

Joo v Cho

2008 NY Slip Op 33648(U)

April 9, 2008

Sup Ct, New York County

Docket Number: 113591/05

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDGE SHIRLEY WERNER KORNREICH
Judge

PART 54

Index Number : 113591/2005
JOO, KONG WAN
vs.
CHO, NICOLE M.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. 113591/05
MOTION DATE 1/3/08
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

this motion to/for Summary Judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
1
2,3,4
5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

APR 14 2008

COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4/9/08

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----- X
DONG WAN JOO and ON KYONG JOO

Plaintiffs,

Index No.: 113591/05

-against-

DECISION
and ORDER

NICOLE M. CHIO, individually and d/b/a Lotte
Mortgage, BACK CHUL KIM, SOONA LEE, and
AMERICAN GATEWAY ENERGY, L.L.C.,

FILED
APR 14 2008

Defendants

**COUNTY CLERK'S OFFICE
NEW YORK**

KORNREICH, SHIRLEY WERNER, J.:

This action arises out of a loan made in December 2003 by plaintiffs Dong Wan Joo and On Kyong Joo (the Joos) to defendants Back Chul Kim (Kim) and Soona Lec (Lee). As collateral for the loan, plaintiffs obtained a mortgage on a condominium, allegedly owned by Kim, located at 304 East 65th Street, Unit 3C, New York, N.Y. (Unit 3C). Defendant American Gateway Energy, LLC (AGE), a limited liability company owned and operated by non-party Sandra Dyche (Dyche), Kim's sister, now moves for summary judgment dismissing the fifth and sixth causes of action of the verified complaint which allege that the sale of Unit 3C from Kim to AGE on or about August 31, 2004 was fraudulent. AGE claims that a notice of pendency filed by Dyche in a prior action she commenced against Kim for title to Unit 3C extinguishes plaintiffs mortgage on the property. Plaintiffs oppose.

I. Background

A. Affidavit of Dong Wan Joo

Plaintiff Dong Wan Joo avers the following. He is an adjunct professor of sociology at

the New York Theological Seminary and the owner and operator of The Korean Research Center (the Center) in Queens. The Center is a facility that helps local Korean-Americans assimilate into the community. For approximately five years ending in 2005, Joo sublet part of the Center's office space to defendant Nicole Cho (Cho). Out of this space, Cho ran and operated a mortgage brokerage business entitled Lotte Mortgage.

Joo and his wife sold their condominium in 2002 and subsequently began looking for a short term investment opportunity. In November 2003, Cho approached Joo about loaning Lee money to finance a restaurant she owned called "Pacific Sea World". As collateral, Joo would be given a mortgage on Unit 3C, a condo allegedly owned by Lee's husband defendant Kim. Joo avers that Cho persuaded him this was a safe investment because Kim's equity in Unit 3C was appraised at \$500,000 and he had no mortgage or other lien. The loan amount was \$88,000. Joo further avers that he was told the full amount of the loan, plus interest, would be paid back in 2004 once Cho helped Kim obtain a mortgage on Unit 3C.

According to Joo, Cho handled all of the preparation leading up to the closing. He further avers Cho told him she had hired an attorney to look over all of the documents and also to appear on the Joo's behalf at the closing. On December 30, 2003, Cho, Kim, Lee, Joo and his wife met at Joo's office to execute the loan. Cho brought two documents with her - a Mortgage Note and a Mortgage. However, no attorney was present. According to Joo, Cho assured him that since an attorney had prepared and reviewed each document, there was no need for one at the closing. The parties executed the loan, and Joo made a check out to Kim for \$88,000. Kim signed the Mortgage Note and Mortgage purportedly giving the Joo's a lien on Unit 3C. Each document was notarized. Joo avers Cho was responsible for delivering the Mortgage to a title company for

recording.

