

80P2L LLC v U.S. Bank Trust, N.A.

2019 NY Slip Op 32604(U)

September 3, 2019

Supreme Court, New York County

Docket Number: 153849/2015

Judge: Kathryn E. Freed

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 153849/2015

80P2L LLC,

Plaintiff,

MOTION SEQ. NO. 003

- v -

U.S. BANK TRUST, N.A., AS TRUSTEE FOR LSF9
MASTER PARTICIPATION TRUST,

**DECISION, ORDER AND
JUDGMENT**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181

were read on this motion to/for REARGUMENT/RECONSIDERATION

In this declaratory judgment action, plaintiff 80P2L LLC moves, pursuant to CPLR 2221, for reargument of its motion for summary judgment against defendant U.S. Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust (motion sequence 001) and, upon reargument, granting it summary judgment on all of its claims in this action; declaring that 80P2L has priority over defendant in the chain of title for the property known as and by 80 Park Avenue, Unit 2L, New York, New York; declaring that the mortgage by Michelle Shipshman Zar in favor of Washington Mutual Bank, N.A., recorded in the Office of the City Register of the City of New York on April 18, 2005 at CFRN 2005000221020 (“the mortgage”) was improperly recorded; striking the mortgage from the record; and for such other and further relief as this Court deems just and proper. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

The facts of this matter are set forth in detail in the decision and order of this Court entered December 24, 2018 (“the 12/24/18 order”). Docs. 143 and 144. Other relevant facts are set forth below. In the 12/24/18 order, this Court denied plaintiff’s motion for summary judgment (motion sequence 001), reasoning that, although plaintiff established its prima facie entitlement to summary judgment by demonstrating that the mortgage was not properly acknowledged at the time it was recorded, defendant raised an issue of fact by submitting sworn affidavits of individuals who attested to the fact that the mortgage filed with the City Register bore a notary stamp. *Id.* Having found that such an issue of fact existed, this Court also denied defendant’s motion for summary judgment (motion sequence 002) which sought, inter alia, dismissal of the complaint as well as a declaration that plaintiff’s right, title and interest in the premises was subject and subordinate to defendant’s judgment of foreclosure and sale. *Id.*

Plaintiff now moves, pursuant to CPLR 2221, for reargument of its motion for summary judgment. Doc. 151. In support of the motion, plaintiff argues that, since the mortgage was not properly acknowledged, and was thus not in recordable form, it did not have legal notice of the mortgage and its title could not have been affected by the recording of the instrument. Plaintiff further asserts that, since defendant was in the best position to ensure that the mortgage was properly acknowledged, it (defendant), and not plaintiff, should suffer the consequences of that mistake. Upon reargument, plaintiff seeks summary judgment on all of its claims in this action; declaring that 80P2L has priority over defendant in the chain of title for the property known as and by 80 Park Avenue, Unit 2L, New York, New York; declaring that the mortgage by Michelle Shipshman Zar in favor of Washington Mutual Bank, N.A., recorded in the Office of the City Register of the City of New York on April 18, 2005 at CFRN 2005000221020 (“the mortgage”)

was improperly recorded; striking the mortgage from the record; and for such other and further relief as this Court deems just and proper.

In opposition to the motion, defendant maintains that certain contentions raised by plaintiff for the first time cannot be considered in connection with this reargument motion. It further asserts, inter alia, that, since the mortgage was “entitled to be recorded” when received by the Register, it was “considered recorded from the time of such delivery” pursuant to Real Property Law § 317. Defendant also maintains that Real Property Law § 318 does not prohibit defendant from submitting evidence proving that the mortgage was validly recorded. Next, defendant argues that plaintiff is not a bona fide purchaser for value because it had constructive and inquiry notice of the mortgage.

LEGAL CONCLUSIONS

The purpose of a motion for leave for reargument pursuant to CPLR 2221(d) is to afford a party an opportunity to demonstrate that, in issuing a prior order, the court overlooked relevant facts or that it misapplied a controlling principle of law. *See Foley v Roche*, 68 AD2d 558, 567 (1st Dept 1979). “Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted.” *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 (1st Dept 1992) (citations omitted).

Real Property Law § 291 requires that an instrument conveying real property cannot be recorded unless it is acknowledged. Pursuant to Real Property Law § 318, “it is vital to include the acknowledgment and authenticating certificate with the recorded instrument. Thus, Section 318 provides that the certificate of the acknowledgment or proof of the execution of an instrument, and the certificate authenticating the signature or seal of the officer so certifying, or

both, if required, must be recorded together with the instrument so acknowledged or proved; otherwise neither the record of the instrument nor its transcript can be read in evidence.” 11 Warren's Weed New York Real Property § 115.43 (2019).

Although this Court correctly determined in the 12/24/18 order that plaintiff established its prima facie entitlement to summary judgment by demonstrating that the mortgage was not acknowledged, it was incorrect in finding that defendant raised a triable issue of fact by submitting affidavits of individuals attesting to the fact that the mortgage contained a proper acknowledgement at the time it was presented to the Register. “Where a proper certificate of acknowledgment is essential to the validity of a conveyance, a defective certificate cannot be aided or cured by parol testimony. Nor so as to make the record of a defectively acknowledged instrument constructive notice.” *Smith v Tim*, 1884 NY Misc LEXIS 228 (Ct Common Pleas 1884) (citations omitted); *see also Precision Performance, Inc. v Perez*, 84 AD3d 647 (1st Dept 2011) (“an improperly recorded judgment does not give constructive notice of the correct terms of the judgment” [citation omitted]).

As plaintiff correctly asserts, relying on *Federal National Mortgage Assn. v Levine Rodriguez*, 153 Misc2d 8 (Sup Ct Rockland County 1991), “the burden was on [defendant] to insure that full recordation occur[red] properly [based] on the theory that where one of two innocent persons must suffer a loss the onus should be on the one [here, defendant] who was in the best position to correct [any error in the acknowledgement].” *Id.* at 11 (citation omitted); *see also Flagstar Bank, FSB v State of New York*, 114 AD3d 138, 146 (2nd Dept 2013). “A cogent reason underlying the rule which places upon the grantee of a deed or other instrument the responsibility for seeing that the record made of the instrument is accurate is that one who files a

paper for record[ing] always has it in his [or her] power to examine the records and satisfy himself [or herself] that his paper has been duly and accurately recorded . . .” Id. at 11. A subsequent purchaser is not liable for ensuring that a document is recorded properly. Rather, “[i]t is the business of the mortgagee; and if a mistake occurs to his [or her] prejudice, the consequences of it lie between him and the [Register], and not between him [or her] and the bona fide purchaser.” Id., at 12 (citation omitted). Therefore, plaintiff is granted reargument of its motion for summary judgment and, upon reargument, its underlying motion for summary judgment is granted.

Defendant’s argument that, pursuant Real Property Law § 317, the mortgage was “considered recorded” at the time it was delivered to the City Register is unavailing. That section explicitly states that that it applies to documents “entitled to be recorded” and, since the mortgage was not properly acknowledged, it clearly was not entitled to be recorded.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff 80P2L for reargument pursuant to CPLR 2221 is granted; and it is further

ORDERED and ADJUDGED that, upon reargument, plaintiff’s motion for summary judgment (motion sequence 001) is granted, and defendant’s mortgage, recorded in the Office of the City Register of the City of New York on April 18, 2005 as number CRFN 2005000221020

in favor of Washington Mutual Bank, NA is hereby vacated, cancelled, and expunged from the public record, and is void and unenforceable against the property; and it is further

ORDERED and ADJUDGED that the defendant and every person or entity claiming under it be forever barred from all claims to an estate or interest in the property at 80 Park Avenue, Apartment 2L, New York, New York (Block: 868, Lot: 1216) to the extent that any such claim may be asserted to be superior to plaintiff's interest in the same; and it is further

ORDERED that the Clerk of the court is to enter judgment accordingly; and it is further

ORDERED that this constitutes the decision, order and judgment of the court.

9/3/2019

DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE