1.2.3. Holding Corp. v Exeter Holding, Ltd.
2008 NY Slip Op 32739(U)
September 10, 2008
Supreme Court, Suffolk County
Docket Number: 06-26107
Judge: Robert W. Doyle

SHORT FORM ORDER

INDEX No. 06-26107
CAL. No. 07-02318-EQ

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

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 7/30/08
Mot. Seq. # 003 - MG

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

Upon the following papers numbered 1 to 13 read on this motion for leave to reargue; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 10 - 11; Replying Affidavits and supporting papers 12 - 13; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant for an order granting leave to reargue its prior motion for summary judgment, which was denied by order of this Court dated January 28, 2008, is considered under CPLR 2221 and is granted. Upon granting leave to reargue, the court vacates the order dated January 28, 2008 and substitutes the following order; and it is further

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 determined herein.

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 titled 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. In the alternative, Exeter seeks summary judgment on its second and third counterclaims imposing an equitable mortgage as well as sanctions as against plaintiff, its principals and its attorneys. 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]; ***Morrocoy 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 demonstrated that at the time that it made the loan to Millenium and obtained a mortgage on the Shirley property, Exeter was a bonafide encumbrancer for value, having properly relied to its detriment on the title report it had ordered indicating that Millenium was the sole owner of the property and Exeter had no duty to conduct any further inquiry (*see*, ***Fleming-Jackson v Fleming***, 41 AD3d 175, 838 NYS2d 506 [1st Dept 2007]; ***Regions Bank v Campbell***, 291 AD2d 437, 737 NYS2d 636 [2d Dept 2002]; *compare*, ***Greenpoint Sav. Bank v Pennolino***, 136 AD2d 600, 523 NYS2d 583 [2d Dept 1988]).

A co-owner can only encumber its own interest in property without the consent of the other co-owners (*see*, ***Kwang Hee Lee v Adjmi 936 Realty Associates***, 34 AD3d 646, 824 NYS2d 672 [2d Dept 2006]; ***Northgate Elec. Profit Sharing Plan v Hayes***, 210 AD2d 384, 620 NYS2d 418 [2d Dept 1994]; *see also*, ***V.R.W., Inc. v Klein***, 68 NY2d 560, 510 NYS2d 848 [1986]). Thus, Exeter's mortgage actually encumbered Millenium's one-half interest in the property (*see*, ***Greenpoint Sav. Bank v Guiliano***, 238 AD2d 472, 656 NYS2d 646 [2d Dept 1997], *lv to appeal dismissed* 90 NY2d 935, 664 NYS2d 272 [1997]).

In addition, Exeter demonstrated that Alan Kasper, the authorized agent of plaintiff, 1.2.3. Holding, had actual knowledge of the existence of the subject Exeter mortgage on the Shirley property at the time that he signed the dissolution agreement dated April 7, 2006 on behalf of AFC. Subsequently, when Alan Kasper transferred ownership of the subject Shirley property from AFC to plaintiff one month later, on May 6, 2006, he was acting on behalf of both corporations with express authority given by his wife, Elvira Palazzo, sole owner of plaintiff. Exeter also demonstrated that plaintiff did not pay valuable consideration for the Shirley Property (*see*, ***Dolphin v Marocik***, 222 AD2d 549, 635 NYS2d 84 [2d Dept 1995]). Therefore, Exeter established that plaintiff was not a good faith purchaser for value of the subject Shirley property with respect to the Exeter mortgage and plaintiff cannot invoke the protection of the New York Recording Statutes (*see generally*, ***HSBC Mtge. Services, Inc. v Alphonso***, 16 Misc3d 1131(A), ___ NYS2d ___, 2007 WL 2429711, 2007 NY Slip Op 51657(U) [NY Sup Aug 20, 2007]; ***Yen-Te Hsueh Chen v Geranium Dev. Corp.***, *supra*; ***Barrett v Littles***, *supra*).

Plaintiff in opposition contends that plaintiff did not have knowledge of the existence of the Exeter mortgage inasmuch as it did not appear on the title report ordered prior to execution of the deed on April 17, 2006 and that in any event, said mortgage secured only the portion of the property owned by Millenium and not AFC since AFC did not sign the note for the loan. Plaintiff submits, among other things, the affidavit of Alan Kasper and the deposition transcript of Linda Haltman on behalf of Exeter.

