

**Del Pozo v Impressive Homes, Inc.**

2010 NY Slip Op 31473(U)

June 8, 2010

Sup Ct, Queens County

Docket Number: 5342/04

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 14  
**Justice**

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PATRICIA DEL POZO,	No. 5342/04
Plaintiff,	Motion
-against-	Date March 23, 2010
IMPRESSIVE HOMES, INC.,	Motion
ETAL.,	Cal. No. 5
Defendants.	Motion
-----	Seq. No. 12

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In this action with respect to the sale of certain real property, known as 35-13 101<sup>st</sup> Street, Corona in the County of Queens, City and State of New York, plaintiff seeks judgment against defendants Corona Gardens, Inc., KFIR Group LLC, Cambridge Funding Group LLC and Remark Development Corp., Merci Astudillo, Bolivar Astudillo, HSBC Mortgage Corporation (USA) and Citibank N.A. vacating conveyances, mortgages and/or all encumbrances against the property; and specific performance as against defendant Impressive Homes with respect to an alleged breach of contract together with any money damages sustained by the plaintiff and the costs and disbursements of this action, or in the alternative, judgment against the defendant Impressive Homes, Inc. in the sum of \$500,000.00 for the profit the plaintiff would have realized if the agreement were not violated, repudiated or breached by the defendant, together with the costs and

disbursements of this action, or in the alternative, money damages as against said defendant.

Defendants Cambridge Funding Group LLC (Cambridge) and Remark Development Corp. (Remark) (collectively movants), move for an order pursuant to CPLR 3212(b) granting summary judgment dismissing the plaintiff's second amended verified complaint as against them.

The second amended verified complaint asserts that, with actual or constructive knowledge of the notice of pendency of action, defendant KFIR mortgaged the premises via separate mortgages to defendants Cambridge and Remark. It was asserted that defendants Corona Gardens, Inc., KFIR Group LLC, Cambridge Funding Group LLC and Remark Development Corp., Merci Astudillo, Bolivar Astudillo, HSBC Mortgage Corporation (USA) and Citibank N.A. encumbered the premises with actual or constructive knowledge of the notice of pendency filed on March 5, 2004. In the wherefore clause, plaintiff demands judgment against said defendants "vacating conveyances, mortgages and/or all encumbrances against the property."

In support of the motion, movants submit the affidavits of Craig Hyman, vice president of defendant Cambridge and Seth Kramer, president of defendant Remark. Mr. Hyman states that, in early 2006, defendant KFIR approached defendant Cambridge for a loan to finance the construction of two three-family dwellings on the subject property which was to be acquired by the defendant KFIR. Prior to the agreement to lend any money, defendant Cambridge caused the documents recorded on the New York City Online Recording System (ACRIS) to be reviewed. At that time, there were no documents of record indicating that plaintiff claimed any interest in the property. The Judgment Docket and Lien Book System for Queens County was also reviewed. The search failed to reveal any judgments, liens, or notices of pendency indexed against the property. Defendant Cambridge agreed to provide KFIR with the requested loans and a closing was held on April 27, 2006. At such time, the prior searches were repeated with the same results. Nine months after making the loans, the mortgage held by defendant Cambridge was satisfied by defendant KFIR. Defendant Cambridge executed two satisfactions of mortgage, with respect to the two loans, which were duly recorded in the office of the City Register on or about January 17, 2007.

Mr. Kramer states that, in the early summer of 2006, defendant KFIR approached defendant Remark for additional financing to complete the construction. Prior to defendant

Remark's agreeing to lend any money, defendant Remark caused the documents recorded on the New York City Online Recording System (ACRIS) to be reviewed. At that time, only the two Cambridge mortgages were found. The Judgment Docket and Lien Book System for Queens County was also reviewed. The search failed to reveal any judgments, liens, or notices of pendency indexed against the property. Defendant Remark agreed to provide KFIR with the requested loans and a closing was held on August 3, 2006. At such time, the prior searches were repeated with the same results. About five months after making the loan, the mortgage held by defendant Remark was satisfied by defendant KFIR. Defendant Remark executed a satisfaction of mortgage, with respect to its loan which were duly recorded in the office of the City Register on or about January 17, 2007.

Defendants Cambridge and Remark argue that the mere filing of a notice of pendency does not create a substantive right, but rather, merely preserves an existing right. Such filing does not preclude a party from conveying or otherwise encumbering real property. There is no dispute that said defendants do not hold an interest in the property because their mortgages have been paid in full and were discharged of record by the filing of duly executed satisfactions of mortgage.

Plaintiff's counsel opposes the motion to the extent that the movants have constructive notice of the notice of pendency. He argues that, pursuant to CPLR § 6501, the notice of pendency became operative in favor of the plaintiff from the time it was filed without reference to whether the clerk performed his duty to index and, if so, the subsequent mortgage was destroyed by the judgment. Lack of actual knowledge of the filing is irrelevant as the doctrine of the notice of pendency does not rest on the presumption of notice but upon reasons of public policy.

Plaintiff argues that the mere filing of the notice of pendency "puts the world on notice of the plaintiff's potential rights in the action and warning all comers that if they buy the realty or otherwise rely on defendant's right, they do so subject to whatever the action may establish as the plaintiff's right." Plaintiff should not lose the effect of the notice of pendency due to the failure of the County Clerk to record and index it. As long as all encumbrances were subject to the filing of the notice of pendency, those encumbrances will be subject to the plaintiff's right in the action. The key point is when the notice of pendency was filed. Here, defendants Cambridge and Remark encumbered the property after the notice of

pendency was filed.

The motion by defendants Cambridge and Remark is granted and the second amended verified complaint is hereby dismissed as against them.

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact. Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank, 100 NY2d 72 at 81.

In the instant case, defendants Cambridge and Remark have established their entitlement to judgment as a matter of law. The complaint as to these two defendants sets forth only a cause of action for "vacating conveyances, mortgages and/or all encumbrances against the property." It is clear and undisputed that these two defendants no longer have any interest in the subject premises as their mortgages have been paid in full and satisfactions thereof have been duly recorded. At this point, said defendants have already extinguished their encumbrances with respect to the property and no further relief is sought against them. There is no prohibition against encumbering real property after the filing of a notice of pendency. Mallick v. Farfan, 66 AD3d 649. The purpose of the notice of pendency is to place others on notice that they would be bound by all subsequent proceedings. The mere fact that defendants Cambridge and Remark issued mortgages either before or after the filing of the notice of pendency does not subject them to liability.

Accordingly, the motion by defendants Cambridge Funding Group LLC and Remark Development Corp. is granted and the second amended verified complaint is hereby dismissed as against them.

Dated: June 8, 2010

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HON. DAVID ELLIOT