

**Banno v Mitchell**

2010 NY Slip Op 32505(U)

August 31, 2010

Supreme Court, Nassau County

Docket Number: 3226/07

Judge: F. Dana Winslow

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SUPAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

CARMELA BANNO and CONSTANCE ROTOLO,

TRIAL/JAS, PART 5  
NASSAU COUNTY

Plaintiffs,

-against-

MOTION SEQ. NOS.: 007, 008,  
009, 010

INDEX NO.: 3226/07

MOTION DATE: 8/17/10

ROBERT MITCHELL, MICHAEL MITCHELL,  
MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC., NEW CENTURY MORTGAGE  
CORP., IMPERIAL ABSTRACT CORPORATION,  
JUSTIN M. BLOCK, P.C. and "JOHN DOE" and  
"MARY DOE," said names being fictitious, it being  
the intention of plaintiffs to designate any and all  
occupants, tenants, persons or corporations, if any,  
having or claiming an interest in or lien upon the  
premises that are the subject of this lawsuit,

Defendants.

The following papers read on this motion (numbered 1-17):

Motion Seq. 007

Notice of Motion (defendants MERS & New Century).....1  
 Memorandum of Law.....1a  
 Affirmation in Opposition (plaintiffs).....2  
 Reply Affirmation (defendants MERS and  
 New Century) .....3  
 Memorandum of Law.....3a

Motion Seq. 008

Notice of Cross-Motion (defendant Block).....4  
 Affirmation in Opposition (defendant R.  
 Mitchell).....5  
 Affirmation in Opposition (plaintiffs).....6  
 Reply Affirmation (defendant Block).....7

Motion Seq. 009

Notice of Cross-Motion (plaintiffs).....8  
 Supplemental Affirmation (plaintiffs).....9

<b>Affirmation in Opposition</b> <b>(defendants R. &amp; M. Mitchell).....</b>	<b>10</b>
<b>Affirmation in Opposition (defendants MERS and</b> <b>New Century).....</b>	<b>11</b>
<b>Memorandum of Law.....</b>	<b>11a</b>
<b>Reply Affirmation (plaintiffs).....</b>	<b>12</b>
<b>Affirmation in Reply (plaintiffs).....</b>	<b>13</b>
<b><u>Motion Seq. 10</u></b>	
<b>Notice of Cross-Motion (defendants R. &amp; M. Mitchell).....</b>	<b>14</b>
<b>Memorandum of Law.....</b>	<b>14a</b>
<b>Affirmation in Opposition (defendant Block).....</b>	<b>15</b>
<b>Affirmation in Opposition (plaintiffs).....</b>	<b>16</b>
<b>Reply Affirmation (defendants R. &amp; M. Mitchell).....</b>	<b>17</b>

This is an action for money damages, punitive damages, specific performance and rescission in connection with the sales of residential real property known as 107 Campbell Avenue, Oceanside, New York (the "Property").

The following motions are determined herein:

1. Motion by defendants MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. ("MERS") and NEW CENTURY MORTGAGE CORP. ("NEW CENTURY") pursuant to **CPLR §3212** for summary judgment dismissing the complaint against MERS and NEW CENTURY [Mot. Seq. 007];
2. Cross-Motion by defendant JUSTIN M. BLOCK, P.C. ("BLOCK") pursuant to **CPLR §3212** for summary judgment dismissing the action as against BLOCK, and dismissing the cross claim for legal malpractice asserted against BLOCK by ROBERT MITCHELL ("R. MITCHELL") [Mot. Seq. 008];
3. Cross-Motion by plaintiffs CARMELA BANNO ("BANNO") and CONSTANCE ROTOLO (collectively, the "plaintiffs") pursuant to **CPLR §3212** for partial summary judgment against defendants R. MITCHELL and MICHAEL MITCHELL ("M. MITCHELL") [Mot. Seq. 009];
4. Cross-Motion by defendants R. MITCHELL and M. MITCHELL pursuant to **CPLR §3212** for summary judgment dismissing the causes of action in the complaint asserted against R. MITCHELL and M. MITCHELL [Mot. Seq. 010].

#### Facts and Procedural History

The following is a summary of the facts as gleaned from the submitted record. This action arises out of transactions that occurred in or about November 2004,

December, 2005 and on or about September 22, 2006 concerning the Property. In plaintiffs' Second Amended Verified Complaint, filed with the County Clerk on September 16, 2008, plaintiffs allege that in or about November, 2004, defendant R. MITCHELL held himself out to be the owner of the Property which was subject to a mortgage held by Option One Mortgage Corp. (the "Option One Mortgage"). The Option One Mortgage was allegedly in default and a foreclosure action had been commenced. In or about November 2004, plaintiffs claim that they provided R. MITCHELL with funds in the amount of \$44,500 and that, at the request of R. MITCHELL, BANNO brought the Option One Mortgage current by the payment of an additional \$77,789.92. These funds advanced by BANNO were allegedly to be reimbursed to BANNO at the closing covering the sale of the Property from R. MITCHELL to BANNO.

On or about December 2005, R. MITCHELL as seller and BANNO as purchaser entered into a Residential Contract of Sale ("Contract of Sale #1") [Motion Seq. 007, Exh. C] allegedly prepared by BLOCK for a purchase price of \$470,000, down payment by BANNO of \$77,000 and a purchase money mortgage in the amount of \$94,000 with the balance of \$299,000 due from BANNO at closing. Simultaneously with the execution of the Contract of Sale, R. MITCHELL and BANNO executed a Lease and Repurchase Agreement (the "Lease Agreement") [Motion Seq. 007, Exh. E] whereby R. MITCHELL agreed to rent the Property from BANNO for a period of one year for a monthly rental fee equal to the monthly payment on BANNO's mortgage. R. MITCHELL would continue to occupy the Property and would have the option to repurchase the Property after one year. The Lease Agreement provides that at the closing of the sale of the Property from R. MITCHELL to BANNO, R. MITCHELL was to execute a separate contract of sale for the repurchase of the Property from BANNO and to pay a down payment of no more than 10% of the purchase price equal to the principal amount due on BANNO's mortgage twelve months from the date of closing. The Court notes that said repurchase agreement is not in the record presented by the parties. The Court notes further that there appears to be another Contract of Sale ("Contract of Sale #2") which sets forth the same purchase price as Contract of Sale #1 (\$470,000), but provides for a \$99,000 down payment with \$371,000 to be paid at closing. (The December 2005 contracts of sale are collectively referred to as "Contract of Sale."). Two deeds were also purportedly executed, one in favor of BANNO and the other in favor of R. MITCHELL, both to be held in escrow by BLOCK. The escrow agreement covering the deed executed in favor of MITCHELL was to be recorded only in the event that BANNO defaulted under the terms of the parties' agreements.

Plaintiffs claim that at closing, R. MITCHELL was unable to transfer clear title to the Property when the title company discovered that the Property was held in the name of R. MITCHELL and Winifred Mitchell, allegedly R. MITCHELL'S deceased mother, who

died intestate and was survived by R. MITCHELL and his two sisters. Plaintiffs claim that as a result, the closing was adjourned and that BLOCK and the attorneys for Option One Mortgage Bank (“Option One”) indicated that they would collectively seek appointment of an administrator for Winifred Mitchell in the Surrogates’ Court. Plaintiffs claim that notwithstanding the foregoing, on or about September 22, 2006, R. MITCHELL transferred the Property to his son M. MITCHELL. M. MITCHELL obtained a loan from NEW CENTURY secured by a first mortgage on the Property [Motion Seq. 008, Exh. I.] . The mortgage provided that MERS acted as nominee for NEW CENTURY as mortgagee (the “MERS Mortgage”). The complaint alleges that a title search was purportedly provided by IMPERIAL ABSTRACT CORPORATION (“IMPERIAL”).

In an affidavit, sworn to on May 16, 2010 [Motion Seq. No. 010], R. MITCHELL asserts that in or about 2003, Option One notified him that foreclosure proceedings were to be commenced on the Property whereupon he contacted BLOCK in the hopes that BLOCK could stop or delay the foreclosure. R. MITCHELL was also allegedly in contact with non party Charles Cruz, a “foreclosure expert” advertised in a Pennysaver newspaper, who together with BLOCK recommended a “purchase/lease/buyback arrangement.” R. MITCHELL claimed he signed many signature pages (he was not aware that there were two contracts of sale) provided by BLOCK and that BLOCK informed him that he owned the Property after his mother had passed away. When the existence of his sisters became an issue during the closing covering his sale of the Property to BANNO, R. MITCHELL contends that BLOCK assured him that “he would take care of it.” After several weeks, R. MITCHELL claims that he was told by BLOCK and BLOCK’s assistant that R. MITCHELL should find another arrangement. R. MITCHELL contends that thereafter he contacted non party Frank Miale of AFG Financial who proceeded to obtain a mortgage for his son M. MITCHELL so that R. MITCHELL could pay off his Option One Mortgage. In connection with said transaction, R. MITCHELL provided an Affidavit of Marital Status attesting that Winifred Mitchell was his wife, not his mother, avoiding the title problems which would otherwise arise out of the December 2005 attempted sale of the Property to BANNO.

Plaintiffs commenced this action on or about February 21, 2007, and by Order, dated July 9, 2009, the Court *inter alia* granted plaintiffs’ motion to serve an amended summons and complaint adding BLOCK as a defendant. Plaintiffs’ Second Amended Verified Complaint, filed on September 16, 2008, seeks (i) return of the \$44,500 and \$77,789.92 allegedly advanced to R. MITCHELL; (ii) an Order directing specific performance by R. MITCHELL of a December 2005 contract of sale between BANNO and R. MITCHELL; (iv) an Order declaring null and void the conveyance and deed, dated September 22, 2006, from R. MITCHELL to M. MITCHELL; (v) punitive damages

[\* 5]

against R. MITCHELL and M. MITCHELL; (vi) money damages against BLOCK (vii) an Order against M. MITCHELL, MERS and NEW CENTURY declaring the mortgage issued in the transaction between R. MITCHELL and M. MITCHELL to be of no force and effect; and (viii) money damages against IMPERIAL.

Motion for Summary Judgment by defendants MERS and NEW CENTURY (Motion Seq. 007)

The only cause of action asserted by plaintiffs against MERS and NEW CENTURY is the eighth cause of action wherein plaintiffs seek a judgment that the MERS Mortgage be declared of no force and effect. Plaintiffs claim that MERS and NEW CENTURY knew or should have known that seller R. MITCHELL was not the surviving tenant by the entirety of Winifred Mitchell and was, consequently, unable to convey marketable title to M. MITCHELL. MERS and NEW CENTURY move for summary judgment dismissing the complaint as against them.

MERS and NEW CENTURY contend that plaintiffs' cause of action against them is dependent on plaintiffs' third cause of action against R. MITCHELL seeking specific performance of the Contract of Sale (although the submissions are unclear as to which Contract) between R. MITCHELL as seller and BANNO as purchaser. MERS and NEW CENTURY argue that plaintiffs are not entitled to specific performance, and as such, BANNO has no standing to raise claims with respect to a subsequent conveyance of the Property. Although the Court agrees with this premise, the Court is unable on the record before it, to declare that BANNO is not entitled to specific performance. On this basis, the Court finds that MERS and NEW CENTURY have failed to make a *prima facie* showing of entitlement to judgment as a matter of law.

Cross-Motion for Summary Judgment by defendant Block against BANNO and co-defendant R. MITCHELL (Motion Seq. 008)

BLOCK seeks to dismiss BANNO's cause of action asserted against him and to dismiss the cross claim of co-defendant R. MITCHELL for legal malpractice. In their seventh cause of action, plaintiffs' claim that in conjunction with BLOCK's representation of R. MITCHELL, BLOCK gave legal advice to BANNO and that BLOCK's actions were a proximate cause of BANNO's damages in the context of the funds advanced to R. MITCHELL prior to the execution of the December 2005 Contract of Sale. In his motion for summary judgment as against plaintiffs, BLOCK argues that BANNO's deposition testimony establishes that BANNO was not represented by an attorney and that BLOCK represented R. MITCHELL only. With respect to R. MITCHELL's cross claim for legal malpractice, BLOCK asserts that R. MITCHELL has

failed to establish that BLOCK's alleged negligence was a proximate cause of any damages to R. MITCHELL. BLOCK argues that, if R. MITCHELL is found to be liable to BANNO, any damages paid by R. MITCHELL to BANNO would be the result of R. MITCHELL's own actions and not any negligence of BLOCK.

The Court finds that BLOCK has satisfied his *prima facie* burden of entitlement to summary judgment as a matter of law with respect to both BANNO and R. MITCHELL. In opposition, the Court finds, however, that both BANNO and R. MITCHELL have raised issues of fact, although marginally, which preclude the Court granting summary judgment to BLOCK. The Court finds that BANNO has raised issues of fact including whether or not BLOCK acted as BANNO's attorney. Likewise, R. MITCHELL has raised issues of fact with respect to his legal malpractice claim against BLOCK, including proximate cause and proof of damages incurred.

Cross-Motion for Summary Judgment by plaintiffs (Motion Seq. # 009) and Cross-Motion for Summary Judgment by defendant R. MITCHELL (Motion Seq. #010)

The Court finds that BANNO and R. MITCHELL have failed to make a *prima facie* showing of entitlement to judgment as a matter of law. The record is replete with discrepancies, including fundamentally, which Contract of Sale governs the purported sale of the Property from R. MITCHELL to BANNO. The Court notes, in addition, that many of the submitted contracts are missing dates and that there are issues of fact as to R. MITCHELL's capacity to convey title in any of the transactions.

Conclusion

The Court finds that the record raises issues of fact, including issues regarding the credibility of the parties, validity of the contracts and the differing versions of the facts. Consequently, summary judgment in favor of any of the moving parties is unwarranted and a trial is necessary to determine the issues raised.

Based on the foregoing, it is

ORDERED, that the motion by defendants MORTGAGE ELECTRONIC REGISTRATION SYSTEMS and NEW CENTURY MORTGAGE CORP. for summary judgment pursuant to CPLR §3212 [Mot. Seq. 007] is **denied**; and it is further

ORDERED, that the cross-motion by defendant JUSTIN M. BLOCK, P.C. pursuant to CPLR §3212 for summary judgment dismissing action by plaintiffs and the

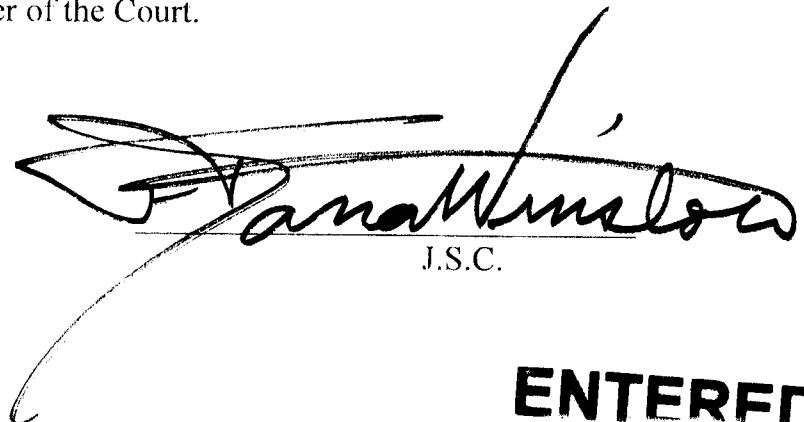
cross claim by ROBERT MITCHELL against JUSTIN M. BLOCK, P.C. [Mot. Seq. 008] is **denied**; and it is further

ORDERED, that the cross-motion by defendant ROBERT MITCHELL pursuant to CPLR §3212 for summary judgment dismissing the action against ROBERT MITCHELL [Mot. Seq. 009] is **denied** and it is further

ORDERED, that the cross-motion by defendants ROBERT MITCHELL and MICHAEL MITCHELL for summary judgment dismissing the action against them [Mot. Seq. 010] is **denied**.

This constitutes the Order of the Court.

Dated: August 31, 2010



J.S.C.

**ENTERED**  
SEP 10 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE