

Shimon v Wachovia Mtge. FSB
2011 NY Slip Op 30834(U)
March 23, 2011
Supreme Court, Nassau County
Docket Number: 9192/10
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

MARIE SHIMON,

Plaintiff,

- against -

WACHOVIA MORTGAGE FSB, EXPRESS ABSTRACT
SERVICES, INC., MARIE VARRIALE,
FRANCISCA RODRIGUEZ, SUSAN POLI and
JACOB SHIMON,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 9192/10
Motion Seq. Nos.: 01, 02, 03
Motion Dates: 12/21/10
12/21/10
12/21/10

The following papers have been read on these motions:

	Papers Numbered
<u>Notice of Motion (Seq. No. 01), Affidavit and Exhibits</u>	<u>1</u>
<u>Affidavits in Opposition by Defendant Wachovia Mortgage FSB and Exhibits and Memorandum of Law in Opposition</u>	<u>2</u>
<u>Affidavit in Opposition by Defendant Marie Varriale and Exhibits</u>	<u>3</u>
<u>Notice of Cross-Motion (Seq. No. 02), Affirmation, Affidavits and Exhibits</u>	<u>4</u>
<u>Notice of Cross-Motion (Seq. No. 03), Affidavit and Exhibits</u>	<u>5</u>
<u>Reply Affirmation in Support of Cross-Motion (Seq. No. 03) and Exhibits</u>	<u>6</u>

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Plaintiff moves (Motion Seq. No. 01), pursuant to CPLR § 3212, for an order striking out defendants' Answers and directing entry of summary judgment for plaintiff upon the causes of action set forth in the complaint and setting this matter down for an assessment of damages, with interest and costs against defendants. Defendant Wachovia Mortgage FSB ("Wachovia") opposes the motion. Defendant Marie Varriale ("Varriale") opposes plaintiff's motion and

cross-moves (Motion Seq. No. 03), pursuant to CPLR § 3212, for an order granting her summary judgment, as well as an order granting sanctions against the plaintiff and for costs and disbursements. Plaintiff failed to oppose defendant Varriale's cross-motion. Defendants Express Abstract Service, Inc. ("Express") and Susan Poli ("Poli") opposed plaintiff's motion and cross-move (Motion Seq. No. 02), pursuant to CPLR § 3212, for an order granting them summary judgment, as well as an order granting sanctions against the plaintiff and for costs and disbursements. Plaintiff failed to oppose defendants Express and Poli's cross-motion. The Court notes that, according to the Affidavit/Affirmation of Service annexed to plaintiff's moving papers, defendants Francisca Rodriguez and Jacob Shimon were never served with plaintiff's summary judgment motion.

According to plaintiff's moving papers, the instant matter is one which deals with the unlawful actions of plaintiff's husband, defendant Jacob Shimon, based upon his illegal procurement of a mortgage upon their marital residence by falsifying documents and bringing an imposter woman to the closing, portraying said woman as his wife, so that he could effectuate his scheme. Plaintiff submits that defendant Jacob Shimon took \$300,000.00 from the equity of their marital residence as a result of his illegal actions. In May, 2008, defendant Jacob Shimon applied for a \$300,000.00 loan from defendant Wachovia. The loan was to be secured by a mortgage placed upon plaintiff and defendant Jacob Shimon's marital home located at 348 Coleridge Road, Jericho, New York. Defendant Jacob Shimon forged two Power of Attorney forms in plaintiff's name which he used to secure the aforementioned mortgage. The forms were brought to a closing wherein plaintiff Jacob Shimon consummated the transaction and absconded with \$300,000.00, placing a lien on the marital residence. Plaintiff asserts that defendant Jacob Shimon's actions all took place in front of a representative from defendant Wachovia and a representative from defendant Express. On May 12, 2010, plaintiff commenced the instant action naming all the parties that participated in the closing in which her husband, defendant Jacob Shimon, orchestrated. On July 16, 2010, defendant Jacob Shimon pled guilty

