

T & V Constr. v Pratti

2009 NY Slip Op 30587(U)

March 13, 2009

Supreme Court, Suffolk County

Docket Number: 21299-2006

Judge: Sandra L. Sgroi

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SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART 19 SUFFOLK COUNTY

Mot Seq: 005MD

Present:

Hon. SANDRA L. SGROI

Adj. Date: 2-19-08

Return Date: 9-25-08

T & V CONSTRUCTION,
Plaintiff,

-against-

MARIO J. PRATTI, MACEDO DEVELOPERS CORPORATION, CATHERINE RASMUSSEN, MATTHEW DECRISTAN, MARIA DECRISTAN, KAREN CICCARELLI, BETTY MCEVOY, JACLYN MCEVOY, MARC MCEVOY, ANTHONY FALZONE and PATRICIA FALZONE,

Defendants.

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Upon the following papers numbered 1 to 23 read on this Motion: Order to Show Cause and supporting papers 1-18; Affirmation in opposition and supporting papers 19-21; Affirmation in Reply and supporting papers 22-23; it is,

ORDERED that the Order to Show Cause of the U.S. Bank National Association as Trustee for Asset Backed Pass Through Certificates, Series 200-HE1 for an order permitting it to intervene in this action, vacate the judgment of foreclosure and sale dated January 17, 2008 and the subsequent deed of the mortgaged premises known as and by 112 Irving Avenue, Deer Park, New York to Suffolk Asset Management, LLC is denied in its entirety.

This is an action to foreclose a mortgage under Index No. 21299 (hereinafter know as the "Instant action") given on three properties to secure a note in the amount of \$308,000.00 dated November 19, 2003(hereinafter the "T & V mortgage"). The Note is secured by a mortgage given by the Defendants Pratti and Rasmussen on three parcels known as 72 Osceola Avenue, Deer Park, New York, 77 Leo Lane, Deer Park, New York and 112 Irving Avenue, Deer Park, New York. On August 12, 2004, the owner of 112 Irving Avenue, Deer Park executed a mortgage in favor of Fremont Investment & Loan to secure a loan in the principal amount of \$288,000.00 (hereinafter the "Fremont mortgage"). The Fremont mortgage was recorded on September 20, 2004 and it was assigned to Ocwen Loan Servicing, LLC. The T&V mortgage was recorded on March 14, 2006.

After the T & V mortgage was given (but before it was recorded) and the Fremont mortgage was given, the Irving Avenue parcel was transferred from the Defendant Mario Pratti to the Defendant Karen Ciccarelli by deed dated September 16, 2005. On that same day Defendant Ciccarelli executed mortgage with MortgageIt, Inc.¹ in the principal amount of \$351,000.00 and \$302,655.21 of those proceeds were used to pay off the Fremont mortgage. A satisfaction of the Fremont mortgage was recorded on November 16, 2005.

Unfortunately, both the Ciccarelli Deed and the U.S. Bank mortgage contained an incorrect description of the premises and as a result were indexed against the incorrect lot. Defendant Pratti executed a correction deed in favor of the Defendant Ciccarelli on December 23, 2005 and that deed was recorded on January 18, 2006, but no steps were taken to correct the description in the U.S. Bank mortgage. As a result a search for liens and mortgages filed against 112 Irving Avenue, Deer Park, New York would not reveal the existence of the U. S. Bank mortgage.

¹The MortgageIt, Inc.'s mortgage eventually was transferred to U.S. Bank National Association as Trustee for Asset Backed Pass Through Certificates, Series 200-HE1 (hereinafter "U.S. Bank"), the proposed intervenor. The Court will refer to this mortgage as the U.S. Bank mortgage.

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This action to foreclose the mortgage and sell the three separate parcels of real estate was commenced in 2006 by T & V Construction and U. S. Bank was not named as a party.

When confronted with the request to sell all three parcels of property covered by the mortgage, this Court stated that it might not be necessary to sell each parcel of real property to fully satisfy the debt in the amount of approximately \$305,000.00 plus foreclosure expenses and, in furtherance of that finding, this Court modified the form judgment of foreclosure and sale submitted by the Plaintiff to provide that the properties be sold separately, one at a time, until the mortgage debt was satisfied. The Court of Appeals in *Sanders v. Palmer*, (68 N.Y.2d 180, 499 N.E.2d 1242, 1986 N.Y. LEXIS 20471, 507 N.Y.S.2d 844) stated:

That several mortgages have been given to secure a single debt does not authorize separate foreclosure actions when the properties involved are all subject to the jurisdiction of one court. What is required, rather, is that, unless the court orders otherwise, there be separate sales of the security in such order as the court may fix, and an application after each sale and before the next occurs for determination of the deficiency resulting from the sale, for otherwise what remains due and payable from the additional security provided cannot be known. Were no deficiency application made after each such sale, a guarantor who has provided security additional to that given by the debtor and who, like the debtor, is entitled to the protection of *RPAPL* 1371 (3) when no deficiency judgment is obtained (*TBS Enters. v Grobe*, 114 AD2d 445; *Kleet Lbr. Co. v Foley Constr. Corp.*, 91 AD2d 1014; *Kings County Sav. Bank v Fulton Sav. Bank*, 268 App Div 452; *Merchants Natl. Bank & Trust Co. v Wagner*, 93 Misc 2d 224; *State Bank v Amak Enters.*, 77 Misc 2d 340; see, *Bedcro Realty Corp. v Title Guar. & Trust Co.*, 290 NY 520; *Statewide Sav. & Loan Assn. v Canoe Hill*, 44 NY2d 843, *affg* 54 AD2d 1018; *Band Realty Co. v North Brewster*, 59 AD2d 770) would be deprived of that protection. That the deficiency in a multiple security situation is determined following sale on foreclosure of the security first sold does not affect the applicability of the statute or permit the institution of separate proceedings without permission of the court (*cf. Frank v Davis, supra*, at p 279) To the extent that *Bodner v Brickner* (29 AD2d 441) and *Klein v Gray* (127 NYS2d 459), relied upon by plaintiffs, are to the contrary they are not to be followed.

In furtherance of the Court's directive in the judgment of foreclosure and sale, the property located on 112 Irving Avenue in Deer Park, New York was sold at public auction by the referee for \$155,000.00.

U.S. Bank now seeks an order permitting it to intervene in this action, vacate the judgment of foreclosure and sale dated January 17, 2008, and the subsequent issuance of the referee's deed of the mortgaged premises 112 Irving Avenue, Deer Park, New York to Suffolk Asset Management, LLC., and to compel the return of any and all proceeds of the sale of that property to the referee.

While U.S. Bank has asked the Court for permission to intervene in this action, it has failed to attach to its papers a proposed answer. This Court, in an attempt to expedite this matter, will not deny the motion to intervene for failure to attach a proposed answer because all of the facts and issues have been fully briefed by the attorneys for the Parties (see, *Zehnder v. State*, 266 A.D.2d 224, 697 N.Y.S.2d 347;

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Lamberti v. Metropolitan Transp. Authority (MTA), 170 A.D.2d 224, 565 N.Y.S.2d 111; *CPLR* 1014).

The Defendant Karen Ciccarelli financed her purchase of the Irving Avenue premises by means of a mortgage in the principal amount of \$351,000.00, which was recorded with the Suffolk County Clerk on October 27, 2005, and obtained from MortgageIt, Inc. MortgageIt, Inc. was U.S. Bank's predecessor in interest. The Plaintiff did not name either MortgageIt, Inc., or U.S. Bank, the successor in interest and proposed intervenor, as a party to this foreclosure action. The reason for the failure to name either U.S. Bank or MortgageIt, Inc. was not due to an error by the Plaintiff or a mistake in the title search conducted by the Plaintiff. Instead, it was caused by a failure to properly record the mortgage given to MortgageIt, Inc. referred to earlier in this decision.

According to the attorney for U.S. Bank, the "**** mortgage was somehow incorrectly described and indexed against the neighboring property, before being corrected by Court order dated April 8, 2008." The Court notes that the instant mortgage foreclosure action was commenced on in 2006, and since the mortgage was not properly recorded, it was not possible to discover its existence through a title search.

When U.S. Bank commenced its own foreclosure action in 2007, the Plaintiff herein was named as a Defendant therein although its name was under a slightly different form and it was denominated as "T and V Construction." The judgment of foreclosure and sale in the U.S. Bank action (Index No. 6068-2007) was signed by Justice Kent on April 8, 2008 and entered on April 28, 2008 (hereinafter known as the "Kent action"). To further complicate matters, this property has already been sold pursuant to U.S. Bank action judgment and the proceeds were used to pay off a prior lien on the premises held by Fremont Investment & Loan. U.S. Bank alleges that it now holds a clear equitable lien that is superior to T&V's mortgage. A copy of the referee's report in that action has not been attached to these papers and according to the attorney for U.S. Bank the real property was not transferred by deed because the "cloud on the title" had been discovered.

The mis-indexing of the U.S. Bank mortgage provides no constructive notice under *RPL* § 291 (see also, *Wells Fargo Bank, NA v. Perry*, --- N.Y.S.2d ----, 2009 WL 440908, 2009 N.Y. Slip Op. 29072 (N.Y. Sup. Feb 20, 2009)). *RPL* § 291 states:

Every***conveyance not so recorded is void as against any person who subsequently purchases or acquires by exchange***the same real property***in good faith and for valuable consideration, from the same vendor or assignor***and whose conveyance, contract or assignment is first duly recorded.

T & V's mortgage was recorded first on March 14, 2006, and U.S. Bank's mortgage was not properly recorded until Judge Kent's order was entered in April of 2008, more than two years later. As the Appellate Division, Second Department stated in *Alliance Funding Co. v. Taboada*, 39 A.D.3d 784, 832 N.Y.S.2d 814:

New York has a "race-notice" recording statutory scheme whereby the mortgage recorded first by a mortgagee without notice of any other mortgages will maintain priority over such other mortgages (see, *Real Property Law* § 291; *Roth v. Porush*, 281 A.D.2d 612, 614,

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722 N.Y.S.2d 566; *Goldstein v. Gold*, 106 A.D.2d 100, 101-102, 483 N.Y.S.2d 375, *affd.* 66 N.Y.2d 624, 495 N.Y.S.2d 32, 485 N.E.2d 239).

Even if it is argued that T & V was placed upon notice when a notice of pendency was filed in the Kent action, the Kent action was commenced after the Instant action was commenced in 2006.


Further, when U.S. Bank commenced its action in 2007, it should have become aware of the existence of the Instant action commenced more than five months prior because a notice of pendency was filed on September 6, 2006 by the attorneys for T & V (*Novastar Mortg., Inc. v. Mendoza*, 26 A.D.3d 479, 811 N.Y.S.2d 411). With regard to an error in indexing, even if that error was made by the County Clerk, the improperly indexed mortgage does not give notice because "(a)An error in indexing a mortgage prevents a record of that instrument from constituting constructive notice "as to the property in any block not duly designated" at the time the mortgage is filed for the period that the error remains uncorrected" (*V & D Realty USA Corp. v. Mitso Group, Inc.*, 240 A.D.2d 562, 659 N.Y.S.2d 985; *County Law* § 919[I][j]; see, *Baccari v. DeSanti*, 70 A.D.2d 198, 202, 431 N.Y.S.2d 829; *Federal Natl. Mtge. Assn. v. Levine-Rodriguez*, 153 Misc.2d 8, 579 N.Y.S.2d 975).

U.S. Bank has no legal claim herein and to the extent that it seeks to assert an equitable claim to the monies that must also be denied. U.S. Bank has failed to explain the failure to act at the point in time when it became aware of or should have become aware of the existence of this action and a properly conducted foreclosure search made prior to the commencement of the Kent action would have revealed the notice of pendency filed on the property.

Therefore, the motion of the proposed intervenor will be denied in its entirety and the sale of the property located on Irving Avenue in Deer Park, New York pursuant to the judgment of foreclosure and sale issued in this action will not be set aside.

Dated:

3/12/09


SANDRA L. SGROI, J. S. C.