Mitchell v U.S.A. Homes, Inc.
2010 NY Slip Op 33028(U)
October 15, 2010
Supreme Court, Nassau County
Docket Number: 010863/08
Judge: Thomas P. Phelan
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[* 1]

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 3
NASSAU COUNTY

KERLINE MITCHELL,

Plaintiff(s),

-against-

U.S.A. HOMES, INC., JOHN EDOS STAR, PETER EDIABONYA, WASHINGTON MUTUAL BANK F.A., AKIN AYORINDE, UNITED LAND TITLE ABSTRACT CO., INC., and VISTA MORTGAGE ASSOCIATES, LLC,

Defendant(s).

ORIGINAL RETURN DATE:07/15/10
SUBMISSION DATE: 08/11/10
INDEX No.: 010863/08

MOTION SEQUENCE #4

The following papers read on this motion:

Notice of Motion..	1
Answering Papers..	2
Defendant's Memorandum of Law..............................	3,4

Defendant, WASHINGTON MUTUAL BANK, F.A. ("WAMU"), moves for summary judgment dismissing the complaint or, in the alternative, for an equitable lien. Plaintiff opposes the motion.

This action was brought by plaintiff on the first cause of action pursuant to RPL 265-a to enforce rescission of the deed; on the second cause of action for violations under the RICO Act; on the third cause of action against defendant, Akin Ayorinde, sounding in legal malpractice; on the fourth cause of action against defendants, U.S.A. Homes, Inc. "USA"), John E. Star ("Star"), Vista Mortgage ("Vista") and Peter Ediagbonya ("Ediagbonya"), based upon material misrepresentations, deceit, fraud and predatory acts; and on the fifth cause of action against defendant WAMU alleging that WAMU knew or should have known of the fraudulent acts.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626 [2d Dept. 1995]).

The burden on the party moving for summary judgment is to demonstrate a prima facie entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of opposing papers (*Id.*; *Alvarez v. Prospect Hosp.*, *supra*). If such a showing is made, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require resolution at trial (*Alvarez v. Prospect Hosp.,* 68 NY2d at 324).

It is alleged in the complaint that plaintiff acquired title to premises known as 1419 Surprise Street, Elmont, New York, on or about April 26, 1999 (Movant's Ex. B, ¶2). It is further alleged that in or about May 2005, plaintiff refinanced her mortgage and obtained a $427,500.00 adjustable rate mortgage and that in or about June 2007 the interest rate adjusted to more than 10% (Id., ¶14). In an attempt to again refinance her mortgage and lower her interest rate, plaintiff's pastor introduced her to defendant Star, the owner and principal of USA (Id., ¶15).

Plaintiff alleges that defendant Star informed her that he would conduct a "short sale" so that her existing lender would accept an amount less than what was due (Id., ¶18). Plaintiff was further advised that Star's friend, for a fee of $10,000.00, would, after plaintiff deeded the premises to him, execute a low-cost mortgage and immediately deed back the premises to plaintiff (Id., ¶23). The deposition testimony of plaintiff reveals that there was never anything in writing that the property would be reconveyed or transferred back to plaintiff (Ex. D., pp. 84, 85).

At her deposition, plaintiff testified that she agreed to the "short sale" because the Option One mortgage was too high and she was having problems with the mortgage payments (Id., p. 10). She further testified that the loan was not in default, but she was two months' behind for January and February 2008 (Id., p. 11). Plaintiff indicated that she first spoke with Mr. Star in the fall of 2007 before she missed any mortgage payments (Id., p. 112).

On or about February 20, 2008, plaintiff was brought to the closing and introduced to defendant Ediagbonya, who, it is alleged, in concert with defendants Vista and Star, fraudulently qualified himself for a loan with WAMU (Ex. B, ¶26). At the closing plaintiff was introduced to her representatives at Vista, the title company, United Land Title Abstract Co., Inc., the bank attorneys for WAMU and her lawyer, Akin Ayorinde (Id., ¶27). The premises were purportedly sold for $560,000.00, and defendant Ediagbonya executed a note and mortgage to WAMU in the principal sum of $530,000.00 (Id., ¶¶31, 32).

Plaintiff testified that she walked out of the closing when she was informed that the monthly mortgage payment was over the $3,000 that she was expecting (Ex. D, p. 32). She went back into the closing after her lawyer and defendant Star told her that her house would be foreclosed (Id., pp. 32, 33).

In support of its motion defendant WAMU submits the affidavit of Eric C. Wheeler, a member of Litigation Support, Home Loans – Risk Research at JP Morgan Chase Bank. N.A. ("Chase").* Mr. Wheeler avers that as a condition to closing, a portion of the loan proceeds were to be utilized to satisfy a prior mortgage to Option One. As a result, the sum of $429,846.47 was remitted to Option One (Wheeler Aff., ¶6). Plaintiff contends that it had no knowledge of any alleged fraudulent acts, schemes or misrepresentations by plaintiff or the other named defendants.

Also submitted in support of WAMU's motion is a certified copy of the transcript of the deposition of plaintiff. Over objection of counsel, plaintiff testified that, if successful in this lawsuit, she would owe WAMU the amount used to satisfy the Option One loan (Ex. D, pp. 81, 82). Plaintiff also testified that she had no interactions with WAMU prior to or during the closing although she believed defendant Star had connections with WAMU (Id., p. 28). Counsel for WAMU submits that it is this belief, as well as the fact that plaintiff did not see the good faith estimate, did not see checks being distributed at closing, the body language of those in attendance at closing and that everyone was friendly, that plaintiff bases her claim that WAMU knew about and participated in the scheme.

Citing *Podraza v. Carriero,* 212 AD2d 331, 335 [4th Dept. 1995], WAMU set forth the elements that must be pleaded to state a civil RICO claim: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Plaintiff does not refute WAMU's contention that plaintiff's RICO claims must fail. It is submitted that since the alleged RICO violation consists solely of one alleged scheme, it does not support a claim for RICO violations.

Counsel for plaintiff submits that: "Plaintiff used poor judgment in participating in a fraudulent scheme she believed was perfectly legal, but did so as a result of fraud" (Melamed Aff., ¶15). Counsel further submits that WAMU was on notice through the actions of its closing attorney who saw the monthly payment being explained to the plaintiff-seller. It is counsel's contention that there is at least a question of fact as to whether plaintiff should be afforded the remedies provided under Real Properly Law § 265-a.

Counsel for WAMU retorts that plaintiff's role in the alleged scheme bars relief under RPL § 265-a. Moreover, it is alleged that WAMU is a bona fide encumbrancer of value and, therefore, RPL § 265-a is not applicable. Plaintiff argues that WAMU cannot be considered a bona fide encumbrancer for value due to its failure, among other things, to inquire as to why the new monthly mortgage payment was being explained to the seller as opposed to the purchaser.

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* WAMU was placed into Receivership by the Federal Deposit Insurance Corporation ("FDIC") on September 25, 2008. Chase purchased the loans and other assets of WAMU from FDIC.

[* 4]

Defendant WAMU established its entitlement to judgment as a matter of law with regard to plaintiff's RICO claim, as well as its entitlement to an equitable lien. In opposition, plaintiff failed to submit any competent evidence sufficient to raise a triable issue of fact with regard to the RICO claim.

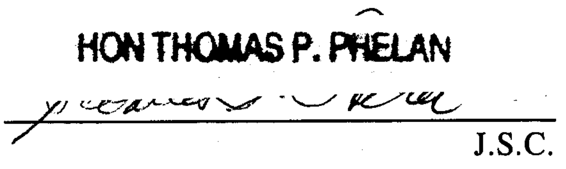
Plaintiff's argument that the relief sought for an equitable lien must be denied as WAMU failed to submit sufficient admissible proof as to payment is unavailing. Annexed to the moving papers is a copy of the recorded satisfaction of mortgage of the Option One mortgage (Ex. F). Moreover, copies of the following documents annexed to the transcript of the deposition of plaintiff evidence payment of the mortgage: Closing Statement showing disbursement to Option One Mortgage in the amount of $429,846.67; check to Option One Mortgage in the amount of $429,846.67; HUD-1 Settlement Statement showing payoff of first mortgage loan to Option One in the amount of $429,846.67 (Ex.D).

The evidence submitted by defendant WAMU in support of its motion on the remaining issues failed to demonstrate its prima facie entitlement to judgment as a matter of law (*see Ayotte v Gervasio,* 81 NY2d 1062). The initial burden not having been met, the motion must be denied as to the remaining issues without regard to the sufficiency of opposing papers (*Id.*; *Alvarez v. Prospect Hosp*., 68 NY2d 320 [1986]).

Based upon all of the foregoing, defendant WAMU's motion for summary judgment is granted only to the extent of dismissing the second cause of action against it and granting it an equitable lien in the amount of $429,846.67, representing the portion of its mortgage proceeds which was allocated to satisfy a pre-existing superior mortgage lien on the subject real property held by Option One (*see, LaSalle Bank Nat'l Ass'n v. Ally,* 39 AD3d 597 [2d Dept. 2007]).

This decision constitutes the order of the court.

HON THOMAS P. PHELAN



Dated: 10-15-10

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ENTERED
OCT 20 2010
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