

**Kunin v Guttman**

2017 NY Slip Op 31735(U)

August 16, 2017

Supreme Court, Kings County

Docket Number: 502725/15

Judge: Debra Silber

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At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 16th day of August, 2017.

P R E S E N T:

HON. DEBRA SILBER,

Justice.

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EDUARD KUNIN,

Plaintiff,

DECISION / ORDER / JUDGMENT

- against -

Index No. 502725/15  
Mot. Seq. # 2 & 3

GEORGE GUTTMAN; ALEX RABINOVICH and  
XIFENG ZHANG,

Defendants.

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The following papers numbered 1 to 11 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_

1-4 7-9  
5-6 10  
10 11

Upon the foregoing papers in this action to enforce a judgment, defendant Xifeng Zhang (defendant Zhang) moves for an order: (1) granting her summary judgment, pursuant to CPLR 3212, dismissing the complaint filed by the plaintiff, Eduard Kunin (Kunin); (2) declaring her ownership of the property at 2300 East 13th Street in Brooklyn (Block 7397, Lot 98) (Property) free and clear of any right, title or interest claimed by Kunin; (3) cancelling Kunin’s notice of pendency filed against the Property, pursuant to CPLR 6514; or, alternatively, (4) imposing a constructive trust on the Property in her favor, which is superior in priority to the lien of Kunin’s judgment in an amount at least equal to \$643,650 plus \$41,263.80 in real estate taxes, with interest at the statutory rate; and (5) granting her

a default judgment on her cross-claims against defendant Alex Rabinovich (Rabinovich) and “directing that proceedings for the entry of a judgment, or the making of an assessment, the taking of an account o[f] proof, or the direction of a reference as to the damages or amount of judgment be conducted at the time of or following the trial or other final disposition between Plaintiff and Zhang of the within action”;<sup>1</sup> or, alternatively, (6) extending her time within which to file a motion for a default judgment against Rabinovich until the main action has been adjudicated.

Plaintiff Kunin cross-moves for an order: (1) granting him summary judgment against defendant Zhang, pursuant to CPLR 3212, and (2) appointing a referee to compute the amount due and owing to him.

### ***Background***

#### ***The Judgment***

Kunin is the assignee of a \$1,065,000.00 judgment that was docketed against, *inter alia*, defendants Rabinovich (spelled “R-a-b-i-n-o-v-i-c-h”) and George Guttman (Guttman) (spelled “G-u-t-t-m-a-n”) on March 4, 2011 (the Judgment) in a Kings County Supreme Court action entitled *Harvard Homes, Inc. v Guttman, et al.*, Kings County index No. 7141/07. The plaintiff in this prior action, Harvard Homes, Inc., assigned the Judgment to Kunin on June 20, 2013, and the assignment of the Judgment was later filed with the Kings County Clerk on February 9, 2015.

#### ***Defendant Zhang’s Purchase Of The Property***

About six months after the Judgment was entered (March 4, 2011), yet prior to the June 20, 2013 assignment of the Judgment to Kunin, defendants Guttman and Rabinovich transferred the Property (held under the names Guttman and Rabinovich) to defendant

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<sup>1</sup> See defendant Zhang’s February 17, 2017 notice of motion at 2.

Zhang by a September 26, 2011 deed. Defendant Zhang paid \$714,000.00 for the Property. The majority of that payment paid off two mortgages which were recorded against the Property before the Judgment was docketed.

***The Instant Action***

On March 10, 2015, Kunin commenced this action against Guttman, Rabinovich and defendant Zhang by filing a summons and a verified complaint.<sup>2</sup> Kunin filed a notice of pendency against the Property on March 20, 2015.

The complaint alleges that “[p]ursuant to the New York Lien Law . . . the JUDGMENT became a valid and enforceable lien against all real property owned [by] the defendants GUTTMAN and RABINOVICH.”<sup>3</sup> Allegedly, “[o]n September 26, 2011, defendants GUTTMAN and RABINOVICH transferred the PREMISES from themselves to defendant ZHANG for no consideration” “with the intention of placing the Plaintiff’s interest in the PREMISES beyond the reach of Plaintiff and other creditors in order to and with the intent to defraud, hinder and delay . . .”<sup>4</sup> The complaint further alleges that “[a]t the time the PREMISES were conveyed to h[er], defendant ZHANG knew or should have known of the lien created by the JUDGMENT against the PREMISES.”<sup>5</sup> The complaint seeks: (1) to foreclose on the Judgment lien; (2) the imposition of a constructive trust based on defendants’ violation of New York Creditor Law § 270; and (3) an award of punitive damages based on defendants’ “malicious, wanton and reckless” conduct.