In his affidavit dated November 29, 2007, Alan Kasper states that he is an officer of 1.2.3. Holding Corp.; that he had an affiliation with AFC; that AFC and Millenium held the Shirley property as joint tenants; and that the Shirley property was purchased jointly by AFC and Millenium

as one of two separate joint ventures of AFC and Millenium. Mr. Kasper rejects Mr. Cervini's statements that Alan Kasper and AFC were fully aware of and consented to the subject Exeter mortgage. According to Mr. Kasper, the entire reason for the dissolution of the joint venture between AFC and Millenium was due to Mr. Cervini's representation that he had encumbered the premises. He states that in the dissolution agreement it was acknowledged that monies were owed to Exeter, however it was based on Mr. Cervini's representation. Mr. Kasper further states that he ordered and conducted a title search on behalf of AFC and that the resulting title report did not show a recorded mortgage of Exeter. He reasons that "[c]onsequently, it was more than good faith to assume either they had reason not to file it or in fact Cervini was in error about owing money to Exeter, LTD and the matter was resolved." Mr. Kasper also points out that Exeter is attempting to place a mortgage on the whole property when it obtained a mortgage against only one joint owner and had a security interest only in the interest held by Millenium. In addition, Mr. Kasper contends that liability should rest on Exeter's title company for failing to discover that there was a joint title holder, AFC, and on Mr. Cervini of Millenium for failing to disclose and inform Exeter of the existence of AFC as co-owner of the subject Shirley property.

Here, it strains credulity that Mr. Kasper, an officer of two corporations, one of which is entitled a "Real Estate" corporation and who has been involved in real estate joint ventures for at least the past three years, would execute an agreement on behalf of his real estate corporation expressly agreeing to assume responsibility for a purported mortgage of "Exeter Bank," and then would merely conduct a title search and after not finding any such recorded mortgage on the title report would assume that there was no such mortgage in existence and would inquire into the matter no further. The repeated references to Exeter in the April 7, 2006 agreement and the express agreement to assume responsibility for its mortgage were in sharp contrast to the complete absence of any reference to Exeter in Mr. Kasper's title report and said disparity was sufficient to require further inquiry by Mr. Kasper as to whether said mortgage actually did exist and as to the nature of its contents and that of the associated loan (*see generally*, ***Morrocoy Marina v Altengarten***, *supra*). Thus, plaintiff "is presumed either to have made the inquiry as ascertained the extent of [the] prior right, or to have been guilty of a degree of negligence * * * fatal to [its] claim [that it is] a bona fide purchaser" (*see*, ***Williamson v Brown***, 15 NY 354, 362 cited in ***Vitale v Pinto***, 118 AD2d 774, 776, 500 NYS2d 283, 285 [2d Dept 1986]). Thus, plaintiff did not meet its burden of proving that it was a good faith purchaser for value of the Shirley property (*see*, ***Yen-Te Hsueh Chen v Geranium Dev. Corp.***, *supra*).

Mr. Kasper's remaining contentions do not alter the fact that the Exeter mortgage encumbered a portion of the Shirley property that was once owned by Millenium and that the Shirley property with said encumbrance is now owned in its entirety by plaintiff. Plaintiff cannot avoid said obligation on the grounds that he on behalf of AFC did not sign the building loan note or the mortgage. Exeter had no duty to mitigate damages by suing the company which furnished it with the defective title report (*see*, ***Marine Midland Bank, N.A. v Virginia Woods Ltd.***, 201 AD2d 625, 608 NYS2d 473 [2d Dept 1994]). Nor can plaintiff avoid said obligation on the grounds that the proper fault lies with Exeter's title company for its failure to discern that AFC was also a title holder

at the time the loan was made as well as with Millenium for its failure to reveal the existence of the joint title holder, AFC. These contentions do not change the fact that prior to acquiring Millenium's portion of the Shirley property to become owner of the entire parcel of Shirley property, Mr. Kasper acknowledged by agreement dated April 7, 2006 the existence of an Exeter mortgage encumbering the property and agreed to assume responsibility for it and that Mr. Kasper carried this knowledge with him when one month later he transferred ownership of the Shirley property from AFC to plaintiff, as an agent of plaintiff and with the authority of plaintiff's sole owner, his wife, Elvira Palazzo.

Accordingly, that portion of the instant motion by defendant, Exeter Holding, Ltd., for summary judgment in its favor dismissing the complaint in its entirety and summary judgment on its first counterclaim is granted. The remaining and alternate requests for relief are denied as academic. The Court declares that the mortgage of defendant, Exeter Holding, Ltd., encumbering the subject Shirley property is superior to the ownership interest of plaintiff, 1.2.3. Holding Corp., in the subject Shirley property. The Clerk of Suffolk County is directed to record said judgment in its record and indices as against the subject Shirley property.

Dated: 10 September 2008

J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**