Scan

SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER
Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

----------x

FIRST AMERICAN TITLE INSURANCE, COMPANY OF NEW YORK,

Plaintiff,

-against-

MARIE RUBAL,

Defendant.

----------x

TRIAL/IAS PART: 22
NASSAU COUNTY

Index No: 018349-06
Motion Seq. No: 1
Submission Date: 11/24/09

Papers Read on this Motion:

Notice of Motion, Affidavit of A. Rubin and Exhibits.....x
Affirmation of Opposition and Exhibits.....x

This matter is before the court on the motion by Plaintiff for summary judgment, filed on November 5, 2009 and submitted on November 24, 2009. For the reasons set forth below, the Court 1) denies Plaintiff's motion for summary judgment; 2) dismisses Defendant's first, third, fourth and fifth affirmative defenses; and 3) denies Plaintiff's motion to dismiss Defendant's second affirmative defense based on the doctrine of equitable estoppel.

The court directs counsel for Plaintiff, and Defendant, who is appearing *pro se*, to appear for a Pre-trial Conference before the Court on April 13, 2010 at 9:30 a.m. The Court is aware that Defendant, who lives outside of New York, has requested adjournments of prior conferences on medical grounds, asserting that she is too ill to travel to New York to attend the conference. The Court directs that the appearance of Defendant at the Pre-trial Conference on April 13, 2010 will not be excused, absent sworn documentation from a competent medical professional. If Defendant seeks to be excused from her required appearance on April 13, 2010, she is directed to provide the Court, on or before March 26, 2010, with the sworn medical documentation

supporting her request, and to provide counsel for the Plaintiff with copies of said documentation. The Court will make the final determination whether to excuse Defendant's appearance on April 13, 2010.

BACKGROUND

A. Relief Sought

Plaintiff First American Title Insurance Company of New York ("First American" or "Plaintiff") moves for an Order, pursuant to CPLR § 3212, granting summary judgment in favor of Plaintiff in the sum of $200,000.00, plus interest since March 23, 2006, and costs and disbursements.

Defendant Marie Rubal ("Rubal" or "Defendant") opposes Plaintiff's application.

B. The Parties' History

In support of its motion, First American provides an Affidavit of Alan M. Rubin ("Rubin"), an attorney and the Vice President of First American, a licensed New York Title Insurance Company. Rubin affirms the following:

Rubal was the owner of the premises located at 717 East 89th Street, Brooklyn, New York ("Premises"). In 1988 and 1989, Rubal made two (2) mortgages with respect to the Premises; the first (in 1988) was to mortgagee Ready Financial Services ("Ready") and the other (in 1989) was to mortgagee United Funding Corporation ("United"). On August 14, 1998, the Ready and United mortgages were assigned to 46-02 Realty Corporation, and then to Manuel Varveris ("Varveris"). First American provides copies of those assignments (Ex. L to P's Motion).

On or about August 21, 1998, Varveris commenced a foreclosure action ("Foreclosure Action") regarding the Premises, and filed a Notice of Pendency. Varveris' counsel subsequently learned that Ready and United, who no longer had any interest in the mortgages as a result of the August 14, 1998 assignments, had erroneously issued satisfactions with respect to their mortgages ("Disputed Satisfactions"). First American alleges that Rubal was aware of these Disputed Satisfactions no later than December of 1999, when she submitted them in opposition to Varveris' Motion for Summary Judgment in the Foreclosure Action (Compl. at ¶ 10). In the Foreclosure Action, Varveris was granted a Judgment of Foreclosure and Sale, and was the successful bidder at the Referee's Sale, thereby receiving title to the Premises.

On or about April 30, 1999, Rubal borrowed the sum of $200,000.00 from Parkway Mortgage ("Parkway") and delivered a mortgage to Parkway on the Premises ("Parkway Mortgage"). Rubal also signed a promissory note dated April 30, 2009 ("Note") in connection with this $200,000 loan (Ex. E to P's Motion). in which Rubal promised to pay the $200,000 principal, plus interest, to Parkway. The Parkway Mortgage was subsequently assigned to Equicredit Corporation of America ("Equicredit"), which is now known as Nations Credit. Prior to insuring the Parkway Mortgage, First American conducted a title search that failed to disclose the Notice of Pendency that Varveris filed, or the existence of the Ready and United mortgages that had been assigned to Varveris. Nations Credit was not joined as a party defendant in the Foreclosure Action because the Notice of Pendency was filed before the execution and filing of the Parkway/Nations Credit mortgage.

Subsequent to the completion of the Varveris Foreclosure Action, a separate, strict foreclosure action was commenced against Nations Credit to extinguish its mortgage and foreclose it from all right, title, interest, claim, lien or equity of redemption in the Premises. First American defended Nations Credit in the strict foreclosure action, and determined that there were no viable defenses in that action. Pursuant to its obligations under the mortgage insurance policy, First American paid the limit of its coverage to Nations Credit by delivering a check to Nations Credit in the sum of $200,000. First American provides a copy of that check, dated March 23, 2006 (Ex. N to P's Motion). As a result of that payment, First American became subrogated to the rights and interests of Nations Credit, its insured, to the extent of $200,000. First American has demanded repayment of the $200,000 from Rubal, who is responsible for that sum by virtue of the mortgages she obtained on the Premises. Despite that demand, Rubal has not repaid that sum to First American.

The Complaint contains three (3) causes of action. In the first, First American alleges that it has been damaged in the sum of $200,000 as a result of its payment of the mortgage policy limits to Nations Credit, for which Rubal has not reimbursed First American. In the second, First American alleges that Rubal would be unjustly enriched if the Court does not require her to reimburse First American for the $200,000 payment. In the third, First American seeks repayment of the $200,000 under a theory of account stated.

Rubal, who was then represented by counsel, submitted a verified answer ("Answer") dated January 30, 2007. In that Answer, Rubal affirms, *inter alia*, that 1) she received title to the Premises in or about 1986; 2) in or about 1992, Rubal, her mother, her husband and Varveris, who was Rubal's brother-in-law at the time, entered into an agreement pursuant to which Varveris would pay the arrears on Rubal's mortgages, and Rubal would make mortgage payments to Varveris; 3) Rubal paid down the notes and, on or about December 28, 1998, received satisfactions of mortgages from both mortgagees; 4) in or about 1999, Rubal took out a mortgage on the premises in the sum of $200,000 with Equicredit; 5) upon information and belief, Equicredit retained a title company that conducted a title search and found no liens or encumbrances on the Premises; 6) Equicredit required Rubal to pay for the title search and for title insurance; 7) Varveris commenced an action against Rubal in which he sought to foreclose on the Premises and claimed that the satisfactions of the mortgages had been issued erroneously; 8) Rubal and her prior attorney notified Fairbanks Capital Corporation, whom Rubal describes as "plaintiff's predecessor" (Answer at ¶ 13), numerous times by letter and telephone regarding the impending lawsuit and foreclosure proceeding, and "requested that Plaintiff join the action to protect its interest in the mortgage, to no avail" (Answer at ¶ 13).

In the Answer, Rubal interposes five (5) affirmative defenses: 1) Plaintiff has failed to state a cause of action on which relief can be granted; 2) Plaintiff's claim is barred by the doctrine of equitable estoppel; 3) Plaintiff's claim is barred as the document on which it seeks relief is legally deficient; 4) Plaintiff's claims with respect to the "alleged note" are barred as the Plaintiff has failed to comply with one or more conditions precedent; and 5) any damages that Plaintiff alleges it sustained were caused in whole or in part by Plaintiff's predecessor-in-interest, barring relief.

In her Affirmation in Opposition, filed shortly after the Court granted her prior attorney's unopposed motion to be relieved, dated November 18, 2009, Rubal affirms that 1) she applied for the loan [1] in good faith based on the two Disputed Satisfactions, of which she provides copies; 2) although the Disputed Satisfactions were "ultimately overturned," she believed at the time that the Valveris' loan was unsecured; 3) Rubal, and the other individuals who allegedly

[1] Although Rubal does not state so explicitly, the Court gleans that her affirmations regarding "the loan" refer to the $200,000 that she borrowed from Parkway/Nations Credit.

entered into an agreement with Valveris, paid Valveris $100,000; 4) at a conference with Judge Bernstein, Varveris was offered an additional $100,000, at which time he "left the conference room;" 5) "Varveris' action caused [Judge Bernstein] unable to rule for or against;" 6) it was "obvious" that Varveris only wanted the Premises; 7) although Rubal and the other individuals paid $100,000 to Varveris, $89,000 to the mortgage company and $30,000 in counsel fees, they still lost the Premises; 8) neither the mortgage company nor the title company would assist her; 9) the mortgage company insisted that it was in first position, and the title company did not respond to Rubal's inquiries; and 10) based on the title company's "failure at discovery," the title company should "assume some liability under their errors and omissions policy."

Rubal provides copies of the Disputed Satisfactions. The Disputed Satisfaction regarding the Ready mortgage is dated November 23, 1998 and the Disputed Satisfaction regarding the United Funding mortgage is dated September 16, 1998. Rubal does not provide documentation, such as a cancelled check, reflecting that she paid, *i.e.* "satisfied," the Ready and United mortgages that were assigned to Varveris.

C. The Parties' Positions

First American submits that it is entitled to summary judgment because it has established that 1) Rubal signed the Note reflecting her promise to pay the $200,000; 2) First American paid the $200,000 to Nations Credit and is now entitled to repayment of that sum as successor-in-interest to Nations Credit; and 3) Rubal, as the obligor on the Note, is now indebted to First American pursuant to the doctrines of subrogation and unjust enrichment.

Rubal opposes First American's motion on the grounds that, with respect to the Parkway Mortgage, 1) First American completed a title search; 2) First American notified Parkway/Nations Credit that the Premises was free of any liens or encumbrances; and 3) based on those findings, Parkway/Nations Credit agreed to lend Rubal the $200,000.

RULING OF THE COURT

A. Summary Judgment Standards

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005); *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The

Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers. *Liberty Taxi Mgt. Inc. v. Gincherman*, 32 A.D.3d 276 (1st Dept. 2006). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324 (1986).

Summary judgment is the procedural equivalent of a trial. *Capelin Assoc., Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 (1974). It is a drastic remedy that will only be granted where the proponent establishes that there are no triable issues of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d at 324. Summary judgment will not be defeated by mere conclusions or unsubstantiated allegations. *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980).

Once plaintiff has met its burden, the defendant must then establish by admissible evidence the existence of a triable issue concerning a bona fide defense. *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, *supra*; *Northport Car Wash, Inc. v. Northport Car Care, LLC*, 52 A.D.3d 794 (2d Dept. 2008). Bald, conclusory allegations are insufficient to defeat a motion for summary judgment. *Federal Deposit Ins. Corp. v. Jacobs*, 185 A.D.2d 913 (2d Dept. 1992).

B. First American Has Demonstrated its Right to Judgment on the Complaint

To establish a *prima facie* case on a promissory note, a plaintiff must establish the existence of the instrument and the defendant's failure to make payment pursuant to the terms of the instrument. *Cutter Bayview Cleaners, Inc. v. Spotless Shirts, Inc.*, 57 A.D.3d 708 (2d Dept. 2008); *Mangiatordi v. Maher*, 293 A.D.2d 454 (2d Dept. 2002).

The essential inquiry in any action for unjust enrichment is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice. Generally, courts will determine whether 1) a benefit has been conferred on defendant under mistake of fact or law; 2) the benefit still remains with the defendant; and 3) the defendant's conduct was tortious or fraudulent. *Paramount Film Distributing Corp. v. New York*, 30 N.Y.2d 415, 421 (1972). Plaintiff may not maintain an action for unjust enrichment where the matter in

dispute is governed by an express contract. *Scavenger, Inc. v. Interactive Software Corp.*, 289 A.D.2d 58 (1st Dept. 2001).

An account stated is an agreement between the parties to an account based upon prior transactions between them with respect to the correctness of the account items and the balance due. *Ross v. Sherman*, 57 A.D.3d 758, 759 (2d Dept. 2008). The agreement may be express or implied from the retention of an account rendered for an unreasonable period of time without objection and from the surrounding circumstances. *Jim-Mar Corp. v. Aquatic Const., Ltd.*, 195 A.D.2d 868, 869 (3d Dept. 1993), *lv. app. den.*, 82 NY2d 660 (1993). Whether a bill has been held without objection for a period of time sufficient to give rise to an inference of assent, in light of all the circumstances presented, is ordinarily a question of fact, and becomes a question of law where only one inference is rationally possible. *Yanelli, Zevin & Civardi v Sakol*, 298 A.D.2d 579, 580 (2d Dept. 2002).

Subrogation is an equitable doctrine that allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse. *Kaf-Kaf, Inc. v. Rodless Decorations*, 90 N.Y.2d 654, 658 (1997).

With respect to the first cause of action, First American has demonstrated that Rubal signed the Note, obligating her to pay $200,000, and Rubal does not dispute that she was obligated to repay $200,000 pursuant to the terms of that Note. Moreover, pursuant to the terms of its agreement with Parkway/Nations Credit, First American is subrogated to the rights of Parkway/Nations Credit, its insured.

With respect to the second cause of action, based on unjust enrichment, First American has demonstrated that Rubal benefitted from the Disputed Satisfactions because they relieved her of her obligation to satisfy mortgages that she obtained.

With respect to the third cause of action, based on the theory of account stated, the Complaint alleges that 1) First American regularly and periodically billed Rubal for the past due sum of $200,000; 2) Defendant received, accepted and retained the demands and statements without objection; and 3) Rubal has failed to refused to repay that sum.

The Court concludes that First American has demonstrated its entitlement to judgment as a matter of law on the three causes of action in the Complaint.

C. There are Issues of Fact Regarding Defendant's Affirmative Defense of Equitable Estoppel that Preclude Summary Judgment

A mortgage lender may be estopped from asserting rights under a mortgage to prevent a fraud or injustice to the person against whom enforcement is sought, who in justifiable reliance upon the lender's words or conduct has been misled to his detriment. *First Union v. Tecklenburg*, 2 A.D.3d 575, 576-577 (2d Dept. 2003). The elements of estoppel are, with respect to the party estopped: 1) conduct that amounts to a false representation or concealment of material facts; 2) intention that such conduct will be acted upon by the other party; and 3) knowledge of the real facts. The party asserting estoppel must show with respect to himself: 1) lack of knowledge of the true facts, 2) reliance upon the conduct of the party, and 3) a prejudicial change in his position. *Id.* at 577, citing *Airco Alloys Div. V. Niagara Mohawk Power Corp.*, 76 A.D.2d 68, 81-82 (4th Department 1980).

In *First Union, supra*, the Second Department held that, by securing a mortgage loan from the defendant-mortgage company after the plaintiff-bank mistakenly informed him that the mortgage it held had been satisfied, the appellant-mortgagor demonstrated that he underwent a detrimental change in his position, in justifiable reliance on the plaintiff's misrepresentations. 2 A.D.3d at 577. The Second Department reversed the decision of the lower court, and dismissed the complaint. *Id.*

In light of, *inter alia*, 1) Rubal's claim that she paid Varveris a portion of the $200,000, which raises issues as to whether the Disputed Satisfactions were improperly issued, and Rubal knew that they were improperly issued, and 2) Rubal's assertions that she attempted to contact First American and Parkway/Nations Credit regarding the Disputed Satisfactions and received no assistance, the Court concludes that there are issues of fact that preclude dismissal of Rubal's second affirmative defense of equitable estoppel.

D. The Court Dismisses the Remaining Affirmative Defenses

CPLR § 3211(a)(7) provides that a party may move for judgment dismissing one or more causes of action asserted against him on the grounds that the pleading fails to state a cause of action. It is well-settled that the Court must deny a motion pursuant to CPLR § 3211(a)(7) if the factual allegations contained in the Complaint constitute a cause of action cognizable at law. *Guggenheimer v Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v Jennifer Realty*

Co., 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally accept the pleading, and accept the facts alleged as true and accord to the Plaintiff every favorable inference which may be drawn therefrom. *Leon v Martinez*, 84 N.Y.2d 83 (1994).

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v Sutton*, 17 A.D.3d 570 (2d Dept. 2005). To prevail on a CPLR § 3211(a)(1) motion, the moving party must show that the documentary evidence conclusively refutes plaintiff's allegations. *AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.*, 5 N.Y.3d 582, 591 (2005); *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

The doctrine of laches bars recovery where a plaintiff's inaction has prejudiced the defendant and rendered recovery inequitable. This doctrine has no application in actions at law. *Blinds To Go v. Times Plaza*, 45 A.D.3d 714 (2d Dept. 2007).

In light of the foregoing principles, and the evidence that 1) Defendant executed the Note that obligates her to repay $200,000 in principal, plus interest; and 2) First American made timely efforts to recover the $200,000 from Rubal, the Court dismisses the first, third, fourth and fifth affirmative defenses in Rubal's Answer.

As outlined *supra*, the court directs counsel for Plaintiff, and Defendant, who is appearing *pro se*, to appear for a Pre-trial Conference before the Court on April 13, 2010 at 9:30 a.m. The Court is aware that Defendant, who lives outside of New York, has requested adjournments of prior conferences on medical grounds, asserting that she is too ill to travel to New York to attend the conference. The Court directs that the appearance of Defendant at the Pre-trial Conference on April 13, 2010 will not be excused, absent sworn documentation from a competent medical professional. If Defendant seeks to be excused from her required appearance on April 13, 2010, she is directed to provide the Court, on or before March 26, 2010, with the sworn medical documentation supporting her request, and to provide counsel for the Plaintiff with copies of said documentation. The Court will make the final determination whether to excuse Defendant's appearance on April 13, 2010.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY
January 15, 2010

HON. TIMOTHY S. DRISCOLL

J.S.C.