

**Matter of Saadia Safdi Realty LLC v Press**

2018 NY Slip Op 34544(U)

December 12, 2018

Supreme Court, Kings County

Docket Number: Index No. 507079/18

Judge: Pamela L. Fisher

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At an IAS Term, Part 94 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 12<sup>th</sup> day of December, 2018.

P R E S E N T:

HON. PAMELA L. FISHER,  
Justice.

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APPLICATION OF: SAADIA SAFDI REALTY LLC  
D/B/A SAADIA SAFDI REALTY 3 LLC AND  
D/B/A SAADIA SAFDI REALTY 2 LLC,

Petitioner,

- against -

MELVIN PRESS AND BASYA PRESS as Trustees  
of the HATZLOCHA B'SYATA D'SHMAYA TRUST,  
2766 W 15<sup>TH</sup> STREET LLC, MANCHESTER  
CAPITAL LLC, ARTHUR DEITEL, ROBERT M.  
GOTTESMAN,

Respondents.

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Decision & order  
Index No. 507079/18  
MS # 1 & 2

The following e-filed papers read herein:

NYSCEF Docket No.:

Notice of Motion/Order to Show Cause/Petition/Cross Motion and Affidavits (Affirmations) and Exhibits Annexed _____	<u>1, 5, 13, 17-18</u>
Opposing Affidavits (Affirmations) _____	<u>29</u>
Reply Affidavits (Affirmations) _____	<u>37-38</u>

Upon the foregoing papers, petitioner Saadia Safdi Realty LLC, petitions for a judgment and order: (1) pursuant to CPLR 5277, directing respondent Manchester Capital LLC (Manchester), 2766 W. 15<sup>th</sup> Street LLC (2766 LLC), and/or their principals, respondents Robert M. Gottesman and Arthur Deitel: (a) to turnover to Petitioner all profits and/or rents

received by 2766 LLC since the delivery to 2766 LLC of the April 28, 2011 quitclaim deed relating to the property located at 2766 West 15<sup>th</sup>, Brooklyn, New York (the Property), over and above payments due to maintain the Property and payments due under a Mortgage Modification and Extension Agreement and Amended and Restated Note, both dated August 10, 2007, (the Note and Mortgage) between Manchester and respondents Melvin Press and Basya Press, as trustees of the Hatzlocha B'Syata D'Shmaya Trust (collectively referred to as the Press Respondents); or (b) requiring Manchester to provide a payoff quote in connection with the Note and Mortgage if there is a balance due and requiring Manchester to accept petitioner's payment of the payoff quote and deeming the Property transferred to petitioner; and (2) appointing a receiver to, among other things, administer the property.

Manchester, Deitel and Gottesman (collectively referred to as the 2766 LLC Respondents) cross-move for an order, pursuant to CPLR 404, dismissing the petition as a matter of law.

The 2766 LLC Respondents' cross motion is granted and the petition is denied and dismissed as against the 2766 LLC Respondents.

Petitioner, which has obtained a judgment in the amount of \$1,082,250 against the Press Respondents, contends that it is entitled to the relief requested in this turnover proceeding because the quitclaim deed dated April 28, 2011 (the Quitclaim Deed), that by its terms purports to transfer the Press Respondents' interest in the Property to 2766 LLC, was, in fact, given to secure Manchester's Note and Mortgage with the Press Respondents.

As such, petitioner argues, the Quitclaim Deed, under Real Property Law § 320, must be considered a mortgage. In August 2007, the Press Respondents, who had apparently owned the Property since 2003, entered into the Note and Mortgage agreement with Manchester, whose principals are Gottesman and Deitel. The August 2007 Note and Mortgage, which were recorded on October 2, 2007, consolidated several prior notes and mortgages and, with an extension, required the Press Respondents to pay the principal amount of \$425,000 plus interest by October 2008.<sup>1</sup> It is undisputed that the Press Respondents defaulted at that time.

According to the affidavit of Robert Gottesman,<sup>2</sup> which petitioner has submitted in support of the petition, Gottesman asserts that the principal and interest (at the default rate of interest) owed by the Press Respondents as of April 1, 2011, totaled \$586,500 and that tax liens and emergency repair liens had been filed against the Property at that time. In order to avoid a foreclosure proceeding, Gottesman avers that he reached an out of court settlement with the Press Respondents in which they agreed to transfer the Property to 2766 LLC, an entity created by Gottesman, by way of a quitclaim deed, in return for being released of their obligations under the Note and Mortgage. In addition to the Quitclaim Deed, the appended Recording and Endorsement Cover page of the same date shows that 2766 LLC paid a New

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<sup>1</sup> Contrary to petitioner's argument, although the "Extension Agreement – Section 255 Affidavit By Borrower" indicates that \$343,000 was due on owing on the mortgages at the time of the execution of the extension agreement, the "Amended and Restated Promissory Note" added a \$82,000 loan made by Manchester to the Press Respondents that made the total principal of \$425,000 due under that note.

<sup>2</sup> Gottesman had submitted this affidavit in support of a summary judgment motion by the 2766 LLC Respondents in a related action (*Saadia Safdi Realty LLC v Press*, 508987/15).

York City real estate transfer tax of \$6,056.25. Moreover, a copy of a release, dated April 28, 2011, was presented to the court, wherein the 2766 LLC Respondents released and discharged the Press Respondents from all causes of action, debts or sums of money owed.<sup>3</sup>

The judgment obtained by petitioner, according to the petition, relates to a \$500,000 loan by petitioner to Blue Rock Capital LLC, an entity controlled by a relative of Melvin and Basya Press, which loan was secured by the promissary note executed by the Press Respondents.<sup>4</sup> This promissary note, among other things, required that the Press Respondents make petitioner an additional owner of the property. The Press Respondents, however, failed to make petitioner an owner pursuant to this requirement and they, along with Blue Rock Capital, defaulted on the loan repayment obligations. In 2015, petitioner commenced the action against the Press Respondents and Blue Rock Capital (*Saadia Safdi Realty LLC v Press*, 508321/15) through which they obtained the above noted judgment, which is dated March 28, 2018. Also in 2015, petitioner commenced an action against the 2766 LLC Respondents and the Press Respondents (*Saadia Safdi Realty LLC v Press*, 508987/15) premised primarily on causes of action based on the fraudulent conveyance provisions of the Debtor Creditor Law §§ 273, 275 and 276. By way of an order dated March

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<sup>3</sup> The very broad release only specifically excluded matters relating to or arising out of the Property.

<sup>4</sup> The note, which formed the basis of the judgment (*Saadia Safdi Realty LLC v Press*, 508321/15), is dated March 10, 2010, and provided that the principal and interest was due on October 1, 2010. The note allowed for the Press Respondents to extend the due date by six months.

23, 2018, the court (Knipel, J.), granted the 2766 LLC Respondents summary judgment dismissing the complaint as against them in the fraudulent conveyance action under index number 508987/15.

This proceeding commenced by petitioner pursuant to CPLR 5227 is a special proceeding (CPLR 5227; *see also* CPLR 401-411). “In a special proceeding, where no triable issues of fact are raised, the court must make a summary determination on the pleadings and papers submitted as if a motion for summary judgment were before it” (*Matter of Friends World Coll. v Nicklin*, 249 AD2d 393, 394 [2d Dept 1998]; *see Port of New York Auth. v 62 Cortland St. Realty Co.*, 18 NY2d 250, 255 [1966], *cert denied* 385 US 1006 [1967]; *Matter of Singh v Baba Makhan Shah Lobana Sikh Ctr., Inc.*, 115 AD3d 962, 963 [2d Dept 2014]; CPLR 409 [b]). Here, while petitioner contends that the Quitclaim Deed must be deemed a mortgage in view of the requirements of Real Property Law § 320, the 2766 LLC Respondents assert that the petition, aside from being barred by the statute of limitations and *res judicata*, is without merit as there is nothing to suggest that the Quitclaim Deed is anything other than an absolute conveyance.

Real Property Law § 320 provides that:

“A deed conveying real property, which, by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage; and the person for whose benefit such deed is made, derives no advantage from the recording thereof, unless every writing, operating as a defeasance of the same, or explanatory of its being desired to

have the effect only of a mortgage, or conditional deed, is also recorded therewith, and at the same time.”

This statute “codifies the common-law principle that the giving of a deed to secure a debt, in whatever form and however structured, creates nothing more than a mortgage” (*Patmos Fifth Real Estate Inc. v Mazl Bldg. LLC*, 140 AD3d 527, 527 [1st Dept 2016]; see *Mooney v Byrne*, 163 NY 86, 91 [1900]; *Leonia Bank v Kouri*, 3 AD3d 213, 216-217 [1st Dept 2004]). Where the proof that the deed was intended to secure a debt comes from another written instrument, “the statute does not require a conclusive showing that the transfer was intended as security [, rather] it is sufficient that the conveyance appears to be intended only as a security in the nature of a mortgage” (*Patmos*, 140 AD3d at 528 [internal quotation marks omitted]; see *Vitvitsky v Heim*, 52 AD3d 1103, 1105 [3d Dept 2008]). While, under the common-law, a claim that a deed was intended as security only may be made out, in the absence of a writing, by parole proof, in such a case the party challenging the deed bears the burden of establishing such an “oral defeasance” by a high standard of proof (*compare Ensign v Ensign*, 120 NY 655, 656 [1890] [proof beyond a reasonable doubt]; *Peerless Constr. Co. v Mancini*, 96 AD2d 666, 667 [3d Dept 1983] [proof beyond a reasonable doubt], *lv denied* 61 NY2d 601 [1983] with *Stevenson v Stevenson*, 32 AD2d 675, 675-676 [2d Dept 1969] [clear and conclusive evidence]). “In determining whether a deed was intended as security, examination may be made not only of the deed and a written agreement executed at the same time, but also of oral testimony bearing on the intent of the parties and to a

consideration of the surrounding circumstances and acts of the parties” (*Bouffard v Befese, LLC*, 111 AD3d 866, 868 [2d Dept 2013] [internal quotation marks and brackets omitted]).

Here, the 2766 LLC Respondents have demonstrated, prima facie, that the Quitclaim Deed was granted to 2766 LLC in lieu of Manchester commencing foreclosure proceedings, and constitutes an absolute conveyance of the Press Respondents’ interest in the Property to 2766 LLC. This burden is made out by the terms of the Quitclaim Deed itself, which conveyed any interest the Press Respondents may have had in the property to 2766 LLC, the Recording and Endorsement Cover Page showing the payment of the real property transfer tax rather than the mortgage tax (*see In re Unit-Rty Corp.*, 1998 WL 299941, \*4 [SDNY 1998], *affd* 175 F3d 1008 [2d Cir 1999]), the release Manchester granted to the Press Respondents, and Gottlieb’s affidavit detailing the circumstances of the transaction. Petitioner, in support of the petition and in opposition to the 2766 LLC Respondents’ cross motion, has provided no evidentiary proof, written or parole, suggesting that the Quitclaim Deed was given as security for any debt or calling into question the authenticity of the proof presented by the 2766 LLC Respondents.

Petitioner, however, asserts that the intent that the deed serve as security for Manchester’s loan can be inferred from certain language contained in Gottesman’s affidavit dated December 5, 2017, the fact that Manchester has not recorded a satisfaction of the mortgage, and the fact that the Quitclaim Deed indicates that it is subject to Manchester’s

mortgage. The paragraph of Gottesman's affidavit relied upon by petitioner, states in its entirety:

"I realized that in order to salvage any part of the loan, I had to gain control of the property so that it would be managed properly. Otherwise real estate taxes, emergency repair liens, and other things of that nature would continue to accumulate and completely wipe out the value of the property. I therefore negotiated an agreement with the trustees of the borrower under which they would give me a deed in return for being released from any liability under the mortgage. For liability purposes, I formed a new entity, 2766 W 15<sup>th</sup> Street LLC, for the sole purpose of taking title to and managing the property" (aff of Gottesman ¶ 7).

Given Gottesman's assertions that he desired to "gain control" of the property and that Manchester would release the Press Respondents from any liability under the mortgage in return for the deed, nothing in the language of this paragraph suggests that the deed was intended as security for any loan. Likewise, in view of the release granted by Manchester to the Press Respondents, the fact that Manchester has not filed a satisfaction of mortgage and the fact that the Quitclaim Deed remains subject to Manchester's mortgage, does not show that the Quitclaim Deed was executed as security for a loan to the Press Respondents or in any way show that the deed is not an absolute transfer of the Press Respondents' interest in the property.<sup>5</sup>

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<sup>5</sup> The court makes no determination of whether, by placing ownership of the Property in the name of 2766 LLC, Manchester properly avoided the extinguishment of the mortgage (*see Congregation Beth Midrosh of Monsey, Inc. v Rolling Acres Chestnut Ridge, LLC*, 101 AD3d 797, 799-800 [2d Dept 2012] [mortgage may be extinguished by common ownership of mortgage and title to the property]; *Cambridge Factors v Thompson*, 215 AD2d 427, 427 [2d Dept 1995]).

In arguing that the Quitclaim Deed must be deemed a mortgage, petitioner also points to case law addressing general rules against a mortgagor waiving his or her equity of redemption (*see e.g. Basile v Erhal Holding Corp.*, 148 AD2d 484, 486 [2d Dept 1989], *lv denied* 75 NY2d 701 [1989]; *Finance Inv. Co. (Bermuda) v Gossweiler*, 145 AD2d 463, 463 [2d Dept 1988], *lv denied* 74 NY2d 881 [1989]; *Maher v Alma Realty Co.*, 70 AD2d 931, 931 [2d Dept 1979]). Under this line of cases, a deed in lieu of foreclosure that is executed at the time a loan is made, or as further security as part of an extension agreement, and with the intent that the creditor could record it in the event of a default by the debtor, will not be found to waive the equity of redemption and will be deemed to be a mortgage under the general principle that such a deed is only intended as security for a debt (*see Patmos Fifth Real Estate Inc. v Mazl Bldg., LLC*, 124 AD2d 422, 426 [1st Dept 2015]; *Bouffard v Befese, LLC*, 111 AD3d 866, 867-868 [2d Dept 2013]; *Burke v State Farm Fire & Cas. Co.*, 105 AD3d 794, 795 [2d Dept 2013]; *Basile*, 148 AD2d at 484-486). The facts here, however, are readily distinguishable from such an arrangement.

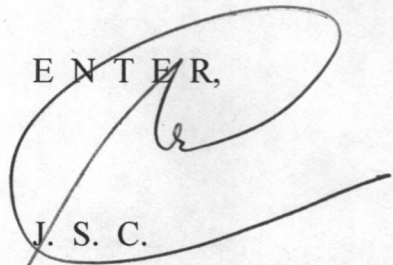
Here, the 2007 Note and Mortgage entered into between the Press Respondents and Manchester constituted a traditional mortgage loan transaction. The Quitclaim Deed at issue was not executed as part of that transaction, but rather, was executed only after a default in return for a release that releases the Press Respondents from liability under the Note. Such an arrangement made after a default on a loan constitutes a generally accepted means for the parties to avoid a foreclosure proceeding and does not constitute an improper attempt to

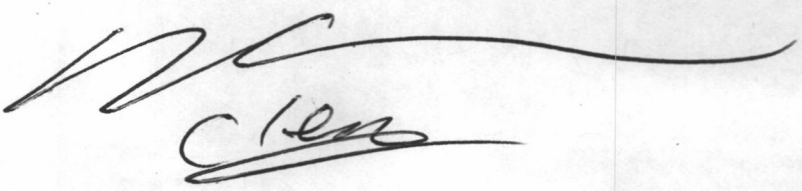
obtain a waiver of the equity of redemption from a mortgagor (*see J & W Wall Sysys., Inc. v Shawmut Mut. First Bank & Trust Co.*, 413 Mass 42, 44-45, 594 NE2d 859, 860-861 [1992]; *Levinson v Fever*, 60 Mass App Ct 428, 436-438, 803 NE2d 341, 348-349 [2004]; *Zuba v Pawtucket Credit Union*, 941 A2d 167, 171-173 [RI 2008]; *Kincaid v South Trust Bank*, 221 SW3d 32, 38-39 [Tx Ct App 2006]; *see also Congregation Beth Midrosh of Monsey, Inc. v Rolling Acres Chestnut Ridge, LLC*, 101 AD3d 797, 798-799 [2d Dept 2012]; *cf. Bouffared*, 111 AD3d at 867-868). Under such circumstances, the deed is not considered to be a mortgage (*see Wilson v Parshall*, 129 NY 223, 226 [1891]; *Johnston v DeHaan*, 37 AD2d 1028, 1028-1029 [3d Dept 1971]; *515-2nd St. Corp. v Bisnoff*, 250 App Div 642, 644-645 [2d Dept 1937]; *Hurwitz v Natruth Holding Corp.*, 194 Misc 56, 57-58 [Sup Ct, New York County 1949], *affd* 277 App Div 1028 [1st Dept 1950]). Indeed, under facts similar to those here, the Court of Appeals, in *Wilson v Parshall* (129 NY 223 [1891]), in finding that a deed granted in lieu of foreclosure was not a mortgage, noted that “it is entirely improbable that [the mortgagee], already having a mortgage to secure their debt, should take another mortgage on the same property for the same debt, without any apparent reason or advantage, and then record it as a deed” (*id.* at 226).

Accordingly, as petitioner has failed to demonstrate the existence of a factual issue suggesting that the Quitclaim Deed was intended as a security for the debt, and given that all of petitioner’s requested relief depends on such a finding, the petition as against the 2766

LLC Respondents is denied and dismissed (see *Matter of Singh*, 115 AD3d at 963; *Matter of 22 Park Place Coop. v Board of Assessors of County of Nassau*, 102 AD2d 893, 893-894 [2d Dept 1984]).<sup>6</sup>

This constitutes the decision, order and judgment of the court.

ENTER,  
  
J. S. C.  
HON. PAMELA L. FISHER



NANCY T. SUNSHINE  
Clerk

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FILED

<sup>6</sup> In view of this determination, the court has not addressed the 2766 LLC Respondents' additional arguments. The court, however, notes that the petition as against the 2766 LLC Respondents is also arguably barred by the statute of limitations (see *Maio v Gardino*, 267 AD2d 816, 817 [3d Dept 1999]; *Ren-Cis Litho v Vantage Graphics*, 194 AD2d 302, 302-303 [20 year statute of limitations for enforcement of judgments only applies to judgment debtors and not transferees unnamed in the judgment]; see also *Loeuis v Grushin*, 126 AD3d 761, 763-765 [2d Dept 2015]; *Piedra v Vanover*, 174 AD2d 191 [2d Dept 1992]; but see *Hoenlein v Kaplan*, 37 AD3d 298, 298 [1st Dept 2007]; *Siegman v Rosen*, 248 AD2d 180, 180 [1st Dept 1998]) and by the doctrine of res judicata (see *Mooney v Manhattan Occupational, Physical & Speech Therapies, PLLC*, \_\_\_ AD3d \_\_\_, 2018 NY Slip Op 08121, \*1 [2d Dept 2018]; *Bayer v City of New York*, 115 AD3d 897, 899 [2d Dept 2014]; *Methal v City of New York*, 50 AD3d 654, 656 [2d Dept 2008]).