[* 1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IA Part 14
Justice

x

YOLANDA BETANCOURT

- against -

LIGIA GUAMAN, et al.

x

Index Number 27222 2006

Motion Date June 15, 2010

Motion Cal. Number 5

Motion Seq. No. 3

The following papers numbered 1 to 11 read on this motion by defendants Ligia Guaman, Milton Guaman, and Benjamin Guaman for an order granting summary judgment dismissing the complaint and canceling of record a $36,000.00 mortgage between Dario Betancourt and Yolanda Betancourt dated November 20, 2000, and recorded on May 21, 2001.

	Papers Numbered
Notice of Motion-Affidavit-Exhibits (A-M).....	1-4
Supporting Affirmation-Exhibits (A-B).....	5-7
Opposing Affirmation-Exhibits (A-C).....	8-10
Reply Affirmation.....	11

Upon the foregoing papers the motion is determined as follows:

Plaintiff Yolanda Betancourt and defendant Dario Betancourt, also known as Ruben D. Betancourt, and as Ruben Dario Betancourt, are sister and brother.

On November 20, 2000, Dario Betancourt executed a purchase money note, whereby he promised to pay Yolanda Betancourt the sum of $36,000.00, together with interest at 9%

per annum, in equal monthly installments of $1,300.00, commencing December 8, 2000, until April 8, 2003, at which time all outstanding principal and accrued interest would be due. The note recites that it is secured by "a purchase money mortgage of even date, which has been executed by Maker in favor of the Payee in connection with the sale and conveyance of said property by Payee to Maker."

On November 20, 2000, Ruben Dario Betancourt executed a mortgage, with an acknowledgment, on the real property known as 41-30 Gleane Street, Elmhurst, New York, which recites that it is between Dario Betancourt as mortgagor, and Yolanda Betancourt as mortgagee, to secure the debt of $36,000.00, to be paid in equal monthly installments of $1,300.00, with interest of 9% per annum, commencing December 8, 2000. This mortgage, referred to herein as the Betancourt mortgage, was recorded on May 21, 2000.

On July 17, 2002, Ruben Betancourt commenced an action against his sister Yolanda, entitled *Betancourt v Betancourt*, (Index No. 18592/02) to cancel the $36,000.00 mortgage and purchase money note dated November 20, 2000, on the grounds of forgery or fraud in the inducement.

On March 31, 2003, defendants Milton Guaman, Benjamin Guaman and Ligia Guaman, pursuant to a deed executed by Ruben D. Betancourt, acquired the real property known as 41-30 Gleane Street, Elmhurst, New York. The Guaman deed was recorded on July 23, 2003. At the time of said purchase, the subject real property was encumbered by the Betancourt mortgage, and the action between the Betancourts was still pending. Ruben Dario Betancourt entered into an escrow agreement dated March 31, 2003, with Washington Title Insurance Company, for the purpose of holding $72,000.00 in escrow as security for the production, on or before April 1, 2004, a "satisfaction of Mortgage recorded in Reel 5881 page 392 or a final order of a court of competent jurisdiction canceling the lien of said mortgage and ordering the New York City Register to mark said mortgage canceled." The escrow agreement makes no reference to any other lien on the property other than the Betancourt mortgage. Washington Title Insurance Company was the Guamans' title insurance underwriter.

On March 31, 2003, the Guamans, in connection with the purchase of the subject real property, executed and delivered a purchase money mortgage in the principal sum of $569,500.00 in favor of HSBC Mortgage Corporation (USA). On March 16, 2005, the Guamans consolidated, extended and modified the purchase money mortgage by executing and delivering to HSBC a mortgage in the sum of $24,921.29 and a consolidation, extension and modification agreement in the sum of $580,000.00, which were recorded on June 6, 2005.

On December 7, 2006 Yolanda Betancourt commenced this action to foreclose on the Betancourt mortgage and filed a notice of pendency. She alleges in the verified complaint that on November 20, 2006, her brother executed and delivered to her a note, in the sum of $36,000.00, plus interest as stated therein, and also executed and delivered a first mortgage on the premises known as 41-30 Gleane Street, Elmhurst, New York. It is noted that the mortgage and note, which are attached as exhibits to the complaint, are dated November 20, 2000, and not 2006, as alleged in the complaint.

Plaintiff alleges that all of the defendants "failed to comply with the terms, covenants and conditions of said Note and Mortgage by defaulting in the payment...[of] any amounts under the bond and mortgage from November 20, 2000 to date." Plaintiff alleges that by reason of said default, she has elected to declare the entire balance of the principal sum secured by said Note and Mortgage to become immediately due and payable. Plaintiff seeks a deficiency judgment only against Mr. Betancourt.

In an amended verified complaint dated March 26, 2007, plaintiff, while making reference to but not repeating any of the allegations contained in the original complaint, asserts a second cause of action to recover, under the terms of the mortgage, all sums paid by the mortgagee for the expenses of litigation, including legal fees, to be paid by the mortgagor, together with interest of 6% per annum, and alleges that she has incurred legal fees in the sum of $30,000.00.

The Guaman defendants served a verified answer which responded to the amended complaint and "by reason of the incorporation by reference of the Verified Complaint, dated December 7, 2006, into a document entitled 'Amended Verified Complaint,' " they interposed three affirmative defenses, and a cross claim against Mr. Betancourt.

Mr. Betancourt served an answer to the amended verified complaint, and interposed two affirmative defenses and counterclaim for fraudulent inducement and a counterclaim for declaratory judgment which seeks a declaration that the note and mortgage is null and void.

Defendant HSBC served a verified answer to the complaint and amended complaint, and interposes seven affirmative defenses and a cross claim against Mr. Betancourt.

Following the trial of the action entitled *Betancourt v Betancourt* (Index No. 18592/02), the Hon. Sydney Leviss, J.H.O., issued a memorandum decision, dated April 11, 2007, and determined that Mr. Betancourt had failed to prove by clear and convincing evidence that the mortgage and note dated November 20, 2000, was procured by fraud on the part of the Ms. Betancourt. Justice Leviss further determined that Ms. Betancourt had established that her brother owed her $25,000.00 with interest from

November 1, 2000 pursuant to an assignment of a claim for Worker's Compensation; and that he owed her the sum of $5,334.85, with interest from April 1, 2002, as he had cashed a check that belonged to the defendant without her consent or knowledge; but that she had not established that the sums she provided to pay his child support obligations were a loan and not a gift.

A judgment dated July 2, 2007, and entered on July 10, 2007, dismissed Mr. Betancourt's complaint, and denied his cause of action to cancel the mortgage and note dated November 20, 2000, stating that it was "ADJUDGED that the Mortgage and Purchase Money Note dated November 20, 2000, executed by plaintiff Ruben D. Betancourt to defendant Yolanda Betancourt, in the amount of Thirty Six Thousand ($36,000) Dollars, recorded in the office of the Clerk of Queens County on May 21, 2001, under Reel 881 Page 0393, is a valid mortgage and lien on the property located at 41-30 Gleane Street, Elmhurst, New York, the plaintiff never paying the defendant any monies to satisfy the mortgage and purchase money note," and awarded Ms. Betancourt the sum of $48,942.62 for claims unrelated to said mortgage and note.

Counsel for the Guamans states that, in attempts to arrange for a satisfaction of the Betancourt mortgage, requests were made to Ms. Betancourt's counsel for a proper and valid payoff statement, and that the statements provided included a calculations of costs and fees which were either unrecoverable or unrelated to the Betancourt mortgage. Plaintiff's counsel in a letter dated May 7, 2007, and addressed to Best Abstract, claimed that the amount needed to satisfy the Betancourt mortgage totaled $159,940.03, and improperly included $49,167.62, which represented the approximate amount of the sums to be awarded to Ms. Betancourt in the unrelated action against her brother. Plaintiff's counsel also sought to recover legal fees of $30,000.00, but did not seek to recover late charges. It is noted that although this letter was sent to Best Abstract, the escrowee is Washington Title Insurance Company.

Plaintiff's counsel in a letter dated February 12, 2009, and addressed to the Guamans' counsel stated that a total of $130,798.28, including default interest and late charges, and legal fees of $31,027.19, was required to satisfy the mortgage. This letter did not seek to recover any amount for the unrelated judgment. The court notes that the request for late charges through February 8, 2009 was improper, as late charges are generally not available following the commencement of a mortgage foreclosure action (*see Green Point Sav. Bank v Varana*, 236 AD2d 443 [1997]; *Centerbank v D'Assaro*, 158 Misc 2d 92, 93-96 [1993]).

Counsel for the Guamans', in an e-mail dated January 26, 2010, requested that plaintiff's counsel provide copies of the transaction file and all documents relating to the Betancourt mortgage. In an e-mail response dated January 29, 2010, plaintiff's counsel

stated that he had provided the entire record of the matter which consisted of the complaint, the recorded Betancourt mortgage and the Betancourt note. Plaintiff's counsel in a letter dated January 29, 2010, stated that a total of $137,717.19, including default interest and late charges, and legal fees of $31,027.19, was now required to satisfy the mortgage.

The Guaman defendants now seek summary judgment dismissing the complaint and canceling the $36,000.00 Betancourt mortgage on the grounds that plaintiff's counsel is unable to produce any evidence that the Betancourt mortgage is supported by good and valuable consideration. Defendants, therefore, assert that the Betancourt mortgage is not a valid mortgage, and should be canceled.

HSBC, in support of the motion, asserts that plaintiff has failed to make a prima facie showing that the subject mortgage is supported by a valid underlying obligation, and that no proof of disbursement of the mortgage loan proceeds, payment records, and/or assumptions of debt were ever produced to support plaintiff's claim that her mortgage is a valid lien against the real property. HSBC therefore asserts that the complaint should be dismissed against the Guamans and itself.

Plaintiff, in opposition, asserts that defendants' motion for summary judgment and to cancel the mortgage is barred by the doctrine of collateral estoppel, as Judge Leviss determined in the July 2, 2007 judgment that the Betancourt mortgage was a valid mortgage and lien on the subject real property. It is also asserted that the defendants' motion is deficient, as no affidavit has been submitted by a person with personal knowledge of the facts.

Defendants' counsel in his reply asserts that his affidavit is sufficient in that the documentary evidence presented establishes that plaintiff's counsel admitted he has no proof of consideration as regards the Betancourt mortgage. He asserts that the recorded mortgage relied upon by plaintiff, is not in itself proof of a valid underlying obligation. It is further asserted that the doctrines of res judicata and collateral estoppel are inapplicable here, as the Guamans were not a party to the prior Betancourt action, and plaintiff has failed to establish that the Guamans are in privity with Mr. Betancourt. It is asserted that the Guamans should not be bound by the judgment in the Betancourt action, as they were not a party to the action, did not have an opportunity to challenge the Betancourt mortgage on the grounds of lack of consideration, and that Judge Leviss did not make any determination on the issue of consideration.

It is noted that although Mr. Betancourt was served with the motion and supporting and opposing papers, he has not responded to the motion. Counsel to Mr. Betancourt was relieved pursuant to an order dated May 23, 2008, at which time all proceedings were stayed

for 60 days, and Mr. Betancourt was given an opportunity to obtain new counsel. No new notice of appearance has been filed with the court. Mr. Betancourt, therefore, is in default with respect to this motion.

The doctrine of res judicata, or claim preclusion, bars successive litigation based upon the same transaction or series of connected transactions if (i) there is a judgment on the merits rendered by a court of competent jurisdiction; and (ii) the party against whom the doctrine is invoked was a party to the previous action or in privity with a party who was (*Matter of People of the State of New York, by Eliot Spitzer, as Attorney Gen. v Applied Card Sys., Inc.*, 11 NY3d 105 [2008]; *Sainval v City of New York*, 57 AD3d 508 [2008]). Under New York's transactional analysis approach to res judicata, "once a claim is brought to a final conclusion, all other claims...are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]; *see 83-17 Broadway Corp. v Debcon Fin. Servs., Inc.*, 39 AD3d 583 [2007]; *New Horizons Invs. v Marine Midland Bank*, 248 AD2d 449, 669 NYS2d 666 [1998]).

Mr. Betancourt's prior action to set aside the mortgage on the grounds of forgery or fraudulent inducement was dismissed and he is now precluded from attacking the mortgage on any other grounds.

In order to invoke the doctrine of collateral estoppel, two well-settled requirements must be satisfied: "First, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination" (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449 [1985]). The policies underlying its application are avoiding relitigation of a decided issue and the possibility of an inconsistent result (*see Buechel v Bain*, 97 NY2d 295 [2001]; *Altegra Credit Co. v Tin Chu*, 29 AD3d 718 [2006]).

With respect to the first requirement, the prior action between the Betancourts involved the same mortgage, secured by the same real property and Justice Leviss determined that it is a valid mortgage and a lien on the subject real property.

With respect to the second requirement, the issue of whether a party has had a full and fair opportunity to contest the prior decision "requires consideration of the 'realities of the litigation' " (*Staatsburg Water Co. v Staatsburg Fire Dist.*, *supra* at 153, quoting *Gilberg v Barbieri*, 53 NY2d 285, 292 [1981]; *see Buechel v Bain, supra*; *Matter of Halyalkar v Board of Regents of State of N.Y.*, 72 NY2d 261 [1988]), and "the fundamental inquiry is whether relitigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of resources of the court

and the litigants, and the societal interests in consistent and accurate results. No rigid rules are possible, because even these factors may vary in relative importance depending on the nature of the proceedings" (*Staatsburg Water Co. v Staatsburg Fire Dist., supra* at 153).

The term "privity" for collateral estoppel and res judicata purposes "does not have a technical and well-defined meaning. It denominates a rule, however, to the effect that under the circumstances, and for the purposes of the case at hand, a person may be bound by a prior judgment to which he was not a party of record (Restatement, Judgments, § 83, Comment a). It includes those who are successors to a property interest, those who control an action although not formal parties to it, those whose interests are represented by a party to the action, and possibly coparties to a prior action (Restatement, Judgments, §§ 81-90)" (*Watts v Swiss Bank Corp.*, 27 NY2d 270, 277 [1970]).

Here, the Guamans are successors to the subject real property which is encumbered by the Betancourt mortgage. Therefore, as the prior action involved the identical mortgage, there was "privity" between Mr. Betancourt and the Guamans (*see Buechel v Bain*, *supra*). The Guamans' therefore are barred from challenging the validity of the $36,000.00 Betancourt mortgage.

Accordingly, the Guaman defendants' motion for summary judgment dismissing the complaint and canceling the mortgage, is denied, as they failed to eliminate issues of fact with respect to whether plaintiff's mortgage is valid and whether plaintiff is ultimately entitled to the relief set forth in the complaint.

Dated: September 15, 2010

J.S.C.