

Bank of New York Mellon v Perricone
2013 NY Slip Op 32972(U)
November 22, 2013
Sup Ct, Richmond County
Docket Number: 130469/13
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.: 130469/13
Motion No.: 002**

**THE BANK OF NEW YORK MELLON F/K/A
THE BANK NEW YORK, AS SUCCESSOR TO
JP MORGAN CHASE BANK, N.A., AS INDENTURE
TRUSTEE, ON BEHALF OF THE HOLDERS OF THE
TERWIN MORTGAGE TRUST 2006-6,
ASSET-BACKED SECURITIES, SERIES 2006-6,**

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**BARBARA PERRICONE A/K/A BARBARA ANN
PERRICONE, SILVER FALCON PROPERTIES, LLC.,
CITY OF NEW YORK ENVIRONMENTAL CONTROL
BOARD; CITY OF NEW YORK PARKING VIOLATIONS
BUREAU; CITY OF NEW YORK TRANSIT ADJUDICATION
BUREAU, ET AL.,**

Defendants

The following items were considered in the review of the following motion to dismiss.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Affirmation in Opposition	2
Notice of Cross Motion	3
Affirmation in Reply	4
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Defendant Silver Falcon Properties moves for an order pursuant to CPLR 3211 (a)(5) to dismiss the cause of action for reformation based on statute of limitations, CPLR 3211 (a)(7) to dismiss for failure to state a cause of action, and pursuant to CPLR 3211 (a)(1) for dismissal based on documentary evidence. Defendant Barbara Perricone cross moves for an order pursuant to CPLR 3211 (a)(5) to dismiss the reformation claim based on statute of limitations and pursuant to CPLR 3211 (a)(7) to dismiss for failure to state a cause of action upon which relief can be granted. The motion and cross motion are granted.

Facts

This is a foreclosure action whereby plaintiffs seek to divest defendant Perricone of her equitable interest in the premises known as 1027 Hylan Boulevard, Staten Island, New York due to a default on the accompanying mortgage note. On or about April 6, 2006, defendant Perricone executed a mortgage on what the instrument describes as 1027 Hylan Boulevard, Staten Island, New York. The mortgage application filed in connection with the instrument states defendant Perricone's current address as 1027 Hylan Boulevard and further identifies the same as the subject property address. The application indicates it is for a refinance loan originally acquired in 1977 for a cost of \$60,000. Defendant Perricone is also the record owner of additional piece of land known as 131 Radcliff Road, Staten Island, New York. The Radcliff Road and Hylan Boulevard location are both listed on the application, with 131 Radcliff Road having an existing mortgage or lien of \$752,172 and 1027 Hylan Boulevard having an existing \$2,821 mortgage or lien. The mortgage itself contains a property description in the "Transfer Of Rights In The Property" section which states it is the first mortgage lien on the premises and identifies the street address as 1027 Hylan Boulevard. However, the legal description in "Schedule A" reads as follows:

BEGINNING at a point on the Northerly side of Radcliff Road distant 80 feet Westerly from the corner formed by the intersection of the Northerly side of Radcliff Road and the Westerly side of Briarcliff Road; RUNNING THENCE South 57 degrees 09 Minutes 19 seconds East, along the Northerly side of Radcliff Road 80 feet; RUNNING THENCE North 32 degrees 50 minutes 41 seconds East, 100 feet; RUNNING THENCE South 57 degrees 09 minutes 19 seconds West, 80 feet; RUNNING THENCE North 32 degrees 50 minutes 41 seconds East, 100 feet to the Northerly side of Radcliff Road to the point or place of beginning

The description also refers to the premises as 131 Radcliff Road, Staten Island, New York and identifies the block and lot as 3232 and 30, respectively. Plaintiffs contend this legal description was recorded with the mortgage in error and is not otherwise incorporated into the mortgage contract. To this end, they submitted defendant Perricone's initial application and a different "Schedule" which reads as follows:

BEGINNING at a point on the Northerly side of Hylan Boulevard, distant 61.47 feet Westerly from the corner formed by the intersection of the Westerly side of Briarcliff Road and the said Northerly side of Hylan Boulevard; RUNNING THENCE North 32 degrees 50 minutes 41 seconds East 97.14 feet to a point; THENCE South 67 degrees 55 minutes 43 seconds East 84.01 feet to a point; THENCE south 12 degrees 46 minutes 48 seconds West 101.83 feet to a point on the Northerly side of Hylan Boulevard; THENCE along the said Northerly side of Hylan Boulevard on a curve deflecting to the right having a central angle of 3 degrees 40 minutes 22 seconds a distance of 49.68 feet to the point or place of beginning

