

**Second Saint Matthew Baptist Church v
Robinson-Traore**

2009 NY Slip Op 31404(U)

June 22, 2009

Supreme Court, New York County

Docket Number: 124204/01

Judge: Judith J. Gische

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 OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE

PART 10

Justice

Second Saint Matthew

Plaintiff (s),

INDEX NO. 124204 | 01

MOTION DATE _____

- v -

MOTION SEQ. NO. 005

Robinson-Trapore et al.

Defendant(s)

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

*motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.*

FILED
JUN 25 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/22/09

[Signature]
Hon. Judith J. Gische, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
SECOND SAINT MATTHEW BAPTIST CHURCH,

Plaintiff

-against-

FAYE ROBINSON-TRAORE, a/k/a FAYE M. ROBINSON, HOMESIDE LENDING INC., FEDERAL NATIONAL MORTGAGE ASSOCIATION, BERT MANDEVILLE, GWENERVA DARLING CHERRY, ESQ., JOSEPH GREENBLATT, PETER F. VOGEL, MAYWOOD CAPITAL CORP., TUMBLER'S INC., 224 EDGECOMBE AVE. REALTY CORP., MAIN STREET, NY, TITLE AGENCY INC., and STEWART TITLE INSURANCE COMPANY,

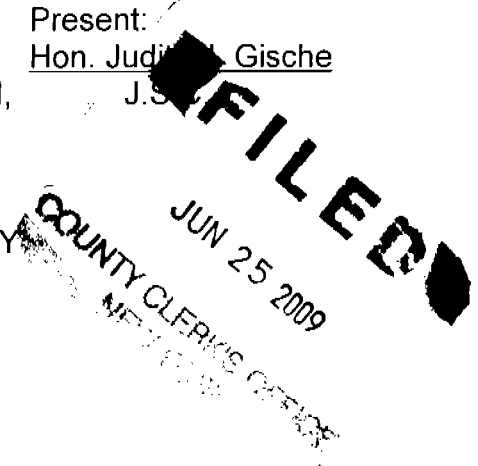
Defendants.
-----X

DECISION/ORDER

Index No.: 124204/01
Seq. No.: 005/006/007

Present:
Hon. Judge Gische

J.S.



Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers - motion seq. 005	Numbered
Stewart n/m (3212), JLK affid, exhs	1
PSF affirm in opp, exhs	2
ECK reply affirm, exhs	3
EB affid	4

Papers - motion seq. 006	Numbered
Homeside n/m (3212), BT affirm, exhs	1
BT reply affirm	2

Papers - motion seq. 007	Numbered
Robinson-Traore n/m (3212), FMRT affid, exhs	1
RDH affirm in supp	2
BT affid in partial opp	3
RDH reply affirm	4

Upon the foregoing papers the court's decision is as follows:

Plaintiff, Second Saint Matthew Baptist Church (the "Church") brings this action to, *inter alia*, vacate and void a deed dated October 14, 1999 and filed on March 6, 2000 conveying the real property located at 224 Edgecombe Avenue, New York, New York (the "property"). It also seeks an order declaring all subsequent deeds and mortgages null and void. The following defendants each move for summary judgment dismissing plaintiff's complaint: [1] Stewart Title Insurance Company ("Stewart") (motion sequence number 005); [2] Homeside Lending, Inc. ("Homeside") and Federal National Mortgage Association ("FNMA") (motion sequence number 006); and [3] Faye M. Robinson-Traore (motion sequence number 007). Stewart also seeks an order reimbursing it for the attorneys' fees, costs and disbursements it has incurred in defending this action.

Homeside and FNMA specifically seek dismissal of the complaint as to each entity, but alternatively seek dismissal of the Fourth, Fifth and Seventh causes of action and a declaration that the mortgage on the subject property held by FNMA is a valid lien on that property to the extent of \$193,693.26 plus interest from December 19, 2000, superior to plaintiff's right, title and interest, if any, in the subject property. Homeside and FNMA also seek dismissal of the first cross-claim in Robinson-Traore's verified amended answer.

Finally, Robinson-Traore seeks summary judgment dismissing "any and all cross-claims against [her], with prejudice," as well as an order reimbursing her for attorneys' fees, costs and disbursements.

