

New York Community Bank v Campbell

2019 NY Slip Op 30072(U)

January 7, 2019

Supreme Court, Suffolk County

Docket Number: 11291/2007

Judge: Jr., Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

-----X
NEW YORK COMMUNITY BANK, as Successor in
Interest to ROOSEVELT SAVINGS BANK,

Plaintiffs,

-against-

EDWARD CAMPBELL, JR., CAROL A.
CAMPBELL, E*TRADE BANK, ADVANCE
DERMATOLOGY, P.C., SUFFOLK COUNTY
DEPARTMENT OF SOCIAL SERVICES, PEOPLE
OF THE STATE OF NEW YORK, NEW YORK
STATE DEPARTMENT OF TAXATION AND
FINANCE, EDWARD F. CAMPBELL, MARY
ALICE RUPPERT, as Executor of the Estate of
LUCY A. CAMPBELL, "JOHN DOE #1" to "JOHN
DOE #30", inclusive, the last thirty names being
fictitious and unknown to plaintiff, the persons or
parties intended being the tenants, occupants, persons
or corporations, if any, having or claiming an interest
in or lien upon the premises described in the
complaint,

Defendants.

-----X

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INDEX NO.: 11291/2007

MOTION DATE: 2/22/18

MOTION SEQ. NO.: 019 MD, 020 Mot D,
and 021 MD

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ORDERED that the following motions and cross-motion are consolidated for purposes of this decision and order and, as so consolidated, are determined as follows; and it is

ORDERED that the motion (motion sequence no. 019) of non-party U.S. Bank Trust National Association, as Trustee for Towd Point Master Funding Trust 2017-PM13 as assignee of plaintiff New York Community Bank, as successor in interest to Roosevelt Savings Bank, for an order granting summary judgment in favor of plaintiff pursuant to CPLR R. 3212 and striking the joint amended answer of Edward F. Campbell and Carol A. Campbell is denied in all respects; and it is further

ORDERED that the motion (motion sequence no. 020) of defendant Mary Alice Ruppert, as executor of the estate of Lucy A. Campbell, deceased, for an order (a) dismissing all causes of action and cross-claims against Edward F. Campbell on the ground that well-established New York law provides that dead persons cannot be sued; (b) dismissing as untimely, pursuant to CPLR R. 3211(a)(5), plaintiff's causes of action for unjust enrichment, equitable lien (and also as to CPLR R. 3211(a)(7)), and equitable subrogation interposed in the amended verified complaint dated March 5, 2012 against defendant Mary Alice Ruppert, as executor of the estate of Lucy A. Campbell, deceased; (c) pursuant to CPLR R. 3212, granting summary judgment to defendant Mary Alice Ruppert, as executor of the estate of Lucy A. Campbell, deceased, and dismissing the complaint and all causes of action by plaintiff and cross-claims by co-defendants, is granted to the extent set forth hereinafter and is otherwise denied; and it is further

ORDERED that the cross-motion (motion sequence no. 021) of defendants Edward F. Campbell, Jr. and Carol A. Campbell for an order in defendants' favor dismissing the second and third causes of action alleged in plaintiff's amended complaint, verified on March 5, 2012, is denied.

As a preliminary matter, the court must address the fact that motion sequence no. 019 for summary judgment is interposed by a non-party to this action, U.S. Bank Trust National Association, as Trustee for Towd Point Master Funding Trust 2017-PM13 ("U.S. Bank"), as purported "assignee of plaintiff." The motion is supported by the affirmation of Victor L. Matthew, Esq., an attorney with McGlinchey Stafford, "co-counsel for Plaintiff," together with various exhibits, as well as by the affidavit of Diane Weinberger, who identifies herself therein as an officer of Select Portfolio Servicing, Inc. ("SPS"), the servicer of the subject mortgage and attorney-in-fact for Towd Point Master Funding Trust 2017-PM13. Among the items of relief sought in the instant motion is an order amending the caption of the action to substitute U.S. Bank as plaintiff in place and in stead of New York Community Bank, as Successor in Interest to Roosevelt Savings Bank.

Annexed to the Weinberger affidavit as Exhibit 10 is a document entitled "corporate assignment of mortgage" dated December 19, 2017, which purports to grant U.S. Bank "all interest under that certain Mortgage Dated 5/23/1997, in the amount of \$200,000.00, executed by

EDWARD F. CAMPBELL, JR. CAROL A. CAMPBELL to ROOSEVELT SAVINGS BANK and Recorded: 6/5/1997, Liber: 19206, Page: 449 in SUFFOLK County, State of New York.” The document is executed by an “authorized signatory” of FirstKey Mortgage, LLC as attorney in fact for plaintiff New York Community Bank as Successor to Roosevelt Savings Bank, but a copy of the power of attorney has not been provided to the court.

It is well established that where “a note and mortgage are validly assigned to a third party subsequent to the commencement of a foreclosure action, ...the assignee can continue an action in the name of the original mortgagee [or] ...take the steps necessary to effect a formal substitution” (*Brighton BK, LLC v Kurbatsky*, 131 AD3d 1000, 1001 [2d Dept 2015]; CPLR §1018). Assuming that the assignment of the \$200,000.00 mortgage is nevertheless valid absent proof of the authority of the purported attorney in fact (see *Aurora Loan Servs., LLC v Taylor*, 25 NY3d 355 [2015]; *CW Capital Asset Mgt., LLC v Great Neck Towers, LLC*, 99 AD3d 850 [2d Dept 2012]), the document does not assign the other mortgage given by defendants Edward F. Campbell, Jr. and Carol A. Campbell (hereinafter the “Junior Campbells”) dated July 15, 1998 in the amount of \$56,784.51, or the Consolidation, Extension and Modification Agreement dated July 15, 1998 whereby the two mortgages were consolidated.

More importantly, the document does not purport to assign either of the two notes to the movant. In light of the well-established principle that “the mortgage follows the note,” a bare assignment of the mortgage without a transfer or assignment of the underlying note does not create in the assignee a right to foreclose the mortgage or prosecute the action (*Kluge v Fugazy*, 145 AD2d 537 [2d Dept 1988]; *Aurora Loan Services v Taylor, supra*, 145 AD2d at 361; *U.S. Bank N.A. v Dellarmo*, 94 AD3d 746 [2d Dept 2012]). As no admissible proof has been offered to establish that the movant is now the holder of the notes (indeed, the affirmation of “plaintiff’s” attorney ambiguously avers that “[p]laintiff remains the owner and holder of the said notes...and mortgages” [(Affirmation, ¶16)], the summary judgment motion of non-party U.S. Bank Trust National Association, as Trustee for Towd Point Master Funding Trust 2017-PM13, must be denied in its entirety based on the movant’s lack of standing herein.

Nor can the court deem the motion to have been interposed by the plaintiff of record (New York Community Bank, as successor in interest to Roosevelt Savings Bank), as such motion is not supported by an affidavit by a person with knowledge of the facts sufficient to establish plaintiff’s *prima facie* burden of proof (CPLR R. 3212(b)).

With respect to the motion of defendant Mary Alice Ruppert, as Executor of the Estate of Lucy A. Campbell, Deceased (the “Estate”), so much of the motion as seeks an order dismissing all causes of action and cross-claims against Edward F. Campbell (father of defendant Edward F. Campbell, Jr.) is granted. The submissions and the court’s records reflect that the senior Mr. Campbell died on May 15, 2006, prior to the commencement of this action. It is a well-established principle that “the dead cannot be sued” (*Marte v Graber*, 58 AD3d 1 [1st Dept 2008]); accordingly this action is a nullity as to the decedent, as are any cross-claims (*Rivera v*

Bruchim, 103 AD3d 700 [2d Dept 2013]). Moreover, the record reflects that defendant Lucy A. Campbell (and, upon her death, her estate) succeeded to the interest of her deceased husband in the premises that are purportedly encumbered by plaintiff's mortgage. Accordingly, neither Edward F. Campbell, Sr. nor his estate is a necessary party to this action.

The Estate also moves to dismiss as untimely, pursuant to CPLR R. 3211(a)(5), plaintiff's causes of action for unjust enrichment, equitable lien and equitable subrogation. The latter causes of action were asserted for the first time in 2012 when plaintiff's motion for leave to amend its complaint was granted. Contrary to the Estate's argument, plaintiff's newly interposed causes of action are not time-barred. As noted in the October 11, 2012 order of this court (BAISLEY, J.) granting plaintiff's motion for leave to amend the complaint, the newly interposed causes of action arise out of the same underlying facts and occurrences as alleged in the original complaint, of which defendants had actual notice. The amendments merely assert alternative theories of recovery in the event plaintiff is unable to recover on its cause of action for foreclosure of the subject mortgage. As such, the causes of action for unjust enrichment, equitable lien and equitable subrogation are deemed to have been interposed when the original complaint was interposed (CPLR §203(f)) and are not subject to dismissal as untimely. Accordingly, that branch of the Estate's motion is denied.

The Estate also moves for summary judgment dismissing the complaint and all cross-claims as against it. Plaintiff's first cause of action is for foreclosure of the mortgage given to plaintiff's predecessor in interest by Junior Campbells. It is well established that a mortgage provides security to the mortgagee, but only to the extent of the interest of the mortgagor (*1.2.3. Holding Corp. v Exeter Holding, Ltd.*, 72 AD3d 1040 [2d Dept 2010]; *CitiFinancial Co. (DE) v McKinney*, 27 AD3d 224 [1st Dept 2006]). Where, as here, the deed whereby the mortgagors acquired title to the subject property has been nullified on the ground of undue influence, and record title has been restored to the former owners, who were not parties to and did not consent to the mortgage, there is a question of fact as to whether there is any ownership interest to which the mortgagee's security interest can attach (*1.2.3. Holding Corp. v Exeter Holding, Ltd.*, *supra*, 72 AD3d at 1043).

That question appears to turn on whether or not plaintiff is a *bona fide* encumbrancer for value; that is, without prior knowledge of the senior Campbells' retained interest in the premises or of the Junior Campbells' fraud and undue influence in obtaining record title to the premises. Notwithstanding the prior order of this court denoting the senior Campbell's deeded retained interest in the subject property a "life estate," the movant's submissions do not establish that the deed in fact granted the senior Campbells a life estate in the subject premises. The typical words used to connote the grant of a life estate as opposed to a mere right of occupancy are "use and occupancy" (*In re Estate of Sauer*, 194 Misc 2d 634 [Nassau Cty Surr Ct 2002]). Here, the deed from the senior Campbells to the Junior Campbells provided that "[t]his conveyance shall be subject to the right of the parties of the first part [the senior Campbells] to occupy the above described premises, during their respective lives, on a non-exclusive, rent-free basis with the

parties of the second part [the Junior Campbells]... provided, however, that such right shall be personal to the parties of the first part; shall not be transferred, assigned or otherwise encumbered by the parties of the first part; shall be subordinate to any mortgage now or hereafter affecting the above described premises, and shall be released as to both parties of the first part by an acknowledged instrument executed by either of such parties or by an attorney-in-fact for either of such parties.” Where the “usual words denoting a life tenancy ‘use and occupation’ are not used,” the party has “merely a right to occupancy” as opposed to a life estate (*Estate of Sauer, supra*, at 194 Misc 2d 636, citing *Rizzo v Mataranglo*, 16 Misc 2d 20, 21, aff’d 16 Misc 2d 21, lv denied 285 AD 814). As the movant’s submissions fail to establish that the interest reserved to the senior Campbells in the deed was a life estate as opposed to a mere right of occupancy, the submissions also fail to establish, *prima facie*, that plaintiff’s predecessor in interest was on notice of the Junior Campbells’ undue influence or fraudulent intent and thus not a *bona fide* encumbrancer for value. Accordingly defendant’s motion for summary judgment on that issue is denied.

Plaintiff’s remaining causes of action against the Estate for unjust enrichment and equitable subjugation and equitable lien are predicated on plaintiff’s allegations that some of the monies from plaintiff’s loan to the Junior Campbells were applied to satisfy Lucy Campbell’s prior mortgage, in addition to being used toward various home improvements and the payment of taxes on the subject property, and the satisfaction of a judgment against Lucy Campbell and/or Edward Campbell, Sr. stemming from an American Express bill. As it has previously been determined, in the underlying action under Index Number 23391/2001, that amounts presumably representing the proceeds of loans to the Junior Campbells by plaintiff’s predecessor in interest were expended on items that benefitted the senior Campbells and enhanced the value of the subject property, plaintiff’s submissions fail to establish, *prima facie*, that the Estate has been unjustly enriched (*see* CPLR §3004)..

Defendant is, however, granted summary judgment dismissing plaintiff’s cause of action for an equitable lien upon the premises. The amended complaint fails to allege facts that demonstrate an agreement on the part of the senior Campbells to grant plaintiff a security interest against their interests in the property in the circumstances presented here. Accordingly, plaintiff’s amended complaint fails to state a cause of action for the imposition of an equitable lien against the Estate’s interest in the subject property (*TDD Irrevocable Trust v J & A Saporta Realty Corp.*, 139 AD3d 706 [2d Dept 2016]).

The Estate is also granted summary judgment dismissing all of the cross-claims asserted against the Estate by the Junior Campbells. This court has previously determined that the purported oral stipulations between the parties to the underlying action is unenforceable as it is not reduced to a writing or reduced to the form of an order and entered. Accordingly, plaintiff’s first cross-claim fails to state a cause of action. Moreover, the remaining cross-claims are substantially duplicative of those interposed in the underlying action, as to which judgment in favor of the Junior Campbells has already been granted.

The cross-motion of defendants Edward F. Campbell, Jr. and Carol A. Campbell seeks dismissal of plaintiff's second and third causes of action for fraud and unjust enrichment, respectively. Defendants urge that the same considerations that necessitated denial of plaintiff's previous motion to add an additional cause of action upon the underlying promissory note to plaintiff's complaint for foreclosure of the mortgage given by the Junior Campbells bars plaintiff's alternative causes of action. That conclusion is not, however, supported by the plain language of the election of remedies provision set forth in RPAPL §1301, which precludes plaintiff from simultaneously pursuing foreclosure and an action upon the note, but is inapplicable to plaintiff's causes of action for fraud and unjust enrichment.

With respect to the latter, to the extent plaintiff is determined to be unable to foreclose its mortgage because the Junior Campbells are no longer in title to the subject property, plaintiff's complaint states a potentially viable cause of action for unjust enrichment predicated on such defendants' receipt of the loan proceeds, particularly in light of the judgment entered in the underlying action in favor of the Junior Campbells and against defendant Lucy A. Campbell. In light of the foregoing, the cross-motion is denied in its entirety.

Dated: January 7, 2019

HON. PAUL J. BAISLEY, JR.

J.S.C.