

WMC Mtge. Corp. v Vandermulen
2019 NY Slip Op 30671(U)
March 20, 2019
Supreme Court, Suffolk County
Docket Number: 00371-05
Judge: Elizabeth H. Emerson
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Bank of New York Mellon Trust Company, N.A.; and the appointment of a referee to compute are granted; and it is further

ORDERED that the branch of the motion by the plaintiff which is for an order directing the Suffolk County Clerk to record a copy of its mortgage on the premises that is the subject of this action is denied as academic; and it is further

ORDERED that William Andes Esq. (Fiduciary ID 229946), 224 Griffing Avenue, Riverhead, New York 11901, 631-727-5780 is hereby appointed Referee to ascertain and compute the amount due the plaintiff for principal, interest, real estate taxes, and other disbursements provided for by statute and in the note and mortgage upon which this action is based and to examine and report on whether the mortgaged premises can be sold in parcels; and it is further

ORDERED that, pursuant to 22 NYCRR § 36.1, the Referee is subject to Part 36 of the Rules of the Chief Judge; and it is further

ORDERED that, by accepting this appointment, the Referee certifies that he is in compliance with Part 36 of the Rules of the Chief Judge (22 NYCRR part 36), including, but not limited to, § 36.2(c) ("Disqualifications from appointment") and § 36.2(d) ("Limitations on appointments based upon compensation"); and it is further

ORDERED that, by accepting this appointment, the Referee certifies that he is familiar with the duties and responsibilities of a Referee, that he has experience in such area, and that he is fully capable and prepared to assume those duties and responsibilities, which are commensurate with his abilities; and it is further

ORDERED that attorneys or support staff in the Referee's office may perform tasks under his direct supervision, but all substantive appearances and reports must be performed and/or created by the Referee; and it is further

ORDERED that, upon receipt of this order and UCS form 872 ("Notice of Appointment and Certification of Compliance"), the Referee shall complete, execute, and return the UCS form 872 to the Fiduciary Clerk; and it is further

ORDERED that, if the Referee is disqualified from accepting this appointment, he shall notify the appointing Justice forthwith; and it is further

ORDERED that the Referee is prohibited from accepting or retaining any funds for himself or paying any funds to himself without compliance with Part 36 of the Rules of the Chief Judge; and it is further

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ORDERED that, pursuant to CPLR 8003(a), the Referee's fee for the computation stage and the filing of his report is fixed in the amount of \$250.00; and it is further

ORDERED that the plaintiff include in any proposed judgment of foreclosure and sale language complying with the Suffolk County local rule for the filing of the foreclosure-action-surplus-moneys form contained in Suffolk County Administrative Order No. 41-13; and it is further

ORDERED that the cross motion by the defendant Bank of New York Mellon Trust Co., N.A., for summary judgment dismissing the complaint insofar as asserted against it is denied.

The plaintiff is entitled to judgment as a matter of law on its first cause of action for foreclosure. It has produced the mortgage, the unpaid note, and evidence of default (**Republic Natl. Bank of N.Y. v O'Kane**, 308 AD2d 482).¹ Contrary to the contentions of the defendants Donald and Carrie MacPherson, the plaintiff has established that it was the holder of both the subject mortgage and the underlying note when this action was commenced (**Deutsche Bank Natl. Trust Co. v Haller**, 100 AD3d 680, 682). The plaintiff has rectified any deficiencies in its submission of the pleadings and notice of pendency, and the documentary evidence submitted contains a bargain-and-sale deed dated September 28, 2000, transferring the mortgaged property from the MacPhersons to the defendant Hendrika Vandermeulen.

The plaintiff is also entitled to dismissal of the MacPhersons' counterclaims for negligence, contractual and common-law indemnification. As a lender and prospective mortgagee, the plaintiff did not owe a duty to the MacPhersons, who were the sellers of the mortgaged property (*see e.g.*, **Burger v Singh**, 28 AD3d 695, 697 [lender did not owe a duty to seller to exercise due care in verifying the identity of the person who appeared at the closing purporting to be the owner of the property]; *see also*, **Tenenbaum v Gibbs**, 27 AD3d 722, 723 [mortgagee bank did not owe a duty of care to seller to ascertain the validity of documentation presented by individual who falsely claimed to have authority to act on behalf of borrower corporation]). In the absence of a duty of care, the MacPhersons' counterclaim for negligence must fail. In the absence of a contractual relationship between the plaintiff and the MacPhersons, their counterclaim for contractual indemnification must also fail. Moreover, since the MacPhersons are being sued solely for their own alleged wrongdoing, rather than on a theory of

¹The court notes that the defendants Donald and Carrie MacPherson oppose granting summary judgment to the plaintiff insofar as the second cause of action seeks an equitable lien on the mortgaged property. The plaintiff's motion, however, is limited to seeking summary judgment on the first cause of action for foreclosure. Accordingly, the court will not discuss the second cause of action.

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vicarious liability, they cannot assert a claim for common-law indemnification (*see, Mathis v Central Park Conservancy, Inc.*, 251 AD2d 171, 172).

The defendant Bank of New York Mellon Trust Co., N.A. (“BONY”) opposes the plaintiff’s motion and cross moves for summary judgment dismissing the complaint insofar as it is asserted against it. BONY argues, *inter alia*, that its mortgage, which was recorded, has priority over the plaintiff’s mortgage, which was never recorded.

Under New York’s Recording Act (**Real Property Law** § 291), a mortgage loses its priority to a subsequent mortgage when the subsequent mortgagee is a good-faith lender for value and records its mortgage first without actual or constructive knowledge of the prior mortgage (**Lend-Mor Mtge. Bankers Corp. v Ameriquest Mtge. Co.**, 69 AD3d 680). A mortgagee is under a duty to make an inquiry when it is aware of facts that would lead a reasonably prudent lender to make inquiries of the circumstances of the transaction at issue (**Lucas v J&W Realty and Constr. Mgt., Inc.**, 97 AD3d 642, 643). If a lender knows facts that would “excite the suspicion of an ordinarily prudent person” and fails to investigate, the lender will be chargeable with the knowledge that a reasonable inquiry, as suggested by the facts, would have revealed (**Booth v Ameriquest Mtge. Co.**, 63 AD3d 769). A mortgagee who fails to make such an inquiry is not a good-faith lender for value (**Id.**).

The title report prepared for BONY’s predecessor in interest, Homecomings Financial Network, Inc., (“Homecomings”) reveals that Homecomings was on notice that there was a gap in the chain of title from the MacPhersons to Vandermulen and that the deed (which was missing at the time) “must be obtained and considered and any questions arising therefrom must be satisfactorily disposed of.” The court finds that, under these circumstances, Homecomings possessed facts that would have “excited the suspicion of an ordinarily prudent person” as to the existence of some right or title in conflict with what it was about to acquire (**Id.**). It, therefore, was not a good-faith lender for value. Since an assignee never stands in a better position than its assignor (**2 Lisa Court Corp. v Licalzi**, 89 AD3d 721, 722), BONY, as Homecomings’ assignee, cannot take priority over the plaintiff’s mortgage even though Homecomings recorded its mortgage first (**Id.**).

In view of the foregoing, it is not necessary to reach the parties’ remaining contentions. Accordingly, the plaintiff’s motion, *inter alia*, for partial summary judgment is granted to the extent indicated. BONY’s cross motion for summary judgment dismissing the complaint insofar as asserted against it is denied. The MacPhersons’ request that the court search the record and award summary judgment to them is also denied. The MacPhersons have not cross moved for summary judgment (**CPLR** 2212). Thus, that issue is not properly before the court, and the court declines to consider it (**Lee v Colley Group McMontebello, LLC**, 90 AD3d 1000, 1001; **DiLacio v New York City Dist. Council of United Bhd. of Carpenters & Joiners of Am.**, 80 AD3d 553, 554; **99 Cents Concepts, Inc., v Queens Broadway, LLC**, 7 AD3d 656, 659).

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Finally, the branch of the motion by the plaintiff which is for an order directing the Suffolk County Clerk to record a copy of its mortgage is denied as academic. Real Property Law § 291 provides that a conveyance of real property, which includes a mortgage, may be recorded in the office of the clerk of the county where the real property is situated and that "the county clerk shall, upon the request of any party, on tender of the lawful fees therefor, record the same in his office." The plaintiff does not contend that it attempted to record the mortgage and was denied. Therefore, judicial intervention is not needed to record the plaintiff's mortgage.

Dated: March 20, 2019


J.S.C.