

Del Pozo v Impressive Homes

2010 NY Slip Op 33240(U)

October 29, 2010

Supreme Court, Queens County

Docket Number: 5345/04

Judge: Orin R. Kitzes

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS**

**PART 17
HON. ORIN R. KITZES**

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GERMAN DEL POZO,
Plaintiffs,

-against-

**Index No. 5345/04
Motion Date: 10/27/10
Motion No. 24**

**IMPRESSIVE HOMES, CORONA GARDENS, INC.,
KFIR GROUP LLC, CAMBRIDGE FUNDING
GROUP LLC, AND REMARK DEVELOPMENT
CORP., MERCI ASTUDILLO, BOLIVAR ASTUDILLO,
BANK OF AMERICA, N.A. and NATIONAL CITY
CORPORATION, a/k/a NATIONAL CITY BANK,
Defendants.**

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The following papers numbered 1 to 17 read on this motion by proposed intervenor HSBC Mortgage Corporation (USA) (“HSBC”) for orders pursuant to CPLR 1012 and 1013, allowing HSBC to intervene in this action, pursuant to CPLR 3212 for summary judgment dismissing the claims of Plaintiff in which he seeks ownership interest in property located at 35-15 101st Street Corona, New York (“the Property”), and for a declaration establishing that HSBC holds a valid mortgage on the Property.

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Upon the foregoing papers it is ordered that this motion by proposed intervenor HSBC Mortgage Corporation (USA) (“HSBC”) for orders pursuant to CPLR 1012 and 1013, allowing HSBC to intervene in this action, pursuant to CPLR 3212 for summary judgment dismissing the claims of Plaintiff in which he seeks ownership interest in property located at 35-15 101st Street Corona, New York (“the Property”), and for a declaration establishing that HSBC holds a valid mortgage on the Property, is granted, for the following reasons:

Based on the second amended complaint and the undisputed evidence, this action involves Plaintiff, as the prospective purchaser, seeking specific performance of a contract, dated, June 7, 2002, for the purchase of a three-family house to be built upon real property located at 35-15 101st Street, Corona, New York, for alleged breach of contract. Plaintiff and defendant Impressive Homes entered into the contract of sale, whereby Impressive Homes agreed to sell the property to plaintiff for the purchase price of \$610,000 and Plaintiff made a down payment of \$10,000.00.

The contract also provided that it was contingent on the buyers obtaining a mortgage of \$579,500.00 within 30 days of the contract, and a closing date of June 18, 2002 was provided in the contract. Plaintiff claims that the closing did not take place on that or any other date and Impressive Homes never sent any time of the essence notice to the Plaintiff, demanding closing title with an unequivocal date to close title. Subsequently, on February 2, 2004, Impressive Homes, through its attorney sent a letter together with a check in the amount of \$10,000.00 to the Plaintiff's attorney, thereby canceling the contract.

Thereafter, Plaintiff commenced the underlying action against Impressive seeking, among other things, specific performance of a purported Contract of Sale, and/or damages for breach of contract. On or about March 5, 2004, Plaintiff purportedly filed a Notice of Pendency against the property "known as Block 1742, Lot 49 (part of old lot 49) and also known as 35-15 101st Street, Corona, New York (the "Notice of Pendency"). However, as evidenced from the remarks in the County Clerk's Judgment Docket and Lien Book System, dated April 30, 2007, the "Notice of Pendency filed on 3/5/04" was "not entered in lien system on same date due to clerical oversight."

