

RTT Holdings, LLC v Nacht
2015 NY Slip Op 32505(U)
December 11, 2015
Supreme Court, Suffolk County
Docket Number: 60680/2013
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

RTT Holdings, LLC,

Plaintiff,

-against-

Pearl Nacht,

Defendant.

Motion Sequence No.: 002; MOTD; CD
Motion Date: 1/7/15
Submitted: 9/2/15

Index No.: 60680/2013

Attorney for Plaintiff:

Windels Marx Lane & Mittendorf
156 West 56th Street
New York, NY 10019

Defendant:

Pearl Nacht
1004 Gotham Dr
Saint James, NY 11780

Clerk of the Court

Upon the following papers numbered 1 to 39 read upon this application for an order vacating judgment and other relief: Notice of Motion and supporting papers, 1 - 28; 29; Answering Affidavits and supporting papers, 30 - 39; Other, **E-Filed**, 1 - 79; it is

ORDERED that this motion by plaintiff RTT Holdings, LLC, for an order vacating a money judgment filed against defendant, Pearl Nacht, is granted only to the extent that, upon presentation of a copy of this order, the Clerk of the County of Suffolk shall vacate the judgment in favor of RTT Holdings LLC against defendant Pearl Nacht, in the amount of \$295,050.00 that was filed under index number 07-30250 on June 4, 2013; and it is further

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ORDERED that upon presentation of a copy of this order, the Clerk of the County of Suffolk shall cancel the deed recorded on March 15, 2012 at Liber 000012687 Page 735 against real property located at 1004 Gotham Drive, St. James, New York (0800-059.04-01.00-076.000), and in all other respects, the motion is denied; and it is further

ORDERED that, since the relief sought in the complaint has been determined this application and has been denied, the complaint is hereby dismissed.

Plaintiff commenced an action in foreclosure by the filing of a summons and complaint with *lis pendens* on September 27, 2007 under Suffolk County index number 30250/2007. Defendant served an answer to the complaint. It is alleged that on or about June 2, 2006, defendant executed and delivered to RTT Holdings, LLC (RTT), a note whereby defendant agreed to pay the sum of \$210,000.00 with interest at the rate of 12%, with monthly interest payments of \$2,100.00 from August 1, 2006 to July 1, 2007, at which time the principal sum of \$210,000.00 was due and payable. It is alleged in the complaint that defendant failed to make the payment of principal that was due on July 1, 2007. By stipulation dated June 4, 2010 that was executed by counsel for the parties, the action was “settled and discontinued” upon multiple terms, including the execution and delivery by defendant Nacht of “a deed in lieu of foreclosure” for the premises located at 1004 Gotham Drive, St. James, New York as well as a confession of judgment. In addition, even though the stipulation provided for the execution and delivery of a deed “in lieu”, it also provided that the defendant pay \$25,000.00 for unpaid loan interest, real estate taxes and prospective interest payments under the mortgage for the period from June 1, 2010 to May 31, 2011. In addition, payments in the amount of \$875.00 for mortgage interest were to be made monthly, and defendant was to pay real estate taxes as well as homeowner association fees. While the stipulation gave defendant “the right, at any time, to repay in full all amounts due Plaintiff”, it also specified that, provided that all of the aforementioned payments were made, the defendant would “vacate the Mortgaged Premises on or before June 1, 2012 (the Vacate Date) and, on the Vacate Date, Plaintiff shall be allowed to record the Deed without any further or prior notice. Upon defendant’s default in payment, the stipulation provided that “Plaintiff shall have the right to elect its remedy, including but not limited to recording the Deed and/or filing the Confession of Judgment, without any further or prior notice to Defendant...” Plaintiff alleges that defendant defaulted in making the payment due on February 10, 2012.

According to the records of the Suffolk County Clerk, a deed purporting to transfer ownership of the subject property from Pearl Nacht to RTT Holdings, LLC, was filed in the office of the Suffolk County Clerk on March 15, 2012. On July 20, 2012, a 10-day notice to quit was served on defendant Nacht. According to the affidavit of defendant’s son Larry Nacht, he was told by plaintiff’s counsel that a \$20,000 payment would be needed to avoid having his mother “put out on the street,” so he paid \$21,122.28 to RTT on or about July 26, 2012. On August 30, 2012, Pearl Nacht and plaintiff’s counsel executed a surrender agreement under which it was agreed that defendant would vacate the premises and surrender possession on or before October 26, 2012. In addition, the confession of judgment in the amount of \$295,050.00 was filed against the defendant, Pearl Nacht, on June 4, 2013. According to the affidavit of Larry Nacht, he made payments to RTT

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of \$30,000.00 on April 8, 2014, plus \$20,000.00 on June 30, 2014, plus \$10,000.00 on August 22, 2014 and \$12,500 on September 5, 2014.

Plaintiff thereafter commenced this action by the filing of a summons and complaint on April 30, 2013 to recover possession of the subject premises and to recover the value of the use and occupancy of the premises from February 10, 2012 in the sum of “no less than \$210,000.00.” In her verified answer to the complaint, defendant asserted that she did not sign the stipulation of settlement dated June 4, 2010 and that she was not present when the stipulation was executed by counsel. Addressing numerous allegations in the complaint, defendant also asserted that it was her understanding that the deed that she executed was being held by plaintiff as collateral and that she retained the right to redeem the property. Defendant asserted seven affirmative defenses in her answer, among which are that plaintiff’s claims are barred by the doctrine of “unclean hands” and that the stipulation and surrender agreement are voidable “due to duress.”

Plaintiff now moves for an order vacating the judgment in the amount of \$295,050.00 and granting plaintiff immediate possession of the premises. Defendant, who appears *pro se*, has opposed the application and submitted a “motion to set aside so-called ‘deed in lieu’ and void mortgages.” Among the arguments made by defendant are that the agreements under which plaintiff now seeks to enforce its alleged rights are unconscionable. In addition, defendant argues that pursuant to Real Property Law § 320, the deed was given to secure a debt, which would require that the plaintiff proceed by foreclosure and sale to extinguish defendant’s interest in the subject premises.

Real Property Law § 320 codifies the well-settled common law principle “that the giving of a deed to secure a debt, in whatever form and however structured, creates nothing more than a mortgage” (*Patmos Fifth Real Estate Inc. v Mazl Building, LLC*, 124 AD3d 422, 426, 2 NYS3d 83 [1st Dept 2015], quoting *Leonia Bank v Kouri*, 3 AD3d 213, 216-217, 772 NYS2d 251 [1st Dept 2004]). The statute does not require a conclusive showing that the transfer was intended as security; rather, it is sufficient that the conveyance appears to be intended only as “a security in the nature of a mortgage” (*Patmos Fifth Real Estate Inc. v Mazl Building, LLC*, *supra* at 124 AD3d 426, quoting *Leonia Bank v Kouri*, 3 AD3d at 217). Thus, the holder of a deed given as security must proceed to extinguish the mortgagor’s interest by foreclosure and sale, and the mortgagor’s right of redemption can not be waived or abandoned by any stipulation of the parties, even if the waiver is embodied in the mortgage (*see Patmos Fifth Real Estate Inc. v Mazl Building, LLC*, *supra* at 124 AD3d 426). Here, the documentary evidence clearly demonstrates that the plaintiff agreed to extend the deadline for payment of the mortgage in return for plaintiff’s execution of a deed. The 2010 stipulation expressly provided for payments to be made for interest on the mortgage loan until June 2012, and that defendant “shall retain ownership of the subject Property” upon repayment of the loan. Thus, instead of being a purported deed in lieu of foreclosure, the stipulation showed that the plaintiff agreed to extend the loan payment deadline in exchange for the defendant’s execution of the deed. Furthermore, the undisputed evidence before this Court indicates that the plaintiff continued to accept payments on the loan that were made by defendant and also made on her behalf by her son. Accordingly, the 2010 deed, which was given as security, should have been recorded

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with the stipulation as a mortgage and not as a deed that purported to transfer title (*see* Real Property Law § 320).

Even if the deed had been filed as a mortgage, however, foreclosure of that mortgage was barred by the plaintiff's filing of the confession of judgment against defendant. RPAPL § 1301 provides, "Where final judgment for the plaintiff has been rendered in an action to recover any part of the mortgage debt, an action shall not be commenced or maintained to foreclose the mortgage, unless an execution against the property of the defendant has been issued upon the judgment to the sheriff of the county where he resides...and has been returned wholly or partly unsatisfied."

Notwithstanding the foregoing, the plaintiff filed the deed as a transfer of title to the defendant's residence and it also filed a judgment against defendant in the amount of \$295,050.00. In addition, even after it filed the deed, plaintiff accepted a payment on the loan totaling \$21,122.28, and it accepted \$72,500.00 more after it filed the confession of judgment against defendant. By filing both the judgment against defendant as well as the deed against her property, plaintiff prejudiced the defendant by effectively preventing her from availing herself of any chance that she may have had to refinance the loan.

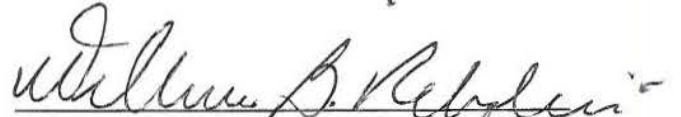
"Stipulations of settlement between parties are binding contracts and, as such, they are favored and not lightly cast aside" (*HSBC Bank USA, N.A. v Wielgus*, 131 AD3d 510, 510, 15 NYS3d 170 [2d Dept 2015], quoting *Rogers v Malik*, 126 AD3d 874, 874, 5 NYS3d 525]). "Only where there is a legally sufficient cause to invalidate a contractual obligation, such as where it is manifestly unfair to one party because of the other's overreaching or where its terms are unconscionable or constitute fraud, collusion, mistake, or accident, will a party be relieved from the consequences of the bargain struck with the stipulation" (*HSBC Bank USA, N.A. v Wielgus, supra* at 131 AD3d 510, quoting *Rogers v Malik*, 126 AD3d at 874). An unconscionable contract has been defined as one which "is so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforcible [*sic*] according to its literal terms" (*Gillman v Chase Manhattan Bank, N.A.*, 73 NY2d 1, 10, 534 NE2d 824, 537 NYS2d 787 [1988], citing 1 Corbin on Contracts § 128, p. 400). An unconscionable contract is usually voidable since a party to a contract has the power to validate, ratify or avoid it (*Lawrence v Miller*, 11 NY3d 588, 595, 901 NE2d 1268, 873 NYS2d 517 [2008], citing Corbin on Contracts § 1.6, p 17-18).

The undisputed facts as established by the documentary and other evidence before this Court demonstrate that the stipulation of settlement dated June 4, 2010 is manifestly unfair to the defendant and is unconscionable in its terms. Pursuant to its terms, plaintiff filed a substantial money judgment against defendant while it also filed a deed purporting to transfer ownership of defendant's home to plaintiff. Meanwhile, defendant's son continued to make significant payments of money to plaintiff, allegedly under a threat that his elderly mother would be "out on the street" if he failed to do so, and plaintiff accepted such payments. Furthermore, while the stipulation of settlement purports to enable defendant to retain ownership of her home upon payment of "all amounts due Plaintiff" including, although not specifically stated, the \$210,000.00 balloon payment, plaintiff effectively prevented defendant from refinancing the loan by filing the money judgment against her as well as the deed.

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Furthermore, plaintiff exploited defendant's fear of losing her home by demanding and accepting additional payments, even after the deed and the judgment had been filed. The settlement agreement and all subsequent agreements between the parties are unconscionable, overreaching and unenforceable.

Dated: 12/11/2015


HON. WILLIAM B. REBOLINI, J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION