

**Hempstead Realty, LLC v Sturup**

2011 NY Slip Op 32004(U)

July 19, 2011

Supreme Court, Nassau County

Docket Number: 205/10

Judge: F. Dana Winslow

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SCAN

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**HEMPSTEAD REALTY, LLC,**

**TRIAL/IAS, PART 4  
NASSAU COUNTY**

**Petitioner,**

**INDEX NO.: 205/10**

**-against-**

**MOTION DATE: 4/14/11**

**DANIEL STURRUP as Trustee of the TESSIE  
W. WARMERS TRUST NO. 1, ANTONIA  
WARMERS CASTON, DANIEL STURRUP and  
ALBERT STURRUP,**

**MOTION SEQ. NO: 002**

**Respondents.**

**The following papers having been read on the motion (1-5):**

**Order to Show Cause (Petitioner).....1**  
**Affirmation (Respondents).....2**  
**Affirmation (Respondents).....3**  
**Reply Affirmation (Petitioner).....4**  
**Reply Affirmation (Respondents).....5**

In this proceeding, Petitioner HEMPSTEAD REALTY, LLC (“Hempstead” or “Petitioner”), as mortgagor seeks an Order *inter alia* cancelling and discharging a certain mortgage and directing THE TESSIE W. WARMERS TRUST NO. 1 (the “Trust”), as mortgagee, to accept a specific sum in full satisfaction of a mortgage debt and to issue a satisfaction of mortgage based thereon.

**PROCEDURAL HISTORY**

By Order to Show Cause under Index No. 10091/09, dated August 19, 2009 (“OTSC #1”), Petitioner sought an Order of the Court (1) canceling and discharging a mortgage recorded on May 27, 2004, in Liber 26771 of Mortgages, Page 814, given to secure payment of the sum of One Million One Hundred Fifty-Eight Thousand (\$1,158,000.00) Dollars (the “Mortgage”) and further ordering and directing that the debt or obligation secured by the Mortgage be cancelled; (2) directing Petitioner to deposit the sum of \$272,863.05 representing the principal amount of \$266,750 and interest in the sum of \$6,113.05 representing five months interest thereon through August 31, 2009 with the Treasurer of Nassau County, by official bank check or certified check

[\* 2]  
within ten days of the granting of the Order to Show Cause, and upon such deposit directing the County Clerk, in whose office the Mortgage has been recorded, to mark the mortgage cancelled and discharged and further ordering and directing that the obligations secured by the Mortgage be cancelled; and (3) staying and restraining respondents DANIEL STURRUP as Trustee of the Tessie W. Warmers Trust No. I, ANTONIA WARMERS CASTON, DANIEL STURRUP and ALBERT STURRUP ("Respondents"), its agents, servants or attorneys, from declaring the Mortgage in default and taking any steps to enforce the Mortgage and note in any manner, until the final determination of the proceeding; and (4) granting Petitioner an award of reasonable attorneys' fees and court costs for the bringing of the application. By Order, dated December 23, 2009, Justice Roy S. Mahon dismissed the application on grounds that Petitioner failed to include an affidavit of service attesting to service of the Order to Show Cause upon the County Clerk as directed ("Order of Justice Mahon") [Petitioner's OTSC, Exh. H].

By Order to Show Cause, dated January 5, 2010, (Motion Seq. #001) under Index No. 205/10 ("OTSC #2"), Petitioner made an application for the same relief as sought under OTSC #1. By Order dated April 23, 2010 ("April 23 Order"), this Court dismissed the matter as barred by the doctrine of *res judicata* based on the Order of Justice Mahon wherein Petitioner sought the same relief. By Order to Show Cause, dated April 29, 2010, and signed by this Court on May 6, 2010 under Index No. 205/10 (Motion Seq. #002), Petitioner sought an Order permitting Petitioner to reargue the Court's April 23 Order. The Orders to Show Cause also temporarily stayed and restrained Respondents from declaring the note and Mortgage to be in default and enforcing any provisions thereof.

Upon multiple conferences held in chambers and upon consent of both parties, the Court hereby **grants** Petitioner's motion to reargue on grounds that the dismissal by J. Mahon was not based on the merits. The Court's consideration of this matter will be limited to whether or not Petitioner has demonstrated sufficient merit to support its application for a preliminary injunction and for an Order directing Respondents to discharge the Mortgage.

FACTS

In March of 2004, Donald Boehm, in his purported capacity as Trustee of the Tessie W. Warmers Trust No. 1 ("the Trust"), entered in a \$1.4 million "Commercial Real Estate Contract of Sale" (the "Contract") by which he conveyed certain Trust-owned real property – known as 500 Fulton Avenue, Hempstead, New York (the "Property"), to "Panamoka Realty, LLC" ("Panamoka Realty Contract") [Rappleyea Aff., dated February 24, 2011, ¶¶ 9-10, Exh. A]. At the time, there was a Burger King restaurant occupying the premises pursuant to a lease agreement due to expire on January 24, 2007 – which lease also contained a right of first refusal [Rappleyea Aff., dated February 24 2011, Exh. A].

Significantly, the Panamoka Realty Contract identifies "Connelly Industries, Inc" ["Connelly"] – an entity allegedly controlled by Boehm – as a party to the agreement, describing Connelly as a "3<sup>rd</sup> party vendor". The Panamoka Realty Contract also contains a provision

[\* 3]  
requiring the purchaser at closing to pay a \$150,000.00 “service agreement” fee to Connelly (Agreement, ¶ 8[e]). It is undisputed that Panamoka Realty assigned the Panamoka Realty Contract at closing to Petitioner herein. [Rappleyea Aff., ¶¶ 3-5].

On April 27, 2004, Hempstead, as mortgagor, executed and delivered the Mortgage to Donald Boehm, as Trustee of the Trust (“Boehm”) [Petitioner OTSC Exh. A to Exh. B]. Among other things, the subject mortgage recites that it was given to secure Hempstead’s repayment of a \$1,158,000.00 indebtedness, a debt further evidenced by a separate note in that amount executed by Hempstead together with the mortgage (the “Note”) [Petitioner OTSC Exh. B to Exh. B].

Pursuant to the material terms of the Note, Hempstead was to pay interest at a rate of 5.5% and make monthly interest only payments of \$5,307.50 to Boehm as payee for the Trust – after which the Note was to mature on April 30, 2007, unless extended to up and until January 31, 2009. Significantly, the record contains a “Leasing Agent Agreement”, also dated April 27, 2004, between Hempstead, the Trust and Boehm, individually, pursuant to which Hempstead retained Boehm to act as its leasing agent for a prescribed fee of \$20,000.00 payable upon the execution of a new lease [Rappleyea Aff., dated February 24, 2011, ¶ 24; Exh., “F”; Agreement, ¶ 7].

That same day, on April 27, 2004, an ‘Addendum to Mortgage Note’ (the “Note Addendum”) was executed by Peter Petrakis, Member-Manager of Hempstead. The Note Addendum states that Boehm was to provide a tenant for the Premises on or before January 24, 2007, upon certain specified terms and conditions. The Note Addendum provides further that if Boehm, the Leasing Agent, denominated as such pursuant to the separate Leasing Agent Agreement, fails to provide a tenant by that time with no less favorable terms described therein; or if Hempstead as Purchaser/Landlord “extends the Burger King Lease at fair market value terms, then Purchaser/Landlord shall credit the sum of SIX HUNDRED THOUSAND DOLLARS (\$600,000) plus any interest paid to date and any mortgage tax on said credit against the Mortgage and Mortgage Note in the amount of ONE MILLION ONE HUNDRED FIFTY EIGHT THOUSAND DOLLARS (\$1,158,00.00), dated April \_\_, 2004.”

At the time of the original sales transaction in March of 2004, counsel for Boehm – Cohen, Estis & Associates, LLP (“Cohen”) wrote letters apprising Burger King of the impending sale and attached the original Panamoka Realty Contract thereto [Rappleyea Aff., dated February 24, 2011, Exh. D]. The two March 2004 Cohen letters refer to Burger King’s right of first refusal, and summarize the basic sales terms set forth in the Panamoka Realty Contract and Note, although no reference was made to the \$600,000 credit provision set forth in the Note Addendum and Leasing Agent Agreement. On or about July 20, 2006, Hempstead entered into an extension and modification agreement with Burger King (the “Lease Extension”) under which Hempstead allegedly obtained a significant (200%) rent increase [Rappleyea Aff., dated February 24, 2011, Exh. H].

According to Respondents, Boehm never informed the three trust beneficiaries of the Panamoka Realty Contract or closing. After they discovered that the sale had taken place without their knowledge, they commenced proceedings to remove him, after which the current respondent, Daniel Sturup, was appointed Trustee in his place (Rappleyea Aff., ¶¶ 7-8). Notably, Donald Boehm was not the trustee originally designated by the Trust instrument. Rather, Boehm was appointed successor trustee by the Nassau County Surrogates Court in 1999 upon his own application, after the designated trustee, Frederic J. Warmers (Boehm's cousin), passed away. Although in its December 1, 1999 appointment order, the Surrogates Court, directed Boehm to file a bond and oath as a prerequisite to assuming his trusteeship, it is undisputed that he never did so.

In January of 2007, Boehm and (Connelly Industries as well), entered guilty pleas in Orange County to grand larceny, second degree arising out of extensive thefts from the Estate of Frederic J. Warmers. In accord with the plea arrangement, Boehm agreed to make restitution to the Estate in the sum of some \$5.4 million, although according to Respondents, he later died in prison [Rappleyea Aff., dated February 24, 2011, Exh., C].

Prior thereto in 2006, the Trust beneficiaries commenced a separate action in Dutchess County Supreme Court against the Cohen law firm – alleging, *inter alia*, that the firm breached its fiduciary duty to the Trust in its representation of Boehm. On or about January 12, 2010, the individual Respondents executed a Settlement Agreement and General Release which provided *inter alia* that the individual Respondents were to receive \$290,000 in settlement of claims asserted by them therein [Petitioner's Reply Affirmation, dated March 16, 2011, Exh. A].

By letter dated, March 16, 2009, Hempstead tendered a check the amount of \$266,750.00, which it claimed constituted the final amount due and owing under the Note. In its letter, Hempstead's counsel requested that the Trust produce a "satisfaction of mortgage in recordable form" [Petitioner's OTSC, Exh. E to Exh. B]. The foregoing final sum includes, *inter alia*, the previously mentioned \$600,000.00 credit. Specifically, Hempstead now claims that the total credit accrued to its benefit amounts to some \$691,250.00 – thereby allegedly leaving the unpaid Note balance referenced above, *i.e.*, \$266,750.00 [Petitioner's OTSC, Exh. B].

In response, counsel for the Trust rejected Hempstead's March 2009 tender, advising that "we hereby return your client's check dated March 9, 2009 in the amount of \$266,750.00. This amount is incorrect. If your client truly wishes to pay the balance in full call us for accurate payoff figures" [Petitioner's OTSC, Exh. F to Exh. B]. Upon receipt of Hempstead's Orders to Show Cause in the current action, the Court temporarily restrained the Trust from, *inter alia*, declaring the subject Note and Mortgage to be in default and enforcing any provisions thereof.

In opposition, Respondents contend that there are issues of fact and law which preclude the granting of Petitioner's application. Respondents argue Petitioner's application raises issues including: (1) Does Petitioner have title of the Property given Boehm's alleged lack of authority?; (2) Can Petitioner establish bona fide purchaser for value ("BFP") status when

[\* 5]

Boehm allegedly lacked authority, failed to obtain Court approval of the transaction, less than fair market value was paid for the Property and a proper notice of first refusal was not provided to Burger King?; and (3) Is Petitioner entitled to a \$600,000 credit when no consideration supports the Addendum and the reasonable value of the Property is \$1.5 to \$1.6 million, higher than the \$1.4 million contained in the original Contract. Essentially, Respondents argue that the circumstances surrounding the sale, including Boehm's alleged self-dealing, establish that the entire transaction was a "sham;" and that Boehm lacked proper authority to act as a Trust fiduciary. Further, since Hempstead knew or should have known about the suspect nature of the transaction key facts, Hempstead cannot be considered a BFP with respect to the acquisition of the Property.

In reply, Petitioner argues that the second condition in the Note Addendum that, Petitioner extend the Burger King Lease at fair market terms has been met thereby triggering the \$600,000 credit. Petitioner provides copies of proposed leases with third party entities setting forth comparable rents to that provided in the Lease Extension entered into with Burger King. In addition, Petitioner argues *inter alia*, that Petitioner had no knowledge about the Trust since a commercial real estate broker was handling the transaction, Boehm was issued Letters Testamentary, and in any event Respondents provide no proof that Boehm was in the process of being removed as Executor at the time of the Panamoka Realty Contract. Petitioner contends further that Respondents are estopped from raising issues about said Contract as a result of Respondents' previous collection of payments from Petitioner.

#### DISCUSSION

RPAPL §1921 provides, in sum that "[a]fter payment of authorized principal, interest and any other amounts due thereunder \* \* \* a mortgagee of real property \* \* \* must execute and acknowledge \* \* \* a satisfaction of mortgage." See generally, **Rusin v. Grasso**, 40 AD3d 284; **Glatter v. Chase Manhattan Bank**, 239 AD2d 68). "However, before such statutory relief is available, it must appear that the mortgagee willfully and unjustifiably refused to satisfy the mortgage" (78 NY Jur2d, Mortgages, § 383).

In general, to establish as a matter of law that a party is a bona fide purchaser, that party has the burden of proving that he or she purchased the property for valuable consideration, "without knowledge of facts that would lead a reasonably prudent purchaser to make inquiry." See **Berger v. Polizzotto**, 148 AD2d 651, 652, quoting from, **Morrocoy Marina v. Altengarten**, 120 AD2d 500. See also **Maiorano v. Garson**, 65 AD3d 1300; **Booth v. Ameriquest Mortg. Co.**, 63 AD3d 769; **Fischer v. Sadov Realty Corp.**, 34 AD3d 630; **Miner v. Edwards**, 221 AD2d 934 cf., **Anderson v Blood**, 152 NY 285, 293.

"A party seeking the drastic remedy of a preliminary injunction must establish a clear right to that relief under the law and the undisputed facts upon the moving papers." **Gagnon Bus Co., Inc. v. Vallo Transp., Ltd.**, 13 AD3d 334, 335. See, **Abinanti v. Pascale**, 41 AD3d 395, 396; **William M. Blake Agency, Inc. v. Leon**, 283 AD2d 423; **Peterson v. Corbin**, 275 AD2d

[\* 6]  
35, 37. Absent unusual circumstances, a preliminary injunction will not issue where to do so would grant the movant the ultimate relief sought. See **Wheaton/TMW Fourth Ave., LP v. New York City Dept. of Bldgs**, 65 AD3d 1051; **MacIntyre v. Metropolitan Life Ins. Co.**, 221 AD2d 602; **Rosa Hair Stylists v. Jaber Food Corp.**, 218 AD2d 793. The decision to grant or deny a preliminary injunction rests in the sound discretion of the Supreme Court. See **Doe v. Axelrod**, 73 NY2d 748; **Ruiz v. Meloney**, 26 AD3d 385.

Notably, “[i]t is well settled that the standards governing motions for summary judgment apply to the determination of a special proceeding” (**White v. Scrofani**, 161 AD2d 398, 399-400. See also, **Port of New York Authority v. 62 Cortlandt St. Realty Co.**, 18 NY2d 250; **CPLR §409(b)**; **Karr v. Black**, 55 AD3d 82, 86), and that in conformity with those standards, “[a] party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment.” **Valdivia v. Consolidated Resistance Co. of America, Inc.**, 54 AD3d 753, 755; **Venables v. Sagona**, 46 AD3d 672, 673. See also, **Valdivia v. Consolidated Resistance Co. of America, Inc.**, 54 AD3d 753, 754; **Elliot v. County of Nassau**, 53 AD3d 561, 563; **Olmedo-Garcia v. Dobson**, 31 AD3d 727.

With these principles in mind, the Court agrees that the parties’ conflicting allegations with respect to the evolution of the disputed transaction preclude, at this juncture, an award of the ultimate relief, as sought by the Petitioner on the subject motion. See **Olmedo-Garcia v. Dobson**, *Id.*

In opposition to the Orders to Show Cause, Respondents have raised a series of factual claims and allegations relating to, *inter alia*, Hempstead’s status as a bona fide purchaser, which cannot be resolved as a matter of law upon the limited facts contained in the subject, pre-discovery record. See, **Olmedo-Garcia v. Dobson**, *Id.*; **Fazio v. Brandywine Realty Trust**, 29 AD3d 939. See also **Venables v. Sagona**, 46 AD3d 672, 473; **Hall Enterprises, Inc. v. Liberty Management & Const., Ltd.**, 37 AD3d 658; **Afzal v. Board of Fire Com’rs of Bellmore Fire Dist.**, 23 AD3d 507.

Significantly, and among other things, there is a dispute as to whether Hempstead purchased the property with “knowledge of facts that would lead a reasonably prudent purchaser to make inquiry” (**Morrocroy Marina v. Altengarten**, 120 AD2d 500. See, **Hicksville Properties, LLC v. Wollenhaupt**, 273 AD2d 356; **United Matura Realty, Inc. v. Reade Industries, Inc.**, 155 AD2d 660, 662; **Berger v. Polizzotto**, 148 AD2d 651. See also, **Congregation Talmud Torah Ohev Shalom R. Morris Kevelson v. Sorscher**, 69 AD3d 898; **Lucia v. Goldman**, 68 AD3d 1064); namely, whether, *inter alia*, that the facts and circumstances surrounding the sale when cumulatively examined, should have generated substantial suspicion relative to sale terms and the *bona fides* of the entire transaction.

Although Hempstead contends that the sale was entirely proper in all respects and that the consideration paid was fair, the Trust has shown that key facts regarding Hempstead’s status as a bona fide purchaser may exist which are currently unavailable absent further discovery. See

**Olmedo-Garcia v. Dobson**, *supra*, 31 AD3d 727. *See also Astudillo v. City of New York*, 71 AD3d 709; **Venables v. Sagona**, *supra*.

On the limited facts presented in this pre-discovery record – and since Respondents have not yet been afforded the opportunity to develop their claims and allegations – the Court agrees that the subject application is premature. *See Venables v. Sagona*, *supra*, 46 AD3d at 673; **Olmedo-Garcia v. Dobson**, *supra*; **Fazio v. Brandywine Realty Trust**, *supra*. *See generally, Congregation Talmud Torah Ohev Shalom R. Morris Kevelson v. Sorscher*, *supra*, 69 AD3d 898; **Lucia v. Goldman**, 68 AD3d 1064.

The Court has considered Hempstead’s remaining contentions and concludes that they do not establish its entitlement to the relief sought upon the record as presently constituted.

Accordingly, it is

ORDERED, that Petitioner’s motion to reargue the Court’s Order of April 23, 2010 is **granted**; and it is further

ORDERED that upon reargument, the motion by the Petitioner Hempstead Realty, LLC pursuant to **Real Property Actions and Proceedings Law §1921[1] and [2]**, for an Order, *inter alia*, directing the Respondent mortgagee, Daniel Sturrup, as Trustee of The Tessie W. Warmers Trust No. 1, *et. al.*, to accept a specific sum in full satisfaction of the Mortgage debt and to issue a satisfaction of mortgage based thereon, is **denied**.

This Constitutes the Order of the Court.

Dated: *June 24*, 2011

*[Handwritten Signature]*  
J.S.C.

**ENTERED**  
JUL 11 2011  
NASSAU COUNTY  
COUNTY CLERK’S OFFICE