

Galpern v 311 Dahill, LLC
2020 NY Slip Op 30851(U)
March 13, 2020
Supreme Court, Kings County
Docket Number: 518276/2016
Judge: Bruce M. Balter
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At IAS Part 13 of the Supreme Court of the State of New York, Kings County, 320 Jay Street, Brooklyn, New York 11201, on the 13th day of March, 2020.

PRESENT:

HON. BRUCE M. BALTER,
J.S.C.

ELLIOT GALPERN, X

Plaintiff

-against-

DECISION /ORDER
Index No.: 518276/2016
Motion Date: 02/04/2020
Motion Cal. No: 16
Motion Sequence: 3

311 DAHILL, LLC, JACOB HERBST, RAMCHAL
5 LLC, JULES LEVENTHAL, HAJE LLC, ESTHER
FRANKEL- ROSS, JOSEPH GOLDSTEIN, MAYER
HERSH NOSKOW, DDS, STEVEN CHAIM
GOLDBERGER a/k/a Steven Goldberg a/k/a Chaim
Goldberger a/k/a Chaim Tzvi Goldberger, RACHEL
GOLDBERGER and JOHN DOE,

Defendants.

X

2020 MAR 18 AM 7:20
KINGS COUNTY CLERK
FILED

Plaintiff’s motion for an order, pursuant to CPLR §3215, in part, and CPLR§ 3212 in part, and for an order of reference pursuant to RPAPL §1321. Defendants 331 Dahill and Noskow oppose the motion.

This is an action to foreclose a mortgage that was assigned to Galpern as security for a loan of \$200,000.00 he made to the mortgagee, defendant 331 Dahill LLC (“Dahill”). When Dahill defaulted in the loan’s repayment, Galpern commenced this foreclosure. Record title to the mortgaged property is held by defendant Ramehal 5 LLC (“Ramchal”). Dahill and Ramehal are, in their own words, “related entities]. The property’s former owner, and the original mortgagor of the subject mortgage is the defendant Mayer H. Noskow. In a joint answer, Dahill and Ramchal generally deny the existence of the mortgage, the loan from Galpern, the mortgage’s assignment, and Dahill’s default on the loan. In his answer, Noskow claims he never owned the subject property and that his signature on the mortgage is a forgery. Plaintiff’s Amended Verified Complaint adds the other defendants, and it seeks the same relief: a judicial sale of the mortgaged premises. Plaintiff now moves for judgment as a matter of law and seeks a default judgment against the non-answering defendants and an order of reference.

PROCEDURAL HISTORY

On February 22, 2011, defendant Mayer H. Noskow executed and delivered a mortgage of the real property at 331 Dahill Road, Brooklyn, NY 11218 (Block 5369, Lot 74) in favor of Dahill, as mortgagee; the Mortgage, which was recorded in the City Register's Office as CRFN 2011000105947 on March 24, 2011. On May 16, 2011, Dahill executed a promissory note in favor of Galpern in the principal sum of \$200,000.00, requiring interest on the principal, at 12% per annum (or 24% in case of default) to be paid monthly, and for the entire principal to be repaid on May 31, 2012. As security for its repayment, Dahill assigned all of its right, title, and interest to the Mortgage to Galpern by an Assignment of Mortgage dated May 16, 2011 and reproduced (as recorded in the City Register's Office as CRFN 2011000198038 on Jun. 3, 2011.) Dahill also executed and delivered an assignment of its right, title and interest in "the bond or note or obligation described in [the M]ortgage", and a Security Agreement. Dahill failed to repay the principal on May 31, 2012 as the Dahill Note required, but continued paying interest every month until 2016 when all payments ceased. Dahill has paid no interest since June 1, 2016, and has never paid any of the \$200,000.00 principal. On or about March 16, 2016, Jules Leventhal, Haje LLC, Esther Frankel-Ross, and Joseph Goldstein commenced an action in this court under Index Number 504304/16, against Plaintiff and others seeking to set aside several real estate transfers — including the Mortgage, and the Assignment — as fraudulent conveyances and filed a lis pendens against the Premises.