The Church opposes each motion. The remaining defendants have not answered the complaint, nor have they submitted any opposition to these motions.

Stewart issued an owner's title insurance policy (the "Policy") to defendant 224 Edgecombe Ave. Realty Corp., insuring 224 Edgecombe Ave. Realty Corp's title to the property arising from a Deed dated October 14, 1999. Robinson-Traore is the present possessor of the property and legal title owner of record as well. Homeside is a mortgagor and Robinson-Traore is the mortgagee of the property pursuant to a mortgage dated December 19, 2000 and recorded in the New York City County Office of the New York City Register on August 23, 2001 in Reel 3347, Page 176. Homeside subsequently assigned the mortgage to FNMA, by assignment of mortgage dated August 30, 2002 and recorded in the New York County Office of the New York City Register on October 3, 2002 in Reel 3624, Page 641 (the "FNMA Mortgage").

These motions were consolidated for the court's consideration by order dated April 23, 2009. Since the note of issue has been filed and the motions were brought within the time provided under the CPLR, summary judgment relief is available. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

Many of the material and relevant facts are based upon documentary evidence or are not in dispute. Plaintiff has submitted the affidavit of Eva Briggs, the Church's secretary and a member of the Board of Trustees for the Church. Briggs also was deposed on March 2, 2005 and again on October 17, 2007. Partial excerpts of the transcripts of Briggs' depositions have been provided to the court.

In 1995, the Church became interested in purchasing the property for the

purpose of relocating the church. Defendant Bert Mandeville was the broker for the property and according to Briggs, Mandeville represented herself to be the owner of the property. At or about that time, plaintiff agreed to purchase the property for \$25,000, and paid Mandeville the sum of \$6,000¹ as and for a down payment. In exchange, Mandeville gave the Church a Deed dated August 17, 1995 transferring the property from George and Donna Stewart Barrows to the Church. The August 17, 1995 Deed was recorded in New York County on August 25, 1995. Briggs claims in her affidavit that all parties understood that plaintiff "would have to pay the sum of \$19,000 to complete the sale." There is no dispute that the Church never paid any additional sums to Mandeville or any other party to "complete the sale" of the property.

Instead, after the 8/17/05 Deed was recorded, the Church was apparently dissatisfied with the condition of the property, and sought to return the property back to Mandeville and obtain a refund of its \$6,000 down payment. At Briggs' deposition, she claimed that not only was the condition of the property unsatisfactory (the roof of the building located on the property was missing, the walls were deteriorating and the structure was otherwise unsound), but the members of the Church did not believe that the neighborhood in which the property was situated was a safe place for a "sanctuary."

After some period of deliberation, the Church decided that it no longer wanted to go forward with the purchase of the property, and sought a return of its deposit. The

¹ Briggs claims in her affidavit that the Church paid \$6,000, however, during the course of discovery, the Church only produced four checks totaling \$5,805 which represented a down payment on the purchase price of the property.

Church sent Mandeville a letter dated November 19, 1995, wherein it requested a return of its down payment and related fees because it was no longer interested in consummating the purchase of the property.

The Church also sent another letter to Mandeville dated November 19, 1995, which is nearly identical to the previous letter. The only notable difference is that the Church stated that its reason for not wanting to purchase the property is that they were "not satisfied with the area of this property" and "prefered (sic) to look for a building in the area [the Church] was [presently] in."

Briggs claims that Mandeville ignored the Church's letters. Therefore, the Church commenced an action against Mandeville in Civil Court. The Church has not provided any of the pleadings from this action, or other identifying information such as an index number. However, defendant Robinson-Traore has provided a copy of an Application for a Pro Se Summons and a Summons with Endorsed Complaint in an action entitled Second St Matthew Baptist Church v. Mrs. Bert Manderville bearing Index Number 015445 CVN 1996 (the "Civil Court Action"). In that complaint, the Church alleged as and for a cause of action the following:

Failure to provide proper services. Failure to return property and money. Returned merchandised (sic). We claim reimbursement of payment in amount of 305.00 for seal up building H.P.D. and violation tickets paid to environmental control board. Defendant stated she will return our deposit.

