

Walker v Yusuf

2015 NY Slip Op 32803(U)

March 27, 2015

Supreme Court, Kings County

Docket Number: 3395/13

Judge: Bert A. Bunyan

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At an IAS Term, Part 8 of the Supreme Court of the State of New York, held in and for the County of Kings, at 360 Adams Street, Brooklyn, New York, on the 27th day of March, 2015.

PRESENT:

HON. BERT A. BUNYAN, Justice.

-----X
TYLER WALKER, an infant by his mother and natural guardian, ALEXIS KEARSE, and ALEXIS KEARSE, individually,

Plaintiffs,

Index No. 3395/13

DECISION AND ORDER

- against -

LATEEF A. YUSUF, ARCH BAY HOLDINGS, LLC and REO PROPERTIES CORPORATION,

Defendants.
-----X

The following papers numbered 1 to 7 read herein:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavit (Affirmation) _____
Reply Affidavit (Affirmation) _____
Affidavit _____
Other Papers Sur-Reply Affirmations _____

Papers Numbered

1 - 2, exhibits
3 - 4, exhibits
5
6 - 7, exhibits

Upon the foregoing papers, Defendant Arch Bay Holdings, LLC (hereinafter "Arch Bay") moves for an order pursuant to CPLR 3211 (a) (1) dismissing the complaint and all cross-claims on the grounds of a

complete defense based on documentary evidence.

This is an action to recover damages arising from injuries sustained by the infant plaintiff Tyler Walker, from an alleged trip and fall at 152A MacDougal Street, Brooklyn, NY (hereinafter the "subject premises" or "property"). The subject premises is a multiple dwelling. From February 24, 2006 until February 27, 2013, Defendant Lateef Yusuf was the title owner of the subject premises. (Herbertson affirmation, exhibit E-F). On February 24, 2006, Mr. Yusuf executed a mortgage to Mortgage Electronic Registration Systems, Inc. as nominee for Fremont Investment and Loan, which was recorded on March 16, 2006, and was secured by the property. (Chavez aff, exhibit A). On February 9, 2007, the mortgage was assigned to Defendant REO Properties Corporation (hereinafter "REO"). (Chavez aff, exhibit B). On that date, REO commenced a foreclosure action against Mr. Yusuf with respect to the mortgage on the subject premises, which is still pending. (Friedman opposition affirmation, exhibit A). On July 28, 2010, the mortgage was assigned to Defendant Arch Bay. (Chavez aff, exhibit C). On March 20, 2013, the mortgage was assigned to Goshen Mortgage LLC, which was recorded on July 3, 2013. (Chavez aff, exhibit D).

Plaintiff Tyler Walker lives at the subject premises with his mother and natural guardian, Plaintiff Alexis Kearse. (Herbertson affirmation, exhibit C). On December 23, 2012, Plaintiff Tyler Walker tripped, slipped, stumbled and fell in the area between the living room and the kitchen of the property. (Herbertson affirmation, exhibit A, ¶26; exhibit C, ¶5). Plaintiff alleges that the tiles in the transition area were "in a broken, defective, cracked, uneven, irregular, unlevelled, dangerous and/or hazardous condition." (Herbertson affirmation, exhibit C, ¶6). As a result of the fall, Tyler sustained a fracture of his right tibia and residual trauma to the neck, back and shoulder. (Herbertson affirmation, exhibit C, ¶¶8-9).

Arch Bay contends that it has a complete defense to the allegations because at the time of the alleged accident, it was, at most, a party to the mortgage agreement, and did not own, lease, operate, maintain,

control, manage, inspect, or repair the subject premises. Thus, Arch Bay “did not owe any duty to plaintiffs, and did not cause or contribute to their alleged injuries and/or damages.” (see Herbertson affirmation, ¶7, 11). In support of this contention, Arch Bay provides documentary evidence in the form of deeds, mortgages and assignments for the subject property from 2006, when Defendant Yusuf acquired the property, through 2013 when he transferred the property to PIM Equities. (see Herbertson affirmation, exhibits D-F). At the time of the accident, the subject property was owned by Mr. Yusuf, and mortgaged, by assignment dated July 15, 2010, to Arch Bay. As Arch Bay did not have an ownership interest in the property, Arch Bay posits that the claims against it should be dismissed as a matter of law.

In opposition, plaintiffs contend that there is an issue of fact as to whether Arch Bay, by its own actions or by the terms of the assigned mortgage, was a mortgagee-in-possession, thus owing a duty to plaintiffs to make repairs in the property. The plaintiffs also aver that Arch Bay had actual and constructive knowledge that the property was occupied by tenants, and was not being properly maintained, and that Arch Bay assumed a duty to make repairs in the event the mortgagor defaulted. In support, the plaintiffs rely on the terms of the mortgage agreement and riders, and subsequent assignments, as well as submissions made by REO in the ongoing foreclosure proceeding against Mr. Yusuf. REO assigned Arch Bay a mortgage that, as evidenced by the foreclosure action, was in default at the time of the assignment. By the terms of the mortgage, in the event of default, the lender reserved the right to have a receiver appointed who could “take possession and manage the Property and collect the rents” (Friedman opposition affirmation, exhibit A, 1-4 Family Rider at 2). In its motion for an order of reference, REO moved to amend the caption to include the tenants of the property, which includes Tyree Walker, the father of Plaintiff Tyler Walker. According to plaintiffs, this demonstrates that “defendant plainly had actual knowledge as to the condition of the premises and that the premises were occupied by tenants.” (Friedman opposition affirmation, ¶4). Further,

Defendant REO submitted an affidavit dated May 21, 2007 in support of their motion for an order of reference whereby Margery Rotundo, Senior Vice President of Loss Mitigation for REO stated that, to protect their interest in the property pursuant to the mortgage agreement, REO inspected the property monthly to determine the occupancy of the premises and whether or not it required repairs. (Friedman opposition affirmation, exhibit D, ¶7). Plaintiffs also rely on an affidavit submitted by Ms. Kearse indicating that the mortgagee's "personnel" visited the subject premises on multiple occasions, and on one such occasion informed her that the property had been illegally converted to a multiple dwelling. Based on the terms of the mortgage, and the representations made by REO and Ms. Kearse, Arch Bay inspected the property, took possession as a mortgagee-in-possession, and exercised some degree of control over the property, such that they owed a duty to the tenants to maintain and repair the property.

Additionally, plaintiffs argue that the instant motion for summary judgment is premature, as discovery is not yet complete, document exchange is ongoing and depositions have not been conducted. Plaintiffs assert that discovery is particularly necessary on the issue of whether or not Arch Bay was a lender-in-possession at the time of the Tyler Walker's accident, especially where Arch Bay's only rebuttal rests on an affidavit submitted by its CEO Claudio Chavez in support of the motion.

In response, Arch Bay relies on the testimony of Ms. Kearse at a 50-H hearing on March 20, 2013, where Ms. Kearse testified, inter alia, that she had not paid rent since 2008, and that New York City Housing and Development maintained the property.

Discussion

For dismissal pursuant to CPLR 3211, the pleadings must be liberally construed and plaintiffs afforded the benefit of every possible inference (*Goshen v Mut. Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Under CPLR 3211(a) (1), the court may dismiss an action based on documentary evidence only where the documentary evidence “utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen*, 98 NY2d at 326). In this regard, judicial records and documents which record out-of-court transactions, such as mortgages, assignments and deeds, the contents of which are “essentially undeniable,” unambiguous and of undisputed authenticity constitute documentary evidence. (see *Fontanetta v Doe*, 73 AD3d 78, 84-86 [2d Dept 2010]; *Forbes v Aaron*, 81 AD3d 876, 877 [2d Dept 2011] (“Deeds, mortgages, and notes can qualify as ‘documentary evidence for the purpose of CPLR 3211 (a) (1).’”)) Affidavits and deposition testimony, on the other hand, are not documentary evidence for the purposes of a 3211 (a) (1) dismissal, as they can raise issues of credibility, which are properly for a jury to decide (*Fontanetta*, 73 AD at 85-86; see also *Crepin v Fogarty*, 59 AD3d 837, 838 [3d Dept 2009] (“While factual affidavits submitted by a plaintiff may be considered to remedy defects in the complaint, affidavits submitted by a defendant do not constitute documentary evidence upon which a proponent of dismissal can rely”); *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2d Dept 2003] (“Here, the defendants’ submissions in support of their motion included two affidavits, which should not have been considered by the Supreme Court on a motion to dismiss pursuant to CPLR 3211 (a) (1) because they do not constitute documentary evidence”)).

For a defendant to be liable in tort, they must owe a duty of care to plaintiff. Without such duty, there can be no breach, and thus, no liability. (*Forbes*, 81 AD3d at 877.) “As a general rule, liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or special use of that property” (*Kydd v Daarta Realty Corp.*, 60 A.D.3d 997, 998 [2d Dept 2009]). Alternatively, “[l]iability can be imposed upon a landowner or a lessee who creates a defective condition on the property, or had actual or constructive notice of the allegedly defective condition” (*Gover v Mastic*

Beach Prop. Owners Assn., 57 AD3d 729 [2d Dept 2008]). During the pendency of a foreclosure proceeding, the mortgagor retains his title and interest in the property throughout the proceedings, and is not divested of those rights until conclusion of the foreclosure sale (*Forbes*, 81 AD3d at 877). However, for a multiple dwelling, such as the subject premises, a mortgagee-in-possession is considered an owner of the property and has an obligation to make repairs (*see Multiple Dwelling Law* §§ 4 [44], 78; *Gonzalez v Demasters*, 252 AD2d 540 [2d Dept 1998]; *cf Greenpoint Bank v John*, 256 AD2d 548 [2d Dept 1998]).

The deeds, mortgage, and assignments of mortgage are all proper documents for dismissal pursuant to CPLR 3211 (a) (1). The deed dated February 24, 2006 unambiguously states that Mr. Yusuf was the sole title owner of the property on the date of the accident. The mortgage agreements and subsequent assignment conclusively indicate that Arch Bay was the mortgagee of record at the time of the accident. As the foreclosure proceedings are still pending and the property was not sold at public auction, Mr. Yusuf retained his title and interest in the property at the time of the accident, and Mr. Yusuf retained those rights until and remained so until he transferred the property by Bargain and Sale Deed to PIM Equities Inc. on February 27, 2013.

Plaintiffs have not challenged validity of the documents presented. However, plaintiffs argue that those same documents, in addition to representations made by REO and Ms. Kearse, raise an issue of fact as to whether Arch Bay, as successor mortgagee to REO, was a lender-in-possession in accordance with the terms of mortgage agreement. Pursuant to the mortgage agreement, in the case of default, the lender has the right to enter and inspect the property and to make repairs. (Chavez aff, exhibit A, Mortgage ¶¶ 7(b), 9, 1-4 Family Rider, ¶ H). Despite Arch Bay's contentions to the contrary, the terms of the mortgage agreement and subsequent assignments do not conclusively determine that the Arch Bay did not exercise its right to reenter, inspect or otherwise maintain the property agreement, or was not a mortgagee-in-possession. (*see*

Suchmacher v Manana Grocery, 73 AD3d 1017 [2d Dept 2010] (“Here, even if a 1995 deed by which the appellant transferred, to her son, the title of the premises at which the subject accident allegedly occurred were sufficient to conclusively establish that the appellant did not own the premises on the date of the accident, the appellant failed to offer any qualifying documentary evidence to refute the plaintiffs’ allegation that she “operated, managed and controlled” the premises.”)).

Although Arch Bay is not a party to the foreclosure action initiated by REO, Ms. Kearsse separately alleges that “personnel from the issuer of the mortgage” entered and inspected the property on multiple occasions while plaintiffs were tenants. (Kearsse aff, ¶2). In response, Arch Bay relies on the terms of the mortgage which identifies certain conditions precedent and the duties of a lender-in-possession. Arch Bay has also provided an affidavit by its CEO Claudio Chavez which conclusorily states that Arch Bay “did not in any way whatsoever own, lease, operate, maintain, control, manage, inspect, or repair the premise.” (Chavez aff at 2). However, Arch Bay has not submitted any documentary evidence in support of those statements that utterly refutes the allegation that Arch Bay inspected the property, which would warrant a CPLR 3211 (a) (1) dismissal. The Chavez affidavit creates an issue of fact as to Arch Bay’s conduct with respect to the property. Therefore, this court cannot, on this record, determine as a matter of law Arch Bay is entitled to dismissal of the claims against it.

Further, the 50-H hearing testimony of Ms. Kearsse does not overcome that burden. First, the 50-H hearing testimony does not qualify as documentary evidence for the purposes of a CPLR 3211 (a) (1) motion. Second, that testimony does not conclusively determine that Arch Bay did not collect rent, or otherwise exercise control over the property. Ms. Kearsse testified that she had not paid rent from 2008 up to the date of the hearing. However, Ms. Kearsse’s failure to pay rent does not preclude Arch Bay from collecting rent, nor does it conclusively determine that Arch Bay did not collect rents. Ms. Kearsse also

testified that HPD made frequent visits to the property and sometimes made repairs. However, Ms. Kears also stated in her affidavit that representatives of the mortgagee visited the property and made inspections. Thus, at best, Ms. Kears's hearing testimony creates an issue of credibility, which is properly for a jury to consider.

Conclusion

As there is an issue of fact as to whether Arch Bay triggered the lender-in-possession clause of the mortgage agreement or otherwise exercised its right to enter, inspect and/or repair the property, Defendant Arch Bay's motion for dismissal pursuant to CPLR 3211 (a) (1) is denied without prejudice and with leave to renew after the conclusion of discovery.

ENTER



Hon. Bert A. Bunyan, J.S.C.

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