

<b>All Sts. Coop. Realty Corp. v All Sts. Co Realty Corp.</b>
2019 NY Slip Op 30684(U)
March 18, 2019
Supreme Court, New York County
Docket Number: 155414/2016
Judge: Alexander M. Tisch
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 52

-----X  
ALL SAINTS COOPERATIVE REALTY CORPORATION,  
Fredericka Valentin as Administratrix of  
THE ESTATE OF GERTRUDE IFIELD,  
FREDERICKA VALENTIN, as heir at law to  
Gertrude Ifield,  
ALL SAINTS 2081 LLC,  
as Subrogee of NYCTL 2015-A Trust,

DECISION & ORDER

Plaintiffs,

-against-

Index No. 155414/2016

ALL SAINTS CO REALTY CORPORATION, *et al.*,

Defendants.

-----X  
**ALEXANDER M. TISCH, J.:**

Motion sequence nos. 003 and 004 are consolidated herein for disposition.

In motion sequence no. 003, defendants The City of New York, The New York City Environmental Control Board, NYCTL 2013-A Trust (2013-A Trust), NYCTL 2014-A Trust (2014-A Trust), and NYCTL 2015-A Trust (2015-A Trust) (collectively, the City defendants) move, pursuant to CPLR 3211 (a) (7), for an order dismissing the claims asserted against them on the ground that no right of equitable subrogation exists. In motion sequence no. 004, defendants NYCTL 2017-A Trust (2017-A Trust) and The Bank of New York Mellon, as Collateral Agent and Custodian (BNY Mellon) move, pursuant to CPLR 3211 (a) (1) and (a) (7), for an order dismissing the claims asserted against them and determining that no party holds a right of equitable subrogation.

The three actions previously consolidated in this action by the February 23, 2018 order

issued by the Honorable Robert D. Kalish concern the property located at 2081 Fifth Avenue in the County, City and State of New York, designated as block 1753, lot 102 on the City of New York for the Borough of Manhattan tax map.

In action number 1, the earliest commenced action, plaintiffs All Saints Cooperative Realty Corporation (Cooperative), Fredericka Valentin as Administratrix of the Estate of Gertrude Ifield, and Fredericka Valentin, as heir-at-law to Gertrude Ifield (both, Valentin), allege that the property was conveyed from Cooperative to defendant All Saints Co Realty Corporation (Co Realty) through a fraudulent deed, and seek to have title to the property returned to Cooperative. They seek a declaratory judgment determining that Cooperative is the sole fee owner of the property, and vacating the deed transfer to Co Realty.

In action numbers 2 and 3, the plaintiff in both, All Saints 2081 LLC, as subrogee of NYCTL 2015-A Trust (2081 LLC), seeks a judgment declaring that it is an equitable subrogee, imposing an equitable lien on the property having the same priority as the original liens held by the 2014-A and 2015-A Trusts, and foreclosing on that lien. 2081 LLC also seeks an order declaring that the conveyance of the property from Cooperative to Co Realty is void.

2081 LLC's principals are nonparties Nicolas Auvray (Auvray) and Milton Rainford (Rainford), both real estate investors, and Sherryl Klein (Klein), a real estate broker who initially identified the property as a potentially viable investment, upon her discovery of certain property tax arrears.

On February 24, 2016, Auvray, Rainford, and Klein met with nonparty Cirilo Ifield to discuss investing in Cooperative, whose stock was owned by Gertrude Ifield, deceased. During

the meeting, Cirilo Ifield represented to them that he was Gertrude Ifield's nephew, would provide them with documentation proving his kinship, would commence probate proceedings to establish his successorship to Gertrude Ifield's estate, and would transfer his personal stock interest in Cooperative to them in exchange for \$100,000. Cirilo Ifield also agreed to cause Cooperative to sell the property to them in exchange for \$500,000. At that meeting, they memorialized their verbal agreement in a notarized handwritten agreement.

Later that same day, Auvray and Rainford paid to the 2014-A and 2015-A Trusts a total of \$77,514.74 in real property taxes and associated fees and expenses that had been assessed by the City of New York against the property. 2081 LLC alleges that they paid those sums in order to protect their interests in the property by stopping a tax lien foreclosure sale scheduled to be held a few days later (*see NYCTL 2013-A Trust v All Saints Coop. Realty Corp.*, Sup Ct, NY County, Jan. 7, 2015, Kenney, J., index No. 650334/2014).

The next day, February 25, 2016, Auvray, Rainford, and Klein formed 2081 LLC, and allegedly assigned to it their rights under their contract with Cirilo Ifield and any rights that accrued to them as a result of their payment of the tax liens.

Subsequently, Valentin, rather than Cirilo Ifield, was appointed administrator of Gertrude Ifield's estate. Auvray, Rainford, Klein, and 2081 LLC never paid any sums to Cirilo Ifield and do not own any of the Cooperative's stock.

2081 LLC alleges that Auvray and Rainford paid \$77,514.74 in full satisfaction of the tax liens and fees assessed against the property in order to protect their interests in the property, have not recovered any portion of that amount from the property owner, and that the property owner

has been unjustly enriched by that sum.

By order dated July 10, 2018, this Court granted the motion by the 2017-A Trust and BNY Mellon to intervene as party defendants in the consolidated action.

The City defendants now seek to dismiss the claims asserted against them by 2081 LLC the grounds that 2081 LLC is not an equitable subrogee standing in the position of any lien trust and does not hold an equitable lien, and, therefore, is not entitled to the declaratory and related relief that it seeks.

Similarly, the 2017-A Trust and BNY Mellon seek an order dismissing the claims asserted against them and determining that no parties have obtained any equitable subrogation rights as the result of the payment of previous tax liens.

In so moving, the City defendants, the 2017-A Trust, and BNY Mellon note that they take no position on the dispute regarding the ownership of the building and have no interest in the outcome of that dispute (*see* City defendants moving brief at 2; Christopher P. Kohn Aug. 10, 2018 affirm. ¶ 9).

In opposition, 2081 LLC contends that it joined the City defendants in the belief that they held potential interests in the property, but has since discovered that they do not. Therefore, continues 2081 LLC, the City defendants are moving for an impermissible advisory opinion.

2081 LLC has improperly raised the concept of standing against the City defendants. Contrary to 2081 LLC's contention, the City defendants are entitled to participate in this action because 2081 LLC has joined them as defendants. 2018 LLC has not voluntarily dismissed its claims against the City defendants.

Next, the City defendants, the 2017-A Trust, BNY Mellon, and 2081 LLC dispute whether the equitable subrogation claim is legally cognizable.

On a motion addressed to the sufficiency of the pleadings, the court must accept each and every allegation in the complaint as true, and liberally construe those allegations in the light most favorable to the pleading party (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; see CPLR 3211 [a] [7]). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d at 87-88).

However, "[a]llegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and [are not] accorded every favorable inference" (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1<sup>st</sup> Dept 1999], *affd* 94 NY2d 659 [2000] [internal quotation marks and citation omitted]; see CPLR 3211 [a] [1]). "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]; *Robinson v Robinson*, 303 AD2d 234, 235 [1<sup>st</sup> Dept 2003]).

2081 LLC is not entitled to equitable subrogation or an equitable lien, pursuant to the voluntary payment doctrine.

"More than a century ago, the New York Court of Appeals found that '[a] mere volunteer or intermeddler will not be substituted in the place of a person whose rights he seeks to acquire, simply because he has paid a debt, or discharged an obligation, for which that person was

responsible" (*Vigilant Ins. Co. v Travelers Prop. Cas. Co. of Am.*, 243 F Supp 3d 405, 422 [SD NY 2017], quoting *Koehler v Hughes*, 148 NY 507 [1896]). "The voluntary payment doctrine thus 'bars recovery of payments voluntarily made with full knowledge of the facts and in the absence of fraud or mistake of material fact or law'" (*Vigilant Ins. Co. v Travelers Prop. Cas. Co. of Am.*, 243 F Supp 3d at 422, quoting *Dillon v U-A Columbia Cablevision of Westchester*, 100 NY2d 525, 526 [2003]).

Therefore, the doctrine

"places a significant limit on the doctrine of equitable subrogation, which provides generally that where the 'property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred the former is entitled to be subrogated to the position of the obligee or lien-holder'"

(*Vigilant Ins. Co. v Travelers Prop. Cas. Co. of Am.*, 243 F Supp 3d at 422, quoting *First Franklin Fin. Corp. v Beniaminov*, 144 AD3d 975, 975 [2d Dept 2016], quoting *King v Pelkofski*, 20 NY2d 326, 333 [1967]). "One cannot ask for subrogation with success, unless he or his property was in some way lawfully answerable for the claim paid" (*Vigilant Ins. Co. v Travelers Prop. Cas. Co. of Am.*, 243 F Supp 3d at 422, quoting *Koehler v Hughes*, 148 NY at 511)

The record here demonstrates that the tax lien payments made by Auvray and Rainford were made voluntarily, rather than out of necessity to protect their own interests. "A party seeking subrogation can establish that its payments were not voluntary either by pointing to a contractual obligation or to the need to protect its own legal or economic interests" (*Broadway*

*Houston Mack Dev., LLC v Kohl*, 71 AD3d 937, 937 [2d Dept 2010] [internal citation omitted]).

"When invoking the latter ground, however, the party seeking subrogation must show that the act is not merely helpful but necessary to its interests" (*id.*).

There is no dispute that Auvray and Rainford held no actual interest in the property at the time that they made the payments, or at any other time. Their written agreement with Cirilo Ifield was never acted upon by either side. Klein attests that Cirilo Ifield "repeatedly put off requests from me that he provide documents showing his kinship with Gertrude [Ifield]. Eventually, I gave up trying to obtain them from him" (Sherryl Klein Oct. 5, 2018 aff ¶ 14). Klein also attests that she understood that "other heirs might exist who would need to be compensated in order to obtain their approval of the property sale" (*id.* ¶ 11). 2081 LLC concedes that Cirilo Ifield was never appointed administrator of Gertrude Ifield's estate (*see* 2081 LLC opposition brief at 9). Significantly, 2081 LLC does not allege that Auvray and Rainford paid any sums to Cirilo Ifield or that they received an interest of any type in Cooperative, Co Realty, or any other alleged owner of the property, at any time.

Thus, even if 2081 LLC proves its factual allegations, 2081 LLC cannot demonstrate that the tax lien payments by Auvray and Rainford were required to protect their interests in the building because they held no interests and had no rational reason to believe that they did. Therefore, their payments were voluntary.

Contrary to 2081 LLC's contentions, equitable subrogation is not an available remedy for the payment of a tax lien, nor is 2081 LLC entitled to any type of lien priority. Pursuant to the Administrative Code of the City of New York (Administrative Code) §§ 301-356, the City of

New York is authorized to conduct a tax lien sale in which it "bundles marketable tax liens into securities, which it sells to a third party Trust, which in turn borrows from institutional investors to pay the City up front" (*Four K. Group, Inc. v NYCTL 2008-A Trust*, 2013 WL 1562227, \*1, n 7, 2013 US Dist LEXIS 53591, \*5-6, n 7 [ED NY Apr. 15, 2013, Nos. 12-CV-2135(JG), 12-CV-3172 (JG)]; *see Matter of Delafield 246 Corp. v City of New York*, 11 AD3d 268, 270 [1<sup>st</sup> Dept 2004]). The purchaser of tax liens is entitled to stand in the same position as the City of New York and holds all the rights and remedies that the City of New York would have had, had it not sold the tax liens (*see Matter of Maspeth 5718 Assoc., Inc. v City of New York*, 292 AD2d 453, 454 [2d Dept 2002], citing Administrative Code § 11-332).

As evidence that a particular trust purchased tax liens from the City, the City issues tax lien certificates to the trust, which the trust records against the specific property (*see* Administrative Code §§ 11-327, 11-328). Here, records maintained by the Automated City Register Information System (ACRIS) demonstrate that BNY Mellon, on behalf of the 2013-A, 2014-A, 2015-A, and 2017-A Trusts, recorded their respective tax lien sale certificates against the property in August 2013, 2014, 2015, and 2017 (*see* ACRIS, Manhattan/New York County, Block 1753, Lot 102). The relevant ACRIS records do not list any filing by Auvray and Rainford (*see id.*), nor should they, given that 2081 LLC does not allege that Auvray and Rainford purchased the liens, and instead alleges that they satisfied liens held by the 2014-A and 2015-A Trusts.

The Court notes that 2081 LLC concedes that any equitable lien or right of equitable subrogation that may be awarded to it would be subordinate to any existing tax liens against the

property held by the City defendants (*see* 2081 LLC opposition brief at 2). 2081 LLC modifies its complaint to seek a judicial declaration according its equitable lien priority against subsequent liens obtained by "private parties" (*see id.*).

Any City of New York property tax lien is, until paid, a first position lien "and shall be preferred in payment to all other charges" (Administrative Code § 11-301; *see NYCTL 1996-1 v Weber*, 292 AD2d 576, 576 [2d Dept 2002]).

2081 LLC has failed to allege any facts that, if proven, would give rise to a relationship between 2081 LLC and the 2015-A Trust that would enable 2081 LLC to acquire subrogation rights. At most, their relationship is one of a municipality to the owner of real property, assuming arguendo that 2081 LLC had acquired any interest in the property.

In conclusion, the Court notes that nothing in this decision may be held to effect any claim for reimbursement that 2081 LLC may have against the owner of the building at any relevant time.

Accordingly, it is

ORDERED that motion sequence no. 003 by defendants The City of New York, The New York City Environmental Control Board, NYCTL 2013-A Trust, NYCTL 2014-A Trust, and NYCTL 2015-A Trust (the City defendants) is granted in its entirety; and it is further

ADJUDGED and DECLARED that plaintiff All Saints 2081 LLC, as subrogee of NYCTL 2015-A Trust (2081 LLC) holds no right of equitable subrogation or an equitable lien with regard to the property, and all claims asserted against the City defendants by 2081 LLC are dismissed, and the Clerk is directed to enter judgment accordingly in favor of those defendants;

and it is further

ORDERED that motion sequence no. 004 by defendants NYCTL 2017-A Trust and The Bank of New York Mellon as Collateral Agent and Custodian is granted in its entirety; and it is further

ADJUDGED and DECLARED that 2081 LLC holds no right of equitable subrogation or an equitable lien with regard to the property, and all claims asserted by 2081 LLC and all claims asserted against those defendants by 2081 LLC are dismissed, and the Clerk is directed to enter judgment accordingly in favor of those defendants; and it is further

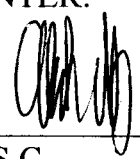
ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records accordingly; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

Dated: March 18, 2019

ENTER:



J.S.C.

HON. ALEXANDER M. TISCH