

Wang v Hon
2018 NY Slip Op 32757(U)
October 24, 2018
Supreme Court, Queens County
Docket Number: 12353/17
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS

IA PART 2

ROUG KANG WANG, STELLA WANG, and WANG
REAL PROPERTY LLC,

Plaintiff,

-against-

JOHN HON, JULIE HON, JOHN HON, D.O., P.C.,
D/B/A ELMHURST AVENUE MEDICAL
ASSOCIATES D/B/A FLUSHING MEDICAL
ASSOCIATES, 41ST ROAD PROPERTIES LLC,
JOSEPH ARONAUER, EMIGRANT BANK, and
JOSEPH FUCITO,

Defendants.

Index Number: 12353/17

Motion Date: 6/2/7/18

Motion Seq. No. 2

The following papers numbered 1 to 5 read on this motion by defendant Emigrant Bank for an order pursuant to CPLR 3211(a)(1), (5), and (7) dismissing the complaint against it

Papers
Numbered

Notice of Motion - Affidavits - Exhibits	1
Answering Affidavits - Exhibits	2-3
Reply Affidavits	4-5

Upon the foregoing papers it is ordered that the motion is granted.

I. Background

Much of the relevant factual and procedural background concerning the dispute between the parties was clearly and concisely stated by the Honorable Salvatore J. Modica in a decision and order dated July 5, 2018 rendered on a motion made by Roug Kang

Wang and Stella Wang in *Wang v. Lin*, a related case pending in the New York State Supreme Court, County of Queens under Index Number 11000/05:

“On April 1, 2003, Roug Kang Wang and Stella Wang (collectively the Wangs or the Wang plaintiffs), as purchasers, entered into a contract for the purchase of property known as 132-05 41st Road, Flushing, New York (the subject property) from Prince Development Co. LLC at a price of \$2,000,000. In 2005, the Wangs began the instant action in the New York State Supreme Court, County of Queens, for, inter alia the specific performance of the contract of sale (*Wang v. Chien-Tsang Lin*, Index No. 11000/05), and pursuant to an order dated April 10, 2013, the Wangs were granted specific performance against Prince. The subject property was conveyed to the Wangs by a sheriff’s deed dated May 3, 2013.

John Hon, Julie Hon, and John Hon, D.O., PC., (collectively the Hons), who own real property known as 135-07 41st Road, Flushing, New York, adjacent to the subject property, are judgment creditors who have a judgment lien on the subject property. The Hons obtained their judgment in the New York State Supreme Court, New York County, in an action captioned *Hon v. Prince Development Company, LLC*, Index No. 602236/04. The Hons filed their judgment in Queens County on January 30, 2009, and the filing of the judgment created a lien on real property owned by any judgment debtor in Queens County as of that date.

Prince Development Co., LLC (Prince) still owned the subject property at the time of the filing of the lien in Queens County on January 30, 2009. Pursuant to a deed dated May 3, 2013, the sheriff conveyed the subject property to the Wangs, the plaintiffs in the instant action, The Wang plaintiffs transferred the subject property to Wang Real Property LLC (Wang Property), the current owner, by deed dated June 17, 2013,

In or about December, 2014, the Wangs and Wang Property began a special proceeding in the New York State Supreme Court, County of Queens, against the Hons, among others, pursuant to CPLR 5239 for a judgment declaring that the Hons did not have a judgment lien against the subject property (*Wang Real Property LLC v; Prince Development Company LLC*, Index No. 18415/14) (the adverse claims proceeding).. Pursuant to a decision and order dated July 8, 2015, the Honorable Diccia T.Pineda Kirwan found, inter alia, that “upon conveyance of the subject property pursuant to the Sheriff’s deed, the Wangs took title to it subject to the Hon’s judgment lien.” The court dismissed the petition brought by the Wangs. Neither the Wangs nor Wang Property appealed the order.

In 2014, the Emigrant Bank began an action to foreclose on a mortgage on the subject property, and in or about June, 2015, 41st Road Properties LLC purchased the mortgage. The Wangs and Wang Property successfully offered money toward the payment of the debt, and they obtained and recorded a satisfaction of mortgage.

After the satisfaction of the mortgage, the Wangs pressed the sale of the subject property to obtain the payment of their judgment lien, and the Sheriff noticed a sale for October 11, 2017. The Wangs and Wang Property made a motion in the New York County action for an “order of protection” prohibiting the Sheriff’s sale, but by order dated October 6, 2017, the court denied the motion, relying on the decision and order rendered by Justice Pineda-Kirwan.

On March 7, 2018, the Wangs submitted a motion in *Wang v. Chien Tsang Lin* for an order staying the sale of the subject property, but by decision and order dated July 5, 2018, the Honorable Salvatore J. Modica denied the motion., finding, inter alia, that the judgment rendered by Justice Pineda-Kirwan was a decision on the merits..

The Wangs began the instant action on December 26, 2017 by the filing of a summons and a complaint. The lawsuit purports to be “ a real property action for enforcement of the plaintiffs’ right of redemption among other cause[s] of action in premises located at 132-05 and 132-03 41st Road, Flushing, NY ***.” (Complaint ¶ 1.)

On January 15, 2018, the Wangs submitted a motion in the instant action for a preliminary injunction prohibiting the defendants from selling the subject property. Pursuant to a decision and order dated March 16, 2018, this court denied the motion, finding, inter alia, “[t]he plaintiffs have failed to demonstrate any likelihood of success on the merits.”

II. Recent Appellate Division Activity

Judge Dufficy signed a judgment of foreclosure and sale entered on April 19, 2017. The Wangs appealed, but in a decision rendered by the Appellate Division, Second Department on August 1, 2018, several orders issued by Judge Dufficy were affirmed. (*41st Rd. Properties, LLC v. Wang Real Prop., LLC*, 164 AD3d 455 [2nd Dept. 2018].) The appellate court held, inter alia, “Upon 41st Road's submission of proof that Emigrant had assigned it the mortgage and the note, the Supreme Court providently exercised its discretion in granting 41st Road's motion to be substituted as the plaintiff and to amend the caption accordingly ***,” (*41st Rd. Properties, LLC v. Wang Real Prop., LLC, supra*, 455.) The Appellate Division stated further: “The Wang defendants failed to establish any proper

ground under CPLR 5015(a) for vacating the order entered September 29, 2015, which, inter alia, granted Emigrant's motion, among other things, for summary judgment on the complaint insofar as asserted against them. Their conclusory allegations of fraud rested on mere speculation." (*41st Rd. Properties, LLC v. Wang Real Prop., LLC, supra*, 455 .) (Emphasis added.)

The Wangs also separately appealed an order of Judge Dufficy, entered November 30, 2016 which granted Emigrant's motion to confirm a referee's report and for a judgment of foreclosure and sale, and denied the Wang's cross motion, inter alia, to disaffirm the referee's report. (*41st Rd. Properties, LLC v. Wang Real Prop., LLC*, 164 AD3d 459, [2nd Dept.. 2018].) The appellate court, affirming Judge Dufficy's order, stated merely that the issues raised by the Wangs had been considered on the other appeal.

III. The Standards

A party moving for judgment dismissing one or more causes of action asserted against him pursuant to CPLR 3211(a)(1) on the ground that a defense is founded on documentary evidence must show that the documentary evidence submitted is " such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim***." (*Fernandez v. Cigna Property and Casualty Insurance Company*, 188 AD2d 700,702 [3d Dept. 1992]; see, *Galvan v. 9519 Third Avenue Restaurant Corp*, 74 AD3d 743 [2d Dept. 2010].)

A party may move pursuant to CPLR 3211(a)(5) for judgment dismissing one or more causes of action asserted against him on the grounds of res judicata and/or collateral estoppel. "Under the doctrine of res judicata, a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding ***." (*Sterngass v. Soffer*, 27 AD3d 549, 549-550 [2d Dept. 2006]; see, *Barbieri v. Bridge Funding, Inc.*, 5 AD3d 414 [2d Dept, 2004].) "The doctrine of collateral estoppel, a narrower species of res judicata, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same ***." (*Ryan v. New York Telephone Co.*, 62 NY2d 494, 500 [1984]; *Parker v. Blauvelt Volunteer Fire Co., Inc.*, 93 NY2d 343 [1999]; *Altegra Credit Co. v. Tin Chu*, 29 AD3d 718 [29 AD3d 718 [2nd Dept., 2006].)

In determining a motion brought pursuant to CPLR 3211(a)(7), "the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only

whether the facts as alleged fit within any cognizable legal theory ***.” (*Antoine v. Kalandrishvili*, 150 AD3d 941,941[2d Dept. 2017]; *1455 Washington Ave. Assocs. v. Rose & Kiernan*, 260 AD2d 770, 770-771 [3d Dept. 1999].) “ Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery ***.” (*Connaughton v. Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017].) “While typically the pleaded facts will be presumed to be true and accorded a favorable inference, ‘allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence [will] not [be] entitled to such consideration’ ***.” (*Marraccini v. Bertelsmann Music Group Inc.*, 221 AD2d 95, 98 [3d Department, 1996] quoting *Roberts v. Pollack*, 92 AD2d 440, 44.) "Where, as here, evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one ***.” (*Hallwood v. Incorporated Village of Old Westbury*, 130 AD3d 571, 572 [2d Dept. 2015]; *Agai v. Liberty Mut. Agency Corp.*, 118 AD3d 830 [2d Dept 2014].)

IV. Discussion

A. Bankruptcy of Plaintiff Wang Real Property, LLC

The court notes initially that it has received a letter from Joseph Aronauer, Esq., the attorney for some of the defendants in this case, stating that plaintiff Wang Real Property, LLC has filed for bankruptcy. The filing does not stay a determination of the instant motion brought by defendant Emigrant in this case. The automatic stay provisions of 11 U.S.C. § 362(a) do not apply to suits brought by the bankrupt (*Kuntz v. Lake Placid Olympic Organizing Committee of 1980, Inc.*, 148 Misc.2d 649, [(Sup..Ct.1990;] *Martin–Trigona v. Champion Federal Savings and Loan Ass'n.*, 892 F.2d 575 [7th Cir. 1989]; *Berry Estates, Inc. v. State of New York*, 812 F.2d 67[2nd 1987]), and 11 U.S.C. § 362(a) does not bar a defendant in an action brought by the bankrupt from seeking the dismissal of that action.. (*Martin–Trigona v. Champion Federal Savings and Loan Ass'n.*, *supra*; *Kuntz v. Lake Placid Olympic Organizing Committee of 1980, Inc.*, *supra*.)

B. The Emigrant Mortgage

On February 24, 2003, Chien Tsang Lin and Tsu W. Wang executed a note in favor of the Emigrant Mortgage Co., Inc. (EMC) obligating themselves to pay the principal sum of \$496,000 plus interest. To secure the note, Lin and Wang executed a mortgage dated February 24, 2003 on premises known as 132-05 41st Road, Flushing, New York in the

original principal amount of \$496,000. EMC subsequently assigned the note and mortgage to defendant Emigrant Bank (Emigrant), and the assignment was recorded with the Office of the City Register of the City of New York on September 23, 2003. After the debtors defaulted on the payment of the note and mortgage beginning on July 1, 2008, Emigrant began a foreclosure action in the New York State Supreme Court, County of Queens (*Emigrant Bank v. Wang Real Property, LLC*, Index No. 704061/14) on June 11, 2014. The complaint alleged, inter alia that (1) on May 2, 2003 Lin and Wang had transferred title to the subject property to the Prince Development Co. subject to the mortgage (2) pursuant to an order dated April 26, 2013, the sheriff had transferred title to the subject property on behalf of Prince Development Co. to Roug Kang Wang and Stella Wang, and (3) the subject property was subsequently transferred to Wang Real Property, LLC. On April 22, 2015, Emigrant submitted a motion for summary judgment, and the Wangs cross moved for summary judgment. By a decision and order dated May 5, 2015, the Honorable Timothy J. Dufficy granted Emigrant's motion and denied the Wangs' cross motion.

On June 4, 2015, Emigrant assigned the note and mortgage to 41st Road Properties LLC for \$450,000. This is evidenced by (1) a wire confirmation dated June 4, 2015 showing a transfer in the amount of \$452,000 from 41st Road Properties to the attorney for Emigrant and (2) an attorney's check dated June 4, 2015 in the amount of \$450,000 payable to the order of EMC. An assignment of mortgage dated June 4, 2015 was recorded in the Office of the City Register on July 22, 2015. When 41st Road Properties moved to be substituted as the plaintiff in the foreclosure action, the Wangs submitted opposition and cross moved for summary judgment, alleging, inter alia, that Emigrant had fraudulently conveyed the mortgage to the proposed plaintiff. By a decision and order (one paper) dated April 29, 2016, Judge Dufficy granted the motion for an order of substitution and denied the Wangs' renewed motion for summary judgment.

C, The Causes of Action Asserted Against Emigrant

The second, third, and ninth causes of action are for fraudulent conveyance by Emigrant. The Wangs allege that when the assignment from Emigrant to 41st Road was made, the judgment was worth about \$964,265,26, but that the Hons only paid \$10 in consideration for the assignment. The complaint alleges that "[t]he Hon defendants entered into the conveyance [the assignment of the mortgage] with the actual intent to hinder, delay, or defraud the the Plaintiffs from obtaining the property." (§72)

Debtor and Creditor Law §276, "Conveyance made with intent to defraud," provides: "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or

future creditors, is fraudulent as to both present and future creditors.” (*See, B.M.H. Management, Inc. v. 81 & 3 Of Watertown, Inc.*, 13 AD3d 1182 [4th Department 2004].)

D. CPLR 3211(a)(1)

The documentary evidence in this case shows that 41st Road Properties paid \$450,000 in consideration for an assignment of the mortgage, not just \$10 as alleged in the complaint . Because direct evidence of fraudulent intent is not common, the plaintiff may prove his case through “badges of fraud,” which are circumstances that accompany fraudulent transfers so frequently that their presence gives rise to an inference of intent. (*See, A&M Glob. Mgmt. Corp. v. Northtown Urology Assocs., P.C.*, 115 AD3d 1283 [4th Department,, 2014]; *Dempster v. Overview Equities, Inc.*, 4 AD3d 495 [2d Department, 2004].) “These badges of fraud include lack or inadequacy of consideration, family, friendship, or close associate relationship between transferor and transferee, the debtor's retention of possession, benefit, or use of the property in question, the existence of a pattern or series of transactions or course of conduct after the incurring of debt, and the transferor's knowledge of the creditor's claim and the inability to pay it ***.” (*Steinberg v. Levine*, 6 AD3d 620, 621 [2d Dept 2004].) The only badge of fraud alleged by the Wangs is inadequacy of consideration, and Emigrant has produced documentary evidence which shows the allegation to be false. The Wangs’ bald allegation that even \$450,000 was inadequate consideration for the assignment does not salvage their complaint against Emigrant. The documentary evidence is dispositive of the fraudulent conveyance claims asserted against the bank.

E. CPLR 3211(a)(5)

The causes of action for fraudulent conveyance are barred by the doctrine of collateral estoppel. 41st Road moved to be substituted as the plaintiff in the foreclosure action after receiving an assignment of the mortgage from Emigrant, and the Wangs moved for leave to renew their motion for summary judgment. The Wangs argued , inter alia, that Emigrant had fraudulently conveyed the note and mortgage to 41st Road. By a decision and order dated April 29, 2016 (one paper), the Honorable Timothy J. Dufficy rejected the argument, denied the motion for leave to renew, and granted the motion for an order of substitution. Judge Dufficy stated: “ The claims of the Wang defendants are unsupported misstatements of law and fact insinuating that the assignment of the mortgage and the associated chose in action is somehow ‘secret’, improper, or that it justifies a retread of issues already litigated.” A reading of an affirmation submitted by the attorney for the Wangs (William R. Stolz) dated January 19, 2016 shows that the matter of an allegedly fraudulent conveyance was raised before Justice Dufficy. For example, Stolz alleged that even \$400,000 was not a fair consideration for the mortgage, citing *Bank of Commc'ns v. Ocean*

Dev. Am., Inc., 904 F. Supp. 2d 356[S.D.N.Y. 2012], a case concerning an alleged fraudulent conveyance. Paragraph 29 of the Stolz affirmation cites and quotes section 273-a of the Debtor and Creditor Law. On appeal, the Appellate Division found: “Their [the Wang’s] conclusory allegations of fraud rested on mere speculation.” (*41st Rd. Properties, LLC v. Wang Real Prop., LLC*, 164 AD3d 455 [2nd Dept. 2018].)

F. CPLR 3211(a)(7)

The documentary evidence submitted by Emigrant shows that the allegation in the Wangs’ complaint that the Hons only paid \$10 in consideration for the assignment of the mortgage is “flatly contradicted by documentary evidence.” (*Marraccini v. Bertelsmann Music Group Inc., supra.*)

Moreover, the court cannot discern a cause of action within the scope of the Debtor and Creditor Law. The Wangs were not creditors of either Emigrant or the Hons within the definition of section 270 of the Debtor and Creditor Law, that is, they were not “person[s] having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent.” The Wangs did not have any claim concerning the mortgage itself that was the subject of the assignment. The Wangs attempt to assert a claim concerning the equity of redemption. The complaint alleges that “[d]ue to the Hon Defendants’ actions, the plaintiffs suffered loss of the benefit of redeeming the property for the discounted amount that the Hon defendants tendered Emigrant.” The right of redemption is “[t]he right of a mortgagor in default to recover property before a foreclosure sale by paying the principal, interest, and other costs that are due.” (Black's Law Dictionary [10th ed. 2014].) The Wangs did not have an enforceable claim to redeem the property at less than full price.

Dated: October 24 , 2018

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J.S.C.