Plaintiff's obtained the note in question via an assignment from Mortgage Electronic Registration Systems which was recorded with the Clerk of Richmond County on May 8, 2013. This assignment purported to transfer Block 3230 Lot 44 which describes the Hylan Boulevard premises and not the Radcliff Road Location. Plaintiffs thereafter filed this action seeking to 1) reform the legal description of the premises recorded with the mortgage and then 2) foreclose on the reformed mortgage. Plaintiff's main contention is that defendant Perricone intended to mortgage the Hylan Boulevard premises. However, plaintiffs do not submit any affidavits that suggest the parties intent was to ever mortgage the Hylan Boulevard premises. Instead, they rely on the mortgage application which lists 1027 Hylan Boulevard as the subject premises and argue the legal description contained in "Schedule A" was inadvertently included during the closing process without providing evidence suggesting that the mortgagor intended to encumber the Hylan Boulevard location.

In defendant's verified answer to the plaintiff's complaint, defendant Perricone denied that 1027 Hylan Boulevard was the subject premises of the disputed mortgage. Defendants also submitted the affidavit of Mr. Achilles Gatanas, a mortgage loan processor for Real Estate Mortgage Network, who averred that he assisted defendant in obtaining the Home Equity line of credit and that defendant intended to mortgage the 131 Radcliff Road location. He further indicated that defendant Perricone had told him the loan documentation incorrectly identified 1027 Hylan Boulevard and wished the loan documentation be changed to reflect the Radcliff Road property. Thereafter, defendants filed a motion pursuant to CPLR 3212(a) (1), (5) and (7) seeking to dismiss the cause of action based on reformation inasmuch as they argue the evidence provided by plaintiffs was insufficient to suggest the mutual agreement of the parties was incorrectly expressed in the written agreement. Defendant

Silver Falcon contends they have a money judgement on the 1027 Hylan Boulevard property entered by the Supreme Court, Kings County on May 29, 2012 and that plaintiff's interest is limited solely to the Radcliff Road location inasmuch as the legal description filed with the mortgage at issue identifies that premises and omits the metes and bounds description of 1027 Hylan Boulevard.

Discussion

CPLR 3211(a)(7)

“A claim for reformation of a written instrument must be grounded upon either a mutual mistake or fraudulently induced unilateral mistake” contained within the recorded document.¹ This is because the purpose of reformation is to “restate the intended terms of an agreement” when the written agreement does not reflect the original intention of the parties.² It is presumed that “a deliberately prepared and executed document manifests the true intentions of the parties” so much so that “the proponent of reformation is required to proffer evidence, which in no uncertain terms, evinces fraud or mistake and the intended agreement between the parties.”³ Motions based on CPLR 3211 (a)(1) and (a)(5) both require a cognizable claim before one may apply a defense based on documentary evidence or claim the action is untimely.⁴ Thus, it is proper to evaluate whether the plaintiff's have stated a cause of action upon which relief may be granted first. A CPLR 3121(a)(7) motion predicated on the plaintiff's failure to state a claim requires the court to “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.”⁵ While a court may consider evidentiary material submitted by a defendant, so long as the motion is not converted into one for summary judgement, and, “unless it has been shown that a material fact as claimed by

¹ *Greater New York Mutual Insurance Company v. United States Underwriters Insurance Company*, 36 A.D.3d 441, 444 [1st Dept. 2007].

² *George Backer Mgt. Corp. v. Acme Quilting Co.*, 46 N.Y.2d 211, 219 [1978].

³ *Chimart Assoc. v. Paul*, 66 N.Y.2d 570, 574 [1986].

⁴ *Jackson v. Bank of New York Mellon*, 33 Misc 3d 1208 [Sup Ct, Kings County 2011].

⁵ *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994].

the [plaintiff] to be one is not a fact at all and unless it can be said that no significant dispute exists,” dismissal is inappropriate.⁶ Although plaintiff’s complaint does not specify whether the alleged mistake in the legal description of the premises was based on either fraud, mutual mistake or a scrivener’s error, the liberal pleading standard allows the court to find the existence of any cognizable theory.

Reformation based on a scrivener’s error requires “proof of a prior agreement between parties” which was not accurately reduced to writing. If “the only mistake alleged is in the reduction of that agreement to writing,” then such an error may be corrected, no matter how it occurred.⁷ Here, plaintiff’s contend that “the description to Borrower’s other property was somehow inadvertently placed in and amongst” the closing papers such that the legal description referred to 131 Radcliff Road instead of accurately describing the intended premises of 1027 Hylan Boulevard. As stated in the facts, defendant Perricone’s verified answer to the plaintiff’s complaint denied that 1027 Hylan Boulevard was the subject premises of the disputed mortgage. The affidavit of Mr. Gatanas further erodes the plaintiff’s position since he indicated that defendant had told him the loan documentation incorrectly identified 1027 Hylan Boulevard and wished the loan documentation be changed to reflect the Radcliff Road property. Plaintiff’s have not submitted any evidence which would suggest the parties in fact agreed and intended that the Hylan Boulevard premises was the subject of the loan. Thus, it is clear that the requisite standard of showing prior agreement has not been met. As such, the equitable relief of reformation due to scrivener’s error is unavailable to the plaintiffs.⁸

Generally, where a written instrument fails to conform to an agreement between parties, a court will reform said instrument to conform it to the intentions of the parties provided the mistake

⁶ *Weill v. East Sunset Park Realty, LLC*, 101 A.D.3d 859, 859 [2d Dept. 2012] (*quoting Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 [1977]).

⁷ *Born v. Schrenkeisen*, 110 N.Y. 55, 58 [1888].

⁸ *See, e.g. Stonebridge Capital, LLC v. Nomura Intern. PLC*, 24 Misc.3d 1218 [Sup Ct, New York County 2009]; *see also Rosalie Estates v. Colonia Ins. Co.*, 227 A.D.2d 335, 337 [1st Dept. 1996].

concerns a fundamental assumption of the contract.⁹ However, reformation based on mutual mistake “requires proof, by clear and convincing evidence,” that the document incorrectly expresses the intentions of either party.¹⁰ “In the case of unilateral mistake, it must be alleged that one party to the agreement fraudulently misled the other, and that the subsequent writing does not express the intended agreement.”¹¹ Claims for unilateral mistake cannot be substantiated by conclusory allegations but require pleading misrepresentation of a material fact, falsity, intent and deception.¹² Here, it is clear that no cause of action for unilateral mistake has been made out in as much as the plaintiff’s complaint does not specify with any particularity the required elements.

As the legal description of a property contained within a document trumps a conflicting street address¹³, plaintiffs would need to establish that the intent of the mortgagor and mortgagee was to identify 1027 Hylan Boulevard as the subject premises and that this intent was not carried out in the ultimate memorialization of the agreement. Plaintiffs fail to provide any non-hearsay evidence other than an attorney affidavit which would suggest the intent of either party was to encumber the 1027 Hylan Boulevard premises. This is especially true considering defendant’s verified answer and affidavit of Mr. Gatanas which together indicate that defendant Perricone’s intent entering into the process was to mortgage the Radcliff Road premises. It would be improper to reform the deliberately executed document because plaintiff is unable to show exactly what was agreed upon by the parties and thus is unable to meet the heavy burden required to allow reformation.¹⁴ The plaintiff’s have

⁹ *Albany City Sav. Inst. v. Burdick*, 87 N.Y. 40 [1881]; 13 Williston, Contract (3d ed.) S. 1544.

¹⁰ *Migliore v. Manzo*, 28 A.D.3d 620, 621 [2006]; *Harris v. Uhlendorf*, 24 N.Y.2d 463, 468 [1969].

¹¹ *Rosen Auto Leasing, Inc., v. Jacobs*, 9 A.D.3d 798, 800 [2003].

¹² *Barclay Arms v. Barclay Arms Assoc.*, 74 N.Y.2d 644, 646-47 [1978].

¹³ *Congregation Yetev Lev D’Satmar v. 26 Adar N.B. Corp.*, 219 A.D.2d 186 [2d Dept. 1996].

¹⁴ *See, e.g., South Fork Broadcasting Corp. v. Fenton*, 141 A.D.2d 312 [1st Dept. 1988].

failed to make out a cause of action based on any theory of reformation. Therefore, defendant's motion based on CPLR 3211(a)(7) is granted.

CPLR 3211 (a)(5)

Assuming, *arguendo*, that plaintiffs have made out a viable cause of action for reformation, it is otherwise barred by the applicable statute of limitations period which is six years from the date the mistake was made.¹⁵ “On a motion to dismiss a complaint pursuant to CPLR 3211(a)(5) on statute of limitations grounds, the moving defendant must establish, *prima facie*, that the time in which to commence the action has expired.”¹⁶ According to plaintiff's submissions, the mistake was made at the closing when the errant description of the premises inadvertently became part of the executed mortgage. As the closing took place in 2006, in order for the action to be timely filed, it must have initiated by 2012.

CPLR 3211 (a)(1)

To prevail on a CPLR 3212(a)(1) motion, a moving party must demonstrate that “the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law.”¹⁷ In order to be considered documentary, the proffered evidence “must be unambiguous” and “essentially unassailable.”¹⁸ It is axiomatic that when presented with a discrepancy between the street address and legal description of a piece of property, the legal description controls.¹⁹ The legal description attached to the mortgage unequivocally refers to 131 Radcliff Road. Therefore, it trumps any conflicting street addresses contained in the documentation

¹⁵ CPLR § 213(6); *Stidolph v. 77160 Equities Corp.*, 103 A.D.3d 705 [2d Dept. 2013].

¹⁶ *Rakusin v. Miano*, 84 A.D.3d 1051, 1052 [2d Dept. 2011].

¹⁷ *Surace v. Commonwealth Land Title Ins. Co.*, 62 A.D.3d 861, 862 [2d Dept. 2009] (quoting *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 [2002]).

¹⁸ *Fontanetta v. John Doe I*, 73 A.D.3d 78 [2d Dept. 2010]; *Suchmacher v. Manana Grocery*, 73 A.D.3d 1017 [2d Dept. 2010].

¹⁹ 1A Warren's Weed, New York Real Property, Description, §§ 11.01-11.02 [4th ed.].

and would warrant dismissal based on CPLR 3211 (a)(1).

Foreclosure

Even though the action for reformation is hereby dismissed, plaintiff may still maintain their foreclosure action on the mortgage they do hold. In order to substantiate a foreclosure action, the plaintiff must establish that the defendant was a party to the mortgage and that she failed to make the required payments inasmuch as the essential elements of a cause of action for breach of a mortgage contract are “the existence of a contract, the plaintiff’s performance under the contract, the defendant’s breach of that contract, and resulting damages.”²⁰ Here, plaintiff has submitted sufficient evidence to buttress their foreclosure claim. The record reveals the existence of a signed and executed mortgage, as well as a mortgage application signed by defendant on April 6, 2006 and required her to “make Minimum Payments” in one-hundred and twenty equal monthly installments until the maturity date of April 1st, 2026. Defendant was further required to pay the entire outstanding balance at the maturity date. The mortgage language also preserved the right of the lender to foreclose on the property by stating that default in payment may result in a loss of the secured premises. The information contained in the record indicates that a principal balance of \$398,650.83 remained and that the last monthly installment paid was on August 5, 2011.

Furthermore, any foreclosure action would be timely inasmuch as the statute of limitations for an action “upon a mortgage of real property” is six years.²¹ This period begins to run “from the due date for each unpaid installment, or from the time mortgagee is entitled to demand full payment, or from the date the mortgage debt has been accelerated.”²² In other words, accrual of the limitations period only begins “when the claim becomes enforceable, i.e. when all elements of the [cause of

²⁰ *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425 [1st Dept. 2010]; *JP Morgan Chase v. J.H. Elec. Of New York, Inc.*, 69 A.D.3d 802, 803 [2d Dept. 2010].

²¹ CPLR § 213(4)

²² *Plaia v. Safonte*, 45 A.D.3d 747, 748 [2d Dept. 2007].

action] can be truthfully alleged in a complaint.”²³ Thus, an action for foreclosure would be timely until September 5, 2017, which is six years from the date of the first unpaid installment.

Accordingly, it is hereby:

ORDERED, that the motions and cross motions to dismiss The Bank Of New York Mellon’s foreclosure action made by Silver Falcon Properties, LLC and Barbara Perricone, respectively are granted.

ENTER,

DATED: November 22, 2013

Joseph J. Maltese
Justice of the Supreme Court

²³*Booth v. Ameriquest Mortg. Co.*, 63 A.D.3d 770, 771 [2d Dept. 2009] (*quoting Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 94 [1993]).