Plaintiff's claimed damages in the Civil Court Action, listed on both the Application for a Pro Se Summons and the Summons with Endorsed Complaint, is \$6,110.00 (with interest from 11/19/95).

Robinson-Traore has also provided a copy of a Request for Inquest dated 9/11/96 which was filed by the Church in the Civil Court Action. In that document, the Church requested an inquest because Mandeville had failed to appear and answer within the time provided.

Nonetheless, Briggs claims in her affidavit that the Church and Mandeville entered into a settlement agreement in the Civil Court Action wherein the "Church agreed to deed the property to Mandeville." Briggs goes on to say that "the Church's down payment was returned." Briggs admits, however, that the Church did not comply with the settlement agreement by delivering a deed to Mandeville because "the Church was unable to obtain the necessary Court approval" authorizing the transfer of real property by a non-for-profit corporation.

Robinson-Traore has also provided to the court two more letters from the Church to Mandeville, each dated January 4, 1996. One letter expressly authorizes Briggs to sign documents on behalf of the Church. The other letter provides as follows:

A meeting of the Second St. Matthew Baptist Church, An unincorporation (sic) Church of the Baptist Faith, Was duly call (sic) and held at 24 West 126th Street New York, N.Y. ... At which meeting a majority of the qualified voters of said Church, being at least 15 in number were present.

At the said meeting Deacon William Sessions was presiding officer and Sis. Eva Briggs, Church clerk. At said meeting it was decided that members agreed to sell the property at 224 Edgecombs Avenue because we are not satisfied with the location and area of the property, we preferred to purchase a building in the 126th street area.

A motion was made and seconded. It was unanimously resolved that the [Church] sell the property at 224 Edgecombs Avenue (sic).

Robinson-Traore has also provided a copy of a Contract of Sale dated January

16, 1996 wherein the Church agreed to sell the property to United Community Housing for \$5,805 (the "Jan. '96 Contract"). The Jan. '96 Contract is signed by Briggs on behalf of the Church and by Mandeville on behalf of United Community Housing. Both signatures appear to be notarized as well.

Briggs testified about the Jan. '96 Contract at her deposition as follows:

- Q. What are the terms of that Contract of Sale? Are you selling that property to a company owned by Bert Mandeville or did she make the representation to you that it was United Community Housing, Inc.? That's the name of the purchaser; is that correct?
- A. Mm-hmm.
- Q. Did she represent that that was her company?
- A. No.
- Q. Did she sign on the second page on behalf of that company?
- A. That is what she was here, but to our understanding it was always Bert Mandeville, United Community or whatever that is. That was not a part of the conversation.
- Q. But under the terms of that contract, you were going to sell the property and it was your understanding that you would sell the property back to Bert Mandeville?
- A. Yes.
- Q. For what purchase price?
- A. It's not saying what we was going to sell it back for.
- Q. Can I –
- A. Okay. The buyer agrees – 5,805.
- Q. That was the deposit that you had given her; right?
- A. Yes.

Q. So it was your understanding that you would get that money back and she would take back ownership of the property? That was your understanding; right?

A. At that time.

Q. There were no other conditions to that agreement; were there?

A. At that time, no.

Q. Now, so obviously you had met with Bert Mandeville between November of '95 and May of '96, since this contract is signed by the two of you in January of '96; right?

A. Yes, but at that time when this was done, it was, like, during the time that we give her the checks. This was brought to us later to sign. All this was taken place at the second meeting when we give her the \$3000. At the time the communication between us and her – if you in contract with somebody, you communicate with the person, you let them know what is happening, what is going on. It was very vague.

Q. On January 16, 1996, the day you signed this agreement, you did see Bert Mandeville on that day?

A. Yes, I saw her. She brought it back.

Q. You had a conversation with her?

A. Yes.

Q. There was some communication on that day?

A. Yes.

Q. She told you what this was?

A. Yes.

Q. You read it and you understood what it was and you signed; right?

A. Yes, I did.

...

Q. Then after you signed this contract, is it true that there was no communication again between you and her until the time that you brought the small claims

action?

A. Right. I called her on the phone and she wouldn't return my call.

...

Q. So, did she ever answer the complaint or was she in default?

A. Yes, she came. We had a meeting with her after we filed the small claim.

...

