

Wells Fargo Bank, N.A. v Enyonam

2010 NY Slip Op 32046(U)

August 3, 2010

Sup Ct, Queens County

Docket Number: 3190 2008

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS
Justice

IA Part 2

WELLS FARGO BANK, N.A. x
3476 Stateview Boulevard
Ft. Mill, SC 29715

Plaintiff,

- against -

“TOLESSI M. ENYONAM” (SAID NAME BEING ASSUMED BY AN UNKNOWN INDIVIDUAL FOR THE PURPOSES OF OBTAINING TITLE TO THE PREMISES AND THE MORTGAGE WHICH IS THE SUBJECT OF THIS ACTION), NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU,

JOHN DOE (Said names being fictitious it being the intentions of Plaintiff to designate any and all occupants of premises being foreclosed herein, and any parties, corporations or entities, if any, having or claiming an interest or lien upon the mortgage premises.)

Defendant.

x

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Number 3190 2008

Motion
Date April 21, 2010

Motion
Cal. Number 36

Motion Seq. No. 5

The following papers numbered 1 to 16 read on this motion by plaintiff for leave to amend the caption substituting Dorothy Thomas, Herman Dunham and Ronald Garner as party defendants in place of defendant “John Doe,” for partial summary judgment striking the first, third, fourth, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth affirmative defenses asserted by defendant Dorothy Thomas in her answer, and to

dismiss pursuant to CPLR 3211 the counterclaims interposed by defendant Thomas; this cross motion by defendant Thomas pursuant to CPLR 3212, 3211(a)(1) and (a)(3) for summary judgment dismissing the complaint asserted against her, to impose sanctions upon plaintiff pursuant to 22 NYCRR 130-1.1(c) and for an award of punitive damages.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
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Answering Affidavits - Exhibits	12-13
Reply Affidavits	14-16

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff commenced this action seeking to foreclose a mortgage dated September 13, 2007, given by defendant Tolessi M. Enyoman on the real property known as 107-43 Union Hall Street, Jamaica, New York as security for a note evidencing a loan in the principal amount of \$533,850.00, plus interest. Plaintiff alleged that defendant Tolessi M. Enyoman was the record owner of the property pursuant to a deed dated September 13, 2007, and defaulted under the terms of the mortgage and note by failing to pay the monthly mortgage installment due on November 1, 2007.

Plaintiff thereafter moved for leave to file a supplemental summons and amended complaint as proposed. The caption for the proposed amended complaint deleted reference to Tolessi M. Enyoman, and substituted in its place and stead, the name "Tolessi M. Enyoman," including the quotation marks and a parenthetical phrase indicating that "Tolessi M. Enyoman" was intended by plaintiff to be the person who obtained the title to the subject premises and the mortgage loan under the assumed name of "Tolessi M. Enyoman." In support of the motion, plaintiff indicated a New Jersey woman named Tolessi M. Enyoman had contacted it, advising that she had been the victim of identity theft, and never had owned or mortgaged the subject premises. Plaintiff also indicated its own investigation confirmed that Ms. Enyoman was not the same person who had obtained the September 13, 2007 deed or mortgage loan. Plaintiff admitted to the court that it did not know the true identity of the person who obtained the deed and mortgage loan. The motion was granted by August 20, 2008.

Plaintiff thereafter sought leave to permit service of process upon the named defendant “Tolessi M. Enyoman” by publication. In support of the application, plaintiff once again indicated that the real Tolessi M. Enyoman had been the victim of identity theft, and had not obtained the deed or mortgage loan. By order dated December 11, 2008, plaintiff was granted leave to serve of process upon defendant “Tolessi M. Enyoman” by publication.

Defendant Dorothy Thomas s/h/i/a “John Doe” served an answer dated March 6, 2009, denying the material allegations of the amended complaint, asserting various affirmative defenses and interposing certain counterclaims. Defendant Thomas alleges, among other things, that her late husband, Eugene Thomas, obtained record title to the subject property from the United States Department of Veteran Affairs pursuant to a deed dated January 29, 1979 during the course of their marriage, and that she was Eugene’s surviving spouse upon his death on September 22, 1986. She also alleges that she is the true owner of the property, and has resided at the subject premises for over 30 years, including at the time of the making of the subject mortgage loan. Defendant Thomas further alleges that the September 13, 2007 deed is forged and that someone other than the real Tolessi M. Enyoman fraudulently used it to obtain a mortgage loan against the subject property. Plaintiff served a reply to the counterclaims, asserting certain affirmative defenses.

That branch of the motion by plaintiff for leave to amend the caption as proposed is granted.

With respect to the branch of cross motion by defendant Thomas pursuant to CPLR 3212, 3211(a)(1) and (a)(3) for summary judgment dismissing the complaint based upon lack of standing, defendant Thomas waived the defense of lack of standing (*see* CPLR 3211[a][3]) by failing to either make a pre-answer motion to dismiss the complaint on that ground or by asserting that defense in her answer (*see* CPLR 3211[e]; *Countrywide Home Loans, Inc. v Delphonse*, 64 AD3d 624, 625 [2d Dept 2009]; *Wells Fargo Bank Minn. v Mastropaolo*, 42 AD3d 239, 244 [2007]). Contrary to defendant Thomas’s argument, the circumstances presented here do not warrant a finding otherwise (*see generally Rogoff v San Juan Racing Assn.*, 77 AD2d 831 [1980], *affd* 54 NY2d 883 [1981]). Furthermore, defendant Thomas makes no request for leave to amend her answer to assert the defense of lack of standing (*cf. Aurora Loan Services, LLC v Thomas*, 70 AD3d 986 [2010]). Therefore, that branch of the cross motion by defendant Thomas pursuant to CPLR 3212 and 3211(a)(3) for summary judgment dismissing the complaint based upon lack of standing is denied.

With respect to that branch of the cross motion by defendant Thomas pursuant to CPLR 3212 and 3211(a)(1), the documentary evidence that forms the basis of a defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claims (*see Saxony Ice Co., Div. of Springfield Ice Co., Inc. v Ultimate Energy*

Restaurant Corp., 27 AD3d 445 [2006]). In this instance, the documentary evidence submitted by defendant Thomas does not resolve all of the factual issues as a matter of law, nor does it conclusively dispose of plaintiff's claims (*see id.*; *Museum Trading Co. v Bantry*, 281 AD2d 524, 525 [2001]).

Clearly, defendant Thomas's late husband, Eugene Thomas, did not execute the September 13, 2007 deed. Defendant Thomas, however, has failed to establish that someone else, who was alive and named "Eugene Thomas," did not execute the deed (*see e.g. Kraker v Roll*, [100 AD2d 424 (1984)]). The deed bears an acknowledgment of a notary public. A duly acknowledged deed is accorded a strong presumption of due execution and cannot be invalidated without clear and convincing evidence that it is a forgery (*see Son Fong Lum v Antonelli*, 102 AD2d 258 [1984], *affd* 64 NY2d 1158 [1985]). Defendant Thomas has failed to offer admissible proof that anyone has been convicted of forgery with respect to the September 13, 2007 deed or having fraudulently used it to obtain the subject mortgage (*cf. Altegra Credit Co. v Tin Chu*, 29 AD3d 718 [2006] [lender collaterally estopped from proving that the underlying deed and mortgage should be given legal effect where the son of the owner of the property was convicted of grand larceny in the second degree and forgery in the second degree, arising out of charges that he forged his father's signature on the deed to the affected property into himself and then used that forged deed to obtain the mortgage]).

In addition, defendant Thomas has failed to present a prima facie case that no one named "Eugene Thomas" had an ownership interest in the property at the time of the conveyance to defendant "Tolessi M. Enyoman." Defendant Thomas has failed to identify who became vested with an ownership interest in the property upon her husband's death (*see generally Waxson Realty Corp. v Rothschild*, 255 NY 332 [1931]; *Kraker v Roll*, 100 AD2d 429 [1984], *supra*). Under such circumstances, that branch of the cross motion by defendant Thomas pursuant to CPLR 3212 and 3211(a)(1) is denied.

