

Citibank, N.A. v Burns
2020 NY Slip Op 32508(U)
July 29, 2020
Supreme Court, Kings County
Docket Number: 503816/2019
Judge: Mark I. Partnow
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At an IAS Term, Part FRP2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 29th day of July, 2020.

PRESENT:

HON. MARK PARTNOW,
Justice

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CITIBANK, N.A., AS TRUSTEE FOR FEDERAL
DEPOSIT INSURANCE CORPORATION 2010 R1 TRUST,

Plaintiff,

-against-

Index No. 503816/2019

STEPHANIE BURNS; LOUIS BURNS; HOME HEATING OIL CORP.; ABRAHAM REINGOLD & JORDAN TUCKER, "JOHN DOE # 1" THROUGH "JOHN DOE # 12," the last twelve names being fictitious and unknown to plaintiff, the persons or parties intended being the tenants, occupants, persons or corporations, if any, having or claiming an interest in or lien upon the premises, described in the complaint,

Defendants.

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The following e-filed papers read herein:

NYSEF #

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____

Opposing Affidavits (Affirmations) _____

Reply Affidavits (Affirmations) _____

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Upon the foregoing papers, plaintiff Citibank, N.A., as Trustee for Federal Deposit Insurance Corporation 2010 Trust, moves for an order, pursuant to CPLR 3211 (a) (1) and (5), dismissing the counterclaim of defendant Louis Burns (Louis) or, alternatively,

dismissing Louis' request for legal fees. Louis cross-moves for an order, pursuant to CPLR 3211 (a) (1), dismissing plaintiff's complaint.

Plaintiff commenced this action to foreclose a consolidated mortgage encumbering the subject property at 256 Decatur Street in Brooklyn. The mortgage was executed by defendant Stephanie Burns (Stephanie) on November 13, 2008 to secure a consolidated note in favor of plaintiff's assignor, IndyMac Bank, F.S.B. (IndyMac), in the amount of \$590,000.00. Stephanie took title to the subject property by deed dated February 4, 2002 from Louis, her father, who reserved a life estate therein. In conjunction with the transfer, Louis and Stephanie entered into an agreement ("2002 agreement") providing, among other covenants, that Stephanie "shall not mortgage, lease, sell, rent, encumber [or] transfer [the subject] property without the express written consent" of Louis.

Previously, on October 22, 2001, Louis granted Stephanie a durable power of attorney authorizing Stephanie to enter into real estate transactions on his behalf. On January 11, 2005, Stephanie, as attorney in fact for Louis, executed a deed effectively eliminating Louis' life estate and conveying a 100% interest in the subject property to herself. The deed and power of attorney were both recorded on April 27, 2005. Stephanie thereafter proceeded to encumber the subject property with certain mortgages, including the subject consolidated mortgage.

In 2007, based upon Stephanie's breach of the 2002 agreement prohibiting her from conveying and/or encumbering the subject property without consent, Louis commenced an action (*Burns v Burns, et al.*, Kings County index No. 37327/07) (the

“constructive trust action”) to impose a constructive trust over the subject property and for an accounting of the income and loan proceeds received by Stephanie with respect to the subject property. A bench trial was conducted in the constructive trust action before Justice Lawrence Knipel and Louis was awarded a judgment imposing a constructive trust over the subject property and ordering Stephanie to convey the subject property to Louis within twenty (20) days after service of the judgment with notice of entry. The judgment directed the Sheriff of Kings County to convey the subject property to Louis in the event Stephanie failed to timely comply. Louis’ claims for an accounting were denied. However, following appeal, the Appellate Division, Second Department modified the judgment to grant Louis’ claim for an accounting and remitted the matter for further proceedings (*Burns v Burns*, 174 AD3d 570 [2d Dept 2019]). On October 25, 2017, the Sheriff executed a deed conveying the subject property to Louis.

The instant action to foreclose the subject mortgage was commenced on February 21, 2019. On September 17, 2019, Louis filed an answer interposing various affirmative defenses along with a counterclaim to void or invalidate the subject mortgage. Plaintiff seeks dismissal of the counterclaim on grounds which include statute of limitations and res judicata/collateral estoppel.

As evidenced by an affirmation submitted by Louis’ counsel in the constructive trust action, Louis was aware of the subject consolidated mortgage as early as February 2, 2009 (NYSCEF Doc No 109). Thus, to the extent Louis is claiming the consolidated mortgage must be invalidated as the product of fraud, his counterclaim is untimely as it

was brought more than six years after the consolidated mortgage was executed and more than two years after discovery of the consolidated mortgage (CPLR 213 [8]).

Moreover, under New York's transactional analysis approach to res judicata, "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). Collateral estoppel, or issue preclusion, "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" (*Bank of N.Y. Mellon v Chamoula*, 170 AD3d 788, 790 [2d Dept 2019], quoting *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). In the constructive trust action, which proceeded to judgment, the issue of the validity of the consolidated mortgage was decided against Louis as Justice Knipel expressly determined that the property should be conveyed to Louis subject to the consolidated mortgage (Trial Transcript, NYSCEF Doc 55 at 240). Louis is thus precluded from relitigating the issue in this matter.

Finally, any contention by Louis that the subject consolidated mortgage is void ab initio is unavailing. It is well settled that a deed based on forgery or obtained by false pretenses is void ab initio, and a mortgage based on such a deed is likewise invalid (*see Cruz v Cruz*, 37 AD3d 754, 754 [2d Dept 2007]; *Crispino v Greenpoint Mtge. Corp.*, 304 AD2d 608, 608-609 [2d Dept 2003]; *Yin Wu v Wu*, 288 AD2d 104, 105 [1st Dept 2001];

Rosen v Rosen, 243 AD2d 618, 619 [2d Dept 1997]; *Filowick v Long*, 201 AD2d 893 [4th Dept 1994]). However, there is no evidence presented establishing that his signature on the power of attorney authorizing Stephanie to execute the 2005 deed was forged or otherwise obtained under false pretenses.

As a result, plaintiff's motion to dismiss the counterclaim of Louis to void or invalidate the consolidated mortgage is granted and Louis' cross motion to dismiss the complaint is denied.

To the extent there is an unresolved request set forth in Motion Sequence # 1 in this matter to consolidate this action with a separate action between Louis and Stephanie (*Burns v Burns*, Kings County index No. 518084/18), that part of said motion is denied.

The foregoing constitutes the decision and order of the court.

ENTER


J. S. C.