

**Del Pozo v Impressive Homes**

2011 NY Slip Op 30186(U)

January 7, 2011

Sup Ct, Queens County

Docket Number: 5345/04

Judge: Orin R. Kitzes

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER**

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

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

-----X

**GERMAN DEL POZO,**  
**Plaintiffs,**

**-against-**

**Index No. 5345/04  
Motion Date: 1/5/11  
Motion No. 22**

**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.**

-----X

The following papers numbered 1 to 9 read on this motion by defendant Bank of America, NA (“BOA”) for an order pursuant to CPLR 3212 for summary judgment dismissing the claims of Plaintiff in his second amended complaint as against BOA, for a declaration establishing that BOA holds a valid mortgage on the Property, and for attorney’s fees, costs, and disbursements.

	<u>PAGES</u> <u>NUMBERED</u>
Notice of Motion-Affirmations-Exhibits.....	1-4
Affirmation in Opposition-Exhibits.....	5-7
Reply Affirmation.....	8-9

Upon the foregoing papers it is ordered that this motion by defendant BOA for an order pursuant to CPLR 3212 for summary judgment dismissing the claims of Plaintiff in his second amended complaint as against BOA, for a declaration establishing that BOA holds a valid mortgage on the Property, and for attorney’s fees, costs, and disbursements is decided, as follows:

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 35-15 101<sup>st</sup> 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 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.

Also on December 12, 2006, upon the closing of HSBC’s mortgage to the Astudillos, and in the same room, Citibank made a second mortgage to the Astudillos in the sum of \$299,600.00, which stated that the mortgaged premises were 35-15 101<sup>st</sup> Street Corona, New York. Citibank relied on the title search on the Property that was performed by Chicago Title for HSBC. This mortgage was recorded on January 17, 2007 and Citibank acknowledges its mortgage is subordinate to HSBC’s mortgage.

The Astudillos also borrowed \$805,000.00 from BOA to purchase the subject premises. To secure the loan, the Astudillos gave a mortgage on the subject premises to BOA, which was recorded on January 17, 2007. There is no indication that BOA 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 BOA 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 seeking summary judgment, which is granted, for the following reasons: BOA now moves for summary judgment in its favor dismissing the claims of Plaintiff in the second amended complaint, as against BOA, and an Order of this Court declaring its Mortgage to be valid and unaffected by the plaintiff’s claim to the

Property because BOA is a good faith mortgagee of the Property for value and without notice of plaintiff's claims. Plaintiff opposes this motion.

Initially, BOA claims that this Court's Order, dated September 28, 2010 and October 20, 2010 is the law of the case and is dispositive of the motion. In these Orders Court granted summary judgment to the Astudillos, National City Corporation and HSBC and dismissed the claims of Plaintiff in which he sought ownership interest in the Property, and made a declaration that HSBC holds a valid mortgage on the Property. BOA claims that it is in the same position as those defendants and now seeks the same relief they did in the motions that resulted in the September and October Orders. Plaintiff neither disputes that the relief sought is the same nor that the prior Order are controlling. In fact, Plaintiff has merely reiterated arguments that were put forth in his opposition papers to those defendants' motions.

The Court finds that this instant motion for summary judgment is based on the same arguments and facts that the other defendants raised on the prior motion to dismiss and Plaintiff has raised the identical arguments in opposition to BOA's motion as he did in opposing the other defendants' motions. Accordingly, this Court's prior determinations regarding the lack of notice of the Notice of Pendency and the validity of the HSBC mortgage constitutes the law of the case on those issues. *See, J-Mar Serv. Ctr., Inc. v. Mahoney, Connor & Hussey*, 45 A.D.3d 809, 809 (2d Dept 2007.) Since there has been no showing of any change in circumstances since the September and October Orders, this Court's determination of these issues on the prior motions are binding upon this Court in deciding the instant motion. Based on this, the branch of the instant motion seeking summary judgment and a declaration regarding BOA mortgage being valid is granted. *Id.*

In any event, BOA has shown that Plaintiff never recorded his June 2002 contract for the purchase of parts or all of the Property. It also shows that BOA took the Mortgage from the Astudillos for value in December 2006 and recorded that mortgage in January 2007. In particular, BOA points out that Plaintiff's *lis pendens* was not properly indexed against the subject property at the time the Mortgage was given to BOA and the Mortgage was recorded. BOA also claims 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.

The Court finds that the Notice of Pendency that was not indexed did not put BOA 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 (3<sup>rd</sup> 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 BOA 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 BOA 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 BOA's Mortgage was not for value. Based on this, the Court finds that BOA 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.

Regarding Plaintiff's fraud claim, defendant BOA has established it had no contact with plaintiff during the course of BOA's providing funding to the Astudillos. Nor is there any indication that Plaintiff was aware of any of BOA's activities. The elements of fraudulent misrepresentation are: (1) the plaintiffs made a material false representation, (2) the plaintiffs intended to defraud the defendants thereby, (3) the defendants reasonably relied upon the representation, and (4) the defendants suffered damage as a result of their reliance. Each of the foregoing elements must be supported by factual allegations containing the details constituting the wrong sufficient to satisfy CPLR 3016 (b) Black v. Chittenden, 69 N.Y.2d 665 (1986.) Ladino v. Bank of Am.,52 A.D.3d 571 (2d Dept 2008.) Swersky v Dreyer and Traub, 219 A.D.2d 321 (1st Dept 1996.) Defendant BOA has sufficiently demonstrated the lack of these elements and plaintiff has not raised any issue that he relied on a misrepresentation by BOA. Accordingly, the claim of fraud is dismissed.

Similarly, regarding plaintiff's negligence claim, BOA has established it owed no legal duty to plaintiff when BOA took the Mortgage on the Property. Accordingly, this claim is dismissed. Harris v. Adejumo, 36 A.D.3d 855 (2d Dep't 2007.) Burger v. Singh, 28 AD3d 695 (2d Dep't 2006) The branch of the motion seeking attorney's fees, costs, and disbursements is denied. The Court finds there is no basis to grant this relief.

In sum, for the reasons set forth above, the branch of the motion by BOA for summary judgment in its favor and dismissing the plaintiff's second amended complaint as against BOA is granted; and this Court sets forth that BOA holds a valid mortgage on the Property and BOA is the holder of a valid mortgage in the amount of \$\$805.000.00 on the Property, that is free and clear of plaintiff's claims. The branch of the motion seeking attorney's fees, costs, and disbursements is denied.

**Dated: January 7, 2011**

.....

**ORIN R. KITZES, J.S.C.**