

US Bank N.A. v Moultrie
2012 NY Slip Op 33314(U)
January 24, 2012
Sup Ct, Queens County
Docket Number: 11648/2011
Judge: Augustus C. Agate
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

		x
US Bank National Association, as trustee, on behalf of the holders of the CSMC Mortgage Backed Pass- through Certificates, Series 2007-1,	Index Number <u>11648</u>	2011
.		
Plaintiff,	Motion	
	Date <u>November 15,</u>	2011
-against-		
Isaiah Moultrie, et al.,	Motion Cal. Number <u>29</u>	
Defendants	x	Motion Seq. No. <u>1</u>

The following papers numbered 1 to 4 read on this motion by defendant Sperry Associates Federal Credit Union for an order pursuant to CPLR 3211(a)(1) dismissing the complaint against it.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2
Reply Affidavits	3 - 4

Upon the foregoing papers it is ordered that the motion is denied.

On October 27, 2006, defendant Isaiah Moultrie executed a note in the principal amount of \$536,000 in favor of Mortgage Electronic Registration Systems, Inc. (MERS) as nominee for Credit Suisse Financial Corp. Moultrie executed a mortgage covering property known as 25-46 Far Rockaway Blvd., Far Rockaway, New York (the subject property) to secure the loan, and the mortgagee recorded the mortgage on November 6, 2006. Defendant Moultrie made payments on this mortgage loan from October, 2006 to December, 2008, when he defaulted.

According to the plaintiff, on April 10, 2007, an unknown party recorded a fraudulent satisfaction of the MERS mortgage. The satisfaction was made returnable to Angelyn Johnson, Esq., the attorney for Moultrie, not the attorney for either the mortgagee or its servicing agent. Johnson has been indicted for felonies allegedly committed on a mortgage transaction unrelated to the one at bar.

On November 10, 2007, defendant Sperry loaned Moultrie \$300,000, which the lender secured with a mortgage covering the subject property. At the time, Moultrie had taken out five mortgages and/or lines of credit within one calendar year. On December 14, 2007, Sperry recorded the mortgage with the New York City Department of Finance.

On November 10, 2010, the plaintiff received an assignment of the MERS mortgage which was recorded on February 25, 2011. Plaintiff US Bank filed a notice of pendency on or about May 12, 2011.

Plaintiff US Bank commenced the instant action on or about May 12, 2011 by the filing of a summons, complaint, and notice of pendency in order to obtain a judgment pursuant to Article 15 of the Real Property Actions and Proceedings Law cancelling the fraudulent satisfaction of mortgage and establishing the priority of claims to the subject property.

CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. a defense is founded on documentary evidence***." (*See, Galvan v 9519 Third Avenue Restaurant Corp.*, 74 AD3d 743 [2010].) In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim***." (*Fernandez v Cigna Property and Casualty Insurance Company*, 188 AD2d 700, 702 [1992]; *see, Galvan v 9519 Third Avenue Restaurant Corp, supra; Vanderminden v Vanderminden*, 226 AD2d 1037 [1996]; *Bronxville Knolls, Inc. v Webster Town Center Partnership*, 221 AD2d 248 [1995].) In the case at bar, Sperry, relying on Real Property Law §291 and *Baron Associates v Latorre* (74 AD3d 714 [2010]), argues that documentation showing the satisfaction of the mortgage held by the plaintiff and showing the sequence of recordings provides it with a good defense to the complaint. The court disagrees.

Real Property Law § 291, "Recording of conveyances," provides in relevant part: A conveyance of real property, *** may be recorded in the office of the clerk of the county where such real property is situated***. Every such conveyance not so recorded is void as against any person who subsequently purchases or acquires by exchange or contracts to

purchase or acquire by exchange, the same real property or any portion thereof *** in good faith and for a valuable consideration, from the same vendor or assignor, his distributees or devisees, and whose conveyance, contract or assignment is first duly recorded***.” (*See, Witter v Taggart*, 78 NY2d 234 [1991].) “New York has a “race-notice” recording statutory scheme whereby the mortgage recorded first by a mortgagee without notice of any other mortgages will maintain priority over such other mortgages ***.” (*Alliance Funding Co. v Taboada*, 39 AD3d 784, 784 [2007].)

In *Baron Associates v Latorre (supra)* , a mortgagee brought an action to foreclose a mortgage and cancel a satisfaction of mortgage filed with the Office of the City Register of the City of New York for Queens County. In or about December 1999, four defendants executed a mortgage note in the sum of \$100,000 in favor of plaintiff Baron Associates, giving as security a mortgage covering two Queens properties, one located in Woodhaven and the other in Richmond Hill. In October 2002, someone recorded a satisfaction of mortgage pertaining to the Richmond Hill property in the Office of the City Register of the City of New York for Queens County. In April 2003 the Richmond Hill property, was sold to the defendant Iris Vargas, who, in turn, sold it to defendant Rose M. Rotondo in June 2005. On June 22, 2005, Rotondo recorded her deed to the Richmond Hill property. Plaintiff Baron Associates subsequently began its action, alleging that the satisfaction was fraudulent. The Appellate Division held that Rotondo was entitled to summary judgment. The appellate court stated: “Rotondo demonstrated that, in June 2005, when she purchased the Richmond Hill property for value from Vargas, the satisfaction of mortgage had already been duly recorded. She was entitled to rely on the satisfaction of mortgage without conducting any further inquiry ***. Moreover, Rotondo's deed was recorded on June 22, 2005, and the plaintiff did not commence this action and file its notice of pendency until January 2006. Thus, at the time Rotondo purchased the Richmond Hill property, she was not on notice of any prior interest in that property which would lead a reasonably prudent purchaser to make inquiry ***, and there was nothing on the face of the satisfaction of mortgage which would have alerted Rotondo to the plaintiff's claims” (*Baron Associates v Latorre, supra*, 716.)

Sperry reads *Baron Associates v Latorre (supra)* too broadly. The case does not stand for the proposition that a potential purchaser can rely on a filed satisfaction of mortgage in disregard of other facts known or which should be known to it.

“Pursuant to Real Property Law §266, a bona fide purchaser or encumbrancer for value is protected in his or her title unless he or she had previous notice of the alleged prior fraud by the seller ***.” (*Karan v Hoskins*, 22 AD3d 638, 638; *see, Maiorano v Garson*, 65 AD3d 1300; *Fischer v Sadov Realty Corp.*, 34 AD3d 630.) A purchaser is chargeable with knowledge of a title or right in conflict with that which he is about to acquire if the facts

already known to him would have caused a prudent person to make further inquiry. (*See, Maiorano v Garson, supra; Fischer v Sadov Realty Corp., supra.*)

In the case at bar, the plaintiff has alleged that Sperry had notice that (1) defendant Moultrie obtained five mortgages and/or lines of credit within the past calendar year, (2) the five mortgages were satisfied within months of delivery, (3) the five mortgages were satisfied approximately three months before the next mortgage transaction, not simultaneously, (4) five satisfactions were made returnable to Moultrie's attorney, not the attorney for the lenders, and (5) defendant Moultrie's credit report showed an open account with the plaintiff.

On this record, the plaintiff has shown that there is an issue of fact not eliminated by documentary evidence concerning whether Sperry had knowledge of facts which created a duty to inquire further about the existence of a right in conflict with the interest which Sperry intended to acquire. (*See, Maiorano v Garson, supra.*)

Dated: January 24, 2012

Augustus C. Agate, J. S.C.