

Home Am. Credit Inc. v Kurtz
2009 NY Slip Op 32955(U)
December 17, 2009
Supreme Court, Steuben County
Docket Number: 99,981
Judge: Marianne Furfure
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driveway separate from the 5 acre portion retained by the mortgagor. However, the mortgagor never obtained a partial release from the bank for the property sold nor did defendant record the land contract. After signing the land contract, defendant moved into the mobile home and continued to live on the premises and make his land contract payments to the mortgagor.

After the mortgagor defaulted on her mortgage, plaintiff instituted a foreclosure action against the entire parcel of property, including that portion of the property which mortgagor had sold to defendant on land contract. Defendant was not made a party to the foreclosure action. Plaintiff bought the property at the foreclosure sale and subsequently instituted an eviction proceeding against defendant as a "John Doe." When defendant received an eviction notice, he filed an Order to Show Cause challenging the Judgment of Foreclosure and Sale. Defendant claimed that he was not bound by the terms of the judgment because he was not named in the foreclosure action, even though he had an interest in the property based on his land contract. By order of this Court dated April 21, 2008, defendant's application to vacate the previously issued Judgment of Foreclosure and Sale was denied, but plaintiff was restrained from evicting defendant until plaintiff brought a separate foreclosure proceeding against him.

Plaintiff commenced this strict foreclosure action against defendant on May 23, 2008, claiming that defendant's potential claim is a cloud on title of the premises plaintiff purchased. Plaintiff argues that, because the recorded

mortgage on which plaintiff foreclosed is a prior lien of which defendant had constructive notice, defendant's rights under the land contract are subordinate and must be foreclosed, unless defendant redeems the entire mortgage. Plaintiff contends that, when defendant entered into the land contract, he assumed the risk that, if the mortgagor defaulted on her mortgage, the entire parcel would be subject to foreclosure.

Defendant filed an Answer in opposition to plaintiff's strict foreclosure action claiming that strict foreclosure is not the appropriate remedy. Defendant argues that plaintiff was, or should have been, aware that defendant was a necessary party to the original foreclosure proceeding based on defendant's open and obvious occupation of his portion of the premises. Defendant claims that, because plaintiff failed to make defendant a party to the foreclosure action, plaintiff could not be a bona fide purchaser at the sale and the judgment of foreclosure must be vacated and a new sale ordered. Defendant also claims that, if he had been properly noticed in the original foreclosure action, he would have had the opportunity to be heard on whether the mortgaged premises should be sold in separate parcels.

Plaintiff filed this motion for summary judgment seeking dismissal of defendant's Answer and Affirmative Defenses and establishing a time by which defendant must exercise his right to redeem the entire property. In response, defendant argues that the Court should deny summary judgment and order the

property to be resold in separate parcels, so as to increase defendant's ability to redeem his portion of the foreclosed parcel.

The burden of proof is on the proponent of summary judgment to set forth sufficient evidence to demonstrate the absence of any material issue of fact (*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373 [2005]; *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]). If the moving party fails to make this showing, summary judgment must be denied regardless of the adequacy of the opposing papers (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). However, once this showing has been made, the burden then shifts to the opponent of the motion to come forward with evidence in admissible form to establish the existence of material issues of fact which require a trial (*Gonzalez v. 98 Mag Leasing Corporation*, 95 NY2d 124, 129 [2000]; *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]). In reviewing a motion for summary judgment, the evidence must be considered in the light most favorable to the opponent (*Ruzycki v. Baker*, 301 AD2d 48, 50 [4th Dept. 2002]).

A plaintiff in a foreclosure action is required to join any person whose interest in the property is claimed to be subject and subordinate to plaintiff's interest (RPAPL §1311). Such necessary parties include every person holding title, or having any right, to the property (*Board of Managers of Parkchester North Condominium v. Alaska Seaboard Partners LP*, 37 AD3d 332, 333 [1st Dept. 2007]; RPAPL §1311[1]). A land contract vendee is an equitable titleholder of the

property (*Bean v. Walker* 95 AD2d 70, 72 [4th Dept. 1983]). Given this possessory interest, a land contract vendee cannot be dispossessed without bringing a foreclosure action (RPAPL §1311; *Bean v. Walker*, supra). Only by so doing can the purchaser obtain full and clear title to the property and extinguish the land contract vendee's right to redeem the property (*Board of Managers of Parkchester North Condominium v. Alaska Seaboard Partners LP*, 37 AD3d 332, 333 [1st Dept. 2007]); *6820 Ridge Realty LLC v. Goldman*, 263 AD2d 22, 26 [2nd Dept. 1999]). The rights of a necessary party who is not made part of the foreclosure action are unaffected by the judgment, and the judgment is considered void as against that party (*6820 Ridge Realty LLC v. Goldman*, Id. at page 26; *Polish Nat. Alliance v. White Eagle Hall Co.*, 98 AD2d 400, 406 [2nd Dept. 1983]).

The purchaser of a foreclosed property in which a necessary party was not joined, can dispose of encumbrances on the property by filing a strict foreclosure action pursuant to RPAPL §1352 or a reforeclosure action pursuant to RPAPL §1503. A strict foreclosure judgment "cures a defect in the judgment or sale under the first foreclosure" and fixes the time within which any person having a right of redemption must act to redeem the property (*6820 Ridge Realty LLC v. Goldman*, supra, at 26). If any person having the right of redemption fails to exercise that right in the time allotted by the court, that individual is thereafter precluded from claiming any title or interest in the property (*6820 Ridge Realty LLC v. Goldman*, supra, at 26). A reforeclosure action, on the other hand,

requires plaintiff to show the defect in the foreclosure was not a result of the plaintiff's wilful neglect and would give the Court the power to order a new sale of the premises (*6820 Ridge Realty LLC v. Goldman, supra*, at 27).

In this case, plaintiff, as purchaser of the foreclosed property, has the absolute right to dispose of a lien on the property by filing a strict foreclosure action rather than a reforeclosure. Therefore, defendant's claims that plaintiff's failure to take action in the original foreclosure against defendant should preclude summary judgment is without merit (*6820 Ridge Realty LLC v. Goldman, supra*, at 26). Plaintiff has set forth a prima facie case sufficient to grant summary judgment foreclosing defendant's subordinate interest in the property. Defendant has raised no questions of fact to preclude foreclosure as a matter of law.

Defendant argues that he should not be required to redeem the entire mortgage which encumbered the entire parcel, but that the Court should require sale of the parcel which was not subject to his land contract and allow him to redeem any balance remaining. Defendant argues that, had he been made a party to the original foreclosure action, he could have raised the argument that the property could be sold in two parcels and asked the Court to direct the mortgagor's parcel to be sold first. Defendant has submitted an affidavit from a licensed real estate appraiser who opined that selling the parcels individually would likely generate as much income as selling the property in one parcel. Therefore, defendant contends, the Court should direct that his right of

redemption cannot be extinguished until the other property is sold and the proceeds applied to reduce the outstanding judgment. Plaintiff opposes defendant's request and argues that defendant assumed the risk of redemption of the entire parcel when he entered into the land contract, after plaintiff's mortgage had been recorded.

It is the general rule that an owner of a subordinate interest in property subject to foreclosure who has elected to exercise the right of redemption, must pay the entire amount due on the mortgage and seek a proportionate contribution from other owners of the mortgaged property (*Coffin v. Parker*, 82 Sickels 117, 124 [1891]; *50 East 78, L.P v. Paneth*, 247 AD2d 222 [1st Dept. 1998]; *Hirsch v. Approved Properties, Inc.*, 16 AD2d 674 [2nd Dept. 1962]; *Shearer v. Field*, 6 Misc 189, 195 [Wayne County, 1893]; *Boqut v. Coburn*, 27 Barb. 230 [1858]). "The redeeming part owner cannot compel a mortgagee to accept partial payment and to give partial satisfaction" (*Hirsch v. Approved Properties, Inc.*, *Id.* at page 674). This requirement, that the whole of the mortgage, rather than a portion, be redeemed was established for the benefit of the mortgagee (*Shearer v. Field*, 6 Misc 189, 195 [1893]). However, it does appear that where there are equitable reasons justifying a departure from that rule, the Court may do so (*Livingston v. Mildrum*, 5 E.P. Smith, 440, 442 [1859]; *50 East 78, LP v. Paneth*, 247 AD2d 222 *supra*; *Bean v. Walker*, 95 AD2d 70, 75 [4th Dept. 1983]).

In this case, defendant has presented his affidavit and the affidavit of a real estate appraiser that the mortgaged parcel is capable of being sold in separate parcels for at least as much as if sold in a single parcel. This is sufficient evidence to establish that the two parcels, which comprise the mortgaged property, could have been sold separately at the time of the original foreclosure. Plaintiff's reply papers do not dispute this. Although defendant seeks to force a resale of the property, this does not appear to be within the Court's authority in a proceeding brought under RPAPL §1352. However, the option of selling the property as two separate parcels was not presented to the Court at the time the original judgment was signed which directed sale of the property as one parcel. Defendant should not be placed in a worse position now than he would have been in had plaintiff proceeded correctly in the first proceeding. Additionally, plaintiff has not put forth any facts to show how its interest in the real property would be adversely affected, if the parcels which have separate residences, deed descriptions, utilities and access, were separately redeemed or sold. Therefore, under the unusual circumstances presented, defendant should be given the opportunity to redeem so much of the mortgage amount which may be attributed to the parcel on which he resides.

Based upon the above, the plaintiff's application for summary judgment declaring that defendant's interest in the property shall be foreclosed unless redeemed is hereby granted. The issue of the amount of the redemption price

and the time within which he shall redeem shall be determined at a hearing to be held by this Court at a date to be set. At that hearing defendant may additionally raise his claim that the redemption amount should be further reduced for the reasons set forth in his Fourth Affirmative Defense.

Defendant's attorney to submit order.

Dated: December 17, 2009.

ENTER:



Hon. Marianne Furfure
Acting Supreme Court Justice