

<b>Zucker Real Estate Corp. v Wilson</b>
2019 NY Slip Op 30932(U)
April 8, 2019
Supreme Court, New York County
Docket Number: 157614/2016
Judge: Jennifer G. Schechter
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JENNIFER G. SCHECTER PART IAS MOTION 54**

*Justice*

-----X INDEX NO. 157614/2016

ZUCKER REAL ESTATE CORP.,

MOTION DATE \_\_\_\_\_

Plaintiff,

MOTION SEQ. NO. 003

- v -

MILTON WILSON, ELIZABETH PEARSON, FRANKIE NEAL, NEW  
YORK CITY DEPARTMENT OF FINANCE

**DECISION, ORDER  
AND  
JUDGMENT**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 55, 56, 57, 58, 59, 60, 61, 63, 65

were read on this motion for

REARGUMENT/RECONSIDERATION

By decision and order dated March 26, 2018 (Dkt. 47),<sup>1</sup> the court denied the motion of defendant Milton Wilson (Wilson) to dismiss the complaint of plaintiff Zucker Real Estate Corp. (Zucker) pursuant to CPLR 3211(a)(1) and (7) and to cancel the lis pendens pursuant to CPLR 6514(b) (the Prior Motion). Wilson moves, pursuant to CPLR 2221(d), for reargument of the Prior Motion. Zucker opposes.

Wilson's motion to reargue is granted. Upon reargument, Wilson's motion is granted to the extent that the action against him is dismissed pursuant to CPLR 3211(a)(1). The lis pendens, however, cannot be canceled on this record as Wilson has not shown that plaintiff has not commenced or prosecuted the action, which involves a dispute as to the ownership of real property, in good faith as required by CPLR 6514(b) (*see 5303 Realty Corp. v O & Y Equity Corp.*, 64 NY2d 313, 320 [1984]).

<sup>1</sup> References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing system (NYSCEF).

### Background<sup>2</sup>

This is an action to quiet title to property located at 245 West 131st Street in Manhattan bearing tax map designation Block: 1937, Lot: 13 (the Property). Susie Foote, as Administratrix of the Estate of James Foote, acquired the Property by deed dated February 8, 1977 (Aff. in Supp. of Mot. to Dismiss [Supp] ¶ 14 [Dkt. 12], Ex D [Dkt. 16]). According to an uncontroverted deed dated November 9, 1978 (the Wilson Deed), Foote conveyed the Property to Wilson (Supp ¶ 11, Ex B [Dkt. 14]). The Wilson Deed was recorded at reel 461, page 708 of the City Register in the City of New York on November 22, 1978 (Supp ¶ 13, Ex B at 4; Opp. to Mot. to Dismiss [Opp] ¶ 19[5] [Dkt. 25]). It was improperly indexed under the wrong address, block and lot when it was recorded (Supp ¶ 24, Ex G [Dkt. 19]; Opp, ASK Aff [Dkt. 27] ¶¶ 8-12).

A title report obtained by Wilson, dated May 6, 2016, states that Wilson, pursuant to a mortgage dated November 9, 1978 (Wilson Mortgage), granted a security interest in the Property to Foote (Supp Ex F [Attorney Search Report] at 5 [Dkt. 18]). Printouts submitted by Zucker and Wilson from the Automated City Register Information System (ACRIS) reflect that the Wilson Mortgage was recorded at reel 461, page 710 on November 22, 1978 (Supp Ex E [ACRIS search results] at 2 [Dkt. 17]; Opp Ex E at 2 [Dkt. 32]).<sup>3</sup>

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<sup>2</sup> On a motion to dismiss, the facts alleged in the complaint are accepted as true except where clearly contradicted by documentary evidence (*see Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]).

<sup>3</sup> The court takes judicial notice of the recorded Wilson Mortgage, viewable in ACRIS at [https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentDetail?doc\\_id=FT\\_1590008598559](https://a836-acris.nyc.gov/DS/DocumentSearch/DocumentDetail?doc_id=FT_1590008598559) (*cf. Des Fosses v Rastelli*, 283 AD 1069, 1070 [2d Dept 1954] [taking judicial notice of recorded deed], *affd* 308 NY 850 [1955]).

Zucker does not allege that the Wilson Mortgage was improperly indexed, although the Wilson Mortgage is absent from Zucker's title report (Opp Ex C [Dkt. 30] at 4, 11).

In March 2016, Zucker purchased the Property from Foote's heirs Frankie Neal (Neal) and Elizabeth Pearson (Pearson), who "held themselves out as the sole remaining heirs of Susie Foote" and fee owners of the Property (Complaint ¶ 9). Zucker paid Neal and Pearson \$50,000 each and took the Harlem Property subject to approximately \$200,000 in tax liens (Opp ¶ 5; Zucker Aff [Dkt. 26] ¶ 4), which were being foreclosed in a New York County action filed in 2015 (*NYCTL 2013-A Trust v Foote*, Sup Ct, NY County, filed April 24, 2015, index No. 154074/2015).<sup>4</sup> Wilson is the second named defendant in that action; Pearson and Neal were added as parties later in 2016.

On April 14, 2016, Zucker's deeds to the Property from Neal (Dkt. 28 at 2-6 [Neal Deed]) and Pearson (Dkt. 28 at 12-16 [Pearson Deed])<sup>5</sup> were recorded under City Register File Number [CRFN] 2016000131051 and 2016000131052, respectively (Complaint ¶ 8). Five days later, a Zucker representative went to the Property to "secure" it (Complaint ¶ 14). Zucker then learned that Wilson was renting out the Property "and at this time was first notified of Wilson's alleged ownership interest" (*id.*; Zucker Aff ¶ 6).

On May 5, 2016, the New York City Department of Finance (DOF) re-indexed the Wilson Deed with a memorandum stating that the deed had been incorrectly indexed at the time it was recorded, the "entry in the index [was] to provide notice of the recorded

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<sup>4</sup> On July 5, 2016, a judgment of foreclosure and sale of the Property was entered in the Foreclosure Action (*NYCTL 2013-A Trust*, Dkt. 36).

<sup>5</sup> The Neal Deed and the Pearson Deed both state that the land parcel was at the time "lying and being in the County of Kings" (Dkt. 28 at 3, 13).

document” and that one should “note the date of the document and its appropriate place in the chain of title” (Supp ¶ 4, Ex G, E; Opp ¶ 9, Ex B [Dkt. 29] at 3). That same day, DOF also filed a satisfaction of mortgage from December 1980, reflecting that Wilson had been the borrower and Foote the lender (Supp Ex E [ACRIS search results] at 2 [Dkt. 17]).

In September 2016, Zucker commenced this action. The first four causes of action, numbered here as in the complaint, seek as follows: (1) to quiet title to the Property in Zucker’s name pursuant to article 15 of the Real Property Law, (2) to cancel the Wilson Deed, (3) to expunge the Wilson Deed from the New York City Register for New York County pursuant to Real Property Law § 329, and (4) to bar Wilson and others claiming under him from claiming an estate or interest in the Property. Zucker alleges that Wilson “unlawfully claims title” to the Property by and through the Wilson Deed, which was only “indexed and/or recorded” after Zucker became record owner and after Wilson received notice of Zucker’s deeds (Complaint ¶¶ 32-33). The remaining causes of action are asserted against Neal and Pearson contingently if Wilson prevails in this action (Complaint at 9-15). Wilson moved to dismiss and the motion was denied (Dkt. 47).

#### Analysis

Under CPLR 3211(a)(1), dismissal is warranted “only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law ....” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Here, even if Zucker purchased the Property from Foote’s distributees, the documentary evidence—which was submitted but was overlooked when the motion to dismiss was analyzed—demonstrates the timely

recordation and indexing of the Wilson Mortgage and conclusively establishes that Zucker lacked the requisite good faith to benefit from New York's recordation statute.<sup>6</sup>

The validity of the Wilson Deed, through which Foote transferred her interest in and rights to the Property to Wilson, is not in dispute. The sole question is whether Zucker—having purchased the Property from Foote's alleged heirs-at-law—acquired superior title to the Property pursuant to New York's so-called “race-notice” statute, which “protects good faith purchasers who record first” (*2386 Creston Ave. Realty, LLC v M-P-M Mgt. Corp.*, 58 AD3d 158, 163 [1st Dept 2008]; see Real Property Law § 291).

Real Property Law § 291 provides:

A conveyance of real property, within the state, ... may be recorded in the office of the clerk of the county where such real property is situated, and such county clerk shall ... record the same in his said office. Every such conveyance *not so recorded* is void as against any person who subsequently purchases ... the same real property ... *in good faith* and for a valuable consideration, *from the same vendor or assignor, his distributees* or devisees, and whose conveyance, contract or assignment is *first* duly recorded . . . (emphasis added).

“[A]n instrument is deemed recorded from the time it is delivered to the clerk for recording” (*Bank of New York v Resles*, 78 AD3d 469, 471 [1st Dept 2010]; see Real Property Law § 317). New York City uses a “block and lot” indexing method, allowing a title searcher to find all recorded conveyances and encumbrances within a given time frame affecting a particular land parcel (see *Andy Assocs., Inc. v Bankers Tr. Co.*, 49 NY2d 13, 23–24 [1979]). Since indexes “form a part of the record of each instrument,” an improperly indexed recording provides no notice until the error is corrected (see *Del Pozo v Impressive*

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<sup>6</sup> Title reports and ACRIS search results reflecting the timely recordation of the Wilson Mortgage were submitted in connection with the Prior Motion.

*Homes, Inc.*, 95 AD3d 1263, 1265 [2d Dept 2012]; *Baccari v DeSanti*, 70 AD2d 198, 202, [2d Dept 1979]; *see also Fed. Nat. Mortg. Ass'n v Levine-Rodriguez*, 153 Misc 2d 8, 16 [Sup Ct Rockland Cty 1991]; Real Property Law § 31).

“[T]he status of good faith purchaser for value cannot be maintained by a purchaser with either notice or knowledge of a prior interest or equity in the property, or one with knowledge of facts that would lead a reasonably prudent purchaser to make inquiries concerning such” (*M-P-M Mgt*, 58 AD3d at 163 [quoting *Chen v Geranium Dev. Corp.*, 243 AD2d 708, 709 (2d Dept 1997)]). For instance, where the person in possession of a property is not owner of record, the purchaser has “a reasonable duty of inquiry to investigate the apparent discrepancy” (*HSBC Mortg. Servs., Inc. v Alphonso*, 58 AD3d 598, 600 [2d Dept 2009]). Real property buyers are also “presumed to have knowledge of information contained in duly recorded instruments affecting the real property” (*ABN AMRO Mortg. Grp., Inc. v Pantoja*, 91 AD3d 440, 441 [1st Dept 2012]). Moreover, a purchaser who “fails to use due diligence in examining the title ... is chargeable, as a matter of law, with notice of the facts which a proper inquiry would have disclosed” (*Fairmont Funding, Ltd. v Stefansky*, 301 AD2d 562, 564 [2d Dept 2003]; *see Tibby v Fletcher*, 13 AD3d 877, 879 [3d Dept 2004]).

As Zucker allegedly purchased the Property from Foote’s distributees<sup>7</sup> and recorded the conveyance, Zucker’s claim to the Property may succeed against Wilson’s *only if* (1) Zucker recorded before Wilson and (2) Zucker possessed the requisite good faith (*see M-P-M Mgt*, 58 AD3d at 163; RPL § 291). The Pearson and Neal Deeds were recorded

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<sup>7</sup> “A distributee is a person entitled to take or share in the property of a decedent under the statutes governing descent and distribution” (NY EPTL § 1-2.5).

April 14, 2016, *before* the indexing of the Wilson Deed was corrected in May 2016. Thus, Zucker is legally deemed to have recorded first (*see Del Pozo*, 95 AD3d at 1265).

Nevertheless, Zucker's complaint cannot succeed, as a matter of law, because it is not a "good faith" purchaser within the meaning of Real Property Law § 291. Zucker is presumed to have knowledge of information contained in duly recorded instruments affecting the Property as of the date of Zucker's purchase (*see Pantoja*, 91 AD3d at 441). Under New York County's "block and lot" system, a proper title search for the Property in early March 2016 would have revealed the Wilson Mortgage, a duly recorded instrument in which *Wilson* conveyed a security interest in the Property to Foote—the *fee owner of record* (*see Andy Associates*, 49 NY2d at 23–24). Charged with constructive knowledge of this anomaly, Zucker had a duty to inquire as to the nature and status of *Wilson's* interest in the Property (*see Alphonso*, 58 AD3d at 600). The complaint and affidavits lack any indication that Zucker fulfilled its duty of reasonable inquiry as to Wilson's claim to the Property. To the contrary, Zucker alleges that it first inspected the Property after the purchase and, immediately upon inspection, found it occupied by Wilson's tenants (Complaint ¶ 14).

As Zucker's causes of action against Wilson fail, so do the first and third causes of action against the New York City Department of Finance for a judgment declaring Zucker as sole owner of the Property and for an order expunging the Wilson Deed from the New York City Register for New York County. Accordingly, it is

ORDERED that Milton Wilson's motion for reargument is GRANTED; it is further

ORDERED that on reargument, Wilson's motion to dismiss is GRANTED and the complaint is dismissed as against defendant Milton Wilson and sua sponte dismissed as against defendant New York City Department of Finance in its entirety; it is further

ORDERED that cancelation of the lis pendens pending appeal is DENIED; and it is further

ADJUDGED and DECLARED that Zucker Real Estate Corp.'s claim to an estate or interest in 245 West 131st Street in Manhattan pursuant to the Pearson Deed and/or Neal Deed is invalid; and it is further

ADJUDGED and DECLARED that Zucker Real Estate Corp. and every person claiming under it, by title accruing after the filing of the judgment-roll is forever barred from asserting such claim to an estate or interest in 245 West 131st Street; and it is further

ADJUDGED and DECLARED that any instrument purporting to create any estate or interest pursuant to the Pearson Deed and/or Neal Deed shall be cancelled of record within 30 days of this decision and order; and it is further

ADJUDGED and DECLARED that defendant Wilson's claim pursuant to the Foote Deed to an estate or interest in 245 West 131st Street in Manhattan is valid.

4/8/19  
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN				

APPLICATION:

CHECK IF APPROPRIATE: