

Ashley v Ashley

2017 NY Slip Op 33559(U)

December 18, 2017

Supreme Court, Westchester County

Docket Number: Index No. 68532/13

Judge: Linda S. Jamieson

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NYSCEF DOC. NO. 185

To commence the statutory time period for appeals as of right (CPLR § 5313 (a)), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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Disp ____ Dec __x__ Seq. Nos. __6__ Type __SJ__

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON
-----X

PAULA ASHLEY,

Plaintiff,

-against-

Index No. 68532/13

DECISION AND ORDER

PHILLIP ASHLEY, et al.,

Defendants.

-----X

The following papers numbered 1 to 3 were read on these motions:

<u>Paper</u>	<u>Number</u>
Notice of Motion, Affirmation and Exhibits	1
Affirmation and Exhibit in Opposition	2
Affirmation in Reply	3

There is yet another motion before the Court in this action arising out of plaintiff's contention that her signature was forged on a mortgage taken out by her then-husband, Phillip Ashley ("Phillip"). It is filed by defendant U.S. Bank, as trustee ("US Bank"). This motion seeks (1) summary judgment on its counterclaim that US Bank is the holder of an equitable mortgage lien on the premises in question in the amount of at least \$691,750; and (2) summary judgment on the second

counterclaim for foreclosure, and to appoint a referee to compute.

Background

The Court has previously summarized the facts in this action, some of which will be repeated herein. In 2000, plaintiff and Phillip bought the premises in question, taking out two mortgages from First Financial Equities ("First Financial"). There is no dispute that these 2000 mortgages are valid. Indeed, plaintiff asserts their validity in her opposition papers on this motion. It is what happened afterwards that is now contested.

There is no dispute that in August 2005, Phillip (possibly with plaintiff's participation, as discussed below) took out a mortgage from US Bank's predecessor, Argent Mortgage Company, LLC ("Argent") in the amount of \$822,000. It is undisputed that some of this money was used to pay off the First Financial mortgages. This undisputedly benefitted both plaintiff and Phillip. In August 2016, in her Response to a Notice to Admit, plaintiff admitted the validity of the 2005 mortgages. However, in her cross-motion in February 2017, plaintiff changed her position, and now contends that she did not participate in the 2005 mortgages. This issue has not yet been resolved.

In August 2006, Phillip, again possibly with plaintiff's participation, took out another mortgage with Argent, this time for \$910,000. Some of this money was used to pay off the 2005

\$822,000 Argent mortgage. In September 2006, Argent assigned the \$910,000 mortgage to US Bank.

In November 2013, plaintiff commenced this action, claiming that her signature on the 2006 mortgage was forged. As stated above, it was only in February 2017, prior to depositions, that plaintiff began to assert in her cross-motion that the 2005 mortgages were also forged. In the previous Decision and Order in this action, the Court allowed US Bank to amend its answer to add the affirmative defense and counterclaim that it is the holder of the \$822,000 mortgage by subrogation (as well as cross-claims against Phillip for indemnification in the event that plaintiff can prove that her signature on the 2006 mortgage is a forgery). In discussing the new counterclaims, the Court explained that "What [the counterclaim] means is that in 2006, US Bank's predecessor, Argent, loaned money to Phillip (possibly with plaintiff's participation). This money was used to pay off the 2005 mortgage, which benefitted Phillip (and possibly plaintiff). US Bank wants to make sure that whether the 2006 mortgage was forged as to plaintiff or not, it will be able to be reimbursed by Phillip at least, or can foreclose on its mortgage."

The Court went on to state that "The Court notes that in its reply papers, however, US Bank states that since plaintiff is now challenging her signature on the 2005 mortgage, it should be

entitled to summary judgment 'declaring it to be the holder of an equitable mortgage lien in the undisputed amount of \$691,750. . . . This is the amount that was paid off from the 2000 mortgages, which plaintiff does not dispute. Plaintiff, of course, did not have an opportunity to respond to this new theory, since US Bank first raised it in reply."

Now, on this motion, US Bank seeks summary judgment on this new theory. Plaintiff opposes this relief on two specific grounds: (1) that it is US Bank's second motion for summary judgment, and thus impermissible; and (2) that there is another foreclosure action pending between the parties. Beginning with the second contention, the other foreclosure action, Index No. 54232/2016, does not pertain to the 2005 mortgages at issue here. It concerns the 2006 mortgages. It is thus irrelevant.

Turning to the second ground, that US Bank's motion is impermissible, the Court observes that "although there is a "general proscription against successive summary judgment motions, under the circumstances, the Supreme Court properly addressed the merits of the defendant's second motion for summary judgment, as the defendant averred that the motion was supported by newly-discovered evidence." *EDP Hosp. Computer Sys., Inc. v. Bronx-Lebanon Hosp. Ctr.*, 63 A.D.3d 665, 666, 880 N.Y.S.2d 349, 350 (2d Dept. 2009). See also *Rotante v. Advance Transit Co.*, 148 A.D.3d 423, 425, 49 N.Y.S.3d 391, 392 (2d Dept. 2017).

In this case, the Court held in the previous Decision and Order - which allowed the new claims - that it could not grant US Bank the relief it sought because it was a new theory, first raised in reply. The reason that it was first raised in reply was because, as the Court also discussed, plaintiff had changed her position on the validity of her signatures on the 2005 mortgages. The Court thus finds, as a matter of law, that this motion is not an impermissible second motion for summary judgment.

The Court has reviewed plaintiff's papers, and finds that there is no substantive reason contained therein for the denial of the relief sought by US Bank. This is because there cannot be any; as stated, plaintiff and Phillip took out the 2000 mortgages. The 2000 mortgages were satisfied by a portion of the proceeds of the 2005 mortgages (\$691,750), whether or not plaintiff's signatures thereon were forged. Thus, even if plaintiff was the victim of wrongdoing, she nonetheless benefitted in some respect because her 2000 obligations were discharged.

Accordingly, the Court grants US Bank's motion in its entirety. US Bank shall submit a proposed Order of Reference to the Court, on notice, within 30 days of receipt of this Decision

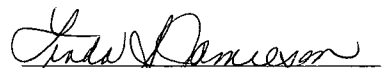
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and Order.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
December 18, 2017


HON. LINDA S. JAMIESON
Justice of the Supreme Court

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