

1.2.3. Holding Corp. v Exeter Holding, Ltd.

2008 NY Slip Op 30299(U)

January 28, 2008

Supreme Court, Suffolk County

Docket Number: 0026107/2006

Judge: Robert W. Doyle

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 11/20/07
ADJ. DATE 12/18/07
Mot. Seq. # 002 - MD

-----X	:		
1 2.3. HOLDING CORP.,	:		WOLINSKY, PARNELL & MONTGOMERY
	:		Attorneys for Plaintiff
	:	Plaintiff,	329 Hawkins Avenue
	:		Lake Ronkonkoma, New York 11779
	:		
- against -	:		
	:		SOLOMON & SIRIS, P.C.
EXETER HOLDING, LTD.,	:		Attorneys for Defendant
	:		50 Charles Lindbergh Blvd.
	:	Defendant.	Uniondale, New York 11553
-----X	:		

Upon the following papers numbered 1 to 46 read on this motion for summary judgment; Notice of Motion/
Order to Show Cause and supporting papers 1 - 33; Notice of Cross Motion and supporting papers _____;
Answering Affidavits and supporting papers 34 - 42; Replying Affidavits and supporting papers 43 - 46;
Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by defendant, Exeter Holding, Ltd., for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint and summary judgment on its first counterclaim for a declaration of the superiority of its mortgage over the ownership interest of plaintiff, 1.2.3. Holding Corp. or, in the alternative, summary judgment on its second and third counterclaims imposing an equitable mortgage and sanctions as against plaintiff, its principals and its attorneys, is denied.

On August 5, 2005, defendant, Exeter Holding, Ltd. (Exeter), obtained a mortgage on real property located at 106 Trafalgar Drive, in Shirley, New York (Shirley property) allegedly to secure a \$125,000.00 building loan made to non-party Millenium Land Developers, Inc. (Millenium), which owned said property jointly with non-party AFC Real Estate, LLC (AFC), for the construction of a one-family house on said property. The Exeter mortgage was not recorded against the property until May 30, 2006. Prior thereto, ownership of the Shirley property changed twice. Millenium transferred ownership of its portion of the Shirley property to AFC by quitclaim deed dated April 7, 2006. Then, AFC transferred ownership of the Shirley property to plaintiff, 1.2.3. Holding Corp., by quitclaim deed dated

May 6, 2006 for “ten dollars and other valuable consideration.” The deed transferring ownership of the Shirley property to plaintiff was recorded on May 17, 2006, thirteen days prior to the Exeter mortgage.

Plaintiff commenced the instant action to declare the Exeter mortgage null and void and to direct the Suffolk County Clerk to cancel said mortgage as against the subject Shirley property on the grounds that when plaintiff acquired title to the subject premises, plaintiff had no knowledge of the then unrecorded Exeter mortgage and acquired title to the subject premises in good faith and for valuable consideration.

By its answer, Exeter asserted a first counterclaim for a judgment, declaring that plaintiff's ownership interest and deed of record is subject and subordinate to its mortgage and directing the Suffolk County Clerk to record said judgment in its record and indices against the subject premises. In addition, Exeter asserted a second counterclaim for equitable subrogation to the rights, remedies and interests of holders of liens superior to plaintiff's ownership interest and for an equitable lien in amounts paid by Exeter to satisfy liens encumbering the premises and for improvement of the premises. Exeter also asserted a third counterclaim for an equitable lien or mortgage superior to plaintiff's ownership interest in an amount equal to the payment of any liens, mortgage or encumbrances superior to plaintiff's mortgage and the cost of substantial improvements to the premises and the amount of the resulting appreciation, plus interest.

Exeter now moves for summary judgment in its favor dismissing the complaint and summary judgment on its first counterclaim for a declaration of the superiority of its mortgage over plaintiff's ownership interest in the Shirley property. Exeter asserts that the Recording Act is inapplicable to support plaintiff's claim inasmuch as plaintiff had actual knowledge of the Exeter mortgage at the time that plaintiff acquired the premises and plaintiff did not pay value for the premises. Specifically, Exeter asserts that Alan Kasper was the only officer and agent of plaintiff who had any dealings with the Shirley property and had actual knowledge of Exeter's unrecorded mortgage at its inception and prior to the acquisition of the Shirley property for no consideration.

In support of its motion, Exeter submits, among other things, the affidavit of Linda Haltman, president of Exeter; plaintiff's summons and complaint; Exeter's answer with counterclaims; plaintiff's reply to the counterclaims; the deposition transcript of plaintiff by Elvira Palazzo; the bargain and sale deed dated June 17, 2005 transferring ownership of the Shirley property from non-party Joseph Petrozza to Millenium and AFC; the Exeter mortgage dated August 5, 2005; Exeter's Mortgage Title Insurance Policy dated August 5, 2005 indicating Millenium to be the sole owner of the Shirley property; the agreement dated April 7, 2006 between Millenium and AFC; the quitclaim deed dated April 7, 2006 transferring ownership of the Shirley property from Millenium to AFC; the quitclaim deed dated May 6, 2006 transferring ownership of the Shirley property from AFC to plaintiff; and Exeter's records documenting advances made under its building loan and stages of the construction on the Shirley property.

A party seeking summary judgment must establish its position by evidentiary proof in admissible form sufficient to warrant judgment for it as a matter of law (*see, Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). If the proponent of such motion does not tender evidence which

would eliminate material issues of fact, the motion must be denied, regardless of the sufficiency of the opposition (*see, Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986], citing to *Zuckerman v City of New York*, 49 NY2d at 562).

New York has a “race-notice” recording statutory scheme whereby the mortgage or deed recorded first in the County Clerk’s Office in which the real property is located by a mortgagee or purchaser without notice of any other mortgages or conveyances will maintain priority over such other mortgages or conveyances (*see, Real Property Law § 291; Alliance Funding Co. v Taboada*, 39 AD3d 784, 832 NYS2d 814 [2d Dept 2007]; *In re Hojnoski*, 335 BR 282, 288 [Bankr WDNY 2006]). The New York Recording Act (Real Property Law § 290 et seq.) protects a good faith purchaser for value from a prior unrecorded interest in real property provided, inter alia, that the subsequent purchaser’s interest is the first to be duly recorded (*see, Real Property Law § 291; Transland Assets, Inc. v Davis*, 29 AD3d 679, 813 NYS2d 675 [2d Dept 2006]; *Yen-Te Hsueh Chen v Geranium Dev. Corp.*, 243 AD2d 708, 709, 663 NYS2d 288 [2d Dept 1997], *lv to appeal* 91 NY2d 921, 669 NYS2d 263 [1998]; *Morrocroy Marina v Altengarten*, 120 AD2d 500, 501 NYS2d 701 [2d Dept 1986]). In addition, a bona fide purchaser or encumbrancer for value is protected in its title unless it had previous notice of the fraudulent intent of its immediate grantor (*see, Real Property Law § 266*).

The status of a good faith purchaser for value cannot be maintained by a purchaser with either notice or knowledge of a prior interest or equity in the property or one with knowledge of facts that would lead a reasonably prudent purchaser to make inquiries concerning such (*see, Yen-Te Hsueh Chen v Geranium Dev. Corp.*, 243 AD2d at 709; *Barrett v Littles*, 201 AD2d 444, 607 NYS2d 134 [2d Dept 1994]; *United Matura Realty v Reade Indus.*, 155 AD2d 660, 547 NYS2d 892 [2d Dept 1989], *appeal dismissed* 75 NY2d 1005, 557 NYS2d 311 [1990]; *Vitale v Pinto*, 118 AD2d 774, 500 NYS2d 283 [2d Dept 1986]). Reliance upon a chain of title search does not inoculate a lender where other evident circumstances, in the exercise of reasonable diligence, would disclose an existing legal or equitable interest (*see, Tompkins County Trust Co. v Talandis*, 261 AD2d 808, 690 NYS2d 330 [3d Dept 1999], *lv dismissed* 93 NY2d 1041, 697 NYS2d 569 [1999]).

Linda Haltman states in her affidavit dated October 31, 2007 that she is the president of Exeter, which is a licensed mortgage banker in New York State extending mortgage loans to finance the acquisition and/or construction of one-family homes and other structures on real property. In addition, she states that the subject building loan is in default and that Exeter has been prevented from enforcing its mortgage by the commencement of the instant action by plaintiff. Ms. Haltman explains that the mortgage was only executed by Millenium inasmuch as Exeter’s title search incorrectly indicated that Millenium was the sole owner of the Shirley property, which Exeter later found was incorrect.

By his affidavit dated February 12, 2007, Riccardo Cervini states that he is the president and sole shareholder of Millenium, a developer/contractor and construction company that is in the business of acquiring properties and building residential and commercial structures. In addition, he states that on June 17, 2005 Millenium and AFC Real Estate, LLC (AFC) purchased the subject premises as part of a

joint venture to construct a one-family home for resale and that AFC's principal owner and officer is Alan Kasper. According to Mr. Cervini, he was essentially in charge of construction, and Alan Kasper was a financial adviser. Mr. Cervini states that Alan Kasper and AFC were fully aware of and consented to the subject mortgage that Millenium obtained on August 5, 2005 as against the subject property to secure a \$125,000.00 building loan from Exeter. Mr. Cervini also states that on April 7, 2006 Millenium entered into an agreement to transfer its interest to the subject property to AFC and that Alan Kasper signed the agreement and the deed on behalf of AFC. He points to a specific condition of the April 7, 2006 agreement in which AFC agreed to assume responsibility for the subject Exeter mortgage. According to Mr. Cervini, at said time the construction of the house on the property was substantially complete. Mr. Cervini adds that Millenium entered into an agreement on that same day concerning property in Smithtown with plaintiff, 1.2.3. Holding Corp., which was signed by Alan Kasper in his capacity as secretary of 1.2.3. Holding Corp.

A bargain and sale deed indicates that on June 17, 2005, Millenium and AFC purchased the subject property in Shirley from non-party Joseph Petrozza. The agreement dated April 7, 2006 between Millenium and AFC was an agreement to dissolve the joint venture that the parties had entered into in order to purchase the subject property. Said agreement expressly provided in the second paragraph that the parties agreed that AFC "will assume responsibility for the presently existing mortgages held by Joseph Petrozza and Exeter Bank and the present mechanic liens," and said agreement was executed by Alan Kasper on behalf of AFC.

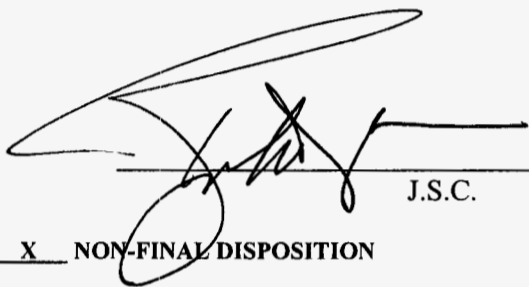
The quitclaim deed dated May 6, 2006 executed solely by Alan Kasper on behalf of AFC transferred ownership of the subject property from AFC to plaintiff "in consideration of ten dollars and other valuable consideration." At her deposition on June 5, 2007, Elvira Palazzo, Alan Kasper's wife, testified that she had always been the sole owner of 1.2.3. Holding but that with respect to the subject Shirley property all actions taken on behalf of 1.2.3. Holding were taken by Alan Kasper with her authority. In addition, Elvira Palazzo testified that she had delegated all authority to Alan Kasper with respect to the subject Shirley property and that he acted as her agent with respect to said property with her full authority and in her place. Elvira Palazzo also testified that everything, including the acquisition of the subject Shirley property from AFC, was conducted by Alan Kasper with her authority on behalf of 1.2.3. Holding.

Here, Exeter failed to satisfy its initial burden on its motion for summary judgment of demonstrating that at the time that it made the loan to Millenium and obtained a mortgage on the Shirley property in August 2005, Exeter was a bonafide encumbrancer for value of the Shirley property (*see*, Real Property Law §§ 266, 291; *see generally*, *LaSalle Bank Nat. Assn. v Ally*, 39 AD3d 597, 835 NYS2d 264 [2d Dept 2007]; *compare*, *Fleming-Jackson v Fleming*, 41 AD3d 175, 838 NYS2d 506 [1st Dept 2007]). Specifically, Exeter failed to establish that it properly relied to its detriment solely on the contents of the title report that it had ordered, indicating that Millenium was the sole owner of the property and that, therefore, Exeter had no duty to conduct any further inquiry (*see*, *Greenpoint Sav. Bank v Pennolino*, 136 AD2d 600, 523 NYS2d 583 [2d Dept 1988]; *Regions Bank v Campbell*, 291 AD2d 437, 737 NYS2d 636, [2d Dept 2002]; *Vitale v Pinto*, 118 AD2d 774, 500 NYS2d 283 [2d Dept 1986]; *Goldstein v Gold*, 106 AD2d 100, 483 NYS2d 375 [2d Dept 1984], *affd* 66 NY2d 624, 495 NYS2d 32 [1985]). Notably, Ms. Haltman makes no mention of whether Mr. Cervini of Millenium was

questioned at the time that he applied for the loan as to whether he was the sole owner of the property, and Mr. Cervini's affidavit is completely devoid of any reference to or explanation of what he told Exeter concerning the Shirley property's ownership at the time that he applied for the loan. In addition, Exeter has failed to submit a copy of the loan note or loan application that was executed in conjunction with the mortgage (*see*, CPLR 3212 [b]). Thus, the Court cannot determine what information was available to Exeter concerning the Shirley property on the loan application and whether any information therein would have warranted further inquiry into the Shirley property's ownership beyond what appeared on the title report. Without an initial determination that Exeter was a bonafide encumbrancer for value of the Shirley property, the Court cannot make a further determination as to whether Exeter is entitled to summary judgment with respect to the subsequent conveyances (*see*, **Greenpoint Sav. Bank v Pennolino**, *supra*; *compare*, **Fleming-Jackson v Fleming**, *supra*; **Regions Bank v Campbell**, *supra*). Thus, Exeter's motion for summary judgment must be denied, regardless of the sufficiency of the opposition papers (*see*, **Winegrad v New York Univ. Med. Ctr.**, *supra*).

Accordingly, the instant motion is denied.

Dated: JAN 28 2008



 J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION