

**Phillips-Thomas v Ellison**

2010 NY Slip Op 30919(U)

March 31, 2010

Supreme Court, Nassau County

Docket Number: 17528/04

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 4

Present: HON. UTE WOLFF LALLY  
Justice

SHAWN PHILLIPS-THOMAS,  
Plaintiff,

Motion Sequence #4  
Submitted January 19, 2010

-against-

INDEX NO: 17528/04

EVELYN ELLISON and MOSES CRAWFORD,  
Defendants.

The following papers were read on this motion for summary judgment:

Notice of Motion and Affs.....	1-3
Affs in Opposition.....	4&5
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Upon the foregoing, it is ordered that this motion by defendant intervenor Deutsche Bank National Trust Company as Trustee, for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and cancelling plaintiff's Notice of Pendency, or "at a minimum" dismissing the causes of action in plaintiff's complaint seeking to affect title to the subject premises, and vacating and cancelling of record plaintiff's notice of pendency, is granted in the alternative and the causes of action which seek to affect title to premises located at 54 Leonard Street, Freeport, New York 11520 described in a Deed recorded in the Nassau County Clerk's office in Book 11584 of Deeds at page 859, more particularly described as Section 55, Block 370, Lots 214-215, are

dismissed, and plaintiff's Notice of Pendency dated December 20, 2004 is vacated and cancelled of record.

Plaintiff Shawn Phillips-Thomas brought this action seeking damages and a return of title to premises located at 54 Leonard Street, Freeport New York. Phillips-Thomas alleges that after her father died she could not pay the mortgage because she had just had a baby and was not working. Her husband was changing jobs. She alleges that defendants Moses Crawford and Evelyn Ellison offered to help her avoid foreclosure but instead defrauded her of title to the premises located at 54 Leonard Street, Freeport, New York.

Plaintiff, by affidavit dated December 6, 2004, avers that Ellison and Crawford operated a business known as Foreclosure Options, and that Crawford offered her a plan to place Ellison together with plaintiff on plaintiff's deed and in exchange Ellison would borrow funds and satisfy plaintiff's mortgage obligation thus avoiding a foreclosure. Plaintiff asserts that at the closing on January 22, 2003 she was told and believed that she was signing an application for a new mortgage with Ellison, when in actuality she signed a deed transferring the premises to Ellison for a purchase price of \$257,000.

In October of 2004 Ellison transferred the premises to John Gajraj for a purchase price of \$335,000. Gajraj financed the purchase with a loan and mortgage from New Century Mortgage in the amount of \$301,500, and defaulted in payment in February of 2005. In April of 2005 New Century assigned the mortgage to the intervenor Deutsche Bank National Trust Company. Deutsche Bank commenced a foreclosure proceeding against Gajraj in June of 2005, and took title to the premises at the sale in foreclosure.

Prior to Century's assignment to Deutsche Bank, plaintiff commenced this action by filing a complaint dated December 6, 2004. A Notice of Pendency bears a date stamp of

the Nassau County Clerk for February 15, 2005. Thus, when New Century financed the Gajraj purchase it was not on record notice of any dispute affecting title and appears to be an "incumbrancer for a valuable consideration" (Real Property Law § 266). In April of 2005, when Century assigned the Gajraj mortgage to Deutsche Bank, plaintiff's Notice of Pendency was on file with the Nassau County Clerk's office.

On this application Deutsche Bank seeks vacatur of the Notice of Pendency and dismissal of the complaint. Deutsche Bank asserts that plaintiff fails to establish a cause of action for fraud.

Initially the court rejects the intervenor's contention that plaintiff has offered only conclusory allegations. Plaintiff provides detailed assertions of events, representations, persons who made those representations, and her reliance upon them. The facts include indicia noted in the 2007 Home Equity Theft Protection Act (the Act), legislation intended to protect homeowners facing foreclosure from equity theft by mortgage rescue fraud (see Real Property Law § 265-a). Although the events in question preceded the passage of the Act, and it is not applicable to this action (L.2006, chap 308, § 5) neither Ellison nor Gajraj took possession of the premises, notwithstanding their purported purchases.

Deutsche Bank also avers that plaintiff's assertion that she believed she was signing a mortgage is belied by the plain and unambiguous language of the deed which makes the nature of the transaction clear. Deutsche Bank places great emphasis on the deed's recitation that "the party of the first part" in consideration of lawful money of the United States "paid by the party of the second part, does hereby grant and release" the premises to the "party of the second part." However, the mortgage document also recites, "I mortgage, grant and convey the Property to Lender..." Plaintiff was not represented by an attorney, and relied upon the representations made by Crawford and Ellison as to the

nature and the meaning of the document she signed. The difference between “grant and release” the premises in the deed, and “grant and convey” the Property in the Mortgage are not clearly discernable to a lay person. Further plaintiff believed that under a mortgage the Lender “owned” the property until the mortgage was paid in full.

Deutsche Bank also claims that plaintiff failed to show misrepresentations, as plaintiff expected Ellison to take a deed and secure a loan, both of which she did. Deutsche Bank’s contention is disingenuous, as plaintiff asserted that Crawford and Ellison assured her that her name would remain on the deed and that the premises could not be sold without her consent. Those representations were not true.

Deutsche Bank next avers that there was no misrepresentation of “existing or pre-existing fact”, a necessary element for a cause of action in fraud. The circumstances are sufficient to allow an inference that Crawford and Ellison never intended to assist plaintiff by allowing her to remain on the deed after the transfer to Ellison. And it appears, plaintiff did not know what she was signing at the closing, was not represented by counsel, and did as she was told.

Deutsche Bank ultimately argues that even were plaintiff able to establish fraud by Ellison and Crawford, she could not prevail against New Century, a bona fide encumbrancer for value, and therefore could not prevail against Deutsche Bank as assignee of New Century.

It is well settled that the “proponent of a summary judgment motion ‘must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case’” (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853). Only then does the burden shift to plaintiff “to produce evidentiary proof in admissible form establishing the existence of material

questions of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 326-327). The statute requires that such a motion be supported by affidavit by one with requisite knowledge of the facts, together with a copy of the pleadings and other available proof (CPLR 3212 [b]). "An opposing affidavit by an attorney without personal knowledge of the facts has no probative value and should be disregarded" (*DiSabato v Soffes*, 9 AD2d 297, 300).

A conveyance for valuable consideration "is presumed to be bona fide within the recording acts" (*Smith v Pure Strain Farms Co.*, 180 AD 703). And, in the absence of any evidence from plaintiff which tends to invalidate the deed of Gajraj or the mortgage of New Century, New Century must be considered "an incumbrancer for a valuable consideration" protected under Real Property Law § 266. Only evidence that Gajraj or New Century "had previous notice of the fraudulent intent" of Ellison would strip them of their protected status (Real Property Law § 266). Plaintiff provides neither allegation nor evidence of such notice.

The status of Gajraj and New Century operates to protect the bona fides of assignee Deutsche Bank, notwithstanding any notice that Deutsche Bank may have had from the *lis pendens* filed by plaintiff. The element of knowledge on the part of one who takes from an incumbrancer for a valuable consideration is "immaterial" (*O'Neill v Lola Realty Corp.*, 264 AD 60). The reason a purchaser with notice is protected under the prior purchaser's status is "to prevent a stagnation of property, and because the first purchaser, being entitled to hold and enjoy, must be equally entitled to sell" (*Jospe v Danis*, 138 AD 544, 546-547). Thus New Century, as an incumbrancer for a valuable consideration, transferred its status to Deutsche Bank, and protected Deutsche Bank from plaintiff's claims to the realty, as Deutsche Bank became an incumbrancer for a valuable consideration. In addition, Deutsche Bank, as a creditor who purchased land at a

foreclosure sale to collect its debt, is rendered "a purchaser for a valuable consideration . . . within the recording act" (*Wood v Chapin*, 13 NY 509).

Accordingly, although Deutsche Bank has failed to establish as a matter of law that plaintiff has no claim against defendants Ellison and Crawford, it has established that she may no longer recover the real property which is the subject of the notice of pendency, and accordingly, the notice of pendency is vacated.

Dated: March 31, 2010

  
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UTE WOLFF LALLY, J.S.C.

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**ENTERED**

**APR 06 2010**

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**