

<b>Cosme v Jackson</b>
2011 NY Slip Op 34173(U)
May 4, 2011
Supreme Court, Bronx County
Docket Number: 18512/06
Judge: Mark Friedlander
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NEW YORK SUPREME COURT-COUNTY OF BRONX  
PART IA-25

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ANGELO COSME,

Plaintiff,

-against

MARYANN SMITH JACKSON, et al.

Defendants.

**MEMORANDUM  
DECISION/ORDER**  
Index No. 18512/06

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HON. MARK FRIEDLANDER

Plaintiff ("Cosme") moves by Order to Show Cause for an Order: (1) vacating any and all foreclosure judgments and warrants of eviction in favor of Property Asset Management ("PAM") and against Cosme concerning certain real property located at 3543 Willet Avenue, Bronx, New York ("the property"); (2) permanently enjoining PAM from evicting Cosme, and any subtenants, from the property; (3) allowing Cosme to amend the complaint and join PAM, US Bank National Association ("US Bank"), as parties to this action; and (4) consolidating all actions instituted by PAM and still pending as against the property, in the Civil Court, Bronx County, or elsewhere, with the instant action. Cosme's motion is decided as hereinafter indicated.

This is an action by Cosme seeking, *inter alia*: The voiding, reformation and/or rescission of the transfer of the property from him to defendant Maryann Smith Jackson ("Jackson") and all other agreements relating to the property; quieting title to the property; compensatory and punitive damages for fraud, deceptive trade practices, unjust enrichment, legal malpractice, intentional tort, fraud in the inducement; and attorneys' fees, costs and disbursements, pursuant to New York's General Business Law, Section 349 and the common

law.

The relevant facts are as follows: In 1997, Cosme purchased the property, a single family house. In 2005, Cosme fell into arrears on his mortgage payments and foreclosure proceedings were commenced against the property. Cosme's complaint alleges that defendants Virginia Robinson ("Robinson") and Katherin Dukes ("Dukes") held themselves out as experts at saving people's homes from foreclosure and visited Cosme at his home to present him with a proposal for keeping the property. More specifically, Robinson and Dukes advised Cosme that the only way for him to save his home was to sell the property to a person they recommended, defendant Jackson, for a fee of \$10,000.00. In return, Jackson would subsequently flip the property back to Cosme, at no cost, with all of Cosme's debts satisfied and with a new, clean mortgage, which would preserve Cosme's equity in the property. The complaint further alleges that, as a result of this and other representations made by the defendants, which later proved to be false, Cosme transferred title to the property to defendant Jackson. However, Cosme remained in possession of the property. When Cosme discovered that the various representations were false, he retained counsel and commenced an action against the defendants herein by the filing of a summons and verified complaint with the County Clerk, Bronx County, on August 9, 2006. A Notice of Pendency was also filed with the County Clerk, Bronx County, on August 9, 2006.

Subsequent thereto, US Bank, as the mortgagee, commenced an action against Jackson, the mortgagor, and other defendants, to foreclose its mortgage on the property, by the filing of a summons and verified complaint with the County Clerk, Bronx County, on September 12, 2006. Notwithstanding the filing of the aforementioned Notice of Pendency by Cosme, he was not named as a defendant in the foreclosure action and was never served.

A Judgment of Foreclosure and Sale ("Judgment") was signed on May 14, 2007, and entered on June 11, 2007. The Judgment caption does not list Cosme as a defendant. Pursuant to the Judgment, a sale of the property was scheduled for September 5, 2007. Cosme's counsel learned, for the first time, on the afternoon of September 4, 2007, of the impending sale of the property. Cosme's counsel informed US Bank's counsel of the pending lawsuit concerning title to the property and requested that the sale be cancelled until the issues regarding title were resolved.

On September 5, 2007, Cosme's counsel appeared at the foreclosure sale and informed the Referee and all parties present that the title to the property was in dispute. Notwithstanding counsel's objection the sale of the property went forward. PAM was the successful bidder. A Referee's Deed, dated September 5, 2007, was issued to PAM and recorded with The City Register on November 19, 2007. Subsequent thereto, PAM's counsel was retained to commence an eviction proceeding against any holdover tenants.

PAM's counsel states that : "As usual, a Ten (10) Notice to Vacate was served and mailed upon all known tenants/occupants and JOHN DOE advising them that PAM is the new owner of the subject premises and they need to vacate the premises within ten (10) days otherwise PAM would commence a summary proceeding." Neither a copy of said notice nor an affidavit of service thereof has been provided to this Court by PAM's counsel. PAM's counsel commenced a holdover proceeding in the Civil Court, Bronx County, under Index No. 6104/2010. Cosme was not named as a respondent therein. On March 22, 2010, a Judgment of Possession was granted in favor of PAM and a Warrant of Eviction authorized to be issued after April 1, 2010. The Warrant of Eviction was subsequently served, and the within application

ensued.

Pursuant to RPAPL§1311, the plaintiff in a mortgage foreclosure action is required to join, as a party defendant, any person “whose interest is claimed to be subject and subordinate to the plaintiff’s lien,” including “[e]very person having an estate or interest in possession, or otherwise, as tenants in fee,” ... and “[e]very person having any lien or incumbrance upon the real property which is claimed to be subject and subordinate to the lien of plaintiff.” It appears that Cosme filed a Notice of Pendency prior to US Bank’s commencement of its foreclosure action. Thus, Cosme is a necessary party to the foreclosure action. The absence of a necessary party in a foreclosure action leaves that party’s rights unaffected by the judgment of foreclosure and sale, and the foreclosure sale may be considered void as to the excluded party. *1426 46 St., LLC v. Klein*, 60 A.D.3d 740 (2<sup>nd</sup> Dept. 2009); *Glass v. Estate of Gold*, 48 A.D.3d 746 (2<sup>nd</sup> Dept. 2008); *Board of Mgrs. of Parkchester N. Condominium v. Alaska Seaboard Partners Ltd.*, 37 A.D.3d 332 (1<sup>st</sup> Dept. 2007).

Accordingly, since the judgment of foreclosure did not extinguish Cosme’s rights, PAM’s summary proceeding in Civil Court, Bronx County, cannot be maintained at the present time. Consequently, the Judgment of Possession granted in favor of PAM and Warrant of Eviction issued are vacated against Cosme. All evictions at the property are enjoined until further order of this Court. Movant may amend the complaint to join PAM and US Bank as parties to this action, provided such parties are served within sixty (60) days of the date of this Order and that all current parties defendant who have appeared are served with copies of the amended pleading within twenty (20) days after completion of the service upon PAM and US Bank.

The parties, including the new parties, shall appear for a conference with the Court on

Monday, August 1, 2011, at 10:00 A.M., at Courtroom 623, 851 Grand Concourse, Bronx, New York, to discuss which other actions, if any, remain to be consolidated with this action and any other matters requiring Court scheduling or intervention. The motion is granted to the extent set forth above.

The foregoing constitutes the Decision and Order of the Court.

Dated: 5/4/11

  
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MARK FRIEDLANDER, J.S.C.