

Otero v Montenegro

2019 NY Slip Op 33423(U)

November 14, 2019

Supreme Court, Suffolk County

Docket Number: 11263/2011

Judge: Paul J. Baisley, Jr.

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Short Form Order

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

PRESENT:

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

-----X
NOHORA OTERO,

Plaintiff,

-against-

ANTONIO MONTENEGRO aka ANTHONY
MONTENEGRO and RESMAE MORTGAGE
CORPORATIONI and BRIDGEFIELD
MORTGAGE CORPORATION and MERS INC. and
THOMPSON LAND SERVICES, INC. and
MICHAEL S. CHARLES and ABC
CORPORATIONS 1 through 20, and JOHN/JANE
DOES 1 through 20,

Defendants.

-----X

INDEX NO.: 11263/2011
MOTION DATE: 10/4/18
MOTION SEQ. NO.: 009 MG

PLAINTIFF'S ATTORNEYS:

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DEFENDANT'S ATTORNEYS:

Fidelity National Law Group
Attorneys for HSBC Bank, as Trustee for the
Registered Holders of Nomura Home
Equity Loans as successor-in-interest to
Bridgefield Mortgage f/k/a Resmae
Mortgage
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Upon the following papers numbered 1 to 45 read on this motion for partial summary judgment on counterclaim for equitable subrogation; Notice of Motion/Order to Show Cause and supporting papers 1 - 22; ~~Notice of Cross Motion and supporting papers~~ ---; Answering Affidavits and supporting papers 23 - 32; Replying Affidavits and supporting papers 33 -45; Other Defendant's Memorandum of Law; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (motion sequence no. 009) of HSBC, as successor-in-interest under the Resmae Mortgage, for partial summary judgment on its counterclaim for equitable subrogation is granted; and it is further

ORDERED that HSBC has a valid lien against defendant Montenegro's remaining one-half interest in the property; and it is further

ORDERED that HSBC's motion for default versus defendant Montenegro on the cross-claim is granted; and it is further

ORDERED that HSBC's motion to amend the caption to reflect its current interest as beneficiary of the Resmae mortgage is granted.

Plaintiff Nohora Otero ("Otero") commenced this action on or about April 5, 2011 to quiet title, asserting that her signature was forged on a deed which was executed on November 17, 2006 transferring title to real property commonly known as 3 Lee Place, Mastic, New York, which she owned with defendant Antonio Montenegro ("Montenegro") as joint tenants, to Montenegro alone.

The submissions reflect that on September 10, 1999, Otero and Montenegro purchased the subject property as joint tenants. Otero and Montenegro each gave a mortgage on the property in the amount of \$77,400.00 to Equicredit Corporation of New York. On or about April 25, 2000 Otero and Montenegro refinanced the First Equicredit mortgage with a second loan from Equicredit in the amount of \$143,660.00, secured by a mortgage on the property in that same amount. A satisfaction of the first Equicredit mortgage was recorded in the land records on May 8, 2000. On or about March 13, 2002, Otero and Montenegro refinanced the second Equicredit mortgage with a loan from Countrywide Home Loans, Inc. in the amount of \$155,500.00, secured by a mortgage on the property in that same amount. According to the deposition testimony of Otero, sworn to on November 4, 2014, Otero and Montenegro lived together at the subject property from the date of purchase until some time in 2002 when their relationship ended and Otero moved out.

In October 2003, Otero and Montenegro each filed a voluntary Chapter 13 Bankruptcy proceeding in the United States Bankruptcy Court for the Eastern District of New York for the purpose of discharging numerous debts. Although Otero testified at her deposition that she had moved out of state the year before filing bankruptcy, she listed the subject property as her primary residence on the bankruptcy petition. On or about November 17, 2006, Montenegro refinanced the Countrywide mortgage with a loan issued by Resmae Mortgage Corp. in the amount of \$276,000.00. The proceeds of the Resmae mortgage satisfied the entire outstanding balance of the Countrywide mortgage in the total amount of \$151,700.00. At the time Montenegro applied for the Resmae Loan, the bankruptcy proceedings were still open. An Order dated November 15, 2006 issued by the Bankruptcy Court authorized the refinancing of the Countrywide mortgage. The Bankruptcy Court issued an order discharging Otero in bankruptcy on December 15, 2006.