That branch of the cross motion by defendant Thomas for an award of sanctions and punitive damages is denied.

With respect to the branch of the motion by plaintiff for partial summary judgment dismissing certain affirmative defenses, the first, third and eighth affirmative defenses are based upon defendant Thomas's claim that any damages suffered by plaintiff are the proximate result of culpable conduct or action of plaintiff. Such claim does not constitute a defense to this mortgage foreclosure action. The concept of apportioning culpable conduct is one related to tort. Since the claims asserted by plaintiff in this case sound in breach of contract, as opposed to tortious conduct, an affirmative defense based on a notion of culpable conduct is unavailable herein (*see CPLR 1401; Pilwesi v Solymosy*, 266 AD2d 83 [1999]; *Nastro Contracting Inc. v Agusta*, 217 AD2d 874 [1995]; *Schmidt's Wholesale, Inc. v Miller*

& *Lehman Const., Inc.*, 173 AD2d 1004 [1991]; *Castleton Holding Corp. v Forde*, 15 Misc 3d 1111[A] [2007]).

There are two affirmative defenses asserted by defendant Thomas which are denominated as a “FOURTH” affirmative defense in the answer. Based upon the submissions of plaintiff, it appears that plaintiff seeks partial summary judgment dismissing the “FOURTH” affirmative defense which is based upon failure to mitigate damages. Plaintiff elected to accelerate the mortgage debt pursuant to a contract right (*see Logue v Young*, 94 AD2d 827 [1983]). Defendant Thomas has failed to demonstrate that once the mortgage was accelerated, plaintiff was required to modify the mortgage terms, forego its right to seek foreclosure, or accept any tender in an amount less than the total amount due under the mortgage (*see Albertina Realty Co. v Rosbro Realty Corp.*, 258 NY 472 [1932]; *First Federal Sav. Bank v Midura*, 264 AD2d 407 [1999]; *Albany Sav. Bank v Seventy-Nine Columbia St.*, 197 AD2d 816 [1993]; *New York Guardian Mortgagee Corp. v Olexa*, 176 AD2d 399, 401 [1991]). Furthermore, to the extent defendant Thomas asserts plaintiff should have made a claim under a title insurance policy in an effort to mitigate damages, she has failed to show that any such policy was issued for the benefit of her (or the mortgagor), rather than for the mortgagee (*see generally, Marine Midland Bank, N.A. v. Virginia Woods, Ltd.*, 151 Misc 2d 915 [1991], *affd* 201 AD2d 625 [1994]).

The thirteenth affirmative defense is premised upon defendant Thomas’s claim that plaintiff failed to properly verify the information provided to it in relation to the mortgage application by defendant “Tolessi M. Enyoman” prior to making the loan. Defendant Thomas, however, makes no allegation of any contractual or fiduciary relationship between her and plaintiff. In the absence of any such relationship, plaintiff owed no duty of care to defendant Thomas to ascertain the accuracy of the information provided to it as part of the application process (*see Beckford v Northeastern Mtge. Inv. Corp.*, 262 AD2d 436 [1999]), the true identity of the party executing the mortgage (*Money Store/Empire State v Lenke*, 151 AD2d 256 [1989]), or the validity of the signatures on the documents (*see Banque Nationale de Paris v 1567 Broadway Ownership Assocs.*, 214 AD2d 359, 360 [1995]; *Money Store/Empire State v Lenke*, 151 AD2d 256 [1989]).

Defendant Thomas, in her first counterclaim, reasserts the allegations of negligent loan verification, and additionally alleges, in essence, that plaintiff should have inspected the property prior to making the loan, and in so doing, would have learned of her occupancy and been alerted to her claim of ownership. Such counterclaim fails to state a cause of action. Defendant Thomas’s alleged occupancy in the premises at the time of the making of the mortgage loan, may provide a basis for her challenge to plaintiff’s purported status as a bona fide encumbrancer under the recording statute (*see Greenpoint Sav. Bank v McMann Enterprises, Inc.*, 214 AD2d 647 [1995]; *see also Phelan v Brady*, 119 NY 587,

591-592 [1890]). It, however, does not support a claim against plaintiff for damages based upon negligence.

The ninth, tenth, fourteenth and fifteenth affirmative defenses asserted by defendant Thomas are founded upon her claim that plaintiff, before making the mortgage loan, had actual knowledge of the purported fraud in relation to the September 13, 2007 deed and the alleged misrepresentations made by defendant “Tolessi M. Enyoman” regarding the mortgage application, but nevertheless, made the loan. Defendant Thomas has failed to demonstrate that plaintiff had actual knowledge of the alleged fraud surrounding the making of the September 13, 2007 deed and use in obtaining the mortgage loan (*cf. Fleming-Jackson v Fleming*, 41 AD3d 175, 176 [2007]; *see* Real Property Law § 266). Clearly, plaintiff’s interests in the transaction were to make a “performing” loan, and acquire a valid, enforceable, first mortgage lien on the premises to secure it, and not to be a target of fraud.

The eleventh affirmative defense and the second, third, fourth and fifth counterclaims are predicated upon defendant Thomas’s claim that plaintiff’s continued recognition of the validity the subject mortgage constitutes the aiding and abetting of the persons who participated in the alleged fraudulent loan transaction. However, defendant Thomas has not established, that a fraud in fact was committed and that plaintiff’s position, i.e. it is a bona fide encumbrancer for value and protected in its interest under the recording statutes, is an invalid one (*see generally Cash v Titan Financial Services, Inc.*, 58 AD3d 785 [2009]).

Furthermore, the third counterclaim seeks an award of sanctions constituting costs, disbursements and attorneys’ fees against plaintiff and plaintiff’s counsel. New York, however, does not recognize a separate cause of action to impose sanctions pursuant to 22 NYCRR 130-1.1(c) (*see Greco v Christoffersen*, 70 AD3d 769, 771 [2010]) and as a consequence, the third counterclaim fails to state a cause of action.

In addition, to the extent defendant Thomas alleges intentional infliction of emotional distress as a fifth counterclaim, the claimed acts of plaintiff not rise to the level of extreme and outrageous conduct which is necessary to sustain such a cause of action (*see Howell v New York Post Co., Inc.*, 81 NY2d 115 [1993]; *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1983]; *Crispino v Greenpoint Mtge. Corp.*, 2 AD3d 478 [2003]; *Glatter v Chase Manhattan Bank*, 239 AD2d 68 [1998]; *Vasilopoulos on Behalf of Vasilopoulos v Romano*, 228 AD2d 669 [1996]). The fourth counterclaim to recover damages for negligent infliction of emotional distress likewise fails to state a claim since plaintiff’s alleged conduct cannot be said to unreasonably endanger defendant Thomas’s safety or cause her to fear for her safety (*see Crispino v Greenpoint Mtge. Corp.*, 2 AD3d 478, 480 [2003], *supra*).

The twelfth affirmative defense asserted by defendant Thomas is in essence, a claim by defendant Thomas that plaintiff is not a bona fide encumbrancer, insofar as Thomas was in possession of the property at the time of the making of the mortgage loan, and has a superior ownership interest in it. Defendant Thomas has raised a triable issue of fact as to the merits of this defense (*see Phelan v Brady*, 119 NY 587, 591-592 [1890]).

Under such circumstances, the branch of the motion by plaintiff for partial summary judgment striking the first, third, fourth, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth affirmative defenses asserted by defendant Thomas, and to dismiss pursuant to CPLR 3211 the counterclaims interposed by defendant Thomas is granted only to the extent of granting partial summary judgment striking the first, third, fourth, eighth, ninth, tenth, eleventh, thirteenth, fourteenth and fifteenth affirmative defenses, and dismissing the counterclaims interposed by defendant Thomas.

Dated: Aug. 3, 2010

J.S.C.