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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 47**

FIRST AMERICAN TITLE INSURANCE COMPANY OF NEW YORK, FOR ITSELF and as SUBROGEE OF NACIS SANTOS,

INDEX NO.: 15434/07

Plaintiff,

MOTION DATE:11-21-08
SUBMIT DATE:11-10-09
SEQ. NUMBER - 001

-against-

LESLIE JONES, GORDON JONES, and FRESH START RECOVERY RESIDENCE, INC.,

Defendants.

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The following papers have been read on this motion:

Notice of Motion, dated 10-28-08.....1
Verified Answer, dated 9-1-09.....2
Reply Affirmation, dated 10-8-09.....3
Sur-Reply (undated).....4

This motion by the plaintiff pursuant to CPLR 32121 for summary judgment is denied.

This is a subrogation action in which the plaintiff, a title insurance company, seeks to recover the $25,000 it paid to its assured, one Nacis Santos, to clear a cloud on his title. According to the plaintiff, this was caused by the actions of Santos's sellers, defendants Leslie Jones and Gordon Jones.

As alleged in the complaint and on this motion by way of the affidavit of Susan

Morrison, plaintiff's Vice President and Senior Claims Counsel, the Jones defendants sold premises commonly known as 166 Church Street in Freeport, New York to Santos, and the plaintiff insured the title transferred. The deed given at the June 30, 2003 closing contained a covenant against grantors' acts. After the sale, one David Rawlins commenced an action in the Supreme Court, Nassau County in which the Joneses, Santos and plaintiff herein, First American Title Insurance Company ("First American"), were defendants. Rawlins contended that the Joneses had fraudulently transferred title to the property from him to them, that a March 14, 2002 deed purporting to make that transfer bore his forged signature, and that as a result he was still the owner of the premises.

First American settled that action for $25,000, in exchange for which Rawlins gave a quitclaim deed to Santos, thereby extinguishing any claim that Rawlins might have to the subject property. This action against the Jones defendants and their corporation followed.

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must

come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v City of New York,* 49 NY2d 557, *supra*), and the defending party must do more than merely parrot the language of a pleading or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993).

In performing its review of the record, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.,* 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.,* 215 AD2d 546 (2d Dept. 1995). It should not attempt to resolve matters of credibility. *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.,* 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol,* 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC,* 27 AD3d 684 (2d Dept. 2006).

In support of its motion, the plaintiff asserts that the defendants violated their

covenant against grantors' acts when they sold to plaintiff's assured, Santos, under the circumstances they allege. Plaintiff presents certain evidence from the Rawlins action, including the pleadings, deposition transcripts and other proof. According to Rawlins, as he testified at his deposition, he was to purchase the Freeport property, which was to be used by the Jones defendants to house a substance abuse program named "Fresh Start" and that the Joneses would then lease it from him, pay the mortgage and maintain the property. There were no written documents exchanged memorializing this agreement. Rawlins made a $12,000 down payment and took a mortgage for $212,000 on the house. Rawlins testified that he put down the $12,000 sometime in June or July of 2001.

Plaintiff also presents a deed from Rawlins to Leslie and Gordon Jones dated March 19, 2002, which it claims was forged, based upon Rawlins' denial of his signature at his deposition. In addition, it advances the report of one Susan E. Abbey, self-described as a Certified Document Examiner, in which she states that the signature on the March 19, 2002 deed "is probably a non-genuine signature of David Rawlins." Plaintiff also submits the affirmation of Richard B. Martin, Leslie Jones's former attorney, who states that sometime in March, 2002 Leslie Jones asked him to prepare a deed for "the premises" conveying title from Rawlins to Jones. He prepared the deed, gave it to Jones, and Jones returned it to him fully signed and acknowledged by a notary. Martin also stated that Jones then took the deed to the Nassau County Clerk to be recorded.

Based on the foregoing, plaintiff contends that summary judgment in its favor is warranted because the deed was signed by Rawlins when the deed was in the control of the Joneses. Therefore, argues plaintiff, it is not even necessary for the Court to conclude that the Joneses were responsible for the forgery, although, it contends, the evidence suggests that

they were.

The Court finds that the foregoing is insufficient to establish the plaintiff's *prima facie* case. The Abbey report is inadmissible, as it is not sworn, nor is it adopted by way of a sworn affidavit. *See, Spierer v Bloomingdale's,* 43 AD3d 664 (1st Dept. 2007). Moreover, the deed presented is facially valid, in that it was properly acknowledged. It is well established that such an acknowledgment raises a presumption of due execution, and should not be invalidated where, as here, the only admissible evidence to the contrary is the unsupported testimony of an interested witness.[1] *39 College Point Corp. v Transpac Capital Corp.,* 22 AD3d 663 (2d Dept. 2005); *Giamundo v McConville,* 309 AD2d 895 (2d Dept. 2003); *Republic Pension Svs., Inc. v Cononico,* 278 AD2d 470, 472 (2d Dept. 2000); *Albin v First Nationwide Network Mortgage Co.,* 248 AD2d 417 (2d Dept. 1998). The one appellate case cited by the plaintiff in support of its position is inapposite, as the Third Department was there reviewing a contract of sale, not an acknowledged deed. *Eggleson v Trustees of General Electric Pension Trust,* 238 AD2d 871 (3d Dept. 1997).

Nor is the affirmation of Leslie Jones' former attorney sufficient, as he merely states that he prepared a deed, gave it to Jones, and that Jones reappeared with the instrument fully executed. This does not undermine the acknowledgment. Plaintiffs' contention that the mere fact that Rawlins may have signed while the deed was in the control of the Joneses is sufficient as proof that the latter violated their covenant against grantor's acts is dubious at best, and is unsupported by any authority. Accordingly, the motion must be denied, without regard to the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64

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[1] Obviously, at the time of his testimony Rawlins had an interest in having his signature declared a forgery. Without this proof he could make no claim to the property, as the deed would have extinguished any interest he once had.

NY2d 851, *supra.*

The Court notes that many of the documents submitted in opposition also are inadmissible, as the defendants had to submit sworn affidavits and not affirmations, as they did. *See,* CPLR 2106 (attorneys, physicians, osteopaths and dentists only professionals who may affirm). However, such proof, had it been in proper form, would have created issues of fact sufficient to defeat the motion even if a *prima facie* showing had been made by the plaintiff. The Joneses contend the 2002 deed to them reflected part of an agreement under which they would share with Rawlins some of the profit from a sale, which is supported by the one admissible document, the affirmation of Paul S. Levy, the Joneses' former attorney in the instant litigation. Perhaps more important, however, is the statement of the notary, one Tony Wright – which also is inadmissible as it not sworn. If in proper affidavit form, however, this would have stood as sufficient opposition to any *prima facie* showing that the 2002 deed was forged, as the notary states that he notarized David Rawlins's signature after verifying his identity with a photo identification, which was his standard protocol.

Accordingly, the motion should be denied. The Court does not agree with plaintiff that it is entitled to a default judgment against Fresh Start Recovery Residence, Inc., as it cannot be represented by the Joneses (*see* CPLR 321) and thus has defaulted on this motion. Plaintiff is correct in its reading of CPLR 321, and the corporation has thus submitted no evidence on its own behalf. However, the plaintiff is still bound to make its *prima facie* showing against the corporation on this summary judgment motion, as this party is not in default in pleading. As has been found above, that has not been accomplished.

Finally, in order for the record to be complete, the Court will accept the sur-reply of the defendants, as permitted by this Court's Law Secretary, notwithstanding the plaintiff's

objection that defendants allegedly violated the instruction as to service and content of the additional submission. Given the holding of this decision, it played no role in the determination, and, in any event, there has been no request by the plaintiff to respond thereto.

The conference currently scheduled for December 16, 2009 remains. Leslie Jones is reminded that although his brother Gordon Jones submitted a statement on this motion, he must appear, as well as the corporation (by counsel), if they are not to be deemed in default in appearing, as Leslie Jones can represent only himself in this action.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: November 18, 2009

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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