

Bank v Verzo

2015 NY Slip Op 31974(U)

October 13, 2015

Supreme Court, Suffolk County

Docket Number: 24323/2014

Judge: Thomas F. Whelan

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COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 08/27/15
SUBMIT DATE: 09/25/15
Mot. Seq. # 001- MD
CDISP: NO

-----X
ASTORIA BANK,
:
:
Plaintiff, :
:
:
ABABELL VERZO, GLORIA M. JARAMILLO, :
MORTGAGE ELECTRONIC REGISTRATION :
SYSTEMS INC, THE SUFFOLK COUNTY :
CLERK'S OFFICE AND JOHN DOE #1 -12, :
these last twleve names being fictitious and :
unknown to the plaintiff intended as persons :
or entities having some claim or interest in the :
premises described in the complain :
-----X

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Upon the following papers numbered 1 to _____ read on this ____, Notice of motion/Order to Show Cause and supporting papers 1 -; Notice of Cross Motion & Supporting papers _____; Opposing papers; _____; Reply papers _____; Other ____; (and after hearing the parties in support of and in opposition to the motion) it is,

ORDERED that this motion (#001) by the plaintiff for a default judgment on its complaint in this action for an order compelling a determination of title under certain deeds and to compel the defendant Suffolk County Clerk to record a copy of a lost mortgage and/or to declare the plaintiff the possessor of an equitable mortgage is considered under CPLR 3215 and RPAPL Article 15 and is denied.

The plaintiff commenced this action for a judgment directing the Suffolk County Clerk to record a photo copy of a deed dated October 20, 2008 from defendant J aramillo to defendant Verzo and a photo copy of a mortgage dated October 20, 2008 allegedly given by defendant Anabell Verzo to Astoria Federal Savings and Loan Association, an apparent predecessor of the plaintiff. The monies allegedly advanced by the original lender were purportedly used by defendant Verzo to purchase residential real property from defendant Jaramillo on August 20, 2008. Defendant Jaramillo previously obtained title to the premises by a deed dated February 24, 2006 issued by her and her husband. The plaintiff alleges

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that “the Deed and Mortgage were entrusted to a representative of the title and abstract company for the purposes of recording such instruments with the Suffolk County Clerk” (*see* ¶ 15 of the complaint) and “upon information and belief the original Deed and original Mortgage have been lost or inadvertently destroyed” (*see* ¶ 16 of the complaint). The plaintiff alleges that it is the holder of a note secured by a subject mortgage (*see* ¶ 4 of the complaint).

The plaintiff characterizes this action as one pursuant to RPAPL Article 15 (*see* ¶ 1 of the complaint) and it separately states seven different causes of action in its complaint. The relief demanded therein is as follows: 1) An order or judgment declaring that title to the premises vested in defendant Verzo as of October 20, 2008 by virtue of the execution and delivery of the deed and that such deed extinguishes any claim of ownership of the premises by defendant Jaramillo after that date and an order directing defendant Suffolk County Clerk to record said judgment in the land records evidencing such declaration; 2) an Order or Judgment directing the defendant Clerk to accept for recording and then to record, a copy of the Deed dated October 20, 2008 upon payment of all fees due, with the same force and effect as if the original had been recorded on October 20, 2008; 3) in the alternative, an Order or Judgment compelling defendants Jaramillo and Verzo to execute and deliver for recording a duplicate original of the subject deed so that it may be recorded, nunc pro tunc, upon payment of fees and applicable taxes.

The same relief is then separately sought with respect to the validity of the plaintiff’s security interest in the premises and its mortgage lien under the terms of the lost mortgage indenture. The plaintiff thus seeks in its Fourth cause of action a declaration of such lien’s superiority over the claims of defendants Jaramillo and Verzo and that the Clerk be directed to record the declaratory judgment. In the Fifth cause of action, the plaintiff seeks an Order or Judgment directing the defendant Clerk to accept for recording and then to record, a copy of the mortgage dated October 20, 2008 upon payment of all fees due, with the same force and effect as if the original had been recorded on October 20, 2008. Alternatively, the plaintiff seeks a judicial directive compelling defendant Verzo to execute a duplicate copy of the mortgage in favor of the plaintiff. On the Seventh cause of action, the plaintiff seeks, alternatively, an Order or Judgment declaring that the debt due by Anabell Verzo to the plaintiff in the original amount is secured by an equitable lien/constructive trust on the premises in favor of the plaintiff in the amount of the original principal sum of \$287,500.00 and that the Clerk be directed to record such judgment in the land records. Finally, the plaintiff demands on all causes of action that the court declare the defendants and all persons and entities claiming under them by title accruing after the filing of the judgment roll or the notice of pendency be forever barred and precluded from asserting such a claim, the invalidity of which is established in this action.

In addition to joining as party defendants, Jaramillo and Verzo, the plaintiff joined Mortgage Electronic Registration Systems, Inc., the alleged holder of an unidentified prior mortgage lien against the premises that was recorded in the office of the Suffolk County Clerk in January of 2006, as relief in the nature of bar claims appears to be sought by the plaintiff against all defendants in the last paragraph of the wherefore clause of the complaint. The plaintiff also joined the Suffolk County Clerk as a defendant as relief in the nature of mandamus or mandatory injunctive relief is sought against this defendant. However, by stipulation dated July 9, 2015, the plaintiff discontinued its claims against the

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Suffolk County Clerk. Although the plaintiff named unknown defendants, the court is without proof of their joinder as party defendants through service of process.

By the instant motion, the plaintiff seeks a default judgment on its complaint. For the reasons stated, the motion is denied.

Entitlement to a default judgment rests upon the plaintiff's submission of proof of service of the summons and complaint, proof of the facts constituting the claim and proof of the defaulting party's default in answering or appearing (*see* CPLR 3215(f); *U.S. Bank Nat. Ass'n v Alba* 130 AD3d 715, 11 NYS2d 864 [2d Dept 2015]; *HSBC Bank USA, N.A. v Alexander*, 124 AD3d 838, 4 NYS2d 47 [2d Dept 2015]; *Interboro Ins. Co. v Johnson*, 123 AD3d 667, 1 NYS3d 111 [2d Dept 2014]; *Todd v Green*, 122 AD3d 831, 997 NYS2d 155 [2d Dept 2014]; *Oak Hollow Nursing Center v Stumbo*, 117 AD3d 698, 985 NY.2d 269 [2d Dept 2014]; *U.S. Bank, Nat. Ass'n v Razon*, 115 AD3d 739, 981 NYS2d 571 [2d Dept 2014]; *Dela Cruz v. Keter Residence, LLC*, 115 AD3d 700, 981 NYS2d 607 [2d Dept. 2014]; *Kolonkowski v Daily News, L.P.*, 94 AD3d 704, 941 NYS2d 663 [2d Dept. 2012]; *Triangle Properties #2, LLC., v Narang* 73 AD3d 1030, 903 NYS2d 424 [2d Dept 2010]). While the quantum of proof necessary to support an application for a default judgment is not as exacting as the proof required on a motion for summary judgment, some firsthand confirmation of the facts forming the basis for the claim must be presented (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 760 NYS2d 727 [2003]; *Feffer v Malpeso*, 210 AD2d 60, 619 NYS2d 46 [2d Dept 1994]). Accordingly, the plaintiff must advance facts from which the court may discern the plaintiff's possession of one or more viable claims for relief against the defaulting defendant in an affidavit or verified complaint by a party or other person possessed of knowledge of the facts alleged (*see see Boudine v Goldmaker, Inc.*, 130 AD3d 553, 2015 WL 3972170 [2d Dept 2015]; *DLJ Mortg. Capital, Inc. v United General Title Ins. Co.*, 128 AD3d 760, 9 NYS3d 335 [2d Dept 2015]; *Williams v North Shore LIJ Health Sys.*, 119 AD3d 937, 989 NYS2d 887 [2d Dept 2014]; *CPS Group, Inc. v Gastro Enter. Corp.*, 54 AD3d 800, 863 NYS2d 764 [2d Dept 2008]; *Resnick v Lebovitz*, 28 AD3d 533, 813 NYS2d 480 [2d Dept. 2006]; *Beaton v Transit Facility Corp.*, 14 AD3d 637, 789 NYS2d 314 [2d Dept. 2005]), together with proof of the amount due, if sufficiently certain (*see* CPLR 3215(f). Where these elements are established, a motion for entry of a default judgment should be granted (*see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 760 NYS2d 727 [2003]; *Csaszar v County of Dutchess*, 95 AD3d 1009, 943 NYS2d 610 [2d Dept 2012]; *King v King*, 99AD3d 672, 951 NYS2d 565 [2d Dept 2012]; *Tarrytown Professional Center, Inc. v Family Medicine of Tarrytown*, 93 AD3d 712, 939 NYS2d 868 [2d Dept 2012]). Where they are not the motion should be denied (*see DLJ Mortg. Capital, Inc. v United General Title Ins. Co.*, 128 AD3d 760, *supra*).

Here, the moving papers of the plaintiff failed to establish its entitlement to the default judgment demanded by it. None of the causes of action targeting the Suffolk County Clerk are viable in light of the plaintiff's discontinuance of its claims against the Clerk. That the Clerk is a necessary party defendant is clear since the plaintiff's claims against her sound in mandamus to compel and/or mandatory injunctive relief. In the Second and Fifth causes of action the plaintiff asks the court to issue directives compelling the Clerk to perform a ministerial statutory duty to record the deed and mortgage of October 20, 2008, which duty arises under the Recording Act of this State codified in Real Property

Law § 290 [3] and § 291. However, it is neither alleged nor proven that these instruments are recordable because they were duly acknowledged submitted to the Clerk with the proper fee (*see* Real Property Law § 290 [3], § 291; County Law § 525 [1]; *JP Morgan Chase Bank, N.A. v Mbanefo*, 123 AD3d 669, 123 AD3d 669 [2d Dept 2014]; *Matter of Merscorp, Inc. v Romaine*, 24 AD3d 673, 674, 808 NYS2d 307, *aff'd*, 8 NY3d 90, 828 NYS2d 266 [2006]). In addition, the plaintiff failed to state a valid cause of action against the Clerk since the complaint does not contain allegations that the copies of the lost deed and mortgage at issue were valid on their face and that both were presented to the Clerk who refused to record it (*see JP Morgan Chase Bank, N.A. v Mbanefo*, 123 AD3d 669, 671, *supra*).

Nor did the moving papers establish that the plaintiff has viable quiet title claims against any of the defendants. The object of quiet title claims is the removal of clouds on property which serve as an apparent title such as a deed or instrument that is actually invalid (*see Acocella v Bank of New York Mellon*, 127 AD3d 891, 9 NYS2d 67 [2d Dept 2015]). In addition a quiet title claim will lie where the plaintiff seeks recovery of ownership or possession of real property free of competing claims of others (*see JP Morgan Chase Bank, N.A. v Mbanefo*, 123 AD3d 669, 671, *supra*). Due to the in rem nature of these actions, specific pleading and party joinder requirements are imposed by RPAPL Article 15 and plaintiffs are required to state their interests in the premises, the source of such interest and its nature and the existence of a removable cloud on the property arising from an invalid or inoperative instrument (*Acocella v Bank of New York Mellon*, 127 AD3d 891, *supra*; *Piedra v Vanover*, 174 AD2d 191, 579 NYS2d 675, 678 [2d Dept 1992]). In addition, RPAPL Article 15 plaintiffs must identify and join all persons having interests in the premises which may be adversely affected by the granting of the relief and state whether such persons are known and/or unknown and, if known, whether they suffer from any of the legal disabilities described in RPAPL § 1515.

While equitable declaratory relief under common law may be available to the owner of a deed or a mortgage that was not recorded due its loss or destruction, the claim must rest upon allegations and proof of the due execution of the lost instrument and of its contents by proof of a certified copy thereof or other clear and convincing proof thereof (*see Argent Mtge. Co., LLC v 35 Plank Rd. Realty Corp.*, ___ AD3d ___, 15 NYS2d 473 [2d Dept 2015]; *O'Brien v Town of Huntington*, 66 AD3d 160, 166, 884 N.Y.S.2d 446 [2d Dept 2009]; *La Capria v Bonazza*, 153 AD2d 551, 552-553, 544 NYS2d 848 [2d Dept 1989]; *Edwards v Noyes*, 65 NY 125, 127 [1875]). Where the lost instrument is a mortgage and the plaintiff is not the original lender listed in the mortgage indenture, proof of the plaintiff's ownership interest in the mortgage is also required, as such interest is not established by the mortgage indenture itself. Since a mortgage loses its priority to a subsequent mortgage where the subsequent mortgagee is a good-faith lender for value, and records its mortgage first without actual or constructive knowledge of the prior mortgage (*see* Real Property Law § 291; *Rite Capital Group, LLC v LMAG, LLC*, 91 AD3d 741, 743, 936 NYS2d 280 [2d Dept 2012]), the record owners of all subsequently recorded deeds and mortgages and others having recorded interests subsequent to the date of the mortgage would be necessary parties to the action. Accordingly, where relief in the form of a nunc pro tunc recording of the lost mortgage, as is requested here, such relief is not available to the plaintiff absent due proof that no persons or entities would be adversely affected thereby (*see Wells Fargo Bank, N.A. v Perry*, 23 Misc 827 875 NYS2d 853 [Sup. Ct. Suffolk County 2009]).

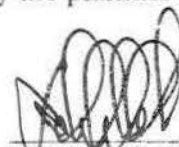
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Neither the complaint served and filed in this action nor the moving papers contain allegations necessary to establish a viable claim for declaratory relief pursuant to RPAPL Article 15 as to the plaintiff's interest in the subject premises or the existence of a removable could such as deed or other instrument (*cf.*, *Argent Mtge. Co., LLC v 35 Plank Rd. Realty Corp.*, ___ AD3d ___, 15 NYS2d 473 [2d Dept 2015]). Nor does the complaint or the moving papers demonstrate the plaintiff's possession of cognizable claims for equitable declaratory relief under lost or destroyed indenture theories. While there are allegations that the plaintiff is the "holder of a note secured against the Premises by a mortgage dated October 10, 2008", the copy of the mortgage attached to the complaint and moving papers is dated October 20, 2008. The affidavit of the plaintiff's employee, did not establish the due execution of the mortgage or its contents by due proof and the affiant failed to allege the particulars as to the manner in which the plaintiff, who was not the original lender, came into holder status of the mortgage note. Indeed, the affiant failed to demonstrate reliable sources for the assertion of the facts set forth in his affidavit as he has no first hand knowledge thereof. In addition, there are no allegations as to the existence or non-existence of persons or entities having recorded interests against the premises subsequent to the subject deed and mortgage whose interests would be adverse affected by the relief granted and certified no title and lien search was attached to the moving papers.

Nor did the moving papers establish the plaintiff's possession of a viable claim for the imposition of an equitable mortgage/constructive trust. Equitable liens may arise only upon proof that money was expended for the improvement of the premises by a person in a confidential relationship to the owner or upon proof of an agreement that the premises would be held as security for the obligation (*see Petrukevich v Maksimovich*, 1 AD2d 786, 147 NYS2d 869 [1st Dept 1956]; *DiNiscia v Olsey*, 162 AD 154, 147 NYS2d 198 [4th Dept 1914]). "To make such a lien binding upon a third party, it is necessary that its existence as a lien be fully proven" (*see Penn. Oil P.R. Co. v Willrock Producing Co.*, 434—435, 196 N.E. 385 [1935]). Neither the complaint nor supporting affidavit established the elements of a claim for an equitable lien. Nor are the elements of claim for a constructive trust discernable from the complaint or the moving papers (*see Manufacturers and Traders Trust Co. V Berthole*, 130 AD3d 881, 15 NYS2d 82 [2d Dept 2015]).

In view of the forgoing, the instant motion (#001) by the plaintiff for a default judgment on its complaint is denied.

Dated: October 13, 2015



THOMAS F. WHELAN, J.S.C.