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<sup>2</sup> Plaintiff filed an amended verified complaint as of right on March 18, 2015, but defendant Zhang contends that she was never served with the amended complaint. However, defendant Zhang was served after the amended complaint was filed, so she was presumably served with it and not the original complaint.

<sup>3</sup> Complaint at ¶ 8.

<sup>4</sup> *Id.* at ¶¶ 12 and 14.

<sup>5</sup> *Id.* at ¶ 17.

On May 18, 2015, defendant Zhang filed an answer, denying the allegations of the complaint and interposing affirmative defenses, including that: (1) the Judgment never attached as a lien against the Property because the deed to the Property was in the names of “Alex Rabinovich” and “George Guttman” as distinguished from the Judgment, which was docketed against “Alex Rabinovich” and “George Guttman,” and (2) she was a bona fide purchaser for value without actual or constructive notice of the Judgment because it was not revealed by a title search of the Property.<sup>6</sup>

In addition, defendant Zhang’s answer asserted two counterclaims against Plaintiff for: (1) a declaration that her ownership of the Property is free and clear of the Judgment, and (2) unjust enrichment because: (a) \$643,650.00 of the proceeds from the sale were used to satisfy two mortgages on the Property, and (b) she has paid \$41,263.80 in real estate taxes. Defendant Zhang also interposed a cross claim against Rabinovich and Guttman for their alleged breach of a covenant in the September 26, 2011 deed by misrepresenting that there were no judgments filed against either of them.

According to defendant Zhang’s affidavit of service in the record, she served her answer upon Rabinovich by delivering a copy to a person of suitable age and discretion at 1814 Avenue X in Brooklyn (Rabinovich’s last known address) on February 4, 2016, and subsequently mailed a copy of the answer to Rabinovich at the same address. Rabinovich and Guttman have both failed to appear in this action, and did not answer or otherwise respond to defendant Zhang’s cross claim.<sup>7</sup>

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<sup>6</sup> On June 1, 2015, Plaintiff filed a reply to defendant Zhang’s counterclaims.

<sup>7</sup> On July 21, 2016, defendant Zhang moved for a default judgment against Guttman, who similarly failed to respond to defendant Zhang’s cross claim. By an October 11, 2016 order, this court granted defendant Zhang an extension of time within which to seek a default judgment against Guttman following the disposition of the action between Kunin and defendant Zhang. She is now seeking the same relief as against Rabinovich.

Discovery ensued, and on January 13, 2017, Kunin filed a note of issue indicating that discovery is complete and the action is ready for trial.

***The Instant Motion And Cross Motion***

Defendant Zhang moves for an order: (1) granting her summary judgment dismissing the complaint as against her; (2) granting her a declaration that she owns the Property free and clear of any right, title or interest claimed by Kunin; (3) cancelling Kunin's notice of pendency; or, alternatively, (4) imposing a constructive trust against the Property or the proceeds from a foreclosure sale, which is "superior in priority to Kunin's claimed lien/recovery";<sup>8</sup> and (5) granting her a default judgment against Rabinovich or extending her time within which to file a motion for a default judgment against him.

Defendant Zhang submits an affidavit attesting that at the time she purchased the Property for \$714,000.00 it was owned by "Alex Rabinovich" and "George Guttman," as reflected in the September 2, 2004 deed to the Property (which pre-dated the Judgment). Essentially, "[t]he names of the debtors on the Judgment do not match the names on the Prior Deed."<sup>9</sup>

Furthermore, defendant Zhang attests that "[a]t no time prior to completing my purchase of the Property . . . was I notified, informed or otherwise aware of any claimed debt owed by the Sellers to Eduard Kunin or his predecessor company, Harvard Homes, Inc."<sup>10</sup> Defendant Zhang attests that "at the closing, Sellers executed a closing affidavit wherein they stated [that] they were the owners of the Property and that there were no judgments against

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<sup>8</sup> See ¶ 3 of the February 17, 2017 affirmation of Rajan Patel, Esq., submitted in support of defendant Zhang's summary judgment motion (Patel Affirmation).

<sup>9</sup> Patel Affirmation at ¶ 36.

<sup>10</sup> See ¶ 13 of the February 15, 2017 affidavit of Xifeng Zhang submitted in support of defendant Zhang's summary judgment motion (Zhang Affidavit).

them . . .”<sup>11</sup> Defendant Zhang also attests that she “relied in part on the Sellers’ representations and on the judgment search in [her] title report which indicated [that] no judgments were found against the ‘certified owners’ of the Property . . .”<sup>12</sup>

Defense counsel asserts that “[b]ecause the Plaintiff’s judgment was not properly docketed against the names of the title holders to the Property, it imparted no constructive notice of Plaintiff’s claimed rights and was not disclosed in a title search conducted in connection with Zhang’s purchase . . .”<sup>13</sup> Defendant Zhang contends that she did not have either actual or constructive knowledge of the Judgment when she purchased the Property, and thus, she was a bona fide purchaser for value whose ownership of the Property should be free from any right, title or interest claimed by Kunin.

Regarding her expenditures on the Property (other than the purchase price), defendant Zhang attests that she has spent about \$150,000.00 on repairs and improvements to the Property and \$41,263.80 in real estate taxes prior to commencement of this action. Defendant Zhang incurred these expenses because she believed that “she owned the Property free and clear of any adverse interests or claims.”<sup>14</sup>

Defendant Zhang’s motion is also supported by the affidavit of Terry Caccioppoli, a senior underwriter and administrator at Intracoastal Abstract Co., Inc. (Intracoastal), the title company that was hired to conduct a title search for defendant Zhang’s purchase of the Property. Caccioppoli attested that defendant Zhang’s purchase of the Property involved a “short sale” because the balance due on the mortgages exceeded the market value of the

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<sup>11</sup> Zhang Affidavit at ¶ 16.

<sup>12</sup> *Id.* at ¶ 18.

<sup>13</sup> *See* Patel Affirmation at ¶ 2.

<sup>14</sup> Defendant Zhang’s February 17, 2017 memorandum of law in support of her motion at 8.

Property,<sup>15</sup> and that Intracoastal obtained copies of the payoff letters for the mortgages. According to the HUD-1 statement in the record, \$627,750.00 of the sale proceeds were applied to a first mortgage on the Property and \$15,900.00 of the sale proceeds were applied to a second mortgage on the Property. Satisfactions of the two mortgages were subsequently filed with the City Register's Office.

Plaintiff, in opposition to Zhang's motion and in support of his cross motion for summary judgment, argues that Intracoastal "admitted that it 'should have' discovered the Plaintiff's Judgment Lien on the Premises, but did not. This is an admission of negligence in [Intracoastal's] performance of the duty it was retained to perform. . . . Under the law of agency, defendant ZHANG is liable for the negligence of her agent, [Intracoastal]."<sup>16</sup> According to Kunin, "defendant ZHANG's recourse is to seek indemnification from her negligent agent, [Intracoastal]."<sup>17</sup>

Defendant Zhang, in reply, notes that Kunin "acknowledges that the spelling of his debtors' surnames on the Judgment did not match the spelling of their names on the deed by which Robinovich and Guttman took title to the Property . . . thus supporting Zhang's position that she had no constructive notice of the Judgment."<sup>18</sup> Defendant Zhang contends that Intracoastal was not Zhang's agent "as a matter of fact . . . because Zhang could not

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<sup>15</sup> At the time defendant Zhang purchased the Property, the total mortgage debt against the Property was approximately \$878,984.66 (Patel Affirmation at ¶ 22). The foreclosure action was *Citimortgage v Guttman and Rabinovich, et al*, 29918/10.

<sup>16</sup> See ¶¶ 31-32 of the March 8, 2017 affirmation of Erik Ikhilov, Esq., submitted in opposition to defendant Zhang's summary judgment motion (Ikhilov Opposition Affirmation) and ¶¶ 37-38 of the March 8, 2017 affirmation of Erik Ikhilov, Esq., submitted in support of Kunin's cross motion for summary judgment (Ikhilov Cross-Moving Affirmation).

<sup>17</sup> Ikhilov Opposition Affirmation at ¶ 37; Ikhilov Cross-Moving Affirmation at ¶ 43.

<sup>18</sup> See ¶ 4 of the March 27, 2017 reply affirmation of Rajan Patel, Esq., submitted in opposition to Plaintiff's cross motion and in further support of defendant Zhang's summary judgment motion (Patel Reply Affirmation).

exercise authority or control over its conduct . . .” as reflected in Schedule B to the title commitment.<sup>19</sup> In any event, Zhang argues that plaintiff failed to present any evidence to support plaintiff’s agency argument.

### *Discussion*

#### *(1)*

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

“The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez*, 68 NY2d at 324; *see also Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the

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<sup>19</sup> Patel Reply Affirmation at ¶ 4.

existence of material issues of fact which require a trial of the action” (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]; *see also Zuckerman*, 49 NY2d at 562).

(2)

Under CPLR 5018 (c) (1), a judgment is docketed when the County Clerk makes an entry “under the surname of the judgment debtor.” The Appellate Division, Second Department has held that a judgment docketed against a surname that differs from the surname of the title owner of real property does not create a lien on that property, since the judgment does not provide notice to purchasers of the property:

“[a] judgment is not docketed against any particular property, but solely against a name, and if that name is incorrectly set forth, a purchaser in good faith should not be the one to suffer; but rather the creditor, who should see to it that the docketing is in the correct name of the debtor, if it is to be notice to subsequent purchasers” (*We Buy Now, LLC v Cadlerock Joint Venture, LP*, 46 AD3d 549, 549 [2007] [internal quotations omitted]).

Here, defendant Zhang has satisfied her prima facie entitlement to summary judgment dismissing the complaint as against her by demonstrating that Kunin’s Judgment was docketed against “Guttman” and “Rabinovich,” which are different surnames than that of the former title owners of the Property, “Guttman” and “Robinovich.” A judgment docketed against “George Guttman” and “Alex Rabinovich” did not constitute constructive notice upon defendant Zhang, a good faith purchaser for value, that the Property owned by “George Guttman” and “Alex Robinovich” is subject to a lien, as a matter of law (*Smith v Ralph Dinapoli Landscaping, Inc.*, 111 AD3d 841, 842 [2d Dept 2013]; *Matter of Soressi v SWF, L.P.*, 81 AD3d 1143 [3d Dept 2011]). *See also* CPLR 5018(c).

Kunin, in opposition, has failed to submit evidence that defendant Zhang had either actual or constructive knowledge of Kunin’s docketed Judgment against Guttman and

Rabinovich. Kunin's contention that defendant Zhang had constructive knowledge through an agency relationship with Intracoastal is not supported by the record or the controlling law. Consequently, defendant Zhang is entitled to summary judgment dismissing the complaint as against her and an order vacating the notice of pendency filed against the Property because Kunin's Judgment did not create a valid lien against the Property.

Accordingly, it is

**ORDERED** that the branch of defendant Zhang's motion for summary judgment dismissing the complaint as against her is granted, and the complaint is dismissed as against defendant Zhang along with her cross-claims and counterclaims; and it is further

**ORDERED, ADJUDGED AND DECLARED** that defendant Zhang's ownership of the Property is free and clear of any right, title or interest claimed by Kunin; and it is further

**ORDERED** that the branch of defendant Zhang's motion seeking to cancel Kunin's notice of pendency filed on or about March 20, 2015 against the Property is granted; and the County Clerk of Kings County is directed to cancel and discharge said Notice of Pendency filed against Block 7397 Lot 98 and known as 2300 East 13<sup>th</sup> Street, Brooklyn, New York; and it is further

**ORDERED** that the branches of defendant Zhang's motion seeking a default judgment against the defaulting defendant Alex Rabinovich on her cross claim or an extension of time within which to do so until the time of, or following, the trial or other disposition of the within action between Kunin and defendant Zhang, and for a constructive trust, are denied as moot; and it is further

**ORDERED** that Kunin's cross motion is denied in its entirety, and it is further

**ORDERED** that, as plaintiff has failed to obtain a default judgment against the other two defendants within a year of their default, this action has been abandoned as against them, and accordingly, in light of the dismissal of the complaint against Chang, the complaint is dismissed in its entirety. See CPLR § 3215; *Herzbrun v Levine* 23 AD2d 744 (1<sup>st</sup> Dept 1965).

This constitutes the decision and order of the court.

**E N T E R,**



Hon. Debra Silber, J. S. C

Hon. Debra Silber  
Justice Supreme Court