On or about November 17, 2006, during the closing for the Resmae mortgage, a deed was executed transferring the property from Otero and Montenegro to Montenegro only. According to Otero's deposition testimony, she was entirely unaware that the deed was executed as part of the refinance. Otero testified that she became aware of the motion to refinance when she visited the Bankruptcy Court to confirm that her obligations under the bankruptcy proceeding had been satisfied. In January 2007, Otero and Montenegro hired a mediator to draft an agreement whereby they agreed to sell the house and split the proceeds with 40% to Otero and 60% to

Montenegro. Asserting that the deed had been forged, Otero seeks to set aside the deed as well as the \$276,000.00 Resmae mortgage.

HSBC now moves for summary judgment on its eighth affirmative defense of equitable subrogation asserting that the Resmae mortgage was approved by the Bankruptcy Court as a refinance of the Countrywide mortgage in Montenegro and Otero's name, and paid off that existing encumbrance on the property in the total amount of \$151,700.00, which Otero had listed on her bankruptcy schedule as a secured debt. HSBC further asserts that \$155,361.47 of the proceeds of the Resmae mortgage paid off existing liens on the property, \$350.00 for insurance on the property, and \$5,975.00 satisfied Otero's obligation to the bankruptcy trustee. HSBC contends that HSBC has advanced approximately \$67,420.41 to pay real estate taxes and to maintain homeowner's insurance. HSBC further contends that even if the deed is void that Montenegro was one-half owner of the property at the time of its execution and had the right to encumber his interest in the property. HSBC also seeks a default judgment against Montenegro as he has not participated in the litigation since January 2014. HSBC also seeks to amend the caption to substitute HSBC in place of Bridgefield, contending that the Resmae mortgage and note have been assigned and transferred to HSBC.

In support of their application, HSBC submits copies of the summons and complaint, the deed dated September 10, 1999, Equicredit mortgage dated September 10, 1999, Equicredit mortgage dated April 25, 2000, satisfaction of mortgage dated September 10, 1999, Countrywide mortgage dated March 13, 2002, satisfaction of mortgage dated April 12, 2002, deposition transcript of Otero, settlement agreement between Otero and Montenegro dated January 27, 2007, documents relative to the bankruptcy proceeding of Montenegro, tax receipt from 2007 and 2012, documents and copy of check in the amount of \$5,975.00 to the bankruptcy trustee, deposition transcript of Thompson Land Services, Inc. by Stephen E. Thompson, verified answer of Michael S. Charles, verified answer of Thompson Land Services, Inc., verified answer and counterclaim of Bridgefield Mortgage Corporation f/k/a Resmae Mortgage Corporation, short form order dated June 18, 2012, default motion dated April 25, 2012, short form order dated September 20, 2012, verified answer of Montenegro, motion dated July 23, 2013, preliminary conference order dated October 3, 2013, short form order dated August 23, 2017, minutes of dismissal dated June 15, 2017, short form order dated May 31, 2016, affidavit of Ocwen loan servicer, deed dated November 17, 2006, Resmae mortgage dated November 17, 2006, satisfaction of mortgage dated July 16, 2007, assignment of mortgage from Resmae to HSBC dated June 15, 2011, payment reconciliation history, and limited power of attorney dated March 24, 2010.

In opposition to defendant's motion, plaintiff contends that HSBC is not entitled to recoup real estate taxes it purportedly paid on the property as the party occupying the premises, namely Montenegro, is the sole party responsible for real estate taxes. Plaintiff further contends that as HSBC does not possess the original note that HSBC has failed to make a *prima facie* showing to allow it to be placed into the shoes of the original lienholder, thereby precluding

summary judgment. Plaintiff asserts that even if the court overlooks the inability of HSBC to show the original note, there is no basis to grant HSBC a lien for any amounts paid over and above the amount that was due to the original lienholder. Plaintiff further asserts that HSBC's affiant does not have the requisite knowledge of the practices of Resmae Mortgage Corporation to allow her testimony or the documents concerning Resmae to qualify as a business record exception to the hearsay rule. Finally, plaintiff asserts that as HSBC has not provided the Pooling and Servicing Agreement of the purported loan, that the within motion should be denied.

“The doctrine of equitable subrogation provides that ‘[w]here 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 lienholder’ ” (*Cashel v Cashel*, 94 AD3d 684, 941 NYS2d 236 [2d Dept 2012], citing *King v Pelkofski*, 20 NY2d 326, 33[1967]). In sum, where a mortgagee discharges a lien on another's property, and in the process is given a mortgage which later is held to be invalid, the mortgagee is entitled to an equitable lien by stepping into the shoes of the prior lienholder, whose lien it satisfied. The purpose of subrogation is to avoid the unjust enrichment of the person whose debt is satisfied (see *Great E. Bank v Chang*, 227 AD2d 589, 643 NYS2d 203 [2d Dept 1996]).

Although HSBC concedes that they are not in the possession of the note underlying the prior mortgage, the doctrine of equitable subrogation is premised on the satisfaction of a prior mortgage lien rather than the assignment of a prior mortgage. The amount of \$161,686.47 was paid out of the proceeds of the Resmae loan at the time of its closing and is reflected on the HUD-1 Settlement Statement and demonstrates the satisfaction of the Countrywide mortgage on which both Otero and Montenegro were mortgagors. Accordingly, HSBC has made a *prima facie* showing of entitlement to judgment as a matter of law on its claim for equitable subrogation. The Court finds Otero's argument that she was not required to pay taxes as she did not reside at the premises and, therefore, HSBC does not have a lien for such taxes paid, to be without merit. A tax lien will encumber the entire property held under a tenancy in common (see *Van Duzer v Anderson*, 282 AD2d 779, 123 NYS2d 46 [2d Dept 1953]). Accordingly, HSBC is entitled to an equitable lien for the real property taxes paid in the amount of \$79,824.40 to prevent unjust enrichment to plaintiff and Montenegro. Under the doctrine of equitable subrogation, HSBC is entitled to an equitable lien on the entirety of the property in the amount of \$241,510.87 (\$161,686.47 + \$79,824.40) plus interest. The Second Department has consistently held that an equitable mortgagee is entitled to accrued interest on its equitable lien (see *Wagner v Maenza*, 223 AD2d 640, 636 NYS2d 857 [2d Dept 1996]; *King v Pelkofski*, 20 NY2d 326, 229 NE2d 435, 282 NYS2d 753 [1967]; *Whitestone Sav. & Loan Assn. v Moring*, 286 AD 1042, 145 NYS2d 335 [2d Dept 1955]).

The submissions reflect that the Resmae Mortgage was for the original principal amount of \$276,000.00. It is undisputed that Montenegro held a one-half interest in the property prior to the conveyance to Montenegro alone in 2006. Accordingly, even if the Montenegro deed is

ultimately set aside as a forgery and plaintiff reacquires her interest in the property, Montenegro still holds the interest he held in the property prior to the 2006 deed, which interest he was entitled to and did encumber through the Resmae mortgage (*see 1.2.3. Holding Corp. v Exeter Holding, Ltd.*, 72 AD3d 1040, 900 NYS2d 356 [2d Dept 2010]). As such, HSBC holds a valid mortgage lien solely on Montenegro's interest in the property for the original principal amount of the Resmae mortgage that is not covered by the equitable lien on the entirety of the property. Specifically, HSBC holds a valid mortgage lien on Montenegro's interest in the property in the original principal amount of \$114,313.53 (\$276,000-\$161,686.47 = \$114,313.53).

New York courts have routinely held that a business record will be admissible if the recipient can establish personal knowledge of the maker's business practices and procedures or that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon by the recipient in its business (*see Bank of New York Mellon v. Davis*, 56 Misc. 3d 896 [2017]). Accordingly, HSBC has demonstrated the admissibility of the testimony of Timeka J. Motlow, Vice President of Ocwen Loan Servicing, LLC.

The submissions reflect that Montenegro was previously represented by Brill Legal Group, P.C., but they were relieved as counsel by court order dated May 31, 2016. Thereafter, Montenegro appeared *pro se* at a court conference on May 4, 2017, but has failed to participate in the litigation thereafter. NY Ct. Rules §202.27(c) provides that, "[a]t any scheduled call of a calendar or at any conference, if no party appears, the judge may make such order as appears just." (*See Feldstein v. New York State Dept. Of Correctional Services*, 55 AD3d 663, 867 NYS 2d 464 [2nd Dept. 2008]). Further, where a party has failed to plead or appear in an action or to proceed, the court may grant a default against him (CPLR § 3215). The Court notes that there was no opposition submitted to HSBC's motion for default versus Montenegro with respect to HSBC's cross-claim. Accordingly, HSBC's motion for default with respect to Montenegro on the cross-claim is granted.

HSBC's application to amend the caption to reflect the assignment of the Resmae mortgage and note which it secures from Bridgefield to HSBC is granted.

The Court acknowledges plaintiff's request for oral argument on the within motion but declines to entertain the request for same. The parties are reminded that this matter is scheduled for a compliance conference on November 21, 2019 at 9:30 a.m. at the Supreme Court, One Court Street, IAS Part 36, Room 405, Riverhead, New York.

Submit judgment on cross-claim in accordance herewith

Dated: November 14, 2019


J.S.C.