By Deed dated December 1, 2005, Impressive conveyed title to the Lot 49, which was identified in the metes and bounds description as 35-11 101st Street, Corona, New York, to Corona Gardens Inc. At that time, Plaintiff's Notice of Pendency had not been entered in the lien system by the Queens County Clerk. By Deed dated April 27, 2006, and recorded in the Office of the City Register at CRFN 2006000338480, Corona conveyed title to Lot 49, which was identified as 35-11 101st Street, Corona, New York, to defendant KFIR Group LLC ("KFIR"). At that time, plaintiff's Notice of Pendency had "not [been] entered in [the] lien system." In connection with the same, and in order to finance certain construction on Lots 46 and 49, KFIR, as owner, made two mortgages to Cambridge, the first mortgage, in the principal sum of \$900,000.00, and the second, in the principal sum of \$600,000.00. The Cambridge Mortgages, were duly recorded in the Office of the City Register on June 15, 2006. At the time plaintiff's Notice of Pendency had not been entered and Cambridge claims it had no knowledge that one had been filed by plaintiff. A few months later, on August 3, 2006, KFIR made a mortgage to Remark, in the principal sum of \$400,000.00, which was duly recorded in the Office of the City Register on August 29, 2006. That mortgage was also secured against Lot 46 and Lot 49 and at the time Remark encumbered the property with its mortgage, plaintiff's Notice of Pendency had not been entered and Remark claims it had no knowledge that one had been filed by Plaintiff.

By deed dated December 15, 2006, KFIR conveyed the parcels it previously acquired to Merci R. Astudillo and Bolivar Astudillo ("Astudillos"). In or around December of 2006, KFIR repaid the Cambridge Mortgages in full. As such, on December 15, 2006, Cambridge executed

two satisfactions of mortgage certifying payment in full of the Cambridge Mortgages, and further consenting to the discharge of the same of record, which were duly recorded in the Office of the City Register on or about January 17, 2007. In or around December of 2006, KFIR also paid the Remark Mortgage in full. As a result, Remark executed a satisfaction of mortgage certifying payment in full of the Remark Mortgage, and further consenting to the discharge of the same, which was duly recorded in the Office of the City Register on or about January 17, 2007. National provided part of the financing to the Astudillos to purchase the property from KFIR and the Astudillos granted National a credit line purchase money mortgage in the amount of \$299,950.00 on the Property (“Mortgage”). National’s Mortgage in the property was recorded on or about January 17, 2007.

On December 12, 2006, the Astudillos borrowed \$645,300.00 from proposed intervenor HSBC to purchase the subject premises. To secure the loan, the Astudillos gave a mortgage on the subject premises to HSBC, which was recorded on January 17, 2007. Prior to accepting the mortgage as security, HSBC retained a Chicago Title agent to perform a title search on the Property. This search did not turn up any lis pendens that Plaintiff had filed on the Property or any other claim that the Plaintiff had or has against the Property. There is no indication that HSBC had any knowledge of Plaintiff’s lawsuit or his claims regarding the Property when it loaned money to the Astudillos, accepted the mortgage on the Property, and recorded the Mortgage. In December 2007, Plaintiff filed a second amended complaint wherein he seeks specific performance of the contract of sale with Impressive Homes, Inc. and setting aside all subsequent conveyances and vacate all subsequent encumbrances against property Block 1742, Lot 49 (part of old lot 49).

Initially, the Court finds that the instant motion was made in a timely fashion. Given the circumstances of this case, as set forth above, it is clear that HSBC acted in a reasonably diligent manner in making this motion, once it was aware that its interests were involved. As such, any delay is deemed to have been for good cause.

The Court shall now address the branch of the motion by HSBC seeking permission to intervene in this action, which is granted, to the following extent: Generally, intervention should be permitted where the proposed intervenor has a real and substantial interest in the outcome of the proceeding. Plantech Housing v Conlan, 74 AD2d 920 (2d Dept 1980.) “However, it should be restricted where the outcome of the matter to be determined will be needlessly delayed, the rights of the prospective intervenors are already adequately represented, and there are substantial questions as to whether those seeking to intervene have any real present interest in the property which is the subject of the dispute.” Osman v. Sternberg, 168 A.D.2d 490 (2d Dept 1990.) Here, HSBC has shown it has a real interest in the outcome of the proceeding and it is a necessary party.

It has also shown that there will be no delay and no impact on the rights of the other parties if it is permitted to intervene, since it does not seek any discovery. Accordingly, HSBC is permitted to intervene and the complaint shall be amended to reflect the addition of HSBC as a party defendant.

The Court shall now address the branch of the motion seeking summary judgment, which is granted, for the following reasons: HSBC now moves for summary judgment in its favor dismissing the claims of Plaintiff in which he seeks ownership interest in the Property, and an Order of this Court declaring its Mortgage to be valid and unaffected by the Plaintiff's claim to the Property because HSBC is a good faith mortgagee of the Property for value and without notice of Plaintiff's claims. HSBC bases its motion on the undisputed evidence that shows Plaintiff never recorded his June 2002 contract for the purchase of parts or all of the Property. It also shows that HSBC took the Mortgage from the Astudillos for value in December 2006 and recorded that mortgage in January 2007. In particular, HSBC point out that Plaintiff's *lis pendens* was not properly indexed against the subject property at the time the Mortgage was given to HSBC and the Mortgage was recorded. HSBC also claim that it had no actual or constructive knowledge of the Plaintiff's claims when the loan to the Astudillos was made and when the Mortgage was taken and recorded.

Finally, HSBC points to the Order of this Court, dated May 4, 2010, wherein this Court granted defendants Cambridge and Remark's motion for summary judgment and dismissed the cause of action for encumbering the property with knowledge of the Notice Of Pendency. The Court found that Defendant had established and Plaintiff had conceded that, Plaintiff's Notice of Pendency was not properly indexed against the property when Plaintiff commenced his action, and, in fact was not indexed until April 30, 2007, more than three years after Plaintiff had commenced his action. Accordingly, at the time the Property was encumbered by Defendants' mortgages, there was no way for them to know that Plaintiff claimed an interest in the property, and they cannot be deemed to have had any knowledge of Plaintiff's action for specific performance. According to National, the May 4 Order established the law of the case that the liens and interests in the Property recorded before April 30, 2007, when the County Clerk indexed Plaintiff's Notice of Pendency, are held without constructive notice of Plaintiff's claim. Consequently, HSBC claims that the *lis pendens* did not serve as notice to HSBC of Plaintiff's claim and HSBC is, as a matter of law, a bona fide encumbrancer for value that owns the Mortgage free of Plaintiff's claim.

Plaintiff opposes this motion claiming that the notice of pendency became operative in favor of the Plaintiff in the action from the time it was filed, without reference to whether the clerk performed his duty to index; and, if so, the subsequent mortgage and any other

encumbrances National has on the subject property should be vacated. According to Plaintiff, that the purchaser lacks actual knowledge of the filing of the Notice of Pendency is irrelevant since merely filing a notice of pendency, puts the world on notice of the plaintiff's potential rights in the action and warning all comers that if they then 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 notes that the notice of pendency was filed on March 5, 2004 and the County Clerk did not index the notice of pendency until April 30, 2007. Since HSBC's claim of an encumbrance, i.e. Mortgage, was subsequent to the filing of the notice of pendency, its encumbrance will be subject to the Plaintiff's right in the action. In essence, Plaintiff claims the mere filing of the Notice of Pendency, despite it not being indexed, put HSBC on constructive notice of the Notice of Pendency.

It is axiomatic that the Summary Judgment remedy is drastic and harsh and should be used sparingly. The motion is granted only when a party establishes, on papers alone, that there are no material issues and the facts presented require judgment in its favor. It must also be clear that the other side's papers do not suggest any issue exists. Moreover, on this motion, the court's duty is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist. *See, Barr v. County of Albany*, 50 NY2d 247 (1980); *Miceli v. Purex*, 84 AD2d 562 (2d Dept. 1981); *Bronson v. March*, 127 AD2d 810 (2d Dept. 1987.) Finally, as stated by the court in *Daliendo v. Johnson*, 147 AD2d 312 (2d Dept. 1989), "Where the court entertains any doubt as to whether a triable issue of fact exists, summary judgment should be denied."

The facts set forth above have been shown by HSBC's evidence and, to a significant extent, have also been acknowledged by Plaintiff. The Court notes that the determination made in its May 4, 2010 Order is the law of the case and necessarily results in a finding that the Notice of Pendency that was not indexed did not put HSBC on constructive notice of the instant action. Moreover, NY CLS §919(1)(j), states that in "cases where an instrument shall have been filed with an erroneous designation, such county clerk on presentation of proper proof thereof shall enter such instrument in the proper index under the proper block number of every block, the designation of which shall have been erroneously stated. . . and the record of such instrument shall be constructive notice as to the property in any block not duly designated at the time of such filing only from the time when the same shall be properly indexed."

Moreover, contrary to Plaintiff's assertions, only the filing and indexing of the Notice of Pendency can apprise a prospective purchaser or encumbrancer of the pendency of an action. CPLR §6501. ("The pendency of such an action is constructive notice, from the time of the filing of the notice, only, to a purchaser from, or encumbrancer against, any defendant named in a notice of pendency indexed in a block index against a block in which property affected is

situated. . . “) The cases cited by Plaintiff are not dispositive on this issue since the case of Thelma Sander & Associates, Inc., v Hague Development Corp., 131 AD2d 462, (2d Dept 1987), involved the failure of the County Clerk to properly index and extension to the Notice of Pendency. In such circumstance, the existence of a properly filed and indexed Notice of Pendency was capable of acting as constructive notice of the pending action to any purchaser or encumbrancer. Here, Plaintiff’s original Notice of Pendency was never filed and indexed properly, thus there was nothing to constructively notify others of the pending action. Moreover, The case of Goldstein v Gold, 106 AD2d 100 (2d Dept 1984) does not involve a mis-recorded or mis-indexed Notice of Pendency. It dealt with reliance by a title company on an unfiled and fraudulently obtained satisfaction of the mortgage that it was shown at the closing of the property. The Court held that the purchaser bought the property subject to the mortgage that was properly filed, but purported to be satisfied. The other case relied upon by Plaintiff, Hartwell v Riley, 47 AD 154 (3rd Dept 1900) predates current applicable law and refers to sections of law that no longer exist. In particular, it is no longer good law since the current RPL § 316 provides that indexes “shall form a part of the record of each instrument hereafter recorded.” As such, the cases relied upon by Plaintiff are inapposite to the instant circumstances. Accordingly, the Court finds that HSBC did not have actual or constructive notice of the pendency of the instant action.

Furthermore, the mere filing of a notice of pendency does not create a substantive right, but rather, it merely preserves an existing right. Avila v. Arsada Corp., 34 A.D.3d 609 (2d Dep’t 2006) This is so because the purpose of a lis pendens is a notice of a claim made in respect to property which is the subject of a pending suit, but it does not of itself create an encumbrance upon the property. Simon v Vanderveer, 155 N.Y. 377, 382 (1898). The purpose of a notice of pendency is to carry out the public policy that a plaintiff’s action shall not be defeated by an alienation of the property during the course of the lawsuit. Mechanics Exchange Savings Bank v Chesterfield, 34 A.D.2d 111 (3rd Dept 1970). Its purpose is to afford constructive notice from the time of the filing so that any person who records a conveyance or encumbrance after that time becomes bound by all of the proceedings taken in the action. Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Solow Bldg. Corp., 52 A.D.2d 533 (1st Dep’t 1976.) Finally, the mere filing of a notice of pendency does not preclude a party from conveying or otherwise encumbering real property.

Accordingly, the Notice of Pendency in the instant case was constructive notice of the action when the County Clerk properly indexed the Notice of Pendency on April 30, 2007. Since HSBC filed its Mortgage prior to April 30, 2007, its Mortgage is valid as against Plaintiff’s claims to the Property. Plaintiff does not claim that HSBC’s Mortgage was not for value. Based on this, the Court finds that HSBC is a good faith Mortgagee of the Property for

value and its Mortgage on the Property is free and clear of the Plaintiff's claims. *See*, RPL § 266. Given this Order, the Court shall not address HSBC's additional claims regarding the Plaintiff's contract of sale not being an enforceable contract.

In sum, for the reasons set forth above, the branch of the motion by HSBC for permission to intervene in this action is granted; the branch of the motion by HSBC for summary judgment in its favor and dismissing the claims of Plaintiff in which he seeks ownership interest in the property located at 35-15 101st Street Corona, New York ("the Property") is granted; and this Court sets forth that HSBC holds a valid mortgage on the Property and HSBC is the holder of a valid mortgage in the amount of \$645,300.00 on the Property, that is free and clear of Plaintiff's claims.

Dated: October 29, 2010

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ORIN R. KITZES, J.S.C.