

<b>Hennelly v Retained Realty, Inc.</b>
2016 NY Slip Op 32875(U)
May 12, 2016
Supreme Court, Westchester County
Docket Number: 55633/14
Judge: Lewis J. Lubell
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SCP 5/17/16 @ 9:15 a.m.

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK  
COUNTY OF WESTCHESTER  
-----X

TERESA HENNELLY,

Plaintiff,

-against -

RETAINED REALTY, INC. and EMIGRANT  
MORTGAGE COMPANY, INC.,

Defendants.  
-----X

LUBELL, J.

DECISION & ORDER

Index No. 55633/14

Sequence No. 3

The following papers were considered in connection with this e-filed motion by plaintiff for an Order (1) pursuant to CPLR Art. 63, granting a temporary and preliminary injunction barring defendants from seeking to evict the current occupants from the Property; (2) granting leave to amend the amended Complaint dated May 9, 2014; (3) granting a trial preference pursuant to CPLR 3403(a)(4); and (4) granting such further relief as is just:

PAPERS	NUMBERED
ORDER TO SHOW CAUSE/AFFIRMATIONS/AFFIDAVITS/ EXHIBITS A-EE	1
AFFIRMATION	2
AFFIRMATION IN OPPOSITION/EXHIBITS A-E	3
REPLY AFFIRMATION	4
E-FILED DOCUMENTS 55-99	

This action stems from a loan made by defendant Emigrant Mortgage to plaintiff Teresa Hennelly's son, Mark Hennelly, whereby Mark Hennelly was loaned the amount of \$160,000 and the subject property [the residential premises located at 79 Lewis Parkway, Yonkers, New York] was mortgaged as collateral to secure the loan. The property had been purchased by Mark Hennelly and his mother Teresa Hennelly from Jay Sulzberger in 2000 for the sum of \$75,000. Subsequently, Mark Hennelly repaired the home and in 2006 he moved into the property with his wife and two children.

In 2009, Mark Hennelly submitted a bid to the City of Yonkers to construct and maintain moorings on the Hudson River. Upon the bid being accepted, Mark Hennelly sought a loan to finance the startup costs in order to perform the contract with the City of Yonkers. Mark Hennelly obtained a loan commitment from defendant Emigrant Mortgage for a loan in the amount of \$160,000, with the property being mortgaged as collateral to secure the loan.

Plaintiff alleges that in July of 2009, she attended the closing of the loan with her son. She alleges that she and her son were not represented by independent counsel and that, at that time, she signed certain documents to effectuate the loan. Plaintiff alleges that one of the documents she was required to sign by the lender was a deed transferring the jointly owned subject property from her and her son Mark Hennelly to Mark Hennelly solely.

At some point thereafter, Mark Hennelly failed to make the required payments under the loan and defendant Emigrant Mortgage Company, Inc. filed a foreclosure action against Mark Hennelly, who defaulted in appearing in that action. By Judgment of Foreclosure and Sale (Smith, J.) dated March 11, 2013, Emigrant Mortgage Company, Inc. was granted a judgment directing the property to be sold at auction pursuant to the terms set forth, therein. The property was thereafter sold on June 12, 2013. Mark Hennelly attempted to vacate his default in appearing in that action, which was denied by Decision and Order (Smith, J.) dated April 9, 2014.

By way of her first amended complaint, plaintiff advanced causes of action against Emigrant Mortgage Company, Inc. ("Emigrant") and Retained Realty, Inc. ("Retained"), an affiliate of Emigrant, for fraud, violation of section 349 of the General Business Law, the imposition of a constructive trust and equitable lien and to recover for unjust enrichment in connection with the foreclosure of a mortgage upon the premises located at 79 Lewis Parkway, Yonkers, New York.

By Decision & Order of April 30, 2015, the Court (DiBella, J.), denied plaintiff's motion for a preliminary injunction enjoining defendants from evicting Mark Hennelly and his family from the property (re-application of which is now being made); vacated the temporary restraining order put into effect upon the underlying Order to Show Cause; and granted, in part, defendants' cross-motion to dismiss the complaint to the extent that the causes of action for an equitable lien and constructive trust were dismissed. The Court made note that plaintiff's claims for fraud and for violation of General Business Law §349 were withdrawn and, thus, the sole remaining claim upon the first amended complaint is for unjust enrichment.

Plaintiff now: (1) again moves for a preliminary injunction barring defendants from seeking to evict her son and his family from the property (which eviction proceeding was recommenced upon the Court's [DiBella, J.] April 30, 2015 determination) and (2) seeks leave to amend the amended complaint to add a cause of action for "deed not delivered" and "rescission" upon which she seeks to set aside the conveyance and/or to rescind the deed upon satisfaction of the foreclosure judgement.

CPLR 3025(b) provides that leave to amend pleadings "shall be freely given upon such terms as may be just." Thus, motions for leave to amend are liberally granted absent prejudice or surprise (see Long Is. Tit. Agency, Inc. v. Frisa, 45 A.D.3d 649, 846 N.Y.S.2d 253). "A court hearing a motion for leave to amend will not examine the merits of the proposed amendment unless the insufficiency or lack of merit is clear and free from doubt ... In cases where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit, leave should be denied" (*id.* at 649, 846 N.Y.S.2d 253 [internal quotation marks and citation omitted]; see Ricca v. Valenti, 24 A.D.3d 647, 648, 807 N.Y.S.2d 123).

Upon application of the above standard, plaintiff's motion is denied.

The desired amendments seek to add causes of action otherwise barred by the six year statute of limitations (see Fagan v. Nowitz, 65 AD3d 1184, 1186 [2d Dept 2009]; CPLR 231[8]) which expired on July 7, 2015. In addition, plaintiff has failed to name a necessary party, her son, to whom her interest in the property was transferred.

In any event, the Court finds that there has been an unreasonable delay in the making of the motion. Notwithstanding the alleged new facts adduced during discovery (see *infra*), all essential facts upon which these theories of recovery are based were well within plaintiff's own knowledge or ability to have timely ascertained including plaintiff's own alleged lack of intent to have executed and/or delivered the deed to her son.

A different result is not warranted by virtue of anything uncovered during discovery including the lack of any notice prior to the closing of the alleged need for plaintiff to convey her interest in the property to her son, the lack of any such requirement in the underlying loan commitment, the absence of any such instructions to closing counsel and the fact that the deed was prepared by the title company which eventually filed it upon plaintiff's execution.

In that the Court has denied that aspect of plaintiff's motion for rescision of the deed, it correspondingly denies the injunctive relief requested.

Whether the application for same is timely or not, the Court hereby grants this 84 year old plaintiff a trial preference to the extent that same is needed.

Based upon the foregoing, it is hereby

ORDERED, that those aspects of plaintiff's motion seeking to to amend the Amended Complaint dated May 9, 2014 and for injunctive relief is denied; and it is further,

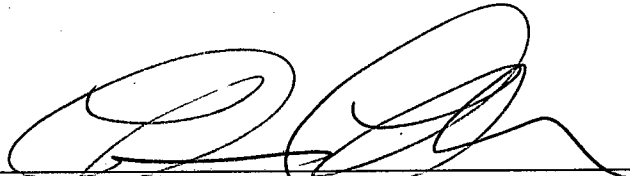
ORDERED, that plaintiff is granted a trial preference; and it is further,

ORDERED, that the Court hereby vacates the injunctive relief imposed upon the presentation of the order to show cause; and it is further,

ORDERED, that the parties are directed to appear on Tuesday, May 17, 2016 at 9:15 a.m. in the Settlement Conference Part, Courtroom 1600, Westchester County Supreme Court, 111 Dr. Martin Luther King, Jr. Boulevard, White Plains, New York, prepared to conduct a settlement conference.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: White Plains, New York  
May 12, 2016

  
HON. LEWIS J. LUBELL, J.S.C.

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