

N.Y. State Realty Assoc., Inc. v DeMarzo

2008 NY Slip Op 31589(U)

June 4, 2008

Supreme Court, Suffolk County

Docket Number: 0030250/2006

Judge: Jeffrey Arlen Spinner

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May 19, 1975 mortgage given by the plaintiff's purported predecessors-in-interest to the defendant to secure the cost of medical services and institutional care provided to the mortgagors by the defendant under the New York State Social Services Law on all dates subsequent to the issuance of said mortgage.

Relevant here are the following provisions of the mortgage that is the subject of this action which the Court sets forth verbatim:

Witnesseth, that the Mortgagors do hereby acknowledge themselves to be indebted to the Mortgagee in such amount of lawful money of the United States, as advanced or as may be advanced at any time by the Mortgagor or on account of the Mortgagor's liability under the provisions of the Social Services Law of the State of New York, which the Mortgagor , do hereby agree to bind themselves to pay to the Mortgagee, his Successors or Assigns on demand from the date of death of the Mortgagor, if the advances have been made to and for the benefit of the Mortgagor , or from the date of death of the person receiving relief, and for whose support, the Mortgagor is/are liable under the provisions of the Social Services Law of the State of New York or at such time as the Mortgagor receives institutional care or ceases to occupy the premises herein described

Anything herein above contained to the contrary notwithstanding, as part of the consideration for the delivery of this instrument the Mortgagee, by the acceptance hereof covenants and agrees that the payment of the principal sum secured hereby will not be demanded or enforced until the date of the death of the recipient of the relief, or at such time as the Mortgagor receive institutional care or ceases to occupy the premises herein, provided however that all other conditions, agreements, covenants on the part of the Mortgagor are performed by the Mortgagor.

And the mortgagor covenant with the mortgagee as follows:

.....

4. That the whole of the principal shall become due if the Mortgagor cease to occupy the property above described as security for the payment of the indebtedness herein acknowledge, or after default in the payment of any tax water rate or assessment for thirty days after notice and demand.

By the complaint served and filed herein, the plaintiff alleges that it is the owner of the subject premises under the terms of a March 26, 1998 deed from Eugene Kowalski, as surviving tenant by the entirety. The plaintiff's deed was recorded in the office of the Suffolk County Clerk on February 11, 2003. Prior to the issuance of said deed, Eugene Kowalski together with his wife and co-tenant by the entirety, Agnes Kowalski, executed and delivered the subject bond and mortgage dated May 19, 1975 to the defendant's predecessor-in-title.

Agnes Kowalski was the apparent recipient of the medical services and care contemplated by the subject mortgage on various dates subsequent to its execution until her death on August 15, 1996. The plaintiff alleges that co-mortgagor, Eugene Kowalski, ceased to occupy the subject premises in 1976. Eugene Kowalski did, however, convey the premises to the plaintiff by deed dated, March 26, 1998, which was not recorded until February 11, 2003. The deed contained the recital that the property was "sold subject to a Department of Social Services Lien and all open property taxes".

In December of 2004, a corporation known as Omni Ventures, Inc., mortgaged the premises to one, William Cirminiello, although no deed conveying the premises to Omni Ventures Inc. was recorded in the Office of the Suffolk County Clerk. Nevertheless, Omni Ventures, Inc., warranted in paragraph 9 of said mortgage that it had title to the subject premises.

Issue was joined by service of the defendant's answer dated December 21, 2006. Therein, the defendant denies certain of the factual allegations contained in the plaintiff's complaint and asserts thirteen affirmative defenses including that the plaintiff lacks standing to prosecute the claims interposed in this action and that the six year statute of limitations applicable to the defendant's remedies in foreclosure has either not run or is unavailable to the plaintiff under theories of estoppel.

Now before the court is the motion by the plaintiff for summary judgment on its complaint and a cross motion by the defendant for summary judgment dismissing the plaintiff's complaint. In support of its motion-in-chief, the plaintiff contends, among other things, that the subject mortgage should be discharged and cancelled of record because the defendant's time to enforce its rights under the bond and mortgage in a foreclosure action has expired under the applicable six year statute of limitations. The plaintiff claims the six year statutory limitations period began to run on August 15, 1996, the date of Agnes Kowalski's death, since her co-mortgagor ceased to occupy the premises in 1976.

The defendant opposes the plaintiff's motion and cross moves for summary judgment dismissing the plaintiff's complaint. Defendant alleges that the plaintiff lacks standing to maintain this action as evidenced by the mortgage dated, December 20, 2004, given by Omni Ventures, Inc. to William Cirminiello that was recorded in the office of the Suffolk County Clerk on March 4, 2005. The defendant claims that the plaintiff is bound by the warrant of Omni Venture's title contained in said mortgage since it was executed by Omni Venture's secretary, Joseph Giampietro, who also serves as the President of the plaintiff. The defendant suggests that Omni Ventures Inc. holds title to the subject premises under a deed given by

the plaintiff on or before December 20, 2004, which deed has not been recorded in the Office of the County Clerk.

The defendant also contends that the statute of limitations applicable to its foreclosure claim has not run or, if it has, that the plaintiff is estopped from asserting said statute due to its misleading and deceitful acts, including its failure to record the deed by which it acquired and/or conveyed title to the subject premises and the failure to remove Eugene Kowalski as the record owner of said premises from the real property tax rolls, all of which is alleged to have induced the defendant to postpone the commencement of a foreclosure action.

In reply, the plaintiff refutes the defendant's claim that Omni Ventures is the owner of the subject premises by its assertion that no deed subsequent to the March 26, 1998 deed by which the plaintiff acquired title to the subject premises was executed by the plaintiff to Omni Ventures, Inc. The plaintiff further claims that the record clearly demonstrates that the statute of limitations began to run on the death of Agnes Kowalski, which occurred on August 15, 1996 as her husband, Eugene Kowalski, ceased occupation of the premises in 1976. In support of this latter claim, the plaintiff relies upon a copy of a purported affidavit by Eugene F. Kowalski dated March 26th 1998, the same date as the deed to the plaintiff, wherein Eugene Kowalski states as follows: "I have not resided at 44 Fairdale Drive, Brentwood, NY 11717 since 1976".

Not in dispute is the rule that the statute of limitations in a mortgage foreclosure action begins to run six years from the date of each unpaid installment or from the time the mortgagee is entitled to demand full payment or when the mortgage has been accelerated by notice and demand or the commencement of an action (*see Zinker v Makler*, 298 AD2d 516, 748 NYS2d 780 [2nd Dept. 2002]). Review of the mortgage at issue here reveals that the commencement of the six year statute of limitations would occur on the last of the following: the date of death of a recipient mortgagor; the date of death of a non-mortgagor recipient for whom a mortgagor is responsible; the cessation of occupancy by a mortgagor; or upon the mortgagors' default in payment of any tax, water rate or assessment for thirty days after notice and demand.

To succeed on its claims that statute began to run on August 15, 1996, the date of death of the recipient mortgagor, the plaintiff must establish that the co-mortgagor, Eugene Kowalski, ceased to occupy the subject premises sometime prior to August 15, 1996. In an effort to sustain this burden, the plaintiff submits the cursory affidavit it exacted from Mr. Kowalski on the same date as the plaintiff's conveyance, namely, March 26, 1998, wherein he asserts that he ceased residing in the subject premises as long ago as 1976.

The court finds however, that the purported affidavit of Eugene Kowalski is defective in form in as much as it contains a handwritten insertion, its venue is incomplete and it is not entitled in the name of this action (*see Baxter v Seaman*, 1 How.PR. 51 [NY Sup. Ct. 1844]; *Castle v Mathews* (Hill & Den 438 [NY Sup. Ct. 1844]). The court further finds that the affidavit of Eugene Kowalski dated March 26, 1998, upon which the plaintiff relies to establish its entitlement to the summary judgment demanded by it, is

substantively insufficient to establish that Mr. Kowalski ceased to “occupy” the premises under the terms of the subject mortgage.

Case authorities emanating from the Appellate Division, Second Department have held that affidavits may not themselves stand as proof of facts in dispute (*see Fletcher v Fletcher*, 56 AD2d 589, 391 NYS2d 630 [2nd Dept. 1977]). Ex parte affidavits asserting material facts are inadmissible hearsay and should not be used to establish ultimate facts particularly where the declarant is unavailable for cross-examination (*see Seinfeld v Robinson*, 300 AD2d 2008, 755 NYS2d 69 [1st Dept. 2002]; *Cf., Kraveta v New York State Division of Parole*, 293 AD2d 843, 740 NYS2d 512 [3rd Dept. 2002]). Since, the declarant in an ex parte affidavit is not subject to cross-examination, questions regarding the his or her bias or self-interest remain unanswered and no evaluation of the credibility of the declarant is possible from a mere reading of said affidavit (*see Wickham v Liberty Mutual Insurance Company*, 73 AD2d 742, 423 NYS2d 273 [3rd Dept. 1979]). Summary judgment should not be awarded where the movant relies on ultimate facts which are asserted in an ex parte affidavit by one not subject to cross-examination.

The insufficiency of the affidavit of Eugene Kowalski dated March 26, 1998, upon which the plaintiff predicates its motion for summary judgment, is immediately apparent from even a most cursory reading thereof. The ex parte affidavit, which was executed on the same day as the plaintiff’s conveyance, pre-dates the commencement of this action by nearly eight years. It is self-serving and conclusory and contains no factual averments from which one might conclude that Mr. Kowalski is now available for cross-examination. The sole and conclusory assertion of fact regarding Mr. Kowalski’s non-residency at the subject premises does not establish his cessation of occupancy as that term is used in the subject mortgage. Issues of fact, including those of credibility, are raised rather than eliminated by said affidavit. The plaintiff’s motion for summary judgment is thus denied.


Left for consideration is the cross motion (#002) by the defendant for summary judgment dismissing the plaintiff’s complaint. The motion is predicated upon various affirmative defenses asserted in the answer of the defendant. The court’s review of the cross-moving papers reveals that defendant failed to establish as a matter of law that the plaintiff lacks standing to bring this action because its sister corporation, Omni Ventures Inc., is purportedly the owner of the subject premises. The defendant offers no proof in support of its claims that the plaintiff conveyed its interest in the subject premises to its related corporation Omni Ventures, Inc., under the terms of an unrecorded deed and, as a result, the plaintiff lacks standing to prosecute the claims interposed in this action. Moreover, the defendant’s allegations regarding the existence of any such unrecorded deed were controverted by the affidavit of the plaintiff’s president. Summary judgment dismissing the plaintiff’s complaint on the grounds that the plaintiff lacks standing is thus precluded.

Nor did the defendant establish her alternate grounds for summary judgment dismissing the plaintiff’s complaint. The defendant’s claim that the statute of limitations begins to run at the option of the defendant on the occurrence of one or more of the triggering events is rejected as unmeritorious as the

same is not supported by the terms of the mortgage. Equally unavailing is the defendant's reliance upon the notice requirements imposed upon recipients of public assistance upon their transfer of real property by §166-2 of the Suffolk County Administrative Law and her reliance upon the tolling provisions of CPLR 207, as neither of these statutory provisions are applicable here. The remaining contentions of the defendant which rest upon the doctrine of estoppel and are aimed at defeating the plaintiff's motion-in-chief shall not be addressed by the court since said motion-in-chief has already been denied for the reasons set forth above.

In view of the foregoing, the plaintiff's motion in chief (#001) for summary judgment is denied as is the cross motion(#002) by the defendant for summary judgment dismissing the plaintiff's complaint.

Dated: JUN 04 2008



J.S.C.
JEFFREY ARLEN SPINNER

 FINAL DISPOSITION X NON-FINAL DISPOSITION