

Emigrant Bank v Rosabianca
2016 NY Slip Op 30793(U)
April 25, 2016
Supreme Court, New York County
Docket Number: 850136/2014
Judge: Gerald Lebovits
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**NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7**

EMIGRANT BANK, as successor-by-merger with
EMIGRANT SAVINGS BANK – MANHATTAN

Plaintiff,

Index No.: 850136/2014
DECISION/ORDER
Motion Seq. Nos. 004 and
005

-against-

LUIGI ROSABIANCA, UNITED STATES OF
AMERICA INTERNAL REVENUE SERVICE,
CARMELO ROSABIANCA, VIVIAN
ROSABIANCA, BOARD OF MANAGERS OF THE
CIPRIANI CLUB RESIDENCES, LITTLE BAY
INVESTMENT CORP., SECURED LENDING CORP.,
SAMUEL GIBNER, DEBORAH A. GENGER
as Executrix of the Estate of FRANCES GIBNER, and
“JOHN DOE” No. 1 through “JOHN DOE” No. 15,
the true name of the said defendants being unknown to
plaintiff, the parties intended to be those persons
having or claiming an interest in the mortgaged
premises described in the compliant by virtue of
being tenants, or occupants, or judgment-creditors,
or lienors or type of nature in all or part of said
premises,

Defendants. .

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant
Secured Lending Corp.’s motion for summary judgment, plaintiff’s cross-motion for sanctions
and to compel discovery, and plaintiff’s order to show cause to depose a prisoner.

Papers	Numbered
Defendant’s Notice of Motion	1
Defendant’s Memorandum of Law in Support	2
Plaintiff’s Corrected Affirmation in Opposition	3
Plaintiff’s Memorandum of Law in Opposition	4
Defendant’s Affirmation in Further Support	5
Plaintiff’s Notice of Cross-Motion	6
Plaintiff’s Memorandum of Law in Support of Cross-Motion	7
Defendant’s Affirmation in Opposition to Cross-Motion	8
Plaintiff’s Reply Affirmation in Support of Cross-Motion	9
Plaintiff’s Reply Memorandum of Law in Support of Cross-Motion	10
Plaintiff’s Order to Show Cause to Take Deposition of a Prisoner	11
Defendant’s Affirmation in Opposition to Plaintiff’s Order to Show Cause	12

Adam Leitman Bailey, P.C., New York (Colin E. Kaufman of counsel), for plaintiff.
Law Office of Mitchell Cantor, New York (Mitchell Cantor of counsel), for defendant Secured Lending Corp.

Gerald Lebovits, J.

Defendant Secured Lending Corp.'s (SLC) motion, sequence 4, and plaintiff's motion, sequence 5, are consolidated for disposition. Defendant SLC moves under CPLR 3212 for summary judgment on plaintiff's second cause of action against SLC on the ground that plaintiff is not entitled to be equitably subrogated to the rights of Larry Levi and Andrew Berg. Plaintiff cross-moves for sanctions and to compel discovery. Plaintiff also moves by the order to show cause to depose defendant Luigi Rosabianca.

Plaintiff's cross-motion for sanctions is denied for the reason stated on the record on April 11, 2016.

I. Defendant SLC's Summary-Judgment Motion and Plaintiff's Cross-Motion

SLC's CPLR 3212 motion for summary judgment to dismiss plaintiff's second cause of action is denied. SLC has not satisfied its burden to prove its priority to Emigrant Mortgage Company Inc.'s (EMC) mortgage. For a court to grant a summary-judgment motion, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact about the claim or claims at issue. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) Under RPL § 291, "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." (*Washington Mut. Bank, FA v Peak Health Club, Inc.*, 48 AD3d 793, 797 [2d Dept 2008], citing *Household Fin. Realty Corp. of New York v Emanuel*, 2 AD3d 192, 193 [1st Dept 2003].)

Defendant SLC has not made a prima facie showing to entitle it to judgment as a matter of law. In support of its motion, SLC relies only on plaintiff's complaint. SLC has presented insufficient evidence about whether defendant Little Bay Investment Corp. had actual or constructive knowledge of the EMC Mortgage.

The following facts are not in dispute. On March 6, 2008, defendant Luigi Rosabianca executed a \$1,040,000 mortgage to Larry Levi (Levi Mortgage) and a \$400,000 mortgage to Andrew Berg (Berg Mortgage), both encumbering 55 Wall Street, Unit 540, New York, New York (Wall Street Property). (Plaintiff's Corrected Affirmation in Opposition, Exhibits 7, 8.) On May 14, 2008, Rosabianca executed a \$1,760,000 mortgage to EMC (EMC Mortgage), encumbering the two properties, including the Wall Street Property. (*Id.* Exhibit 9.) On October 30, 2009, EMC assigned the EMC Mortgage to plaintiff. The assignment was recorded on June 11, 2012. (*Id.* Exhibit 12.) The Levi Mortgage and the Berg Mortgage were recorded on March 5, 2010. (*Id.* Exhibit 7, 8.) On August 8, 2011, Rosabianca executed a \$500,000 mortgage to

Little Bay Investment Corp. (Little Bay) encumbering the Wall Street Property (Little Bay Mortgage). (*Id.* Exhibit 15.) Little Bay recorded its mortgage on September 21, 2011. (*Id.* Exhibit 15.) The EMC Mortgage was recorded on April 20, 2012. (*Id.* Exhibit 9.) On February 19, 2014, the Little Bay Mortgage was assigned to SLC. (*Id.* Exhibit 16.) Thus, Little Bay recorded its mortgage before EMC did. Information about the connection between Little Bay, SLC, and Rosabianca and their knowledge of the EMC Mortgage, however, has not yet been explored through disclosure. Thus, SLC has presented insufficient evidence, thus far, about whether defendant Little Bay had actual knowledge of the EMC Mortgage. SLC has not satisfied its burden to entitle it to summary judgment.

Even if SLC had satisfied its burden to prove its priority, SLC's motion for summary judgment would still be denied. SLC has presented insufficient evidence about whether the Levi Mortgage was satisfied before the Little Bay Mortgage was executed and whether Little Bay knew about the satisfaction. The equitable-subrogation doctrine is defined as follows:

“Where property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien-holder. . . . [W]here 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 NY2d 326, 333-34 [1967].)

(*See also Arbor Commercial Mortg., LLC v Assoc. at the Palm, LLC*, 95 AD3d 1147, 1149 [2d Dept 2012], *citing United States v Baran*, 996 F2d 25, 29 [2d Cir 1993].)

In *Rite Capital Group, LLC v LMAG, LLC*, the court extended the equitable-subrogation doctrine to situations in which a mortgage — the proceeds of which are used to satisfy a prior mortgage — lost its priority to a subsequent mortgage under the Recording Act. (91 AD3d 741, 743 [2d Dept 2012].) Thus, the equitable-subrogation doctrine would be available in this action if plaintiff lost its priority to SLC under the Recording Act.

No dispute exists that on May 14, 2008, the same day the EMC Mortgage was executed, Rosabianca entered into a settlement agreement with a settlement agent to pay off the Levi Mortgage and Berg Mortgage. EMC is the named lender in this agreement. (Plaintiff's Corrected Affirmation in Opposition, Exhibit 11.) On May 6, 2010, however, before the Little Bay Mortgage was executed, Berg recorded a satisfaction of the Berg Mortgage. (*Id.* Exhibit 13.) The recorded satisfaction document is dated May 29, 2008. (*Id.*)

Based on these facts, this court finds that the Berg Mortgage and Levi Mortgages were paid off from the proceeds of the EMC Mortgage. Before the execution of the Little Bay Mortgage, Little Bay had at least record-notice that the Berg Mortgage had been paid off three years earlier. Little Bay loaned the \$500,000 to Rosabianca with a reasonable understanding that this mortgage would not be secondary to the Berg Mortgage. Thus, SLC — as the assignee of the Little Bay Mortgage — would not be “unjustly enriched by the retention of the benefit” of the Berg Mortgage. Plaintiff is not entitled to be equitably subrogated to Berg’s position.

On the other hand, Little Bay did not have record-notice of the satisfaction of the Levi Mortgage. Levi recorded a satisfaction of the Levi Mortgage on August 15, 2011, after the Little Bay Mortgage was executed. (*Id.* Exhibit 14.) The recorded satisfaction document is dated August 8, 2011. (*Id.*) Information about whether the Levi Mortgage was actually satisfied before the Little Bay Mortgage was executed and whether Little Bay knew about the satisfaction has not yet been explored in disclosure. SLC has presented insufficient information about whether SLC would be “unjustly enriched by the retention of the benefit” of Levi. SLC has not satisfied its burden to entitle it to summary judgment. SLC’s summary-judgment motion is denied.

Plaintiff’s cross-motion to compel disclosure is granted. Plaintiff cross-moves to compel SLC to produce documents that plaintiff has not yet received pursuant to the Preliminary Conference Order dated October 21, 2015. According to the Preliminary Conference Order, the end date for all disclosure is June 8, 2016. (Defendant’s Affirmation in Opposition to Cross-Motion, Exhibit A.) SLC does not oppose plaintiff’s assertion that SLC never responded to plaintiff’s demand for discovery and inspection. SLC asserts that it will comply with the Preliminary Conference Order and turn over all disclosure by June 8, 2016. (*Id.* at ¶ 8.) Although SLC is willing to comply, it must do so before June 8, 2016. As discussed below, plaintiff needs these documents before it deposes defendant Rosabianca.

II. Plaintiff’s Order to Show Cause to Depose Defendant Rosabianca

Plaintiff moves by order to show cause to take the examination before trial (EBT) of a prisoner, defendant Rosabianca. Plaintiff’s motion is granted. Under CPLR 3106 (c), “the deposition of a person confined under legal process may be taken only by leave of the court.” Plaintiff has presented insufficient evidence about whether Little Bay knew about the EMC Mortgage, which Rosabianca executed. Little Bay’s principals include Primo Ernesto Gonzalez Avila. (Plaintiff’s Affirmation in Support, Exhibit 6.) Non-party Blue Water Advisors Inc.’s (Blue Water) principals also include Primo Ernesto Gonzalez Avila. (*Id.* Exhibit 7, 8.) Plaintiff asserts that as of May 2015, Rosabianca was listed as the agent for Blue Water. Plaintiff argues that Little Bay might have known about the EMC Mortgage through the connection from Rosabianca to Blue Water to Primo Ernesto Gonzalez Avila to Little Bay. Rosabianca might have personal knowledge about whether defendant Little Bay had actual knowledge of the EMC Mortgage. Additionally, SLC argues that equitable subrogation is not available to plaintiff because Rosabianca intentionally failed to record plaintiff’s mortgage. Rosabianca has personal knowledge about whether he intentionally failed to record plaintiff’s mortgage. Thus, plaintiff’s motion for leave to take Rosabianca’s EBT is granted.

ORDERED that defendant Secured Lending Corp.’s motion for summary judgment (motion sequence 4) is denied; and it is further

ORDERED that plaintiff's cross-motion (motion sequence 4) is granted in part and denied in part, in that sanctions are denied and disclosure is granted; and it is further

ORDERED that plaintiff's order to show cause (motion sequence 5) to take the EBT of defendant Luigi Rosabianca is granted. Plaintiff to present an order for the court's signature to facilitate defendant Luigi Rosabianca's EBT. Rosabianca's EBT must be completed by July 8, 2016; and it is further

ORDERED that defendant SLC must produce to plaintiff, by June 8, 2016, all non-privileged documents responsive to plaintiff's demand for discovery and inspection in SLC's possession, custody or control and a log detailing all documents withheld under a claim of privilege. Disclosure to be completed by August 8, 2016. Parties must appear at a compliance conference on August 10, 2016, at 12:00 p.m., in Part 7, room 731, at 111 Centre Street. Plaintiff to file its note of issue/certificate of readiness on or before September 2, 2016; and it is further

ORDERED that counsel for plaintiff is directed to serve a copy of this order with notice of entry upon all parties.

This constitutes the court's decision and order.

Dated: April 25, 2016



J.S.C.

HON. GERALD LEBOVITS
J.S.C.