This action was commenced against Dahill, Ramchal, and Jacob Herbst (who signed the Dahill Note both personally and for Dahill): on October 17, 2016, by e-filing of the Summons and Complaint and Notice of Pendency of Action. Dahill was served via the New York State Secretary of State on November 1, 2016, and by personal service on November 3, 2016, Herbst was served by substituted service, on November 15, 2016. Ramchal was served via the Secretary of State on November 1, 2016. When all these defendants' time to answer expired, Plaintiff timely moved by Notice of Motion dated Jan. 5, 2017 for a default judgment and an order of reference. This motion was granted without opposition, but before an order was entered, counsel determined that the parties to the Fraudulent Conveyance Action were necessary defendants and must be joined. Plaintiff advised the court of this by letter dated January 31, 2017, and by Notice of Motion dated February 9, 2017, moved for leave pursuant to CPLR §3025 (b) to amend its complaint and the caption. This motion was granted by Order dated April 18, 2017, and entered May 3, 2019. Proof of service by first-class mail on defendants Herbst, and John Doe; upon counsel of record for Dahill, and Ramchal; upon Noskow, and on counsel of record for the Leventhal Parties on May 19, 2017. The Amended Summons and Amended Verified Complaint were served by personal service on Rachel Goldberger and Steven Chaim Goldberger on June 9, 2017; on Joseph Goldstein and Jules Leventhal by personal service on June 19, and June 21, 2017, respectively; and, via the Secretary of State, on Haje LLC, on June 19, 2017.

On May 25, 2017, before service of the Amended Complaint was complete, the Leventhal Parties moved to consolidate this action with the Fraudulent Conveyance Action. The motion to consolidate was granted August 3, 2017, by a Joint Trial Order. On June 19, 2017,

Dahill and Ramchal served a joint Verified Answer to the Amended Verified Complaint. They also interpose 25 affirmative defenses. Noskow filed and served the Verified Answer and Cross-Claim on August 9, 2017. No other defendants have appeared.

In support of the motion, Plaintiff claims that the Dahill-Ramchal and Noskow answers fail to raise any triable issues of fact and that he is entitled to judgment as a matter of law.

STATUTORY AUTHORITY AND APPLICABLE CASE LAW

RPAPL §1321 provides: If the defendant fails to answer within the time allowed or the right of the plaintiff is admitted by the answer, upon motion of the plaintiff, the court shall ascertain and determine the amount due, or direct a referee to compute the amount due to the plaintiff and to such of the defendants as are prior incumbrancers of the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels (See RPAPL 1321 [1].)

In this action, Plaintiff seeks summary judgment that should only be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law. See *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Dorival v. DePass*, 74 A.D.3d 729, 901 N.Y.S.2d 528 (2nd Dept. 2010) citing *Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 320 N.E.2d 853 (1974). “On a motion for summary judgment, the court’s function is to determine whether material factual issues exist, not to resolve such issues”. See *Lopez v. Beltre*, 59 A.D.3d 683, 873 N.Y.S.2d 726 (2nd Dept. 2009), citing *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387 (1957). A Court should not engage in “weighing” of evidence when deciding a motion for summary judgment. *Scott v. Long Island Power Authority*, 294 A.D.2d 348, 741 N.Y.S.2d 708 (2nd Dept. 2002).

An opponent of a motion for summary judgment must be given every favorable inference and the evidence must be viewed in the light most favorable to them. See *Sampino v. Crescent Associates, LLC*, 34 A.D.3d 779, 825 N.Y.S.2d 135 (2nd Dept. 2006); *Judice v. DeAngelo*, 272 A.D.2d 583, 709 N.Y.S.2d 427 (2nd Dept. 2000). In addition, a Court should deny a motion for summary judgment if “the proponent fails to make out its prima facie case for summary judgment. See *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986); *Avotte v. Gervasio*, 81 N.Y.2d 1062, 601 N.Y.S.2d 463 (1993). The standards for summary judgment are well settled. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 1980); CPLR §3212(b). The moving party has the burden of demonstrating that no material factual dispute exists. See *Van Patten v. U.S. Truck Body Company, Inc.*, 176 A.D.2d 1095, 575 N.Y.S.2d 399 (3d Dept 1991).

It is well settled that the basis of a foreclosure is that an actionable, breach of the mortgage has occurred, entitling the plaintiff/mortgagee to sell the property to satisfy the debt the mortgage secured (see e.g. *Fortress Credit Corp. v Hudson Yards, LLC*, 78 AD3d 577 [1st Dept 2010]; *Red Tulip, LLC, v Neiva*, 44 AD3d 204, 209 [1st Dept 2007], lv dismissed 10 NY3d 741 [2008]). The complaint must allege statements that will ultimately establish a judgment of foreclosure and sale (id.). Accordingly, a motion for summary judgment requires the plaintiff to prove the allegations of the complaint which, absent a viable defense or efficacious counterclaim, would entitle a plaintiff to the relief requested. However in the instant action as explained more fully in the accompanying Affidavit of Mayor Noskow and as demonstrated by the exhibits attached thereto including the deposition testimony of it is evident that the underlying deed and mortgage, which formed the basis of the assignment that Plaintiff is attempting to foreclose on in this action, were all fraudulently the Plaintiff himself, conveyed and were forged.

It is well established that a deed based on forgery or obtained by false pretenses is void ab initio (*Faison v Lewis*, 25 NY3d 220, 225 (2015); *Marden v Dorothy*, 160 NY 39 [1899]; *GMAC Mide. Coro. V Chan*, 56 AD3d 521, 522 [2d Dept 2008]; *Cruz v Cruz*, 3:7 AD3d 754 [2007]). Accordingly, if the deed is void, it does not pass title and cannot be enforced even if title is later acquired by a bona fide purchaser (*ABN AMRO Mtge. Group, Inc, v Stephens*, 91 AD3d 801, 803 [2d Dept 2012]). It is well settled that motions for summary judgment search the record and a Court may grant summary judgment to the non moving party with respect to any issue that is the subject of the motion. See *Tannenbaum v. Republic Ins. Co.*, 249 A.D.2d 460, 671 N.Y.S.2d 520 (2d Dept. 1998), *Merritt Hill Vineyards v. Windy Hats. Vineyard*, 61 N.Y.2d 106, 460 N.E.2d 1077, 472 N.Y.S.2d 592 (1984).

ANALYSIS

Plaintiff seeks to foreclose on a non-bank private loan purportedly made to Defendant 331 Dahill LLC allegedly secured by an assignment or partial assignment of a mortgage on property at 331 Dahill Road, Brooklyn arising from a purported sale of the property from 331 Dahill LLC to Defendant Mayer Noskow. Both Defendants Noskow and 331 Dahill LLC have denied the transaction. Plaintiff acknowledges in his motion that Noskow has alleged that his signature on all the transaction documents were forgeries. 331 Dahill LLC, for its part, contends that the conveyance to Noskow was carried out without authorization by someone named Herbst, whom 331 Dahill LLC contends had no authority to act for 331 Dahill LLC or to convey or encumber its property. Plaintiff concedes that Defendants Leventhal, Goldstein, HAJE LLC, and Esther Frankel-Ross have brought another action, *Leventhal v. Goldberger*, Kings County Index no. 504304 /16, which is joined for trial with this one, in which they contend that all the conveyances, including the conveyance to 331 Dahill LLC, were fraudulent conveyances that must be set aside under the New York Fraudulent Conveyance Act, and that the defendant 331 Dahill LLC is just a shell for Steven Chaim Goldberg, the Ponzi scheme fraudster against whom they have obtained a judgment of approximately \$1.5 million which they are seeking to enforce in the companion action through turnover of the 331 Dahill Road property. If the conveyance to 331 Dahill LLC was a fraudulent conveyance, then it would have to be set aside and any putative downstream conveyance by 331 Dahill LLC, be it a transaction with Noskow or a transaction

with Plaintiff, would fall by the wayside.

Firstly, Plaintiff's motion papers do not contain affidavits of service showing that the summons and complaint were even served on Defendants HAJE LLC or Esther Frankel-Ross. Thus, as to those defendants, Plaintiff's motion should be denied without further discussion. A plaintiff cannot obtain a default or summary judgment against a defendant who was not served with the summons and complaint.

Regarding Plaintiff's motion for a default judgment against Defendants Joseph Goldstein and Jules Leventhal, that motion must also be denied since the motion was not made within a year as required by CPLR § 3015©. That section provides:

If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed. A motion by the defendant under this subdivision does not constitute an appearance in the action.

Here, the summons and complaint were putatively served on June 19, 2017 for Defendant Goldstein and June 21, 2017 for defendant Leventhal. The instant motion for a default judgment was not filed until July 19, 2019, which is more than two years after the date of service. Since the motion was not filed within a year, "the court shall not enter judgment but shall dismiss the complaint as abandoned." CPLR § 3215©. Plaintiff has not proffered any legitimate excuse for the delay other than asserting that Plaintiff believed Defendants would have objected if he had moved sooner, which is plainly insufficient since it is hardly momentous that a defendant might object to a motion for a default judgment. Accordingly the action should be dismissed as against defendants Leventhal and Goldstein, as well as the unserved defendants HAJE LLC and Esther Frankel-Ross.

