *inter alia*, MARCO MENDEZ and LUIS MENDEZ' (hereinafter "Mendez") motion seeking to intervene in the within action and also granted the same's motion dismissing the instant action pursuant to CPLR §3211(a)(1). Plaintiff's aver that this Court misapplied the law in granting Mendez' motion. Mendez' opposes the instant motion asserting that the Court did not misapply the law and that much of the arguments proffered by plaintiff's are newly proffered arguments never raised within the opposition to the prior motion. GRAND BAY ASSOCIATES ENTERPRISE INCORPORATED (Grand Bay) opposes plaintiffs' motion as well.

For the reasons that follow hereinafter plaintiffs' motion to reargue is hereby denied.

The instant action is one for cancellation and reformation of a forged real property deed. The action was commenced on January 8, 2004. The verified complaint alleges that plaintiffs are the owners of real property located at 1420 Fteley Avenue, Bronx, NY (1420 Fteley). It is alleged that said property was conveyed to Grand Bay by someone other than plaintiffs and that as a result, the transfer was effectuated by means of a forged deed. Plaintiffs seek to have the deed transferring said property to Grand Bay vacated and reformed.

As particularized in this Court's prior motion, the action herein was dismissed when after allowing Mendez to intervene in the instant action, the Court concluded that Mendez was bonafide purchaser of 1420 Fletley, which Mendez bought from Grand Bay after Grand Bay had obtained summary judgment and dismissal of the instant action. Moreover, the Court concluded that to the extent the action herein, seeking deed reformation was barred by CPLR §5523, the complaint herein warranted dismissal since that was in fact the only remedy sought. In particular the Court stated

Mendez motion pursuant to CPLR §1012, is hereby granted. Mendez is hereby granted intervention and made a party to this action for purposes of the instant motion and cross-motions. The evidence demonstrates that plaintiffs' action seeks to reform title to property duly purchased by Mendez. As a result, Mendez has a real and substantial interest in the outcome of the litigation and intervention should be allowed.

Mendez motion seeking dismissal of the title claim portion of plaintiff's action is hereby granted pursuant to CPLR §§3211(a)(1) and 5523. Contrary to plaintiffs' assertion, restitution and reformation of the deed is not a remedy available to plaintiff's because Mendez was a good faith purchaser of the property herein. Mendez purchased the property herein after the court had dismissed plaintiffs' action and cancelled plaintiffs' notice of pendency. As such the only remedy available to plaintiffs' is money damages from the other defendants in this action. In December 20, 2004, this court granted Grand Bay's motion quieting title in favor of Grand Bay, dismissing plaintiffs' action and cancelling the notice of pendency filed by plaintiffs. While said order was granted on default, this by no means diminishes the applicability of CPLR §5523, since when Mendez purchased the property he did so for value, \$410,00, when there existed no notice of pendency and when title had been quieted in favor of Grand Bay. Horvath v. Grid Realty Corp., 64 A.D.2d 691 (2nd Dept. 1978). (Court held that even when title to property was obtained as a result of a default judgment, restitution would be unavailable, if prior to vacatur of the default, property was purchased in good faith and for value). Mendez purchased the property herein prior to the court's vacatur of its prior order restoring the action to the calendar. As a consequence, title must be quieted in favor of Mendez and plaintiffs only remedy is to seek money damages from all other defendants.

In support of the instant motion, plaintiffs' submit an affidavit from plaintiff FERNELLA GEORGE (George), wherein he makes a host of legal arguments in support of the within motion. Primarily, George attacks the validity of the transfer of 1420 Fletley to Grand Bay. George asserts that to the extent that the property herein was conveyed to Grand Bay through the use of forged documents, namely

the power of attorney forged by non-party Janelle Peters (Peters), Grand Bay never acquired title to 1420 Fletley. George also asserts that the transfer was a nullity since it was effectuated by Peters, acting as attorney in fact for plaintiffs' absent the requisite authority under the General Obligations Law. George also assails the transfer of 1420 Fletley from Grand Bay to Mendez, asserting that said transfer was invalid as Mendez was not a bonafide purchaser for value. George asserts that the transfer was a nullity because Mendez was or should have been aware that the default judgment dismissing the within action was obtained absent service upon plaintiffs. George further asserts that the default judgment was not on the merits and as such does not confer CPLR §5523 protection upon Mendez' title to 1420 Fletley. George asserts that the action herein should have put Mendez on notice that the property herein was encumbered thereby divesting Mendez' status as a good faith purchaser.

Reargument

With respect to a motion for reargument, there are a litany of cases addressing the applicable law. The First Department has stated that

A motion for reargument, addressed to the discretion of the Court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principal of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very

questions previously decided.

John J. Foley v. Mary Ellen Roche, 68 A.D.2d 558, 567 (1st Dept. 1979); See also, Fosdick v. Town of Hemstead, 126 N.Y. 651 (1891); William Simpson v. Fred Loehman, 21 N.Y.2d 990 (1968); In Matter of Rita Holad v. Motor Vehicle Accident Indemnification Corp., 53 Misc.2d 952 (Supreme Court, Kings County 1967); American Trading Company, Inc., v. Leonard Fish, 87 Misc.2d 193 (Supreme Court, New York County 1975). A motion for reargument precludes a litigant from advancing new arguments or taking new positions which were not previously raised in the original motion. John J. Foley v. Mary Ellen Roche, 68 A.D.2d 558, 567 (1st Dept. 1979).

A motion to reargue, must be made within 30 days after service of a copy of the underlying order with notice of entry. Perez v. Davis, 8 A.D.3d 1086 (4th Dept. 2004); Pearson v. Goord, 290 A.D.2d 910 (3rd Dept. 2002).

Discussion

Plaintiffs' motion to reargue is hereby denied inasmuch as the Court previously considered the majority of the arguments made by plaintiffs and found them to be unavailing or unsupported by law. The remaining arguments made are not only newly raised arguments but also unavailing. Rather than addressing all of the arguments made by plaintiff in support of the motion herein, the Court will address only the salient few.

With regard to the made arguments, the issues before this Court on the prior motion were rather narrow. The Court was called upon to decide whether by virtue of this Court's order dated December 8, 2004, dismissing the instant action, albeit on default, Mendez' subsequent acquisition of 1420 Fletley from Grand Bay was valid, making Mendez a bonafide purchaser for value. The Court, relying on Da Silva v. Musso, 76 N.Y.2d 436 (1990) and its progeny, decided that the transfer to Mendez was valid. As previously mentioned within the prior order once this Court granted summary judgment to Grand Bay on December 8, 2004, thereby quieting title in favor of the same, the case herein was disposed and the judgment entered in favor of Grand Bay became final until such time as it was vacated. Further the Notice of Pendency was discharged and no extensions or stays were applied for. As such, when Mendez acquired 1424 Fletley he was entitled to rely on the final judgment entered on behalf of Grand Bay quieting title in favor of the same. Whether Mendez had notice that Grand Bay acquired title by virtue of a default judgment did not give Mendez notice requiring him to make further inquiry or jeopardizing his title. Da Silva, amply supports such a contention since as discussed in Da Silva, a purchaser buying property in good faith with knowledge that plaintiff, the prior owner, has appealed an order adversely affecting his property rights is insufficient to vitiate the subsequent buyer's good faith. Da Silva v. Musso, 76 N.Y.2d 436; Aubrey Equities, Inc. v. Goldberg, 247 A.D.2d 253 (1st Dept. 1998). Accordingly, it follows that if knowledge that a previous owner is attempting to have his property

rights restored by way of an appeal does not divest a subsequent buyer's bonafide purchaser status, neither does knowledge that the pervious owner lost his rights to his property by virtue of a judgment obtained on default.

With regard to newly proffered arguments, plaintiffs aver that since 1424 Fletley was transferred to Grand Bay via a forged power of attorney, said transfer was invalid and violated the General Obligations Law. They also assert that since the default judgment obtained by Grand Bay was not on the merits the conveyance to Mendez was invalid, are new arguments and cannot be considered on a motion to reargue. The newly proffered arguments bear mention only to the extent that plaintiffs fail to appreciate that the issue of forgery and whether Peters exceeded her authority as attorney in fact were issues rendered moot and necessarily decided against plaintiffs when the Court issued its order granting Grand Bay summary judgment, dismissing the herein action, and cancelling the Notice of Pendency. So while is true that if plaintiffs had proven the allegations of forgery and Peter's inability to transfer 1420 Fletley to herself, the transfer to Grand Bay would have been invalid, the arguments fail for two reasons. First, these were allegations and not uncontroverted facts. Second, and pertinent to the issue herein, when the December 8, 2004 order was issued, the aforementioned issues were decided against plaintiffs thereby quieting title in favor of Grand Bay. When the Court issued the order adversely affecting plaintiffs, said order by quieting title in favor of Grand Bay legitimized clean and clear title in favor

of Grand Bay. Thus, when Mendez acquired the property, it acquired good title by virtue of the Court's order. Thus, this new argument lacks merit.

With regard to plaintiffs' contention that since the order granting Grand Bay summary judgment was issued on default, the same does not protect Mendez' title as a bonafide purchaser, the same is without merit. First and foremost, CPLR §5523, does not mandate that the judgment referred to therein be on the merits. Furthermore, as amply stated in this Court's previous order, it has been held, albeit in the form of dicta, that a default judgment does not in anyway diminish the protection afforded to a bonafide purchaser pursuant to CPLR §5523. Horvath v. Grid Realty Corp., 64 A.D.2d 691 (2nd Dept. 1978). (Court held that even when title to property was obtained as a result of a default judgment, restitution would be unavailable, if prior to vacatur of the default, property was purchased in good faith and for value). Moreover, to the extent that a judgment issued on default is binding until the same is vacated, the Court sees no reason to hold that the same failed to convey good title to Mendez.

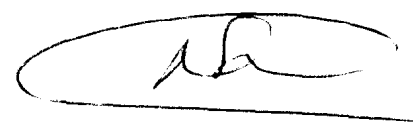
Based on the foregoing, plaintiffs' motion to reargue this Court's prior order is hereby denied.

ORDERED that any and all stays be hereby vacated. It is further

ORDERED that Mendez serve a copy of this Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : March 22, 2007
~~March 22, 2007~~
Bronx, New York


3/22/07
Nelson S. Roman, J.S.C.