Following the closing, Joo avers he became frustrated with Cho due to her "repeated excuses" as to the status of the loan. In or about August 2004, Joo contacted the title company responsible for recording the Mortgage and discovered that it had not been recorded. The recording finally was performed on October 14, 2004.

In or about November 2004, Joo avers he learned Kim executed a "Real Property Transfer Report" (the Real Property Transfer) which sold Unit 3C to AGE for only \$25,000. The Joos subsequently demanded the loan be repaid in full. When Cho and Kim refused, the Joo's commenced the instant action alleging: (1) breach of fiduciary duty against Cho; (2) fraud against Cho, Kim and Lee; (3) breach of contract against Kim; (4) money had and received against Kim and Lee; (5) presumptive fraudulent conveyance regarding the Real Property Transfer against Kim and AGE; and (6) actual fraudulent conveyance of the Real Property Transfer against Kim and AGE.

B. Dyche v. Kim Action

In support of this motion, AGE submits Dyche's January 26 and February 23, 2004 affidavits from a prior lawsuit she brought against Kim. In these affidavits, Dyche avers the following. She was renting Unit 3C when her brother arrived from South Korea in 1996. According to Dyche, she arranged for Kim's citizenship and paid all of his rent and living expenses. When she purchased Unit 3C in 1997, she decided to place it in Kim's name, with the understanding that Unit 3C would remain hers, but Kim could use it to raise capital for his business and investment ventures. Kim executed a promissory note for \$300,000 to Dyche, and she in turn filed a UCC-1 financing statement on September 10, 2001. No money exchanged

hands in the deal.

In late 2003, Dyche avers she learned Kim attempted to re-finance Unit 3C without her knowledge. According to Dyche, Kim apologized, but said he needed the money to help Lee save her restaurant. Dyche and Kim, therefore, executed a "Mortgage Financing and Stock Investment Agreement" (the Agreement) on December 29, 2003. The Agreement was designed to allow Kim to obtain a \$300,000 mortgage on Unit 3C to finance his wife's restaurant. The "Structure of the Transaction" was explained as follows:

KIM, as nominal owner of [Unit 3C] shall make all arrangements necessary to obtain the mortgaged financing. KIM hereby acknowledges that whatever interest he may hold in the mortgaged property is nominal and limited to acting in the place of and/or on behalf of SANDRA DYCHE, strictly for convenience in consummating this transaction. Back C. Kim further agrees that, on demand of SANDRA DYCHE, he will execute any document and/or perform any act necessary to clarify SANDRA DYCHE'S sole and exclusive ownership of [Unit 3C].

Dyche avers the mortgage contemplated under the Agreement became impossible for Kim to obtain due to unforeseen circumstances. However, Kim persisted in using Unit 3C as collateral to obtain financing for Lee and her restaurant. As a result, Dyche decided she needed to re-structure her arrangement with Kim so that title to Unit 3C was solely in her name. Accordingly, she filed suit on or about January 26, 2004, subsequent to the Joos December 2003 loan but prior to the recording of their mortgage on October 14, 2004. She sought a declaratory judgment naming her as the owner of Unit 3C or for specific performance of the Agreement. On January 27, 2004, Dyche obtained a notice of pendency against Kim for Unit 3C and was granted a temporary restraining order on January 30, 2004, preventing Kim from taking any action with regard to Unit 3C.

On or about April 16, 2004, Dyche was granted a preliminary injunction by the Hon. Marcy Friedman restraining Kim from refinancing, transferring, encumbering, or otherwise disposing of Unit 3C during the pendency of the action. The action was discontinued by Dyche on June 24, 2004. On or about August 31, 2004, Kim executed a Real Property Transfer selling Unit 3C to AGE for \$25,000.

II. *Conclusions of Law*

It is well established that summary judgment may be granted only when it is clear that no triable issues of fact exist. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *Friends of Animals, Inc. v. Associated Fur Mfts., Inc.*, 46 N.Y.2d 1065, 1067 (1979). A failure to make a *prima facie* showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact. *Alvarez, supra*, 68 N.Y.2d at 324; *Zuckerman, supra*, 49 N.Y.2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in a light most favorable to the party opposing the motion. *Martin v. Briggs*, 235 A.D.2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgement motion. *Zuckerman, supra*, 49 N.Y.2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v.*

Ceppos, 46 N.Y.2d 223, 231 (1978).

Here, AGE has not met its burden. It argues that plaintiffs' mortgage interest in Unit 3C is precluded by the notice of pendency Dyche filed on January 27, 2004. When a notice of pendency is filed, a purchaser is charged with constructive notice of the litigation if he fails to record prior to the notice being filed. *Goldstein v. Gold*, 106 A.D.2d 100, 102 (2nd Dept 1984). "A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in the action after such filing to the same extent as if he were a party." *Id.* quoting CPLR 6501. Here, plaintiffs' mortgage was recorded on October 14, 2004, well after the notice of pendency was filed. Legally, the notice of pendency has priority over the Joos' mortgage. However, questions of fact exist as to the value of Unit 3C, who owns it, and the reason, purpose and effect of the Real Property Transfer.

Regarding value, two sections of the transfer call for the total value of the property, but are left blank. Although Dyche contends Kim owed her \$300,000, Joo avers Cho told him Kim's equity in Unit 3C was \$500,000. The Real Property Transfer lists the sale price from Kim to AGE as \$25,000. Clearly, an issue of fact exists as to how much the property is worth.

Concerning ownership, Kim is listed as the owner/seller on the Real Property Transfer, yet Dyche averred in her court action that she owned Unit 3C and claims she is the sole owner. The Agreement states that Kim has only a nominal interest in Unit 3C and that he will execute any document needed to clarify that Dyche is the sole and exclusive owner of the property. Here, AGE, who is not a party to the Dyche Action and was not named on the notice of pendency, claims ownership.

In reference to the reason, purpose and effect of the transfer, Dyche, while purportedly

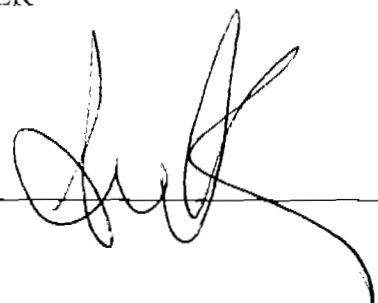
owning Unit 3C, admittedly was complicit in her brother's use of the condo as collateral. Several times, Kim represented to banks, individuals, and other lenders that he in fact was the owner. Kim signed the Agreement with Dyche on December 29, 2003 stating that his interest in Unit 3C was nominal. The next day, he used the entire property as collateral to get a \$88,000 loan from the Joos. Consequently, issues of fraud exist involving Dyche, AGE, her admitted alter ego, and Kim during the execution of the Agreement and by Kim to the Joos during the execution of the loan.

In claiming that the Real Property Transfer was in some fashion used to end the Dyche Action, AGE admits that it and Dyche are one in the same. Their names are used interchangeably throughout this motion. The New York State Division of Corporations Entity Information Sheet states that AGE was formed on February 2, 2004 and lists Unit 3C as the address. The Real Property Transfer, which took place on August 31, 2004, lists Unit 3C as AGE's tax billing address. Dyche and AGE are both listed as buyers. As a result, it is not clear from the record whether Dyche was using Unit 3C as AGE's address prior to executing the Real Property Transfer. In addition, AGE offers no documents or testimony to connect the Real Property Transfer to the discontinuance of the Dyche Action. Accordingly, it is

ORDERED that defendant American Gateway Energy, LLC's motion for summary judgment is denied.

FILED ENTER
 APR 14 2008
 COUNTY CLERK'S OFFICE
 NEW YORK

DATE: April 9, 2008
 New York, NY


 _____ J.S.C.