

U.S. Bank, N.A. v Wern
2015 NY Slip Op 30399(U)
March 17, 2015
Supreme Court, Suffolk County
Docket Number: 09-14389
Judge: Jerry Garguilo
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SHORT FORM ORDER

INDEX No. 09-14389

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 2-25-15
ADJ. DATE 3-17-15
Mot. Seq. # 004 - MotD

U.S. BANK, N.A., as Trustee, Successor-in-Interest to WACHOVIA BANK, N.A., POOLING AND SERVICING AGREEMENT DATED AS OF NOVEMBER 1, 2004, ASSET-BACKED PASS-THROUGH CERTIFICATE SERIES 2004-WWFI,

Plaintiffs,

- against -

CHRISTOPHER J. WERN, JP MORGAN CHASE BANK NA,

Defendants.

GROSS POLOWY & ORLANS LLC
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Hauppauge, New York 11788

Upon the following papers numbered 1 to 34 read on this motion to intervene and for preliminary injunction; ~~Notice of Motion/~~ Order to Show Cause and supporting papers 1 - 11; ~~Notice of Cross Motion and supporting papers~~ _____; Answering Affirmation dated January 30, 2015 and supporting papers 12 - 23; Answering Affirmation dated February 18, 2015 and supporting papers 24 - 34; ~~Other~~ _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by order to show cause by non-party LJ Equities for a preliminary injunction restraining, enjoining and staying plaintiff from proceeding with the foreclosure sale of 15 Wagon Lane East, Centereach, New York, vacating the judgment of foreclosure and sale dated October 14, 2014, adjudging LJ Equities LLC a necessary party to this action and granting it leave to intervene pursuant to CPLR 1012 and 1013, and vacating defendant Chrisotpher J. Wern's default pursuant to CPLR 5015 is determined herein.

This is an action to foreclose a mortgage on premises known as 15 Wagon Lane East, Centereach, New York. On November 19, 2004, Defendant Christopher J. Wern (defendant) executed an adjustable rate note in favor of Argent Mortgage Company, LLC (Argent) agreeing to pay \$324,000.00 at the starting yearly rated of 6.900%. On the same date, defendant also executed a mortgage in the principal sum of \$324,000.00 on the subject property. As a result of defendant's continuing default, plaintiff commenced this foreclosure action by filing a lis pendens, summons and complaint on April 15, 2009 with the Suffolk County Clerk's Office. In its complaint, plaintiff alleges

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in pertinent part that defendant breached his obligations under the terms of the note and mortgage by failing to make his monthly payments commencing with the October 1, 2008 installment. Defendant neither appeared nor answered during the pendency of this action.

Plaintiff subsequently moved for an order of reference and by order dated June 8, 2010, the court granted plaintiff's application (Doyle, J.). On April 12, 2012, plaintiff re-filed its notice of pendency and on October 25, 2012, plaintiff moved to appoint a substitute referee which was granted by this Court by order dated December 4, 2013. Thereafter, plaintiff moved to confirm the referee's oath and report through a judgment of foreclosure and sale. By order dated September 24, 2014, this Court granted plaintiff's application. Subsequently, a foreclosure sale was noticed and scheduled for January 28, 2015.

On February 5, 2015, non-party LJ brought this application seeking a preliminary injunction enjoining and restraining plaintiff from taking any action with respect to the subject premises and from proceeding with and/or scheduling its foreclosure sale, vacating the judgment of foreclosure and sale, vacating the default of defendant, adjudging LJ a necessary party to this action and granting it leave to intervene, and compelling plaintiff to accept its proposed answer. Non-party LJ Equities LLC (LJ) asserts that it is the current title holder to the subject premises at issue by virtue of a deed conveying same from defendant to LJ. It also alleges that the deed was recorded on April 4, 2013 with the Suffolk County Clerks Office. Notably, neither a copy of the deed nor proof of recording has been submitted with LJ's application.

In support of its motion, LJ submits an affirmation in support of intervention, a notice of appearance dated January 16, 2015, a copy of the assignment of mortgage dated April 7, 2009, a copy of the defendant's note, a copy of plaintiff's affidavit of merit in support of an order of reference, a copy of the complaint, a proposed verified answer containing denials and affirmative defenses and, a copy of the judgment of foreclosure and sale.

In its opposition papers, plaintiff asserts that LJ is not entitled to intervene in the matter. Plaintiff further argues that LJ allegedly purchased the premises with at least constructive notice of the subject mortgage and thus is subject to it, that defendant Wern is not entitled to vacatur of his default pursuant to CPLR 5015 and that defendant and LJ waived any defense of standing by failing to make a pre-answer motion to dismiss or otherwise interpose and answer raising such as an affirmative defense.

In order to terminate the interest of one who is an occupant of a property prior to the foreclosure, that occupant must be named as a defendant and if not so named, the tenancy survives the foreclosure (*Matter of SI Bank and Trust v Sheriff of City of New York*, 300 AD2d 667, 751 NYS2d 794 [2d Dept 2002]; *Nationwide Associates, Inc. v Brunne*, 216 AD2d 547, 629 NYS2d 769 [2d Dept 1995]). Whether intervention is sought as a matter of right under CPLR 1012 (a), or as a matter of discretion under CPLR 1013, is of little practical significance, since intervention should be permitted "where the intervenor has a real and substantial interest in the outcome of the proceedings" (*Wells Fargo Bank, N.A. v McLean*, 70 AD3d 676, 677, 894 NYS2d 487 [2d Dept 2010]; see *Berkoski v Board of Trustees of Inc. Vil. of Southampton*, 67 AD3d 840, 843, 889 NYS2d 623 [2d Dept 2009]; *Perl v Aspromonte Realty Corp.*, 143 AD2d 824, 825, 533 NYS2d 147 [2d Dept 1988]).

Here, LJ is entitled to intervene in this action as a party defendant inasmuch as it has sufficiently established that representation of its interests by the parties will be inadequate, that the action involves the disposition of title to real property, and that it will be bound and adversely affected by the judgment of foreclosure and sale (*see* CPLR 1012 [a] [2], [3]; *ABM Resources Corp. v Doraben, Inc.*, 89 AD3d 773, 933 NYS2d 296 [2d Dept 2011]).

“[T]he lien of a mortgage is extinguished upon the sale of the real property affected thereby unless the purchaser has knowledge, either actual or constructive, of the existence of the mortgage” (*Baccari v De Santi*, 70 AD2d 198, 201, 431 NYS2d 829 [2d Dept 1979]). A purchaser who has completed the examination of the basic conveyances comprising the chain of title must ascertain whether the property is encumbered by mortgages (*see Astoria Fed. Sav. & Loan Assn. v June*, 190 AD2d 644, 593 NYS2d 250 [2d Dept 1993]; *see also Fairmont Funding, Ltd. v Stefansky*, 301 AD2d 562, 754 NYS2d 54 [2d Dept 2003]). The intended purchaser must be presumed to have investigated the title, and to have examined every deed or instrument properly recorded, and to have known every fact disclosed or to which an inquiry suggested by the record would have led (*see Andy Assoc. v Bankers Trust Co.*, 49 NY2d 13, 424 NYS2d 139 [1979]; *Astoria Fed. Sav. & Loan Assn. v June*, 190 AD2d 644; *see also Fairmont Funding, Ltd. v Stefansky, supra*). If the purchaser fails to use due diligence in examining the title, he or she is chargeable, as a matter of law, with notice of the facts which a proper inquiry would have disclosed (*see People v Luhrs*, 195 NY 377, 89 NE 171 [1909]; *Cambridge Valley Bank v Delano*, 48 NY 326 [1872]; *Astoria Fed. Savings & Loan Assn. v June*, 190 AD2d 644, 593 NYS2d 250; *see also Fairmont Funding, Ltd. v Stefansky, supra*).

Here, pursuant to CPLR 6501, plaintiff’s filing of a notice of pendency provided constructive notice of an action in which the judgment demanded may affect the title to real property (*see Green Point Sav. Bank v St. Hilaire*, 267 AD2d 203, 699 NYS2d 458 [2d Dept 1999]; *Goldstein v Gold*, 106 AD2d 100, 483 NYS2d 375 [2d Dept 1984]). The statute further provides that a person whose conveyance is recorded after the filing of a notice of pendency is bound by all proceedings taken in the action after such filing to the same extent as if he or she were a party (*see* CPLR 6501; *Mallick v Farfan*, 66 AD3d 649, 885 NYS2d 774 [2d Dept 2009]; *Novastar Mtge. Inc. v Mendoza*, 26 AD3d 479, 811 NYS2d 411 [2d Dept 2006]; *Green Point Sav. Bank v St. Hilaire*, 267 AD2d 203, 699 NYS2d 458 [2d Dept 1999]). “[T]o cut off a prior lien, such as a mortgage, the purchaser must have no knowledge of the outstanding lien *and* win the race to the recording office” (*see Mortgage Electronic Registration Systems, Inc. v Pagan*, 119 AD3d 749, 991 NYS2d 51 [2d Dept 2014]; *citing Goldstein v Gold, supra*).

Moreover, LJ has failed to demonstrate that it is a bona fide encumbrancer for value (*see* Real Property Law § 266; *Phelan v Brady*, 119 NY 587 [1890]; *Maiorano v Garson*, 65 AD3d 1300, 886 NYS2d 190 [2d Dept 2009]). “ ‘[W]here a purchaser has knowledge of any fact, sufficient to put him on inquiry as to the existence of some right or title in conflict with [what] he is about to purchase, he 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 claim, to be considered as a *bona fide* purchaser’ ” (*Lucas v J & W Realty & Constr. Mgt., Inc.*, 97 AD3d 642, 949 NYS2d 391 [2d Dept 2012], *quoting Williamson v Brown*, 15 NY 354 [1857]; *see Maiorano v Garson, supra*; *Ward v Ward*, 52 AD3d 919, 859 NYS2d 774 [3d Dept 2008]). “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' ” (*Lucas v J & W Realty & Constr. Mgt., Inc.*, 97 AD3d 642, quoting *Lasalle Bank Natl. Assn. v Ally*, 39 AD3d 597, 835 NYS2d 264 [2d Dept 2007]). Here, notwithstanding the absence of the alleged deed in LJ’s moving papers, neither LJ nor its attorney mention whether they had a title search performed prior to the purchase of the property. Therefore, LJ had constructive notice of plaintiff’s mortgage lien and was chargeable with the duty to make further inquiry to determine whether the lien had been satisfied or released (see *Andy Assoc. v Bankers Trust Co.*, 49 NY2d 13, 424 NYS2d 139; see also Real Property Law § 291; *Congregation Beth Medrosh of Monsey, Inc. v Rolling Acres Chestnut Ridge, LLC*, 101 AD3d 797, 956 NYS2d 95 [2d Dept 2012]). Under the circumstances, LJ cannot claim to be a bona fide purchaser for value without notice of plaintiff’s prior encumbrance and, therefore, is not entitled to the protection of the recording statutes (see Real Property Law § 291; *Fairmont Funding, Ltd. v Stefansky*, *supra*; see also *HSBC Mortg. Services, Inc. v Alphonso*, 58 AD3d 598, 874 NYS2d 131 [2d Dept 2009]). Its interest in the property, if any, is subject to the prior interest of plaintiff.

“A party seeking the drastic remedy of a preliminary injunction has the burden of demonstrating, by clear and convincing evidence, (1) a likelihood of ultimate success on the merits, (2) the prospect of irreparable injury if the provisional relief is withheld, and (3) a balancing of the equities in the movant’s favor” (*Berkoski v Board of Trustees of Inc. Vil. of Southampton*, 67 AD3d 840, 844, 889 NYS2d 623 [2d Dept 2009]; see *Shasho v Pruco Life Ins. Co. of N.J.*, 67 AD3d 663, 665, 888 NYS2d 557 [2d Dept 2009]; *Ying Fung Moy v Hohi Umeki*, 10 AD3d 604, 781 NYS2d 684 [2d Dept 2004]). “The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual” (*Ruiz v Meloney*, 26 AD3d 485, 810 NYS2d 216 [2d Dept 2006]). “The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court” (*Arcamone–Makinano v Britton Prop., Inc.*, 83 AD3d 623, 920 NYS2d 362 [2d Dept 2011]). Here, LJ failed to demonstrate that it was a bona fide purchaser for value and the balance of the equities do not favor the issuance of the preliminary injunction in this action (compare *Perpignan v Persaud*, 91 AD3d 622, 936 NYS2d 261 [2d Dept 2012]; *Gates v Easy Living Homes, Inc.*, 29 AD3d 733, 815 NYS2d 683 [2d Dept 2006]). Therefore, its request for a preliminary injunction is denied.

A defendant seeking to vacate his or her default under CPLR 5015 must provide a reasonable excuse for the default and show a potentially meritorious defense (see *Eugene Di Lorenzo, Inc. v A.C. Dutton Lbr., Co.*, 67 NY2d 138, 501 NYS2d 8 [1986]; *ACT Prop., LLC v Ana Garcia*, 102 AD3d 712, 957 NYS2d 884 [2d Dept 2013]; *Deutsche Bank Natl. Trust Co. v Gutierrez*, 102 AD3d 825, 958 NYS2d 472 [2d Dept 2013]; *Wells Fargo Bank, N.A. v Russell*, 101 AD3d 860, 955 NYS2d 654 [2d Dept 2012]). As defendant has offered no reasonable excuse for his default in answering¹, the court need not address whether defendant has a meritorious defense (see *Deutsche Bank Natl. Trust Co. v Gutierrez*, *supra*; *Wells Fargo Bank, N.A. v Russell*, *supra*). *ACT Prop., LLC v Ana Garcia*, 102 AD3d 712; *Deutsche Bank Natl. Trust Co. v Gutierrez*, 102 AD3d 825, 958 NYS2d 472 [2d Dept 2013]).

¹ It is noted that defendant Wern has not submitted an affidavit setting forth a reasonable excuse for his default.

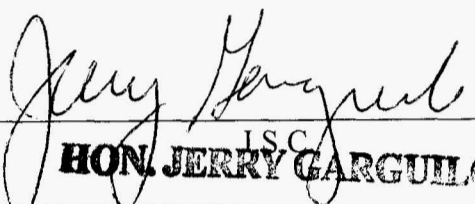
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LJ's remaining demands for relief include claims for dismissal of the complaint on the grounds that the plaintiff allegedly lacks standing to prosecute its claims for foreclosure. However, the defense of standing was waived by the defendant due to the unsuccessful attempt to secure a vacatur of his default in answering, the absence of any duly served answer raising such defense and his failure to timely move for dismissal under CPLR 3211 (*see Countrywide Home Loans Serv., LP v Albert*, 78 AD3d 983; *Deutsche Bank Trust Co., Am. v Stathakis*, 90 AD3d 983, 935 NYS2d 651 [2d Dept 2011]; *Holubar v Holubar*, 89 AD3d 802, 934 NYS2d 710 [2d Dept 2011]).

The remaining assertions contained in LJ's application are denied as being without merit.

As a result of the foregoing, the preliminary injunction restraining, enjoining and staying plaintiff from proceeding with the foreclosure sale of 15 Wagon Lane East, Centereach, New York is hereby vacated.

Dated: March 17, 2015



HON. JERRY GARGUILO
JSC

____ FINAL DISPOSITION X NON-FINAL DISPOSITION