Q. What was discussed at that meeting? Did Bert say that she would take care of this?

A. Yes, she did.

Q. She would take care of the claim and she would even pay back your filing fee?

A. Yes, she would give us some papers to sign. That she will stop the taxes from coming to us.

Although Briggs claimed that there were documents evidencing the settlement agreement entered into by the Church and Mandeville in the Civil Court Action, the Church has not provided these to the court.

Briggs claims, both in her affidavit and at deposition, that the Church was unable to transfer the property to Mandeville because "[t]he Church could not afford to retain an attorney to draw up the necessary papers to obtain the Court order." At some unspecified time, the Church engaged Jenik Radon, Esq., who agreed to file a petition for the court order *pro bono*. Briggs claims that Attorney Radon represented that "Mandeville was refusing to cooperate and would not return any of his telephone calls... [therefore] Mandeville did not want the title to the property transferred out of the Church's name..." The Church has not provided an affidavit from Attorney Radon

attesting to any of these facts.

Defendant Robinson-Traore has provided a copy of a letter to Briggs from Mandeville to as CEO of United Community Housing, dated January 30, 1996, which states the following:

Please sign and have your signature notarized, initial each page in duplicate and mail back to me. We shall sit down and close (the fund returned) shortly thereafter.

Robinson-Traore has also provided copies of a check made out to the Church for \$6,000. The drawer and date of that check is not clear from the photocopy provided to the court. However, the document was marked as Defendant's Exhibit "G" and Briggs was asked about this document at her deposition. Briggs acknowledged the check as having been received by the Church from Mandeville. Another check that was provided to the court is clearer. That check is dated October 2, 1995, made payable to the Church for \$110.00 and signed by Mandeville. In the memo line of the 10/2/95 check is two notes: "paid in full" and "balance due on 224 Edgecombe".

Based upon all of these facts, the Church essentially claims that it received its deposit from Mandeville, in full, but it was unable to obtain a court order authorizing the transfer of the property to Mandeville, based upon a variety of circumstances. Thus, the Church claims that the August 17, 1995 Deed, which has the Church as owner, is the last valid deed.

Sometime in late 2000, the Church claims that it learned the property had been sold, "without its knowledge." The Church claims that Gwenerva Darling Cherry, Esq. perpetrated a fraud on the court by filing a false petition (Index Number 121928/99) (the

"Cherry Petition") on the Church's behalf, without the Church's knowledge or consent, to obtain a court order approving the sale of the property from the Church to Mandeville for \$160,000.

The Church also claims that the documents submitted in support of that petition (i.e., Brigg's verification of the contents of the petition, minutes from the Church's Board meeting approving the sale of the property, and a Contract of Sale which has not been provided to the court.) were fraudulent and/or were forged by various defendants. The purported signatory, Briggs, claims to not have signed any of the documents attached to the petition.

Based upon the Cherry Petition, Justice Stanley Parness issued an order dated October 28, 1999 authorizing the Church's sale of the property to Mandeville, her heirs, successors and assigns for the sum of \$160,000. There is no claim and no proof that Mandeville ever paid the Church \$160,000.

A deed dated October 14th, 1999 was duly recorded whereby the Church conveyed the property to 224 Edgecombe Ave. Realty Corp. This Deed is signed by Briggs, although Briggs also claims that this signature is a forgery. Stewart claims that it issued the Policy to 224 Edgecombe Ave. Realty Corp; that policy has not been provided to the court.

At a subsequent closing on November 6, 2000, 224 Edgecombe Ave. Realty Corp., in turn, delivered a deed dated November 5, 2000 to Robinson-Traore, whereby the former transferred title to the property to the latter for \$290,000. Robinson-Traore took out a mortgage on the property in favor of ABN Amro Mortgage Group, Inc.

Shortly thereafter, Robinson-Traore refinanced the property with defendant Homeside on December 19, 2000. Robinson-Traore claims that she had no reason to believe there were any irregularities in the chain of title when she purchased the property.

Summary of the Parties' Arguments

In the complaint, plaintiff has asserted the following causes of action seeking: [1] a declaration that all deeds and mortgages other than those conveying ownership of the property to the Church are null and void and declaring the Church to be the sole, unencumbered owner of the property (first cause of action); [2] a declaration that Robinson-Traore's title and interest in the property is void (second cause of action); [3] a declaration that the FNMA mortgage is void (third cause of action); [4] an order ejecting Homeside, FNMA and Robinson-Traore from the property (fourth cause of action); [5] money damages for the defendants' wrongful conversion (fifth cause of action); [6] treble damages for the defendants' alleged collusion (fraud) (sixth cause of action); and [7] money damages for Homeside and FNMA's negligence (seventh cause of action).

Several arguments are raised by each of the defendants in support of their motions for summary judgment. Those arguments are that the complaint should be dismissed because based upon plaintiff's deposition testimony and all other evidence in this action, it is clear that plaintiff was not the true legal and equitable title owner of the property.

Stewart individually argues that it is entitled to summary judgment dismissing the claims against it because it does not stand in privity to the Church. Stewart also

contends that there are insufficient allegations of fraudulent conduct as to it, let alone evidence of fraud. Stewart also argues that the conversion claim against it is barred by the statute of limitations.

Robinson-Traore maintains that she is an innocent, *bona fide* purchaser of the property. She argues that even if a fraud was perpetrated on the court by virtue of the false petition, the Church has suffered no damages by virtue of such fraud and should not be allowed to prevail in its action to take back title to the property, since it was never the owner thereof. Robinson-Traore alternatively argues that it would be inequitable to permit plaintiff to take back title because it would be a windfall for plaintiff given that plaintiff paid no consideration for its nominal title to the property, never occupied the property, never paid any real estate taxes, water or sewer charges, never obtained any insurance on the property nor otherwise attempted to make productive use of the property during the duration of its purported ownership.

Neither Stewart nor Robinson-Traore raise any arguments in support of their contention that they are entitled to reimbursement for their attorneys' fees, costs and disbursements. Nor has Robinson-Traore identified what claims were asserted by her co-defendants which she now seeks dismissal of, or provided any argument as to why such claims should be dismissed.

Homeside and FNMA argue that Robinson-Traore's cross-claim for indemnification should be dismissed because it is without merit as a matter of law.

In opposition to Stewart's motion, plaintiff contends that "a title company can[not] simply close its eyes and pretend that it does not see the crime being committed before

its eyes because it does not have privity with the victim.” The Church maintains that there is at least an issue of fact as to whether Stewart aided and abetted the purported fraud, and that based on such acts, Stewart can be found liable to plaintiff for its consequential damages.

Plaintiff also argues that there can be no question that “legal title to the property belongs to the Church and that the deed stating that Robinson-Traore is the owner is based on a fraudulent transaction.” Plaintiff also claims that there is an issue of fact as to whether “Robinson-Traore is as innocent as she claims”, in part, because Attorney Cherry represented her in connection with her purchase of the property in 2000. Plaintiff also points to an affidavit provided by Paula Gellman, Assistant Attorney General in the Charities Bureau of the Office of Andrew M. Cuomo, Attorney General of the State of New York. In that affidavit, Gellman states:

The Church alleges that the October 28, 1999 order was procured as the result of fraud. the Attorney General reviewed and raised no objection to the October 18, 1999 petition seeking court approval for the sale of the Edgecombe Avenue property. However, had the Attorney General been aware of the allegations of fraud at the time of our 1999 review, we would have brought them to the attention of the court and would not have signed off on the proposed order approving the sale.

...

Instead, I would have filed objections or an explanatory affidavit with the court, required notice of the petition to the complaining Church representatives pursuant to N-PCL § 511 (b) and asked that the court determine whether or not the proposed sale had been authorized by the Church.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of

setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 NY2d 223 (1977). The court's function on these motions is limited to "issue finding," not "issue determination." Sillman v. Twentieth Century Fox Film, 3 NY2d 395 (1957). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 AD2d 459 (2d Dept 2003).

Stewart's motion for summary judgment

At the outset, the court must grant Stewart's motion for summary judgment as the claims against it are without merit. The only causes of action alleged against Stewart are for "wrongful conversion" and "collusion" (the fifth and sixth causes of

action, respectively). Conversion is the wrongful interference with the property of another. Republic of Haiti v. Duvalier, 211 AD2d 379 (1st dept. 1995). In order to assert a cause of action for conversion, a plaintiff must demonstrate an ownership interest in the property alleged to have been converted. State v. Seventh Regiment Fund, Inc., 98 NY2d 249 (2002). Here, plaintiff has not even alleged that Stewart converted the property, e.g. that Stewart claimed any right to the property or otherwise exercised any dominion or control over the property.

Moreover, the conversion claim is untimely as to Stewart. The statute of limitations for a claim of conversion is three years. CPLR § 214 (4); Sporn v. MCA Records, Inc., 58 NY2d 482 (1983). The alleged conversion occurred in 1999 when the property was transferred from the Church to 224 Edgecombe Realty Corp. This action was not commenced as to Stewart until 2006 upon the filing of the amended complaint which identified Stewart as a defendant. Therefore, the conversion claim was brought against Stewart more than three years after the alleged conversion could have possibly taken place. Accordingly, plaintiff's fifth cause of action for conversion against Stewart is fatally defective and is hereby severed and dismissed.

In its opposition papers, the Church argues that its cause of action for collusion against Stewart is really one for aiding and abetting fraud. To state a cause of action for aiding and abetting fraud, a plaintiff must show: [1] that the aider had knowledge of the fraud; [2] that the aider rendered substantial assistance in further the fraud; and [3] damages. Franco v. English, 210 AD2d 630 (3d Dept 1994). Again, all of the admissible evidence submitted to the court on this motion fails to demonstrate a triable issue of fact

any of the elements of an aiding and abetting fraud claim. Aside from Briggs' mere speculation in her affidavit, the Church has offered no facts which would support a finding that Stewart knew about the alleged fraud, assisted in said fraud, or aided or abetted the fraud by omission. Accordingly, the sixth cause of action for "collusion" against Stewart is hereby severed and dismissed.

Homeside and FNMA's motion

Based upon the Court's reasoning with respect to Stewart's motion for summary judgment, the fifth and sixth causes of action against Homeside and FNMA must also be severed and dismissed.

The Church has asserted additional claims against Homeside and FNMA for ejectment and negligence. The Church also seeks a declaration that the FNMA mortgage is null and void (the discussion of this claim will appear in the next section). Ejectment is a common law action to recover possession of real property. Alleyne v. Townsley, 110 AD2d 674 (2d Dept 1985). One of the essential elements for a valid cause of action for ejectment is that the party sought to be ejected is in possession of the real property. Jannace v. Nelson, L.P., 256 AD2d 385 (2d Dept 1998). Homeside originated the mortgage that FNMA now holds. Homeside and FNMA were never more than the holder of a lien on the property and were never in possession of the premises. Therefore, a cause of action for ejectment against either of these defendants simply does not lie and the fourth cause of action against Homeside and FNMA is hereby severed and dismissed.

The elements of a claim for negligence are: [1] the existence of a duty; [2]

breach of that duty; [3] proximate cause; and [4] damages. Solomon by Solomon v. City of New York, 66 NY2d 1026 (1985). Here, plaintiff has failed to even allege that Homeside and FNMA had a duty to her. Instead, plaintiff has alleged that Homeside breached a duty to "abide by certain standards, practice and regulations which govern the underwriting and placement of mortgages guaranteed by defendant [FNMA], and to report deviations from and inconsistencies with such practices to the proper reporting authorities." Assuming such a duty existed, Homeside would not owe such duty to plaintiff, but rather, to defendant FNMA. However, no such duty exists with respect to Homeside, a mortgagee bank, and certainly FNMA, a mere assignee (see Tenenbaum v. Gibbs, 27 AD3d 722 [2d Dept 2006]). Accordingly, the seventh cause of action for negligence is hereby severed and dismissed.

Homeside and FNMA's application to dismiss Robinson-Traore's cross-claim must also be granted. Robinson-Traore has not alleged that either Homeside or FNMA have a contractual obligation to indemnify her, therefore, this claim must be for common law indemnification. Common law indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party (Baron v. Grant, 48 AD3d 608 [2d Dept 2008]). The record is devoid of any evidence that Homeside or FNMA performed any act which caused, contributed to and/or aggravated any damages that Robinson-Traore has or may sustain as a result of this action. Accordingly, Robinson-Traore's first cross-claim against Homeside and FNMA is hereby severed and dismissed.

Robinson-Traore's motion and Homeside/FNMA's motion to dismiss the declaration

judgment claim

The Church seeks the following declarations: [1] a declaration that all deeds and mortgages other than those conveying ownership of the property to the Church are null and void and declaring the Church to be the sole, unencumbered owner of the property; [2] a declaration that Robinson-Traore's title and interest in the property is void; and [3] a declaration that the FNMA mortgage is void.

In general, a *bona fide* purchaser for value is protected in his or her title unless he or she had previous notice of the alleged prior fraud by the seller. Karan v Hoskins, 22 AD3d 638 (2005) see also LaSalle Bank Natl. Assn. v Ally, 39 AD3d 597 (2007). Where, however, the grantor lacks actual or apparent authority to sign a deed on an entity's behalf and the grantee has knowledge of facts that would lead a reasonable, prudent purchaser to make inquiries as to the circumstances of the transaction, a purchaser's title cannot be protected since he or she has previous notice of the prior fraud by the immediate seller (see LaSalle Bank Natl. Assn., *supra*).

Where the signature of the grantor to a deed is a forgery, the deed is null and void and cannot divest the title of the actual owner (see LaSalle Bank Natl. Assn., 39 AD3d at 600). A person cannot be a *bona fide* purchaser for value through a forged deed, as such a deed is void and conveys no title (Karan, *supra*; Cruz v Cruz, 37 AD3d 754, 754 [2007]). Furthermore, once a property has been obtained by way of a forged deed, any subsequent purchaser from the alleged grantee, even for value and without notice, will not be protected, and such transfer is also a nullity (see Yin Wu, 288 AD2d 104 [1st Dept 2001]). Therefore, Robinson-Traore's argument that she is a *bona fide*

purchaser for value does not entitle her to summary judgment. In order to be entitled to summary judgment, Robinson-Traore would have to prove, that as a matter of law, Briggs' signature on the October 14, 1999 Deed is not a forgery (*cf* Son Fong Lum v. Antonelli, 102 AD2d 258 [2d Dept 1984]).

Even assuming the certificate of acknowledgement is *prima facie* evidence that Briggs' signature is valid (see Uvalde Asphalt Pav. Co. v. City of New York, 99 AD 327 [1st Dept 1904]), here, the Church has presented sufficient evidence to demonstrate a triable issue of fact as to whether the October 14, 1999 Deed conveying the property from the Church to 224 Edgecombe Ave. Realty Corp. is a forgery. Specifically, the Church claims that the 1999 petition and the supporting documentation thereof were fraudulently filed with the court without its permission, resulting in a fraudulent obtained court order authorizing the transfer of the property from the Church to 224 Edgecombe Ave. Realty Corp. Moreover, the Church vehemently denies that it sold the property to 224 Edgecombe Ave. Realty Corp. for \$160,000 in 1999 as represented to the court in the 1999 petition. Furthermore, Briggs claims in her affidavit that her signature on the October 14, 1999 Deed is a forgery.

Robinson-Traore and Homeside/FNMA each argue that because the Church did not pay any consideration in exchange for the original conveyance of the property to it in 1995, the Church cannot maintain this action because it never had legal or equitable title to the property. However, there is no dispute that the Church did initially pay approximately \$6,000 to purchase the property. Moreover, they have not supported their argument that the August 17, 1995 Deed was to be held in escrow pending

closing. No such escrow agreement was provided and the fact that the August 17, 1995 Deed was recorded with the buyer and seller's knowledge, belies any such claim of escrow.

Robinson-Traore argues plaintiff has no monetary damages, and therefore, this action should be dismissed. This argument fails because an action for a declaration does not require monetary damages. CPLR § 3017 (b); see i.e. Morgan v. Town of West Bloomfield, 295 AD2d 902 (4th Dept 2002).