before the Honorable George R. Peck in Nassau County Court to the crimes of larceny in the third degree, a Class D felony, and Identity Theft in the First Degree, a Class D Felony, for his intentional defrauding of defendant Wachovia (through the use of forged Power of Attorneys in his wife's name) in order to obtain the \$300,000.00 mortgage. In her complaint, plaintiff requests that the mortgage presently held by defendant Wachovia be discharged as against the marital residence, that said mortgage be declared null and void and that the Nassau County Clerk be directed to expunge said mortgage from the County records. Plaintiff argues that there are no issues of fact to determine due to the illegal actions that have taken place by defendant Jacob Shimon. Plaintiff states "[h]ere it is clear from the Criminal Court transcripts attached, that the defendant Jacob Shimon did indeed commit the crime of forging my name to certain powers of attorney documents and then compounded his crime by appearing at a closing with an imposter who posed as me, which all enabled him to take a mortgage on our marital home in the amount of \$300,000. I had no knowledge of my husband's illegal actions, nor did I participate in those actions, nor did I benefit from anything he did. Accordingly, I respectfully submit to this Court that there are no questions of fact that this Court need decide..." Plaintiff further requests that the instant matter be set down for an assessment of damages as against all named defendants based upon her prayer for relief.

In opposition to plaintiff's motion, defendant Wachovia argues that plaintiff seeks to hold Wachovia, an innocent mortgagee, liable for the alleged wrongful conduct of defendant Jacob Shimon. Defendant Wachovia adds that it is a bona fide mortgagee which provided value in connection with the making of a mortgage, namely a loan in the principal amount of \$300,000.00, without knowledge of any claimed defects or wrongful acts of defendant Jacob Shimon. The mortgage in issue was given to defendant Wachovia to secure the sum of \$300,000.00, which was actually paid by defendant Wachovia, without any knowledge of wrongdoing by defendant Jacob Shimon and, as a result, defendant Wachovia is a bona fide mortgagee for value. Defendant Wachovia also argues that plaintiff is not entitled to the relief

requested since defendant Jacob Shimon was capable of mortgaging or transferring his own interest in the premises, notwithstanding plaintiff's claim of joint ownership and therefore said mortgage constitutes a valid lien on defendant Jacob Shimon's share of the mortgaged premises.

Defendant Wachovia submits that "factual issues exist as to whether plaintiff received or otherwise benefitted from the mortgage loan proceeds, whether she ratified the claimed forgeries, and whether or not she is otherwise estopped from denying the apparent authority possessed by her husband to sign the mortgage." It adds that "despite plaintiff's vague assertions of collusion among the co-defendants, no evidence has been submitted that Wachovia did not act in good faith when it relied upon the signed and notarized Powers of Attorney provided to it at closing." Defendant Wachovia also submits that plaintiff's motion for summary judgment is premature in that depositions of the parties have not yet been conducted, fact discovery has not been concluded, no Preliminary Conference has been held as of yet, no Preliminary Conference Order has been entered, nor has any meaningful discovery occurred.

In defendants Express and Poli's cross-motion (Motion Seq. No. 02), they oppose plaintiff's motion and move for summary judgment on their own behalf. They state that "[p]laintiff's entire motion for summary judgment is based on the plea to the charges of forgery by Jacob which are attached to Plaintiff's papers. However, on its face the motion should be denied and the cross motion granted. The fact that Jacob has pled guilty to forgery has no impact whatsoever on the liability of Defendants (or the other defendants)...Moreover, Plaintiff cannot establish negligence against Defendants under any circumstances for the following reasons: 1) Defendants had no duty to Plaintiff; i.e. Plaintiff is not an insured under the title policy; 2) there was no breach of any duty by Defendants, to Plaintiff. As Defendants acted in accordance with reasonable industry standards and had no actual knowledge of any purported fraud or forgery; 3) Defendants did not cause the damages alleged by Plaintiff, they were merely the victim of this alleged scheme by Jacob; and 4) Defendant were disclosed agents. Thus, under no circumstances could Express be liable to Plaintiff for negligence." Defendants Express and Poli add that the alleged forgery was not known, nor foreseeable, and thus there is no negligence

claim. In his affidavit, Jailelih Walker, Manager of defendant Express, states that “[a]s a title company we are only liable to our insured and Plaintiff is not an insured under any policy of Express. In addition, Express is a disclosed agent of Commonwealth and therefore there is no claim against Express as it is a disclosed agent.” In her affidavit, defendant Poli, an independent contractor/title closer, states that “[t]he subject closing was conducted with a power of attorney from Plaintiff to Jacob Shimon (“Jacob”). The power of attorney on its face looked perfectly proper. There were no irregularities or indications of any kind that there was any problem with the power of attorney....I have been in the title industry for more than seven years and have reviewed countless powers of attorney. This one looked no different than any other power of attorney and there was no reason to decline to accept it. I was a disclosed agent, acted in good faith and cannot be held liable for where I committed no affirmative act of negligence, and I was not acting on my own account.”

In defendant Varriale’s cross-motion (Motion Seq. No. 03), she opposes plaintiff’s motion and move for summary judgment on her own behalf. Defendant Varriale states that “[t]he only causes of action against me are the Third and Fourth Causes of Action. The Third Cause of Action alleges that ‘notarial misconduct.’ The Fourth Cause of Action alleges that I acted in a ‘negligent manner.’...I became a notary public on April 17, 2006, approximately two years after the power of attorney discussed below was notarized, and not by me. I cannot be held liable for notarial misconduct when I did not notarize any document and was not even a notary public on June 25, 2004 when the power of attorney was allegedly signed. I cannot be held liable for negligence when I did not notarize any document and I was not even a notary public on June 25, 2004 when the power of attorney was allegedly signed. Additionally, I had no privity with any of the parties to this action....I never notarized Plaintiff’s signature. The signature on the Power of Attorney is not my signature and it is nothing close to my signature....The notary stamp used on the Power of Attorney is not my stamp....There is no way that Plaintiff can prove that I had any duty to Plaintiff. There is no way that Plaintiff can prove that I caused any damages to Plaintiff.”

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See CPLR § 3212 (b); Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

After applying the law to the facts in this case, the Court finds that plaintiff, in her

motion (Motion Seq. No. 01), has failed to demonstrate *prima facie* entitlement to summary judgment against the defendants. Therefore, plaintiff's motion is hereby denied.

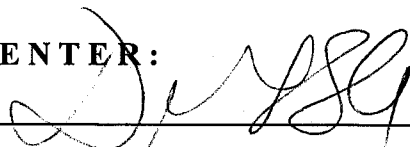
However, the Court does find that, in their cross-motion (Motion Seq. No. 02), defendants Express and Poli demonstrated *prima facie* entitlement to summary judgment against plaintiff. As previously noted, plaintiff failed to submit any opposition to said motion. Therefore, defendants Express and Poli's motion (Motion Seq. No. 02) is hereby granted to the extent that plaintiff's complaint against them is dismissed. Defendants Express and Poli's request for sanctions against plaintiff and costs and disbursements is denied.

The Court also finds that, in her cross-motion (Motion Seq. No. 03), defendant Varriale demonstrated *prima facie* entitlement to summary judgment against plaintiff. As previously noted, plaintiff failed to submit any opposition to said motion. Therefore, defendant Varriale's motion is hereby granted to the extent that plaintiff's complaint against her is dismissed. Defendant Varriale's request for sanctions against plaintiff and costs and disbursements is denied.

It is further ordered that plaintiff and defendants Wachovia, Francisca Rodriguez and Jacob Shimon shall appear for a Preliminary Conference on May 23, 2011, at 9:30 a.m. in the Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

ENTERED

MAR 23 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

Dated: Mineola, New York
March 23, 2011