

PHH Mtge. Corp. v Peters

2011 NY Slip Op 30086(U)

January 12, 2011

Sup Ct, New York County

Docket Number: 115707/09

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN

PART 11

Justice

PHH Mortgage Corp.

INDEX NO. 115707/09

- v -

MOTION DATE _____

Peters, William

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is determined in accordance with the annexed decision, order and declaratory judgment.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: January 12, 2011

[Signature]
HON. JOAN A. MADDEN *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X

PHH MORTGAGE CORPORATION,

INDEX NO. 115707/09

Plaintiff,

-against-

WILLIAM A. PETERS a/k/a WILLIAM PETERS;
YOUHIN CHOY; BOARD OF MANAGER OF KIPS
BAY CONDOMINIUM; JP MORGAN CHASE BANK;
CITY OF NEWYORK ENVIRONMENTAL CONTROL
BOARD; CITY OF NEW YORK PARKING VIOLATIONS
BUREAU; CITY OF NEW YORK TRANSIT
ADJUDICATION BUREAU, AND "JOHN DOE #1 through
"JOHN DOE #10" the names being fictitious and unknown
to the Plaintiff, the person or parties intended being the
persons or parties, if any, having or claiming an interest in or
lien upon the mortgaged premises described in the complaint,

Defendants.

-----X
JOAN A MADDEN, J.:

In this mortgage foreclosure action, defendants Youyin Choy ("Choy") and JP Morgan Chase Bank ("Chase") move for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint in its entirety as against them, and granting them summary judgment on their counterclaim for a declaration pursuant to RPAPL Article 15 that plaintiff's mortgage is subject to and subordinate to Choy's deed and Chase's mortgages.

The following facts are not disputed, unless otherwise noted. Plaintiff seeks to foreclose a mortgage on a condominium unit located at 343 East 30th Street, Unit 7K, New York, New York, which is designated as Block 936, Lot 2095 on the New York County Tax Map. The mortgage is dated March 8, 2002 and was given by defendant William A. Peters a/k/a William

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Peters ("Peters") in the principal amount of \$299,915 to Mortgage Electronic Registration Systems, Inc., as nominee for Merrill Lynch Credit Corporation. On April 9, 2002, the mortgage was recorded in the New York County Office of the City Register, but was mis-indexed under an incorrect block and lot number, Block 836, Lot 2095, as opposed to Block 936, Lot 2095. The mortgage was subsequently assigned to plaintiff by an Assignment of Mortgage dated November 4, 2009, which was recorded with the City Register under the correct block and lot number, on November 27, 2009.

On or about April 1, 2003, defendant Choy entered into a contract of sale to purchase the subject property from Peters for \$414,000. Choy paid Peters a down payment of \$41,500, and financed the balance with two loans from co-defendant Chase in the amounts of \$322,700 and \$50,800, secured by two mortgages. A title search commissioned by Choy or Choy's attorney in connection with the purchase, did not disclose the existence of plaintiff's mortgage since it was mis-indexed. A closing was held on July 22, 2003, whereby Peters received the balance of the purchase price and Choy acquired title to the property by deed dated July 22, 2003. On August 11, 2003, the mortgages and the deed were recorded with the City Register.

On November 6, 2009, plaintiff commenced the instant action to foreclose on its mortgage. Defendants Choy and Chase appeared and served an answer asserting, *inter alia*, a First Counterclaim for a declaratory judgment that plaintiff's mortgage is subject to and subordinate to the Choy deed and the Chase mortgages. Defendants Choy and Chase are now moving for summary judgment on that counterclaim, and for dismissal of the complaint as against them.

As the proponent of a motion for summary judgment, defendants Choy and Chase bear

the initial burden to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidentiary proof to eliminate any material issues of fact from the case. See Winegrad v. New York University Medical Center, 64 NY2d 851, 853 (1985). Once that showing is satisfied, the burden of proof shifts to plaintiff, as the party opposing the motion, to produce evidentiary proof in admissible form establishing the existence of a material issue of fact requiring a trial. See Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986).

In support of the motion, Choy and Chase each submit an affidavit, as well documents relating to their mortgages and plaintiff's mortgage, the pleadings, documents recorded with the City Register, Choy's contract of sale with Peters, cancelled checks and the title search report. Choy states in her affidavit that she did not have any knowledge or notice of plaintiff's mortgage before she purchased the property from Peters, and that she first learned of plaintiff's mortgage when she received the papers in the instant action. Choy further states that Peters never informed her of the existence of plaintiff's mortgage, that she did not intend or agree to purchase the property subject to plaintiff's mortgage, and that the title report her attorney obtained prior to the sale did not disclose plaintiff's mortgage.

On behalf of Chase, Thomas E. Reardon states in his affidavit that at the time Chase took the mortgages on the property, it had no actual knowledge or notice of plaintiff's mortgage, that Peters did not inform Chase of plaintiff's mortgage, that the title report provided to Chase prior to the closing did not disclose plaintiff's mortgage, and that it did not learn of plaintiff's mortgage until it received the papers in the instant action. Reardon further states that the Chase mortgages were intended to be a first and second mortgage on the property, and had Chase been aware of plaintiff's mortgage, it would have conditioned its loans on satisfaction of that mortgage

at the closing, or it would not have made the loans to Choy. According to Reardon, “Chase had nothing to gain by ignoring plaintiff’s alleged mortgage and letting the seller [Peters], walk away with the bulk of the loan proceeds.”

Defendants submit a copy of the certification from the title company that performed a title search of the property, which includes a “Mortgage Schedule” stating “NO OPEN MORTGAGES FOUND OF RECORD.” Defendant also submits copies of documents obtained through the Automated City Register Information System (ACKRIS), which is the public website maintained by the New York City Department of Finance, Office of the City Register. One document is the “Search Results by Parcel Identifier” for Block 836, Lot 2095 in Manhattan, which lists only plaintiff’s mortgage, as recorded on April 19, 2002, between William A. Peters and Merrill Lynch Corporation in the amount of \$299,915. Another document is the “Search Results by Parcel Identifier” for Block 936, Lot 2095 in Manhattan, which does not list plaintiff’s mortgage, but only the assignment of that mortgage as recorded on November 27, 2009. The search results for Block 936, Lot 2095 also list several other mortgages (and satisfactions of mortgages) going back to 1981, including the two mortgages that Choy gave Chase, recorded on August 11, 2003, along with the deed from Peters to Choy recorded on August 12, 2003.

Based on the foregoing, defendants Choy and Chase have made a sufficient prima facie showing that they did not have actual or constructive notice of plaintiff’s mortgage, as the undisputed error in the indexing of plaintiff’s mortgage establishes the that Choy and Chase were not on constructive notice of that mortgage. See V & D Realty USA Corp v. Mitso Group, Inc, 240 AD2d 562 (2nd Dept 1997); Baccari v. DeSanti, 70 AD2d 198 (2nd Dept 1979); Q’Neill v. Lola Realty Corp., 264 App Div 60 (2nd Dept 1942); T & V Construction v. Pratti, 2009 WL

788987 (Sup Ct, Suffolk Co 2009), aff'd 72 AD3d 1065 (2nd Dept 2010); Residential Funding Corp v. Epps, 25 Misc3d 1211 (A) (Sup Ct, Queens Co 2009); Federal National Mortgage Ass'n v. Levine-Rodriguez, 153 Misc2d 8 (Sup Ct, Rockland Co 1991). The undisputed evidence likewise establishes that Choy and Case paid valuable consideration for their interests in the property, took their interests in good faith, and as between them and plaintiff, Choy and Chase were first to record their interests against the property. Thus, as a matter of law, pursuant to RPL §291, Choy and Chase's interests in the property are superior and paramount to plaintiff's mortgage. See Household Finance Realty Corp. v. Emanuel, 2 AD3d 192 (1st Dept 2003).

In opposition the motion, plaintiff argues that defendants had constructive notice of plaintiff's mortgage, since "a simple mouse click, under the ACRIS 'Search by Name' option, would have revealed that the Merrill Lynch Mortgage was, and is a lien on the Subject Premises." Alternatively, plaintiff argues that summary judgment is premature as it has not had an opportunity to conduct discovery regarding defendants' claims that they had no notice or knowledge of plaintiff's mortgage, and discovery is required of defendants or their title company regarding any title searches conducted in connection with Choy's purchase of the premises from Peters. Plaintiff's arguments are insufficient to defeat defendants' motion. The case law cited above uniformly holds that where as here an undisputed error has occurred in the indexing of a prior mortgage, that error prevents a record of that instrument from constituting constructive notice of the prior mortgage. See V & D Realty USA Corp. v. Mitso Group, Inc., *supra*; Baccari v. DeSanti, *supra*; Residential Funding Corp v. Epps; Federal National Mortgage Ass'n v. Levine-Rodriguez, *supra*. In any event, plaintiff's reliance on the "Search by Party Name" option is not persuasive, as the results of that search still list the incorrect block and lot number,

Block 836, Lot 2095, for plaintiff's mortgage. Finally, plaintiff fails to show that facts essential to oppose the motion are in defendants' exclusive knowledge, or that discovery might lead to facts relevant to the issues. See Woods v. 126 Riverside Drive Corp., 64 AD3d 422, 424 (1st Dept 2009); Silverstein v. Westminster House Owners, Inc., 50 AD3d 257 (1st Dept 2008).

Based on the foregoing, defendants Choy and Chase are entitled to summary judgment dismissing the complaint as against them, and summary judgment on their First Counterclaim.

Accordingly, it is hereby

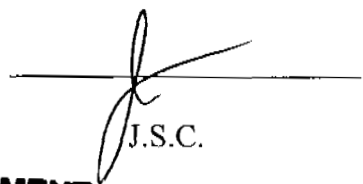
ORDERED that the motion by defendants Youhin Choy and JP Morgan Chase Bank is granted, and the complaint is severed and dismissed as against defendants Youhin Choy and JP Morgan Chase Bank, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, ADJUDGED AND DECLARED that the mortgage of plaintiff PHH Mortgage Corporation is subject to and subordinate to defendant Youhin Choy's deed and defendant JP Morgan Chase Bank's mortgages; and it further

ORDERED that the parties are directed to appear for a conference on February 3, 2011, at 9:30 a.m., in Part 11, Room 351, 60 Centre Street.

DATED: January 12, 2011

ENTER:


J.S.C.

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