

**Williams v Mentore**

2012 NY Slip Op 31965(U)

July 9, 2012

Supreme Court, Queens County

Docket Number: 13135/2011

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT  
Justice

IAS Part 14

RUBY WILLIAMS,  
Plaintiff,

Index  
No. 13135 2011

- against -

Motion  
Date March 27, 2012

ESDEL MENTORE, et al.,  
Defendants.

Motion  
Cal. No. 32

Motion  
Seq. No. 4

The following papers numbered 1 to 10 read on this motion by defendant Wells Fargo Bank, N.A. (Wells Fargo), pursuant to CPLR 3212 for summary judgment dismissing the complaint asserted against it, and for summary judgment in its favor on its counterclaim.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	1-4
Answering Affirmation - Exhibits.....	5-8
Reply Affirmation.....	9-10

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

In the verified complaint, plaintiff, an elderly woman, claims that she is the true owner of the real property known as 187-15 Keeseville Avenue, St. Albans, New York, and was the victim of a scheme perpetrated by defendant Esdel Mentore, an alleged real estate broker, and others, to defraud her of her title to her property and strip her of her equity in her home. Plaintiff alleges that in late 2002, at a time when she was unable to keep up with payments of her medical bills and repairs on her home, she sought to refinance the then-existing

mortgage on the property (the Indymac mortgage), and her daughter-in-law, Grace Haye Williams, agreed to assist her. Title was transferred to Grace Haye Williams by deed dated December 5, 2002, and Grace Haye Williams obtained a mortgage from Security American Mortgage Co. Inc. (Security American mortgage) against the property.

It is alleged that Grace Haye Williams thereafter sought to have her name removed from the mortgage, and plaintiff was referred to defendant Mentore for assistance in obtaining a reverse mortgage. Plaintiff alleges that he indicated a reverse mortgage would not be an appropriate option, falsely advising her that the “government” would only give her a few dollars and then would take her home away. She also alleges that defendant Mentore ingratiated himself to her, assured her that he would assist her in arranging the transfer of the mortgage from Grace Haye Williams, and convinced plaintiff to refinance the mortgage instead. Plaintiff further alleges that unbeknownst to her, title had already been transferred from Grace Haye Williams back to plaintiff by deed dated March 28, 2006.

Plaintiff further alleges that defendant Mentore sent a car to bring plaintiff to his office at 8:00 P.M. on January 5, 2007, purportedly for the closing of the mortgage transaction. At the closing, defendant Mentore allegedly falsely claimed to assist plaintiff and promised never to allow her to do anything to put her or her house at risk, and in doing so, induced her to sign documents purportedly to allow defendant Aman Bindra to “take over the mortgage” for one year, and to give her daughter Hope Jackson, an opportunity to take the mortgage over thereafter. Plaintiff alleges she did not understand the papers, including that she was conveying her home to defendant Aman Bindra or that defendant Bindra’s name would be on the deed. She also alleges she asked defendant Mentore what was going on, and expressed concern that she was signing her house away, but relied upon the assurances of defendant Mentore that she should not worry, and to trust him and sign the documents. She also alleges that during the closing, there was no discussion of her surrendering the premises, turning over keys to the house, or paying any use or occupancy until her vacatur of the property, or when defendant Bindra would perform a final inspection or move in.

It is alleged that two mortgage loans from Fremont Investment & Loan were issued to defendant Bindra on January 5, 2007, and the Security American mortgage was allegedly discharged, and then Bindra, in turn, transferred the subject property to defendant London by deed dated October 16, 2008. To finance that purchase, defendant London allegedly obtained a mortgage loan from defendant Wells Fargo, and when defendant London defaulted, a foreclosure action entitled *Wells Fargo Bank, N.A. v London* (Supreme Court, Queens County, Index No. 12555/2011) was commenced against London.

Plaintiff alleges that the individual defendants conspired to defraud her of her property, and that she did not knowingly sign the deed into defendant Bindra or convey her

title to the property. Plaintiff also alleges that defendant Mentore used defendants Bindra and London as “straw buyers” to conceal his ownership interest in the targeted property, and obtain fraudulent mortgages. Plaintiff further alleges that defendant Bindra allegedly aided and abetted defendant Mentore by providing his name to finance the sham purchase with the Bindra mortgages, and transferring title to the property to defendant London, who also aided and abetted defendant Mentore, by providing his name to finance his purported sham purchase with the Wells Fargo mortgage. Defendant Parmanand Ramdass allegedly aided and abetted defendant Mentore by serving as the buyers’ attorney and settlement/closing agent in connection with the fraudulent deed transactions, while aware the transactions were arranged by defendant Mentore to enrich himself. Plaintiff claims that defendant Wells Fargo failed to exercise due diligence when making the mortgage loan to defendant London. It is alleged that plaintiff continually resided at the premises since 1976, and as a consequence, defendant Wells Fargo should have made further inquiries about defendant Bindra’s ownership of the property prior to making the loan. Plaintiff asserts causes of action pursuant to article 15 of the Real Property Actions and Proceedings Law and General Business Law § 349, and sounding in fraud, conspiracy to commit, and aiding and abetting, fraud and conversion. Plaintiff seeks declaratory, injunctive, and monetary relief, including a declaration setting aside as null and void the transactions purportedly transferring title and ownership from herself to Bindra and from Bindra to London, and the Wells Fargo mortgage recorded against the property.

Defendant Wells Fargo previously moved to dismiss the complaint asserted against it in lieu of serving an answer. The motion was denied by order dated October 12, 2011. The court determined the complaint stated a cause of action pursuant to article 15 of the RPAPL (*see* order dated October 12, 2011), and defendant Wells Fargo failed to submit evidence flatly contradicting plaintiff’s claims. Defendant Wells Fargo thereafter served an answer, including various affirmative defenses, including, that it is a good faith encumbrancer for value and without notice of any claims by plaintiff with respect to the property, and a counterclaim based upon equitable subrogation and cross claims against its codefendants.

Plaintiff previously moved to consolidate this action with the *Wells Fargo* foreclosure action (Index No. 12555/2011). That motion was granted to the extent of joining the actions for trial (*see* order dated February 29, 2012).

Defendant Wells Fargo moves for summary judgment dismissing the complaint asserted against it and, in the alternative, for summary judgment in its favor on its counterclaim for equitable subrogation. Defendant Wells Fargo asserts that it is a bona fide good faith encumbrancer for value and protected in its title pursuant to Real Property Law § 266, and the conveyances to defendants Bindra and London are not voidable, insofar

as plaintiff cannot establish they are the product of fraud. Defendant Wells Fargo alternatively asserts that, even in the event plaintiff secures a judgment setting aside the Bindra and London deed transfers and its mortgage, it is entitled to an equitable mortgage lien against the property to the degree the proceeds of its loan were used to discharge prior liens against the property.

Plaintiff opposes the motion, asserting that it is premature because discovery is incomplete, since no party has yet been deposed. Plaintiff also asserts that defendant Wells Fargo has failed to demonstrate it is entitled to bona fide encumbrancer status, and there are triable issues of fact as to whether the deeds into defendants Bindra and London are the product of fraud.

It is well settled that the proponent of a summary judgment motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Furthermore, the court’s function on a motion for summary judgment is issue finding, not issue determination (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

A mortgagee’s interest in the property is protected unless it has notice of a previous fraud affecting the title of its grantor (*see Real Property Law § 266; Thomas v Lasalle Bank Nat. Assn.*, 79 AD3d 1015 [2010]; *Mathurin v Lost & Found Recovery, LLC*, 65 AD3d 617 [2009]). In addition, as the Appellate Division, Second Department, in *Stracham v Bresnick*, (76 AD3d 1009 [2010]) explained:

“ “[w]here a purchaser has knowledge of any fact, sufficient to put him [or her] on inquiry as to the existence of some right or title in conflict with that he [or she] is about to purchase, he [or she] is presumed either to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his [or her] claim, to be considered as a bona fide purchaser ” ’ (*Maiorano v Garson*, 65 AD3d 1300, 1303 [2009], *quoting Williamson v Brown*, 15 NY 354, 362 [1857]). Similarly, a mortgagee is under a duty to make an inquiry where it is aware of facts ‘that would lead a reasonable, prudent lender to make inquiries of the circumstances of the transaction at issue’ (*LaSalle Bank Natl. Assn. v Ally*, 39 AD3d 597, 600 [2007]). ‘Actual possession of real estate is sufficient notice to a person proposing to take a mortgage on the property, and to all the

world of the existence of any right which the person in possession is able to establish' (*Phelan v Brady*, 119 NY 587, 591-592 [1890]; see *1426 46 St., LLC v Klein*, 60 AD3d 740, 743 [2009]).”

Summary judgment is not warranted here, particularly on the limited facts presented in the papers submitted and since no parties have been deposed. Furthermore, defendant Wells Fargo has failed to make a prima facie showing that it is protected in its title because it lacked notice of any fraud affecting the title of defendant London, and that plaintiff was not the victim of a fraudulent scheme by the individual defendants to deprive her of her ownership interest in the property. Plaintiff has raised triable issues of fact as to whether she is the victim of a scheme to defraud her of her property and equity therein, and whether her actual possession of the subject premises should have led defendant Wells Fargo to inquire further about defendant Bindra’s ownership thereof and become alerted to the fraud allegedly perpetrated against her by the individual defendants (see *Phelan v Brady*, 119 NY 587, 591-592 [1890], *supra*; *Maiorano v Garson*, 65 AD3d 1300 [2009], *supra*; but see *Fleming-Jackson v Fleming*, 41 AD3d 175 [2007]).

Defendant Wells Fargo offers the affidavit of its employee, Christen J. Beckman, indicating Wells Fargo obtained a title search relative to the subject property prior to the execution of the mortgage, and that the title search did not reveal any conflicts in title with defendant Bindra. Defendant Wells Fargo, however, has failed to present a copy of that title search in support of its motion (CPLR 4523; *Maiorano v Garson*, 65 AD3d 1300 [2009], *supra*; see also *Commandment Keepers Ethiopian Hebrew Congregation of the Living God, Pillar & Ground of Truth, Inc. v 31 Mount Morris Park, LLC*, 76 AD3d 465 [2009]). Instead, it offers a copy of the computer printout from Automated City Register Information System website of the Office of the City Register, New York City Department of Finance, which is not evidence in admissible form (CPLR 3212 [b]; see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986], *supra*). Defendant Wells Fargo, furthermore, has failed to establish a prima facie showing that the deed from plaintiff into Bindra was not the product of fraud in the inducement or factum (*cf. Cash v Titan Financial Services, Inc.*, 58 AD3d 785 [2009]).

Moreover, plaintiff, in her affidavit in opposition to the motion, states among other things, that she has lived at the property for over 30 years, and indicated she never intended to sell her property, and always wanted it to remain in her family. Ms. Beckman, whose claimed knowledge of the relevant facts is based upon her review of the mortgage and closing documents, asserts that Wells Fargo did not become aware of any facts which raised suspicion of fraud or wrongdoing, and did not know plaintiff claimed to reside in the property at the time of the execution of the mortgage. She states the title search failed to reveal that plaintiff resided at the property. Again, no copy of the title search has been provided to the court. More importantly, Ms. Beckman admits that no representative of Wells

Fargo visited the property prior to the execution of the mortgage. Defendant London, in his affidavit offered in support of the motion by defendant Wells Fargo, indicates that plaintiff has been in physical possession and occupancy of the premises “since it was sold to [him] in October 2008.” He too has failed to explain whether he inquired as to whether plaintiff had any right or title to the property which was in conflict with that which he was to purchase.

With respect to that branch of the motion by defendant Wells Fargo which seeks, in effect, conditional summary judgment on its counterclaim for a declaration of entitlement to equitable subrogation, a conditional declaration is appropriate only in those instances where the interests of justice and judicial economy are served by affording the parties with the earliest possible determination as to the extent a party may be expected to be reimbursed (*see McCabe v Queensboro Farm Products, Inc.*, 22 NY2d 204 [1968]; *Lowe v Dollar Tree Stores, Inc.*, 40 AD3d 264 [2007]). In this case, a declaration that defendant Wells Fargo is entitled to equitable subrogation is premature given that the dispute concerning whether plaintiff has any ownership interest in the premises has not yet been resolved (*see Bernard-Cadet v Lee*, [Supreme Court, Queens County, Index No. 8807/2006, order dated February 19, 2008, Satterfield, J.]; *Scott v Doyle*, 12 Misc 3d 1163[A] [2006]; *see also Cain v Bethea*, 2007 WL 2859681, 2007 US Dist LEXIS 75824 [ED NY, August 17, 2007], *adopted in part and rejected in part on other grounds*, 2007 WL 2846914, 2007 US Dist LEXIS 71585 [ED NY, September 26, 2007]).

Accordingly, the motion is denied.

Dated: July 9, 2012

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J.S.C.