

Shaw Funding, L.P. v Boris

2012 NY Slip Op 31061(U)

April 12, 2012

Supreme Court, Suffolk County

Docket Number: 08-10962

Judge: John J.J. Jones Jr

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SHORT FORM ORDER

INDEX No. 08-10962
CAL. No. 11-00509EQ

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 8-10-11
ADJ. DATE 8-10-11
Mot. Seq. # 003 - MG

-----X
SHAW FUNDING, L.P., :
Plaintiff, :
-against- :
BARBARA MARSH BORIS, DENNIS BORIS, :
STATE OF NEW YORK on behalf of :
UNIVERSITY HOSPITAL SUNY at STONY :
BROOK, KRISTINA NEGLIA, RALPH NEGLIA, :
MIDLAND FUNDING, LLC, and "JOHN DOE :
#1" through "JANE DOE #10", the last 10 names :
being fictitious and unknown to the Plaintiff, the :
persons or parties intended being the occupants, :
tenants, persons or entities, if any, having or :
claiming an interest in or lien upon the mortgaged :
premises described in the verified complaint, :
Defendants. :
-----X

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Upon the following papers numbered 1 to 12 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 9 - 10; Replying Affidavits and supporting papers 11 - 12; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion by plaintiff Shaw Funding, L.P. for an order striking the affirmative defenses of defendants Kristina and Ralph Neglia, and dismissing their answer and counterclaims; dismissing the answer of defendants Barbara Marsh Boris and Dennis Boris; and granting it summary judgment on its complaint, appointing a referee to compute, and imposing an equitable mortgage on the subject property, is granted to the extent set forth herein.

JA

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Defendants Ralph Neglia and Kristina Neglia are husband and wife (hereinafter the "Neglias" when referred to collectively). Defendant Barbara Marsh-Boris, f/k/a Barbara Marsh (hereinafter referred to as "Marsh-Boris" or "Barbara Marsh") is the mother of defendant Kristina Neglia. In July 1999, Barbara Marsh and the Neglias each provided \$15,000 towards a down payment to jointly purchase the property located at 181 West Lake Drive in Lindenhurst, New York (the "Property"). The purchase was financed with a loan from Bank of America in the principal amount of \$140,000, secured by a mortgage on the Property. The note, mortgage and deed, however, were placed in the name of Barbara Marsh as she had better credit than the Neglias. It was also agreed that the Neglias would be added to the deed in the future. Barbara Marsh moved into the first floor and the Neglias moved into the second floor of the Property, each paying one-half of the mortgage and utilities.

In 2001, Barbara Marsh refinanced the Bank of America mortgage note to lower the interest rate and obtain \$30,000 in cash, increasing the principal balance to \$170,000. Barbara Marsh gave \$15,000 of the cash to the Neglias, and each continued to pay one-half of the mortgage. Thereafter, allegedly unbeknownst to the Neglias, Barbara Marsh took a separate loan from Bank of America for \$15,000, secured by a second mortgage on the Property.

At some point the Neglias approached Barbara Marsh to have their names added to the deed; allegedly Barbara Marsh refused to do so. On September 28, 2005, the Neglias commenced an action against Barbara Marsh seeking the imposition of a constructive trust on the Property (the "Neglias Lawsuit"). The notice of pendency for the Neglias Lawsuit, dated September 27, 2005, was recorded in the Suffolk County Clerk's office on November 2, 2005. By Order dated March 15, 2007 (Baisely, J.) a constructive trust was imposed to the extent of granting the Neglias a one-half equitable interest in the Property. On May 21, 2007, a judgment was entered in the Neglias Lawsuit directing Barbara Marsh to convey a one-half interest in the Property to the Neglias and to execute and deliver a deed reflecting same. In the event Barbara Marsh failed to do so, the Sheriff was directed to prepare and deliver the deed to the Neglias. During her EBT, Marsh-Boris testified the Sheriff executed the deed.

Barbara Marsh and defendant Dennis Boris were married on October 28, 2007. By quitclaim deed dated December 13, 2007, Barbara Marsh conveyed the Property to Dennis Boris and to herself as Marsh-Boris, as husband and wife. On the same date, Marsh-Boris and Dennis Boris (hereinafter the "Boris Defendants" when referred to collectively) borrowed the principal sum of \$230,000 from plaintiff Shaw Funding, L.P. ("Shaw Funding") executing a note secured by a mortgage on the Property (the "Shaw Funding Mortgage"). At the closing, a portion of the proceeds from the loan was used to payoff the first and second Bank of America mortgages in the amount of \$186,207.08, the real property tax lien of \$5,495.00, and a personal judgment against Barbara Marsh for \$200.00. The quitclaim deed and Shaw Funding Mortgage documents were recorded in the Suffolk County Clerk's office on January 14, 2008.

The Boris Defendants defaulted in making the first payment on the Shaw Funding Mortgage in the amount of \$2,635.17 which was due on January 1, 2008, and all payments due thereafter. On March 17, 2008, Shaw Funding commenced the instant action to foreclose on the mortgage and for equitable subrogation with respect to the Bank of America mortgages it satisfied, and the real property taxes and judgment it paid. The Neglias interposed an answer with general denials, asserted affirmative

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defenses of lack of jurisdiction due to improper service and lack of service of process, alleged cross claims against the Boris Defendants to set aside as null and void the deed dated December 13, 2007, and to partition or sell the Property which they hold as tenants in common with Marsh-Boris. The Neglias also asserted counterclaims against Shaw Funding sounding in negligence, and for a declaratory judgment against Shaw Funding and the Boris Defendants declaring that their one-half interest in the Property is unencumbered by the Shaw Funding Mortgage. In their answer, the Boris Defendants also deny the material allegations in the complaint and as a first affirmative defense and counterclaim against Shaw Funding allege that the note and mortgage are void as usurious. Plaintiff has submitted a reply to the counterclaims. The instant motion ensued. The Neglias have submitted opposition to the equitable subrogation branch of the motion; the Boris Defendants have not submitted any opposition papers.

The branch of Shaw Funding's motion which seeks to strike the Neglias' first and second affirmative defenses alleging lack of personal jurisdiction on the basis of improper service and lack of service is granted. The Neglias have not submitted any opposition to this branch of the motion, and did not move to dismiss the complaint on these grounds within 60 days of service of their answer, thus, these defenses are waived (*see JP Morgan Chase Bank v Munoz*, 85 AD3d 1124, 927 NYS2d 364 [2d Dept 2011]; CPLR 3211[e]).

Turning to the branch of the motion for summary judgment, to establish its prima facie entitlement to judgment as a matter of law in a foreclosure action, the plaintiff must produce the mortgage, the unpaid note and undisputed evidence of a default under the terms thereof (*see* CPLR 3212; RPAPL § 1321; *Zanfini v Chandler*, 79 AD3d 1031, 912 NYS2d 911 [2d Dept 2010]; *Washington Mut. Bank, F.A. v O'Connor*, 63 AD3d 832, 880 NYS2d 696 [2d Dept 2009]). Once such a showing is made, the burden shifts to the defendants to raise a triable issue of fact regarding any affirmative defenses and counterclaims asserted by them in opposition to a plaintiff's motion seeking foreclosure (*see Washington Mut. Bank, F.A., supra*).

Here, Shaw Funding has produced the mortgage, note and proof of the default, however, based on the record before the court, the mortgage it holds is not enforceable against the entire Property. The filing of the notice of pendency in the Neglias Lawsuit provided Shaw Funding with constructive notice that the judgment demanded may affect the title to the Property (*see Novastar Mortgage, Inc. v Mendoza*, 26 AD3d 479, 811 NYS2d 411 [2d Dept 2006]). Moreover, since the Shaw Funding Mortgage documents were recorded after the filing of a notice of pendency, Shaw Funding "is bound by all proceedings taken in the action after such filing to the same extent as a party" (*Mallick v Farfan*, 66 AD3d 649, 885 NYS2d 774 [2d Dept 2009]; CPLR 6501). "That a [mortgagee] lacks actual knowledge of the filing is irrelevant as the principle underlying the doctrine of notice of pendency 'does not rest upon the presumption of notice but upon reasons of public policy, manifested by the language of [CPLR 6501] (citation omitted)'" (*Goldstein v Gold*, 106 AD2d 100, 102, 483 NYS2d 375 [2d Dept 1984]).

When Shaw Funding became a mortgagee on the Property, the Neglias had been judicially awarded one-half interest in the Property, thereby becoming tenants in common with Barbara Marsh (EPTL 6-2.2 ["a disposition of property to two or more persons creates in them a tenancy in common, unless expressly declared to be a joint tenancy"]). Barbara Marsh was not prevented from conveying her one-half interest in the Property to herself and Dennis Boris, and the Boris Defendants were not

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prevented from mortgaging their interest in the Property (*see V.R.W., Inc. v Klein*, 68 NY2d 560, 510 NYS2d 848 [1986]). However, “[a] co-owner can only encumber its own interest in property without the consent of the other co-owners” (*Kwang Hee Lee v Adjmi 936 Realty Assocs.*, 34 AD3d 646, 648, 824 NYS2d 672 [2d Dept 2006]). A mortgage given by one of several parties with an interest in the mortgaged property gives the “mortgagee security...only up to the interest of the mortgagor” (*Real Spec Ventures, LLC v Estate of Deans*, 87 AD3d 1000, 1002, 929 NYS2d 615 [2d Dept 2011]; *1.2.3 Holding Corp. v Exeter Holding, Ltd.*, 72 AD3d 1040, 1042, 900 NYS2d 356 [2d Dept 2010]). Therefore, Shaw Funding obtained no greater interest in the Property than the Boris Defendants possessed. Thus, the Shaw Funding Mortgage is enforceable only against the Boris Defendants’ interest in the Property (*see Real Spec Ventures, LLC v Estate of Deans, supra*).

Nevertheless, equity dictates that Shaw Funding is entitled to an equitable mortgage on the Property to the extent of the funds expended by it to satisfy the Bank of America mortgages and the real property tax lien (*see King v Pelkofski*, 20 NY2d 326, 282 NYS2d 753 [1967]; *Great Eastern Bank v Chang*, 227 AD2d 589, 643 NYS2d 203 [2d Dept 1996], *lv dismissed* 88 NY2d 1064, 651 NYS2d 407 [1996]). In support of its claim for equitable subrogation, Shaw Funding submits the affidavit of its managing director, Vasilios Lefkaditis (“Lefkaditis”). In the affidavit, Lefkaditis asserts that prior to extending the loan, plaintiff obtained a commitment for title insurance (“title report”) from Grant Abstract, Inc. The title report, with an effective date of October 1, 2007, listed an April 9, 2002 mortgage in the principal amount of \$169,000 and an October 20, 2006 mortgage in the principal amount of \$15,000 made by Barbara Marsh to Bank of America, and a \$100 judgment against Barbara Marsh. Proceeds from the loan were used to satisfy and discharge the two Bank of America mortgages which totaled \$186,207.08, and the judgment which totaled \$200.00. The remainder of the proceeds was used to pay the real property tax lien of \$5,495.00, and expenses associated with the closing of title. Lefkaditis asserts that the title report did not disclose the notice of pendency filed, the judgment entered in connection with the Neglias Lawsuit, or a deed conveying a one-half interest in the Property to the Neglias. Lefkaditis also asserts that Shaw Funding did not otherwise obtain knowledge of the Neglias Lawsuit and judgment prior to the closing of title.

Unpersuasive is the argument in opposition by the Neglias’ that the equitable subrogation doctrine should not apply because Shaw Funding had constructive knowledge of a potential defect in the title. Additionally, the cases relied upon by the Neglias are distinguishable from the case at bar. Moreover, in a case strikingly similar to the facts herein, *Elwood v Hoffman* (61 AD3d 1073, 876 NYS2d 538 [3d Dept 2009]), the court found that “[t]he presence of constructive notice does not render the doctrine of equitable subrogation inapplicable where, as here, the notice of pendency was ‘unbeknown’ to...[Shaw Funding] at the time” (*id.* at 1075). In *Elwood*, one owner of property (hereinafter the “movant”), commenced an action against the other owner of the property (hereinafter the “non-movant”) seeking to impose a constructive trust on the property for the purpose of selling it and dividing the proceeds. In connection therewith, the movant filed a notice of pendency against the property in May 2006. Notwithstanding the notice of pendency, in October 2006, the non-movant obtained a loan for \$85,000, secured by a second mortgage on the property. A portion of the loan proceeds was used to satisfy a preexisting mortgage. The predecessor in interest of the mortgagee holding the second mortgage, moved to intervene in the movant’s action. The constructive trust was thereafter granted. The court in *Elwood* found that although the notice of pendency had been filed at the

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time the second mortgage was given, it was apparently overlooked by the second mortgagee's title agent. Thus, the second mortgagee had constructive notice, but not actual notice of the recorded notice of pendency. The court in Elwood held, "[b]ased upon the Court of Appeals' decision in *King v. Pelkofski* [citation omitted], the presence of constructive notice does not render the doctrine of equitable subrogation inapplicable where, as here, the notice of pendency was 'unbeknown' to...[the second mortgagee] at the time" (*id.* at 1075). The court in Elwood also highlighted that the movant would be unjustly enriched if the doctrine of equitable subrogation was not applied, and specifically stated it declined to follow the cases holding otherwise (the same cases relied upon by the Neglias).

The same result is warranted in the case at hand. "Where, as here, the funds of a mortgagee are used to discharge a prior lien upon the property of another, the doctrine of equitable subrogation applies to prevent unjust enrichment by subrogating the mortgagee to the position of the senior lienholder" (*Great Eastern Bank v Chang*, 227 AD2d 589, 643 NYS2d 203 [2d Dept 1996]; see *King v Pelkofski, supra*; *Elwood v Hoffman, supra*). Even though the Shaw Funding Mortgage is not a legal charge upon the Neglias' interest in the Property, the Neglias knew of, and consented to at least, the first Bank of America mortgage. The Bank of America mortgages were senior to the judicially awarded interest of the Neglias in the Property. If the doctrine is not applied here, the Neglias would be unjustly enriched with one-half of the Property unencumbered by any mortgage, an outcome the Appellate Court in Elwood would not countenance. Thus, "[e]quity will preserve for the benefit of the plaintiff [Shaw Funding] the senior incumbrance which...[it] caused to be discharged" (*King v Pelkofski, supra* at 334).

The cases relied upon by the Neglias are factually distinguishable from the facts herein. In *Roth v Porush* (281 AD2d 612, 722 NYS2d 566 [2d Dept 2001]), a judgment creditor filed a notice of pendency and commenced the action to set aside a fraudulent conveyance of real property from the judgment debtor to his wife, who in turn sold the real property to third parties. The court found that there were facts which should have led the third-parties and their title insurance company to conduct further inquiry before purchasing the property, and found that the doctrine of equitable subrogation was inapplicable. There was no issue of the judgment debtor who was the owner of the property, being unjustly enriched with an unencumbered property, as would be the case here for the Neglias if the doctrine of equitable subrogation is not applied.

R.C.P.S. Associates v Kamam Developers, (238 AD2d 492, 656 NYS2d 666 [2d Dept 1997]) and *Bank One v Mui* (38 AD3d 809, 835 NYS2d 585 [2d Dept 2007]) involved the foreclosure of competing mortgages held by different mortgagees on the same property. The court found the doctrine did not apply inasmuch as the mortgagee seeking to be subrogated to the rights of the senior mortgagee had knowledge of the preexisting lien. Again, there was no issue of the mortgagor/owner of the property being unjustly enriched by getting a property free and clear of a mortgage.

Similarly, *Pawling Savings Bank v Hunt Properties* (225 AD2d 678, 639 NYS2d 462 [2d Dept 1996]), involved competing mortgages on the same property held by different mortgagees, where the mortgagee seeking to be subrogated to the senior mortgage admittedly knew of the preexisting mortgage. The doctrine was not applied. Summary judgment was denied in *Countrywide Home Loans Inc v Dombek*, 68 AD3d 1041, 892 NYS2d 465 [2d Dept 2009]), a case also involving competing mortgages held by different mortgagees. The court in the Countrywide case found that an issue of fact existed as to

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whether the mortgagee seeking to be subrogated had knowledge of the preexisting lien. Again, neither Pawling nor Countrywide involved an owner being unjustly enriched with a mortgage-free property.

Therefore, the branch of the motion by Shaw Funding which seeks the imposition of an equitable mortgage on the entire Property for \$187,207.08 the amount extended to pay off the Bank of America mortgages, and for \$5,495.000 the amount extended to pay off the real estate tax lien, and to foreclose on the equitable mortgage is granted. The branch of the motion by Shaw Funding to foreclose on the Shaw Funding Mortgage and for the appointment of a referee to compute is granted in its favor and against the Boris Defendants as to their one-half interest in the Property.

The Neglias have not opposed that branch of Shaw Funding's motion for summary judgment dismissing their answer and counterclaims. Therefore, that branch of the motion is granted, and the answer and counterclaims are severed and dismissed as to Shaw Funding.

The Boris Defendants have answered the complaint asserting a claim of usury, however, offer no opposition to Shaw Funding's motion for summary judgment or evidence to support their claim of usury. Thus, the facts alleged in Shaw Funding's papers are deemed admitted, thereby eliminating any issue of fact for trial as to the Boris defendants (*see Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Therefore, that branch of the motion for summary judgment is also granted, and the answer of the Boris Defendants is severed and dismissed as to Shaw Funding.

Submit order.

Dated: 12 April 2012



J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION