

Old Republic Natl. Tit. Ins. Co. v Zottola
2019 NY Slip Op 34708(U)
November 1, 2019
Supreme Court, Westchester County
Docket Number: Index No. 57876/2019
Judge: Terry Jane Ruderman
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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OLD REPUBLIC NATIONAL TITLE INSURANCE
COMPANY,

Plaintiff,

Index No. 57876/2019

-against-

Motion Sequence No. 1

MARGARET ZOTTOLA,

DECISION AND ORDER

Defendant.

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RUDERMAN, J.

The following papers were considered in connection with plaintiff's motion for an order pursuant to CPLR 3212 granting plaintiff summary judgment:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibits A - C	1
Affirmation in Opposition	2

This action, brought by a title insurance company, seeks to recoup sums plaintiff was obligated to pay out to its insured, a lender bank, under the title insurance policy issued by plaintiff's predecessor in interest. Defendant Margaret Zottola was the borrower on a \$140,000 note and mortgage executed on December 3, 1992 in connection with her purchase of a property at 69 Mahopac Avenue in Amawalk, New York. However, the mortgage was not properly recorded.

Although the borrower made the scheduled payments on the mortgage loan for over 25 years, when she sold the property to bona-fide purchasers for value on October 23, 2018, she did

encumbrances on the property. The sum remaining due to the lender bank on the note, \$44,097.17, was not paid by defendant, either at or after the closing in which she received \$324,824.31 in sale proceeds. When plaintiff title insurer determined that the insured lender's mortgage had not been properly recorded, and that therefore the lender could not claim a priority lien interest in the property, plaintiff title insurer paid the lender the amount of its loss, consisting of the remaining \$44,097.17 due on the loan. The lender bank assigned the title insurance company the mortgage and note.

Plaintiff title insurer then commenced this action by the filing of a summons and complaint on May 16, 2019, to recoup the payment it made to the insured lender, pursuant to two causes of action: quantum meruit and breach of contract. Defendant filed an answer on July 26, 2019, containing twelve affirmative defenses.

Plaintiff now moves for summary judgment, asserting that the facts entitle it to judgment as a matter of law. Defendant submits an affirmation in opposition, contending that she has not had the opportunity to obtain discovery, and that facts essential to justify opposition to the motion are exclusively within plaintiff's knowledge and control. She further argues that the failure to record the underlying mortgage precludes the relief requested.

Analysis

Initially, contrary to defendant's contention, the promissory note, and defendant's obligations to make payments thereunder, was not extinguished by the sale of the property. Although "the lien of a mortgage is extinguished upon the sale of the real property affected thereby unless the purchaser has knowledge, either actual or constructive, of the existence of the mortgage" (*Baccari v De Santi*, 70 AD2d 198, 201 [2d Dept 1979]), the same is not true of the

mortgage” (*Baccari v De Santi*, 70 AD2d 198, 201 [2d Dept 1979]), the same is not true of the promissory note. The note represents a contractual obligation on the part of the borrower to repay the principal and interest as set forth therein. Here, the note, on which defendant defaulted, has been assigned to plaintiff.

This Court also rejects the argument propounded by counsel for defendant, that the motion is premature since depositions have not been conducted, and that CPLR 3212 (f) precludes an award of summary judgment at this time. “A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence” (*Cortes v Whelan*, 83 AD3d 763, 764 [2d Dept 2011] [citation omitted]). “The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion” (*id.*).

Defendant has failed to show what possible additional facts regarding this claim may exist that are not already within her knowledge. The absence of discovery therefore need not preclude summary judgment at this time. Plaintiff has established its prima facie entitlement to judgment based on defendant’s default in payment under the note, on theories of breach of contract and unjust enrichment, and defendant has not submitted any evidentiary materials disputing plaintiff’s showing, or establishing any factual basis for the defenses contained in her answer.

Accordingly, it is hereby

ORDERED that plaintiff’s motion for summary judgment is granted; and it is further

ORDERED that plaintiff is entitled to enter judgment against defendant in the amount of

\$44,097.17, together with costs and disbursements.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
November 1, 2019


HON. TERRY JANE RUDERMAN, J.S.C.