

Washington Mut. Bank v Murphy

2010 NY Slip Op 33720(U)

December 30, 2010

Supreme Court, Suffolk County

Docket Number: 15811-07

Judge: Peter Fox Cohalan

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INDEX # 15811-07
RETURN DATE: 11-4-09
MOT. SEQ. # 003 & 004

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN

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WASHINGTON MUTUAL BANK F/K/A WASHINGTON
MUTUAL BANK, F.A., JP MORGAN CHASE BANK,
NATIONAL ASSOCIATION as successor-in-interest,

-Plaintiff,

-against-

EDWARD MURPHY, COUNTRYWIDE HOME LOANS,
INC, GARDEN CITY ASSET MANAGEMENT CORP,
JEROME GARDNER DDS, THOMAS DONNELLY
DDS, GOOD SAMARITAN HOSPITAL, CHARMER
INDUSTRIES INC, THE COMMISSIONERS OF THE
STATE INSURANCE FUND, NATIONSBANK A/K/A
BANK OF AMERICA, BURKE & BURKE ESQS. PC,
COLORADO CAPITAL INVESTMENTS INC
SUCCESSOR IN INTEREST TO CITIBANK, EXCISE
BOND UNDERWRITERS, COMMISSIONER OF
TAXATION AND FINANCE-TAX COMPLIANCE
DIVISION-CHILD SUPPORT ENFORCEMENT
SECTION, SABRINA L. WALTERS C/O CSEB,
SABRINA WALTERS C/O CUMBERLAND COUNTY
CSE, COUNTY OF SUFFOLK, COMMISSIONER OF
TAXATION AND FINANCE TAX COMPLIANCE
DIVISION SUFFOLK DO, PEOPLE OF THE STATE OF
NEW YORK,

-Defendants.

CALENDAR DATE: April 14, 2010
MNEMONIC: MG; MG

PLTF'S/PET'S ATTORNEY:
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350 Fifth Avenue, Suite 5016
New York, NY 10118

DEFT'S/RESP ATTORNEY:
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Lexington, MA 02420

THIRD-PARTY DEF'S/ATTORNEY
Donald G. Davis
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New York, NY 10118

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Upon the following papers numbered 1 to 30 read on this motion to vacate foreclosure and sale _____;
Notice of Motion/Order to Show Cause and supporting papers 1-12; 20-23; Notice of Cross-Motion and
supporting papers _____; Answering Affidavits and supporting papers 13-16; 24-37; Replying
Affidavits and supporting papers 17-19; Other _____; and after hearing counsel in support of and
opposed to the motion it is,

ORDERED that these motions (003 & 004) by the defendant, Edward Murphy, to vacate the judgment of foreclosure and sale, dated August 19, 2008, and to add Paul Luciano, the alleged "bona fide purchaser", as a third party defendant to this action are decided as follows:

ORDERED that the defendant Edward Murphy's motion to vacate the judgment of foreclosure and sale, dated August 19, 2008, is held in abeyance pending a traverse hearing to determine the jurisdiction of the Court to be conducted on Monday, March 7, 2011 at 11:00 am.

ORDERED that the defendant Edward Murphy's motion (004) pursuant to CPLR §1001 to join as a party defendant, Paul Luciano, the alleged "*bona fide* purchaser" and to enjoin the sale, transfer and/or encumbering the property allegedly purchased from the plaintiff after the claimed invalid foreclosure and sale was conducted is granted pending a hearing to be conducted into the "*bona fide*" nature of the purchase. This hearing will be conducted after the conclusion of the hearing into whether jurisdiction was ever acquired over the defendant, Edward Murphy.

This action was originally instituted by the plaintiff to foreclose on property located at 1492 Millstone Road in Noyac, Suffolk County, Long Island, New York (hereinafter Millstone Road). The defendant Edward Murphy (hereinafter Murphy) purchased the property in 2002 and executed a 40 year note and mortgage, dated June 4, 2002, in the amount of \$1,360,000.00 with Washington Mutual Bank which has now been succeeded by J P Morgan Bank, the plaintiff in the foreclosure action. Murphy resides at 134 Reade Street (hereinafter Reade Street), New York City, New York and the Millstone Road premises was used by him as a summer residence and it appears that all correspondence and monthly statements and bills related to the mortgage went to Murphy's residence in New York City, New York. The economic downturn caused Murphy to fall behind in his mortgage payments and resources, assistance and a loan modification were offered to him at his Reade Street address. Inexplicably, the plaintiff in instituting this foreclosure action served the summons and complaint on an alleged "John Doe" at the Millstone Road premises on May 26, 2007 rather than Murphy's Reade Street residence where all other mortgage related documents had been sent. Murphy disputes that any "John Doe" was at Millstone Road to receive service of process. Murphy alleges he was out of the country on that date. Murphy defaulted in appearance and the plaintiff was granted summary judgment on its complaint seeking foreclosure and the appointment of a referee to compute on Wednesday, February 20, 2008. As per this Court's rules with regard to foreclosure actions, the plaintiff was required to notify Murphy of the foreclosure action on the Court's Wednesday motion calendar by letter and again such letter of notification was sent to the Millstone Road address rather than the Reade Street address.

After Murphy's default, the plaintiff sought and was granted a judgment of foreclosure and sale on August 19, 2008 and this judgment was sent by mail to the Millstone Road address. The property was sold on November 12, 2008 by the referee appointed by this Court, Patricia Dempsey, Esq., and the plaintiff bid its interest in the Millstone Road premises and successfully purchased it for \$1,535,092.76. A referee's deed was issued on December 8, 2008 to the plaintiff and thereafter a notice to vacate the premises was sent to the Millstone Road address and not Murphy's Reade Street address.

The plaintiff sought an eviction proceeding of the Millstone Road premises in the Town of Southampton (New York) Justice Court and as part of the petition stated it "lacked information or notice of any address where the [defendant is] employed or has] a place of business in New York State." This application to evict was granted on March 11, 2009 and the eviction notice was posted by the Sheriff of Suffolk County on April 16, 2009 with a 72 hour notice to vacate the Millstone Road premises. As an aside, the Court notes that notwithstanding the initial service of the summons and complaint on May 26, 2007 to a "John Doe" alleged to be a co-tenant, no subsequent proceedings reflect anyone residing at the Millstone Road address. Murphy does state that all during these foreclosure, sale and eviction proceedings he was in contact with the plaintiff's representatives from his Reade Street

address as to the late mortgage payments and states unequivocally that he was never told by the plaintiff that the Millstone Road residence was being foreclosed.

Murphy now moves to vacate the judgment of foreclosure and sale, seeking restoration of the ownership of the Millstone Road premises and/or damages if a sale occurred to a "bona fide purchaser" arguing that the Court never acquired jurisdiction over Murphy, rendering the foreclosure proceedings a nullity. Murphy also moves by order to show cause to add the alleged "bona fide purchaser", Paul Luciano (hereinafter Luciano), as a party defendant to this action. The plaintiff and Luciano oppose the requested relief.

For the following reasons, Murphy's motion to vacate the judgment of foreclosure and sale, dated August 19, 2008, is held in abeyance pending a traverse hearing to determine the jurisdiction of the Court. Murphy's additional motion request to join Luciano, the alleged "bona fide purchaser", as a party defendant and to enjoin the sale, transfer and/or encumbering the property allegedly purchased by Luciano from the plaintiff for \$675,000.00 after the claimed invalid foreclosure and sale was conducted is granted pending a hearing to be conducted into the "bona fide" nature of the purchase. This hearing will be conducted after the conclusion of the hearing into whether jurisdiction was ever acquired over Murphy, if necessary. The hearing into Luciano's status as a "bona fide purchaser" is necessitated only if the Court finds jurisdiction was not obtained by the plaintiff. Murphy shall serve a copy of this order on all parties within 30 days of receipt of a copy of this order. Murphy shall also serve a copy of this order on this Court's calendar clerk to ensure proper calendar entry on the Court's hearing calendar for a hearing on Monday, March 7, 2011 at 11:00 am. Failure to properly serve the Court's Calendar Clerk will result in unnecessary delay.

CPLR §308 (2) authorizes service by delivery of the summons within New York to a person of suitable age and discretion at the defendant's actual place of business, dwelling or usual place of abode and further requires the additional step in the case of substituted service of mailing a copy of the summons and complaint served to the defendant's last known address. Of course, the defendant's claims of a defect in this substituted manner of service presupposes that Daniel Quigley, the process server, is unable to identify the alleged "John Doe" he allegedly served. Murphy claims he was in Europe at the time of the alleged service and that the Millstone Road premises was unoccupied and there was no co-tenant. The Court is thus confronted with a question of fact as to the service of process and upon whom, if anyone, such service was made.

Ordinarily, the proof of the affidavit of service by the process server attesting to either the personal delivery of a summons to a defendant or service at his/her address is sufficient to support a finding of jurisdiction. However, where there is a sworn denial of receipt of the papers by the defendant, the affidavit of service is rebutted and the plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing. **Banker's Trust Co. V. Tsoukas**, 303 AD2d 343, 756 NYS2d 92 (2nd Dept. 2003). Moreover, even if the defendant eventually acquires actual notice and knowledge of the lawsuit, actual notice alone will not sustain improper service, nor subject that person to the Court's jurisdiction when there has not been compliance with the proper conditions of service. **Bank of America National Trust & Savings v. Herrick**, 233 Ad2d 351, 650 NYS2d 754 (2nd Dept. 1996); **European American Bank v. Abramoff**, 201 AD2d 611, 608 NYS2d 233 (2nd Dept. 1994).

Under the circumstances, a traverse hearing is warranted to determine whether Murphy was personally served in accordance with CPLR §308 and whether the Court acquired jurisdiction of him to maintain a foreclosure action on his Millstone Road premises. *Greenpoint Savings Bank v. Taylor*, 92 AD2d 910, 460 NYS2d 121 (2nd Dept. 1983). The question of the defendant's "dwelling place and usual place of abode" is a factual determination to be made by this Court at a hearing. See, *Merchants Insurance Group v. Coutier*, 59 AD3d 602, 873 NYS2d 223 (2nd Dept. 2009); *Vitello v. Rizzo*, 298 AD2d 452, 748 NYS2d 280 (2nd Dept. 2002).

Upon resolution of the jurisdictional issue raised by Murphy, he also seeks to add Luciano as a party defendant because of his alleged "*bona fide* purchase" of the Millstone Road premises from the plaintiff after foreclosure. The application is granted and Luciano is added as a party defendant to this action because he is a necessary party in order for the Court to grant the proper and necessary relief in this lawsuit. CPLR §1001 provides that persons "who might be inequitably affected by a judgment" shall be made a party. Clearly, Luciano as the present owner of the Millstone Road premises may be "inequitably affected" by the jurisdiction question to be decided. Further, the events surrounding the dates of contract and sale of this property and the sale price are all issues requiring Court scrutiny as to Luciano's claim to be a "*bona fide* purchaser" of the property for value.

Here, the closing on the sale of the Millstone Road premises occurred just 3 days prior to Murphy's order to show cause seeking injunctive relief asserting the lack of knowledge of and Court jurisdiction over this foreclosure action. Obviously, any conversations, discussions, settlement negotiations or other communications between the plaintiff, Murphy and possibly Luciano concerning Murphy's prospective actions as to this foreclosure action in which Luciano claims no knowledge as well as possible "bad faith" on the part of plaintiff are all issues which the Court needs to explore to assure the foreclosure process was fair and equitable.

Real Property Law §266 provides an innocent "*bona fide* purchaser" for value is protected in his/her title to property unless he/she had previous notice of the alleged fraud by the seller. See, *Karan v. Hoskins*, 22 AD3d 638, 803 NYS2d 666 (2nd Dept. 2005); *Barnes v. West*, 29 Misc3d 1230(A), WL 4941987 (2010). In the event, the Court finds that jurisdiction was not acquired over Murphy, Murphy's remedy is to be put back into possession of the Millstone Road premises unless it has been purchased by a "*bona fide*" innocent and good faith purchaser, in which case Murphy's remedy is limited to damages against the plaintiff.

The question of timing and who knew what and when on the issue of the alleged subsequent sale of the Millstone Road premises to an alleged "*bona fide* purchaser" are all matters which need to be explored at a hearing before this Court should the Court find jurisdiction was not established over Murphy and that the Millstone Road premises was unlawfully taken by the plaintiff. Luciano's claims of being a "*bona fide* purchaser" for value of the Millstone Road premises require review inasmuch as (1) the sale and closing took place a mere 3 days before Court intervention; (2) the knowledge of the plaintiff and Luciano of Murphy's intentions to seek relief; (3) the rather convenient "rush" to close on the Millstone Road premises; and (4) the alleged "arms length" purchase of this residence which was foreclosed by the plaintiff and then resold to Luciano as the alleged "*bona fide* purchaser for value" for only \$675,000.00, less than half the foreclosed value of the premises.

Luciano's possible interest in the Millstone Road premises is subject to, as the Court noted in Anderson v. Blood, 152 NY285, 46 NE 493 (1897). "...a purchaser for a valuable consideration is entitled to be protected in his title, and, in the absence of actual notice of fraud, it is necessary that the facts and circumstances relied upon to charge him with knowledge of the fraud should be of a character equivalent to notice. If the facts within the knowledge of the purchaser are of such a nature as, in reason, to put him upon inquiry, and to excite the suspicion of an ordinarily prudent person, and he fails to make some investigation, he will be chargeable with that knowledge which a reasonable inquiry, as suggested by the facts, would have revealed." See, Moon v. Darrow, NYS2d (2010), 2010 WL 4400030.

Finally, Murphy cannot be charged with equitable estoppel as his actions through his attorney have all been to avoid the very sale which the plaintiff conducted to Luciano. The Court in Bank of America, NA v 414 Midland Ave. Associates, LLC, AD3d , 911 NYS2d 157 (2nd Dept 2010) noted:

"Where an owner knows of a defect in title and fails to address it, laches does not apply unless the facts are sufficient to constitute equitable estoppel (see, Kraker v. Roll, 100 AD2d 424, 433, 474 NYS2d 527; Washington Temple Church of God in Christ, Inc. v. Global Props & Assoc., Inc., 15 Misc3d 1142[A], 2007 N.Y. Slip Op 51114[U], 2007 WL 1558884, aff'd. 55 AD2d 727, 865 NYS2d 641). Equitable estoppel arises when a property owner stands by without objection while an opposing party asserts an ownership interest in the property and incurs expense in reliance on that belief (see, Andrews v. Cohen, 221 NY 148, 153, 116 NE 862). The property owner must 'inexcusably' delay in asserting a claim to property knowing that 'the opposing party has changed his position to irreversible detriment' (Orange & Rockland Utils. v. Philwold Estates, 70 AD2d 338, 343, 421 NYS2d 640, mod. on other grounds 52 NY2d 253, 437 NYS2d 291, 418 NE2d 1310."

Here, upon knowledge of the foreclosure action, Murphy pursued, through counsel, his remedies with respect to halting the foreclosure process. Of course, the Court must also look at Murphy's actions as to the whole process involving the foreclosure of his Millstone Road premises to determine the applicability of the rules concerning estoppel. Therefore, Luciano is a necessary party to this proceeding and Murphy's motion to join Luciano as a party defendant pursuant to CPLR §1001 is granted in all respects.

Accordingly, the issue of jurisdiction by this Court and whether such jurisdiction was acquired over Murphy will be explored in the first instance at a traverse hearing to be conducted on Monday, March 7, 2011 at 11:00 am.

The Court's findings on the question of jurisdiction will then determine the need to conduct a further hearing on the remedies available to Murphy if jurisdiction is lacking and whether Luciano, the purchaser of the premises at a subsequent sale by the plaintiff, can be considered a "*bona fide* purchaser for value."

The foregoing constitutes the decision of the Court.

Dated: December 30, 2010



J.S.C.