Robinson-Traore offers an additional argument in support of her motion, to wit, that the equities weigh in her favor in light of the considerable expense she has incurred in purchasing the property and making improvements thereupon (in excess of \$500,000). Such equitable relief, however, is not the proper inquiry in an action at law. Under the law, a subsequent *bona fide* purchaser for value is simply not protected where there the deed was void because no conveyance can be made based upon a void deed. Nonetheless, the court notes that Robinson-Traore's arguments based upon the equities herein would properly be the subject of her claim for unjust enrichment.

Therefore, the court must deny Robinson-Traore's motion for summary judgment on the first and second causes of action. As a result, the court must also deny Homeside and FNMA's motion with respect to the third cause of action because if the October 14, 1999 Deed is void, then Robinson-Traore's deed was void as well and Robinson-Traore was unable to encumber the property.

Further, since Robinson-Traore is currently in possession of the property, and

her title to the property is presently in dispute, her motion for summary judgment on plaintiff's claim seeking an order of ejectment, as well as the conversion claim, must be denied.

The Church's remaining claim against Robinson-Traore is for collusion (fraud). Robinson-Traore maintains that she had no knowledge of the alleged fraudulent scheme which forms the basis of plaintiff's claims. The Church, in opposition, speculates that Robinson-Traore "obtained the property under extremely suspicious circumstances." The Church also seeks to impute wrongdoing to Robinson-Traore by virtue of the fact that Robinson-Traore was represented by Attorney Cherry, the same attorney who filed the allegedly false 1999 petition. These allegations, standing alone, do not demonstrate the specificity required to sufficiently state a fraud claim (CPLR 3016[b]; see Raytheon Co. v. AES Red Oak, LLC, 37 AD3d 364 (1st Dept 2007); Brown v. Wolf Group Integrated Communications, Ltd., 23 AD3d 239 [1st Dept 2005]). Discovery is complete and plaintiff's failure at this point to articulate facts in support of fraud warrant dismissal. Accordingly, the fraud cause of action against Robinson-Traore is hereby severed and dismissed.

Insofar as Robinson-Traore seeks summary judgment dismissing any and all cross-claims against her, she has failed to identify which claims upon which she seeks such relief, and has not made any arguments in support thereof. Accordingly, this aspect of her motion is denied for failure to demonstrate entitlement to such relief.

The applications for attorneys' fees

Stewart and Robinson-Traore each seek reimbursement for their attorneys' fees,

costs and disbursements. The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as under 22 NYCRR 130-1.1. Frivolous conduct is defined as conduct which: [1] is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) asserts material factual statements that are false. While Plaintiff's arguments were rejected, in part, by the court, the court cannot say that the claims dismissed herein were frivolous within the meaning of the court rule. Accordingly, this branch of the relief requested by Stewart and Robinson-Traore is hereby denied.

Accordingly, plaintiff's first, second, third and fourth causes of action remain to be tried.

Conclusion

In accordance herewith, it is hereby:

ORDERED that Stewart's motion for summary judgment (motion sequence number 005) is granted only to the extent that the fifth and sixth causes of action against Stewart are hereby severed and dismissed; and it is further

ORDERED that Stewart's motion is otherwise denied; and it is further

ORDERED that Homeside and FNMA's motion for summary judgment (motion sequence number 006) is granted to the following extent: [1] the fourth, fifth and sixth

causes of action against Homeside and FNMA are hereby severed and dismissed; [2] the seventh cause of action is hereby severed and dismissed; and [3] Robinson-Traore's first cross-claim against Homeside and FNMA for indemnification is hereby severed and dismissed; and it is further

ORDERED that Homeside and FNMA's motion is otherwise denied; and it is further

ORDERED that Robinson-Traore's motion for summary judgment (motion sequence number 007) is granted only to the extent that the sixth cause of action against her is hereby severed and dismissed; and it is further

ORDERED that Robinson-Traore's motion is otherwise denied.


The clerk is directed to enter judgment in accordance herewith.

This case is ready to be tried. Plaintiff is hereby directed to serve a copy of this decision/order upon the Office of Trial Support so that a trial date can be scheduled for this case.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
June 22, 2009

So Ordered:

Hon. Judith J. Gische, JSC

FILED
JUN 25 2009
COUNTY CLERK'S OFFICE
NEW YORK
-Page 24 of 24-