At Bar, is a foreclosure action regarding a purported \$200,000 loan allegedly made by Plaintiff to Dahill, secured by a purported assignment of a \$712,000 mortgage made by defendant Mayer Noskow to Dahill, allegedly secured by the real property known as and located at 331 Dahill Avenue, Brooklyn, New York. The purported mortgage made by defendant Noskow in favor of Dahill and purportedly secured by the Property, was made on March 24, 2011. A deed of even date purporting to transfer title to the Property from Dahill to defendant Noskow was given to defendant Noskow. Notably, the deed was signed by defendant Jacob Herbst who was never a member of, and had no authority to act on behalf of, Dahill. Similarly, defendant Noskow denies he was ever an owner of the Property.

The transactions on the Property grew even more nebulous when, on May 16, 2011, defendant Herbst executed an assignment of the Noskow Mortgage to Plaintiff in exchange for the sum of \$200,000. The assignment necessarily relies on the validity of the Noskow Mortgage and the deed, which defendant Noskow disputes. The purported "Owner's Verification of Mortgage" allegedly signed by defendant Noskow in connection with the assignment, names

Louis Galpern, not Plaintiff Elliot Galpern, as the lender. This might explain why, in the related action entitled Leventhal, et. al. v. 331 Dahill LLC, Mayer Hersh Noskow, Elliot Galpern, et.al, Supreme Court, Kings County, Index No, 504304/2016, Plaintiff could not recall who the borrower was, and testified that his father was the person who arranged for the loan. In addition, the checks made in purported payment of the mortgage at the heart of this action were: not made by Moses Neuman a/k/a Moses Neiman, Dahill, or even Jacob Herbst; rather, they were given to Plaintiff by a company called Bentzy's Construction DBA Bentzy's Roofing. Further, payments were frequently made in cash; Plaintiff would either retrieve payments from the mortgage broker at his office or from Chaim "behind the window at a check cashing place" and that Chaim "was the guy paying me".

Nowhere does Plaintiff establish that this is a valid, collectible loan. Rather, the assignment was entirely unauthorized, the underlying mortgage and deed are claimed to be forgeries, the lender does not know who the borrower is, and the "borrower" on the loan documents -never received any money in connection with the mortgage. Defendant 331 Cahill, LLC in it's opposition concedes that the purported deed to Mayer Noskow (and accompanying mortgage) was a nullity since it was granted by an impostor, who had no authority to act on behalf of 331 Dahill, LLC, further vitiating Plaintiff's entitlement to summary judgment

Many of the outstanding factual issues are being addressed in the related action entitled Leventhal, et. al. v. 331 Dahill LLC, Mayer Hersh Noskow, DDS, Elliot Pincus Galpern, et. al., Supreme Court, Kings County, Index No. 504304/2016, in which depositions are ongoing. Specifically, Plaintiff, Defendants, and defendant Noskow, among others, have been deposed, and defendant Jacob Herbst has been subpoenaed to appear for a deposition. Furthermore, and equally troublesome, is that Steven Chaim Goldberger, Defendant Meyer Noskow, and Moses Neuman, who claims to be the principal of 331 Dahill LLC, are all brothers-in-law, which raises some credibility issues.

CONCLUSION

After careful consideration of the oral arguments presented to the Court and a review of the moving papers, oppositions, exhibits and memoranda of law, The Court finds that Plaintiff has failed to establish their entitlement to the relief requested as a matter of law. As such, Plaintiff's motion for an order, pursuant to CPLR §3215, in part, and CPLR§ 3212 in part, and for an order of reference pursuant to RPAPL §1321 is DENIED. Furthermore, this action is hereby dismissed as against defendants Leventhal and Goldstein, as well as the unserved defendants HAJE LLC and Esther Frankel-Ross. This constitutes the Decision and Order of this Court.

March 13, 2020



BRUCE M. BALTER, J.S.C.

2020 MAR 18 11:07 AM
KINGS COUNTY CLERK
FILED
BRUCE M. BALTER
Justice of the Supreme Court