

**Suffolk County Natl. Bank v 1530 N. Hwy., LLC**

2015 NY Slip Op 30892(U)

May 18, 2015

Supreme Court, Suffolk County

Docket Number: 9787/2012

Judge: Jr., Andrew G. Tarantino

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At **PART 50** of the Supreme Court in and  
for the County of Suffolk, at One Court  
Street, Annex Building, Riverhead, New  
York, on **MAY 18 2015**.

PRESENT

HON. ANDREW G. TARANTINO, JR.  
A.J.S.C.

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**SUFFOLK COUNTY NATIONAL BANK,**  
Plaintiff(s)

-against-

**1530 NORTH HIGHWAY, LLC, HSBC BANK  
USA, N.A., ANTHONY TOSCANO, 4 B'S REALTY  
1530 CR39, LLC, ANGELO TOSCANO and  
ANGELA TOSCANO,**  
Defendant(s).  
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Index No. **9787/2012**  
Motion seq. **004: MG  
005: XMD**  
Orig. Date: 4/29/2015  
Adj. Date: 5/5/2015

**ORDER DISCONTINUING  
ACTION AND DENYING  
CROSS MOTION TO AMEND  
ANSWER AND IMPOSE A  
STAY**

Upon consideration of the Notice of Motion of the plaintiff Suffolk County National Bank ["SCNB" or "the plaintiff"], for an order pursuant to CPLR 3217 (b) discontinuing this action in its entirety, and the supporting affirmation, and upon consideration of the Notice of Cross Motion on behalf of the defendants 1530 North Highway LLC and Anthony Toscano ["the defendants"], for an order granting the defendants leave to amend the Answer to assert a counterclaim for declaratory relief and a stay of the scheduled sale of real property owned by defendant 1530 North Highway, LLC, the affirmation in opposition to the plaintiff's dismissal motion and in support of the [defendants'] cross motion, exhibits A through F, and the defendants' memorandum of law in support of its cross motion, it is now

*ORDERED* that the plaintiff's motion (seq. 004) and the defendants' cross motion (005) are considered together for purposes of this determination; and it is further

*ORDERED* that the plaintiff's motion is granted; and it is further

*ORDERED* that the plaintiff is directed to serve a copy of this Order upon the Clerk of the Court within twenty days hereof; and it is further

*ORDERED* that the branch of the defendants' cross motion to amend the Answer, is denied; and it is further

*ORDERED* that the branch of the defendants' motion for a stay of the sale of the premises located at 1530 County Road 39, Southampton is denied.

5/19  
x

The parties' familiarity with the underlying facts and the two previous Orders of this Court dated July 11, 2014, and December 31, 2014, respectively, is assumed and will not be repeated here except to the extent necessary to inform the instant decision. The action was commenced on April 23, 2012, more than three years ago, to remove certain liens encumbering the premises located at 1530 County Road 39, Southampton ["the subject premises"], which appeared in favor of defendants HSBC Bank USA, N.A. ["HSBC"], and 4B's Realty 1530 CR39, LLC [4B's"], in order to enable SCNB to engage the Suffolk County Sheriff to sell the subject premises.

By way of background, the plaintiff secured a judgment in the amount of \$856,608.94 against the defendants, Angelo Toscano ["Angelo"], and Angela Toscano, on April 18, 2008. At the time that SCNB's judgment was entered, Angelo was the title owner of the subject premises, described as a lot of 1.34 acres improved by a 15,000 +/- sq. building. On December 24, 2008, Angelo conveyed the subject premises to his brother, the defendant, Anthony Toscano ["Anthony"]. At the time of the conveyance to Anthony, the subject premises was encumbered by three liens: a first mortgage in the principal sum of \$1.7 million dollars held by the defendant 4B's, a federal tax lien in excess of \$2 million dollars, and the plaintiff's judgment in the amount of \$856,608.94.

According to an affidavit submitted by Anthony Toscano in support of a previous request for a stay of sale (motion sequence 002), in consideration for the transfer of title, Anthony satisfied 4B's mortgage by a payment of in excess of \$2.5 million dollars including interest accrued on the mortgage, secured a release of the federal tax lien by payment of \$624,000.00 to the IRS, and paid the plaintiff, SCNB, the amount of \$150,000 to obtain a release of the plaintiff's lien in the amount of \$856,608.94. Anthony maintained on his previous motion for a stay of the sale of the subject premises that he became subrogated to the extent of the consideration paid to the mortgagee, 4B's, and the federal government. In addition, Anthony maintains that the plaintiff should have executed and filed a partial satisfaction of judgment, a release of the lien of the judgment against the property, and proceeded to collect the balance of the judgment against Angelo and Angela. The stay of the sheriff's sale was continued by the July, 2014, Order, and the parties thereafter appeared for a series of settlement conferences before the Court which were ultimately unsuccessful.

SCNB moved for reargument of the Order continuing the stay of the sale, and again, the defendants argued that under the principle of equitable subrogation, the defendants had priority over SCNB's judgment because Anthony had paid the lienholders 4B's and the IRS, and in any event, the plaintiff had a duty to marshal the assets from which it may seek collection of its judgment before proceeding against the property now owned by defendant 1530.<sup>1</sup> In the December 31, 2014, order, the Court rejected the defendants' arguments and vacated the stay, explicitly permitting the plaintiff to proceed with the enforcement of its judgment through a sale of the subject premises. The defendants did not move to reargue that order and did not file a notice of appeal.

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<sup>1</sup> Anthony avers that purely as an estate planning vehicle for his personal benefit, he transferred title in the subject premises from his name to 1530 North Highway, LLC, the present record owner of the subject premises, on February 27, 2012.

On this motion (sequence 004), the plaintiff seeks to discontinue the action, HSBC<sup>2</sup> having voluntarily executed a satisfaction of mortgage, and 4B's having also recorded a satisfaction of mortgage. The defendants oppose the motion and cross move to Amend their Answer to allege a counterclaim (sequence 005), once more claiming first, that they hold a prior and superior lien to that of the plaintiff by virtue of the principle of equitable subrogation, and that in any event, the plaintiff has a duty to marshal the assets before executing on the subject premises. The defendants affirmatively seek leave of court to convert the first affirmative defense in the Answer into a counterclaim for declaratory relief adjudging that Anthony and 1530 are subrogated to the extent of approximately \$250,000.00 of the mortgage lien formerly held by 4B's, which mortgage was a superior lien to the plaintiff's judgment. They also seek to eliminate the second affirmative defense and request an immediate stay of the sheriff's sale scheduled for June 2, 2015.

The defendants' renewed argument in support of its cross motion is once again grounded on the principle of equitable subrogation but is based on new information suddenly uncovered and disclosed for the first time in this three year old action. The defendants claim that "... certain developments have occurred since this Court's order dated 12/31/14 and entered on 1/5/15, which, upon reargument abated the stay of the Plaintiff from enforcing its judgment against [the subject premises]. (Cross Moving affirmation, ¶ 3). The newly alleged facts are as follows.

Shortly after SCNB obtained its judgment, on May 6, 2008, the Toscano brothers, Anthony and Angelo, entered into a property "Swap Agreement". That same date they entered into a purchase and sale agreement for the subject property [the "1530 Contract"]. The two agreements contained cross-performance conditions under the heading "Linkage".

The 1530 contract required Angelo to convey the subject property free and clear of liens, to remove objections to the transfer of title, and furnish an escrow deposit in the amount of \$250,000.00 as security for Angelo's obligation to evict the tenant at the subject premises, a company of which Angelo was a member.<sup>3</sup> At the closing, Angelo was unable to furnish the \$250,000.00 security deposit. Nevertheless, the closing documents were executed and title to the subject premises was delivered to Anthony. In lieu of furnishing the \$250,000.00 escrow deposit, Angelo delivered to Anthony a Security Agreement dated December 23, 2008, in which Angelo "collateralized his acknowledged obligation 'to pay off [SCNB's] remaining lien" by a pledge of Angelo's interest in the tenant company and the arrears owed by that company. However, the tenant company went bankrupt without paying any portion of the rental arrears and Angelo's interest in the tenant company was rendered worthless. Since Angelo disputed the amount owed to 4B's, the mortgagee of the subject premises, Anthony ultimately paid 4B's an additional sum of \$250,000.00, which the dependants assert for the first time here, make Anthony a "creditor" of Angelo, entitling him to the benefits of the marshaling of Angelo's assets by SCNB.

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<sup>2</sup> HSBC is the successor to 4B's.

<sup>3</sup> Curiously, this new information was not included in Anthony's affidavit submitted on motion sequence 002 detailing the terms of the purchase and sale of the subject premises.

To put the defendants' newly introduced argument into context, in the Order granting SCNB's motion for reargument and to lift the stay of the sale of the subject premises dated December 31, 2014, the Court rejected the defendants' argument that marshaling the assets applied because that doctrine only applies "where there are two competing creditors," and is inapplicable where, as here, "the 1530 defendants are not, like plaintiff, creditors of Angelo". For the first time, the defendants introduce the three agreements from 2008 between Angelo and Anthony to establish first, that the doctrines of equitable subrogation and marshaling of assets, are indeed applicable, and second, that application of these principles give Anthony a prior lien on the subject premises.

"The doctrine of equitable subrogation applies in New York 'where the funds of a mortgagee are used to satisfy the lien of an existing, known incumbrance when, unbeknown to the mortgagee, another lien on the property exists which is senior to his but junior to the one satisfied with his funds. In order to avoid the unjust enrichment of the intervening, unknown lienor, the mortgagee is entitled to be subrogated to the rights of the senior incumbrance' (*King v. Pelkofski*, 20 N.Y.2d 326, 333-334, 282 N.Y.S.2d 753, 229 N.E.2d 435). The doctrine operates to 'erase [ ] the lender's mistake in failing to discover intervening liens, and grants him the benefit of having obtained an assignment of the senior lien that he caused to be discharged' (*United States v. Baran*, 996 F.2d 25, 29). In this manner, equitable subrogation 'preserves the proper priorities by keeping the first mortgage first and the second mortgage second' (*Bank of America, N.A. v. Prestance Corp.*, 160 Wash.2d 560, 565, 160 P.3d 17 [2007] ), and prevents 'a junior lienor from converting the mistake of the lender "into a magical gift for himself"' (*United States v. Baran*, 996 F.2d at 29, quoting *Long Is. City Sav. & Loan Assn. v. Skow*, 25 A.D.2d 880, 881, 270 N.Y.S.2d 234)." *Arbor Commercial Mortg., LLC v. Associates at the Palm, LLC*, 95 A.D.3d 1147, 1149, 945 N.Y.S.2d 694 [2d Dept. 2012]).

The doctrine of equitable subrogation was asserted by the defendants on SCNB's reargument motion and to lift the stay (003), and was rejected by the Court as a valid basis to continue the stay. It is likewise rejected here for the simple reason that equitable subrogation is inapplicable on the facts here.

It is undisputed that Anthony knew about SCNB's judgment against Angelo before Anthony satisfied 4B's lien and the tax lien, respectively. In fact, Anthony supposedly made a \$150,000.00 payment toward satisfying SCNB's judgment at the same time he satisfied the other two prior judgments. Since Anthony had actual knowledge of SCNB's judgment when he satisfied the liens of 4B's and the IRS, the doctrine of equitable subrogation is unavailable to Anthony and provides no basis for the sought-after counterclaim ( *see Arbor Commercial Mortg., LLC v. Associates at the Palm, LLC*, 95 A.D.3d at 1150; *see also King v Pelkofski*, 20 N.Y.2d 326, 229 N.E.2d 435, 282 N.Y.S.2d 753 [1967]).

