

Steward Title Ins. Co. v Jacobowitz

2017 NY Slip Op 30042(U)

January 9, 2017

Supreme Court, New York County

Docket Number: 153296/2013

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

**STEWART TITLE INSURANCE COMPANY, as
assignee and subrogee of the Community
Preservation Corporation,**

Plaintiff,

-against-

AGNES JACOBOWITZ,

Defendant.

**INDEX NO. 153296/2013
MOTION DATE 12-21-2016
MOTION SEQ. NO. 002
MOTION CAL. NO. _____**

The following papers, numbered 1 to 9 were read on this motion to extend the Notice of Pendency and for Summary Judgment:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____	<u>5</u>
Replying Affidavits _____	<u>6 - 9</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiff's motion to extend the notice of pendency and for summary judgment, is granted.

Defendant is a principal of Brookhaven Development LLC (hereinafter referred to as "Brookhaven"). Plaintiff is a title insurance company and the assignee of Community Preservation Corporation (hereinafter referred to as "CPC"). On January 16, 2008, CPC gave an acquisition loan secured by a mortgage to Brookhaven for real property located at two addresses, at 18-59 and 18-69 Gateway Boulevard, Far Rockaway, New York. On January 16, 2008, defendant executed a written guaranty of payment on the Brookhaven mortgage, pledging not to convey, transfer or encumber her assets (Mot. King Aff. Exh.7). Plaintiff claims defendants assets include her property located at 160 Clymer Street, Unit 1, Brooklyn, New York, Block 02173, Lot 1101 (Mot. Exh. 6).

The mortgage funds were fraudulently transferred pursuant to a January 16, 2008 payoff letter by John Simmons an individual that held himself out as the attorney for an entity alleged to have assumed the prior owner's mortgages. The prior owner's mortgages were never satisfied. Mr. Simmons pled guilty to federal fraud charges related to the transaction. A series of actions taking place in Queens and Kings County were brought. CPC unsuccessfully sought to foreclose on the 18-59 Gateway Boulevard, Far Rockaway, New York property, but was unable to do so because the prior owner's mortgage was deemed senior. In another action that is still pending there is another potential senior mortgage on the property located at 18-69 Gateway Boulevard, Far Rockaway, New York.

On February 11, 2013 plaintiff settled CPC's claims and acquired all rights against Brookhaven and the defendant. On April 10, 2013, plaintiff filed a notice of pendency and commenced this action. The Complaint seeks injunctive relief preventing the defendant from selling, conveying, assigning, pledging, encumbering or otherwise transferring any interest in the property located at 160 Clymer Street, Unit 1,

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Brooklyn, New York, Block 02173, Lot 1101 (hereinafter referred to as the “property”), in violation of an asset restraint provision in a guaranty given by the defendant while any portion remains unpaid (Mot. Exh. 1).

Plaintiff’s motion seeks an Order pursuant to CPLR § 6513 granting a three year extension of the Notice of Pendency filed against the property with the Kings County Clerk’s Office on April 17, 2013. Plaintiff also seeks an Order pursuant to CPLR §3212 granting summary judgment on the injunction.

Plaintiff claims the determinations that the CPC mortgage is not senior for the two addresses located at 18-59 and 18-69 Gateway Boulevard, Far Rockaway, New York, is being appealed and that it vigorously litigated in three different actions to preserve the mortgage collateral of the guaranty. Plaintiff argues that there is good cause because without the extension on the Notice of Pendency the outstanding balance secured by defendant’s guaranty will not be paid, rendering the only remaining security of value for the repayment of the CPC loan, virtually worthless.

The authority and procedural requirements for Notices of Pendency are set forth in Article 65 of the CPLR. A properly filed Notice of Pendency places, “the world on notice of plaintiff’s potential rights in the action” and the named property (In Re Sakow, 97 N.Y. 2d 436, 767 N.E. 2d 666, 741 N.Y.S. 2d 175 [2002]). CPLR § 6513, permits a three year extension of the Notice of Pendency as long as the application is made before the expiration date and good cause is shown (Miller-Francis v. Smith-Jackson, 113 A.D. 3d 28, 976 N.Y.S. 2d 34 [1st Dept., 2013]). Good cause can include pending motion practice that delays a final adjudication of the action (Knof v. Sanford, 110 A.D. 3d 502, 972 N.Y.S. 2d 893 [1st Dept., 2013]).

Plaintiff sought extension of the Notice of Pendency before the expiration date and has stated good cause for the three year extension. The multiple and protracted litigations taking place in both Queens and Brooklyn delayed the relief sought in this action, which is good cause for the extension.

Plaintiff seeks summary judgment on an injunction, enjoining the defendant from selling, conveying, assigning, pledging, encumbering, or otherwise transferring or disposing of any interest in the property for as long as any portion of the balance due to plaintiff under the guaranty remains unpaid.

Plaintiff argues that it is entitled to summary judgment on the injunctive relief because as assignee of CPC, it is entitled to foreclosure relief on the mortgage note and the guaranty and the only remaining security on the balance of the mortgage is the guarantee. In support of the relief sought plaintiff relies on the affidavit of Richard J. King Esq., its vice president and regional counsel, who claims that he has personal knowledge of the material facts resulting from the review of acknowledged and recorded documents, administration of CPC’s claim and attempts to recover losses as a result of settlement of the claim. Mr. King claims the defendant has already breached the promise made in the guaranty by failing to make any payment, and that without the injunctive relief there may be no recovery.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving

party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form, requiring a trial of material factual issues (*Amatulli v. Delhi Constr. Corp.*, 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]).

Defendant provides only the affidavit of her attorney in opposition to the motion and argues that Mr. King's affidavit fails to make a proper foundation for the business records. Defendant also argues that the mortgage and note were invalid for lack of consideration and that plaintiff was negligent in clearing title and is seeking to enforce a flawed claim.

An affirmation from an attorney having no personal knowledge of the facts is hearsay that has no probative value, and is insufficient for purposes of defeating summary judgment (*Johannsen v. Rudolph*, 34 A.D. 3d 338, 824 N.Y.S. 2d 276 [1st Dept., 2006]).

The affidavit of Richard J. King, Esq., does not rely on hearsay and states a prima facie basis to obtain summary judgment on the injunctive relief sought. The hearsay affidavit of defendant's attorney is insufficient to raise an issue of fact. In any case, defendant's arguments fail to state a basis to deny summary judgment. CPC was granted summary judgment in a foreclosure action and defendant's answer was stricken by the February 28, 2011, Decision and Order of the Hon. Marguerite A. Grays, in a Queens action filed under index # 1843/2010, and a subsequent motion by the defendant to vacate was denied (Reply Exhs. 1 and 2). An action brought by the defendant to recover insurance proceeds against plaintiff in Kings County filed under index #010002/2010, resulted in a May 9, 2014, Decision and Order of the Hon. Mark I. Partnow which found that Brookhaven created the conditions that allowed the defect in title to arise and that there was no entitlement to recovery from plaintiff in this action (Reply Exh. 3).

Accordingly, it is ORDERED, that plaintiff's motion to extend the notice of pendency and for summary judgment, is granted, and it is further,

ORDERED, that the Notice of Pendency filed against the property situated at 160 Clymer Street, Unit 1, Brooklyn, New York, identified on the tax map as Block 02173, Lot 1101, which is owned by defendant AGNES JACOBOWITZ, filed on April 17, 2013, is extended for three years from the date of expiration, and it is further,

ORDERED, that the New York County Clerk is directed to forthwith enter this Order and upon payment of the requisite fees issue a certified copy of this Order to plaintiff's counsel, and it is further,

ORDERED, that the Kings County Clerk is directed upon receipt of a certified copy of this Court's Order and the payment of any requisite fees to forthwith make the proper notations upon the land records extending the Notice of Pendency, and it is further,

ORDERED, that plaintiff shall, pursuant to e-filing protocol, serve a copy of this Order with Notice of Entry on the General Clerk's Office and separately, pursuant to e-filing protocol upon the New York County Clerk's Office, and it is further,

ORDERED, that plaintiff is granted an injunction, enjoining AGNES JACOBOWITZ from selling, conveying, assigning, pledging, encumbering, or otherwise transferring or disposing of any interest in the property located at 160

Clymer Street, Unit 1, Brooklyn, New York, identified on the tax map as Block 02173, Lot 1101, for as long as any portion of the balance due to plaintiff under the guaranty remains unpaid, and it is further,

ORDERED, that the Clerk of the Court is directed to enter judgment accordingly.

ENTER:



MANUEL J. MENDEZ,
 J.S.C. **MANUEL J. MENDEZ**
J.S.C.

Dated: January 9, 2017

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE