

Deutsche Bank Natl. Trust Co. v Campbell
2011 NY Slip Op 31227(U)
April 11, 2011
Supreme Court, Queens County
Docket Number: 18097/07
Judge: Kevin Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

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Deutsche Bank National Trust Company, Index
as Trustee of Argent Mortgage Securities, Number: 18097/07
Inc., Asset Backed Pass Through
Certificates, Series 2006-M1 Under the
Pooling and Servicing Agreement dated as Motion
of June 1, 2006 without recourse, Date: 3/29/11

Plaintiff,

- against -

Charles Campbell, Argent Mortgage Motion
Company, LLC, Criminal Court of the City Cal. Number: 5
of New York, New York State Department of
Taxation and Finance, New York City Parking
Violations Bureau, United States of
America, "John Doe #1" through "John Doe #10",
inclusive, et.al.,

Motion Seq. No.: 2

Defendants.

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The following papers numbered 1 to 11 read on this motion by plaintiff for summary judgment.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	1-4
Affidavit-Affirmation in Opposition-Exhibits.....	5-8
Reply-Exhibits.....	9-11

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by plaintiff in this mortgage foreclosure action for summary judgment is granted.

Movants Sylvester Douglas and Yvonne Douglas, apparently sued herein as among the "John Doe" defendants, were the former owners of the subject premises. The Douglasses, in their answer, and Yvonne Douglas, in her affidavit in opposition, represent that they were victims of a mortgage rescue scam perpetrated by defendant Charles Campbell, the mortgagor and current title owner of the premises.

The following facts are not in dispute:

The Douglases originally acquired title to the subject premises on June 25, 2003 and obtained an adjustable rate mortgage in the sum of \$216,000 from Option One Mortgage Corp. Subsequently, they refinanced the mortgage with Argent Mortgage Company, LLC, obtaining an adjustable rate mortgage in the sum of \$257,000 and satisfying the Option One mortgage with part of the funds of the new mortgage. On July 15, 2005, they again refinanced, obtaining an adjustable rate mortgage from Freemont Investment & Loan in the sum of \$289,000, and paying off the Argent mortgage with part of the funds of the new mortgage. Thereafter, the Douglases again sought to refinance to "get rid of the adjustable rate", as Yvonne Douglas testified in her deposition. She testified that they were approached by someone from 4Closure Rescue 911 who offered to clear their debt and save their home. They entered into a "Credit Repair Service Agreement and Retainer" on May 22, 2006 (which, although called an "agreement" did not contain the name or signature of any representative on behalf of 4Closure Rescue 911 or any provision for execution of the agreement by any such representative. It was executed only by the Douglases). According to the agreement, an "investor" would be provided to purchase the property from the Douglases and pay off the mortgage, with an understanding that the property would be "bought by homeowner after 12 months."

In furtherance of this agreement, the Douglases entered into a contract of sale of the property with defendant Campbell (presumably the "investor" proffered by 4Closure Rescue 911), dated April 12, 2006 for a purchase price of \$415,000. At the closing on May 17, 2006, Argent gave Campbell a first mortgage in the sum of \$332,000 and a second mortgage in the sum of \$83,000. The balance of the Freemont mortgage in the sum of \$310,786.05 was satisfied from the funds of the first mortgage. The Douglases, on said date, also entered into a lease agreement with Campbell as landlord and the Douglases as tenants in which the premises were rented to the Douglases for a term of six months at a monthly rental of \$3,495.40. Thereafter, Argent assigned the \$332,000 mortgage with Campbell, as well as the note, to plaintiff pursuant to an assignment dated June 15, 2007.

According to Yvonne Douglas, the mortgage payments for the first six months would be made by Campbell/4Closure Rescue 911, the next six months would be paid by the Douglases and then the property would be deeded back to them. Campbell defaulted under the subject mortgage and, according to Douglas, has refused to reconvey the property back to them.

The Douglases interposed an answer containing eight affirmative defenses, a counterclaim and two cross-claims. The counterclaim alleges fraud, breach of fiduciary duty and violation of the Home Equity Theft Prevention Act on the part of Campbell and 4Closure and demanding that a constructive trust be imposed upon the premises and that Campbell and 4Closure be compelled to reconvey the property to the Douglases. The first cross-claim against Campbell and 4Closure reiterates the allegations set forth in the counterclaim and seeks rescision of the deed and reformation of the deed to reflect title of the property as being in the Douglases. The second cross-claim seeks monetary damages against Campbell.

The first through fifth, and the seventh and eighth, affirmative defenses, alleging a defense founded upon documentary evidence, lack of personal jurisdiction, statute of frauds, failure to state a cause of action, failure to join a necessary party, failure to comply with RPAPL §1303 and Banking Law §265-a and lack of subject-matter jurisdiction are patently meritless and are hereby dismissed.

The sixth affirmative defense alleging violation of the Home Equity Theft Prevention Act is likewise without merit and must be dismissed. Although the record on this motion raises an issue of fact as to whether Campbell and 4Closure defrauded the Douglases, no evidence is presented so as to raise an issue of fact as to whether plaintiff, or its assignor, Argent, was in any way complicit in or had any knowledge of such mortgage rescue fraud scheme so as to deprive them of their status as good faith encumbrancers for value (see Merritt v Merritt, 47 AD 3d 689 [2nd Dept 2008]).

In her deposition, Yvonne Douglas acknowledges and states that she entered into a contract of sale with Campbell and knowingly and willingly transferred title of the premises to him, that she intended to do so in order to effectuate the aforementioned mortgage rescue, that she understood that the purchase of the property by Campbell would be financed by a mortgage that he would take out, that the Douglas' outstanding mortgage would be satisfied from the funds from the Campbell mortgage and that a sum amounting to six months' mortgage would be set aside from the remaining proceeds of the sale and put in escrow for the payment of the first six monthly payments of the mortgage taken out by Campbell. She also acknowledged that she entered into a lease with Campbell under which she would pay rent of \$3,459.40, that such rent would also be paid through the remaining proceeds of the sale and that after the six months, she and her husband would re-acquire the premises by obtaining financing at a more favorable interest rate because of

their improved credit rating. Therefore, the Douglasses knowingly and intentionally transferred the property to Campbell for the express purpose of inducing plaintiff's assignor, Argent, to give him a loan, secured by a mortgage of the property, to pay off the Douglas' existing mortgage. Having done so, the Douglasses may not be heard now to argue that the mortgage of the property securing the loan funds which were used to pay their debts should be expunged because they were defrauded by Campbell.

Yvonne Douglas' averments in her affidavit in opposition that at the closing, "a representative from the plaintiff was present" that "upon information and belief, that representative was aware of the fraud being committed upon me and my husband", that she asked about the documents she was signing and the representative refused to answer her questions and that their attorney "was provided by either the bank or defendant Campbell" contradict her prior deposition testimony and were, thus, clearly crafted to create a feigned issue of fact to defeat summary judgment and must be disregarded (see Schleifer v Schlass, 303 AD 2d 204 [1st Dept 2003]). At her deposition, she testified that it was Foreclosure recovery 911 that provided her with an attorney, that she did not meet anyone at the closing who said they were from the bank and that she did not believe that there was anyone at the closing representing the bank. In any event, her affidavit presents no issue of fact since she merely stated that the attorney was provided "either by the bank or defendant Campbell" and that her opinion that the bank knew about the fraud was "upon information and belief". Likewise, Sylvester Douglas testified in his deposition that the attorney was furnished by 911 and did not talk to anyone from the bank at the closing, but only to the lawyer and that every paper he signed was looked at first by the lawyer before he signed it. Indeed, it is undisputed that plaintiff had nothing to do with the sale of the property pursuant to the alleged mortgage rescue scam, since it merely acquired the mortgage by assignment from Argent over one year after the closing.

The remedy of deed rescission and cancellation of a related mortgage pursuant to Real Property Law §265-a, also known as the Home Equity Theft Prevention Act, is subject to the rights of bona fide encumbrancers (see Wells Fargo Bank v Edsall, 2009 NY Slip Op 50112[U] [Sup Ct Suffolk County]). In any event, movants may not avail themselves of this section since it only applies to contracts of sale entered into on or after its effective date of February 1, 2007 (see L. 2006, c. 308, §5). It is also to be noted that movants have not sought any remedy against plaintiff in their counterclaim. Although they seek deed rescission against Campbell (which could not properly be sought by way of a counterclaim since Campbell is not a plaintiff), they do not seek to cancel the mortgage being held by

plaintiff. Conversely, in their first cross-claim against Campbell, movants seek the remedy of mortgage cancellation, a remedy which is improper since Campbell is not the holder of the mortgage debt.

Therefore, plaintiff is entitled to summary judgment, as a matter of law.

Accordingly, the motion is granted and the answer and counterclaim is stricken. However, to the extent that the cross-claims seek rescission of the deed and damages as against Campbell upon the ground that the transfer of title was fraudulently induced, such claims survive as against Campbell.

Dated: April 11, 2011

KEVIN J. KERRIGAN, J.S.C.