

Corning Fed. Credit Union v Georgilis

2020 NY Slip Op 35766(U)

May 12, 2020

Supreme Court, Queens County

Docket Number: Index No. 710044/16

Judge: Timothy J. Dufficy

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This opinion is uncorrected and not selected for official publication.

FILED

**5/14/2020
11:02 AM**

Short Form Order

**COUNTY CLERK
QUEENS COUNTY**

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

**Present: HON. TIMOTHY J. DUFFICY
Justice**

IAS PART 35

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CORNING FEDERAL CREDIT UNION,

Plaintiff,

Index No. 710044/16

- against -

Motion Date: 2/4/20

**STEVEN GEORGILIS, DIBENEDETTO
PROPERTIES INC., JASON GEORGILIS,
QUONTIC BANK and JOHN DOE 1 and 2,
the Names of the "John Doe" defendants being
Fictitious and Unknown to Plaintiff, but
intended to be the Parties, if any, Having or
Claiming an Interest in the Real Property
Described Herein,**

Motion Seq.: 8

Defendants

- and -

BOKF, NA,

Intervenor-Defendant.

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The following papers were read on this motion by intervenor-defendant, BOKF, NA, for an order granting summary judgment dismissing plaintiff's complaint, or, in the alternative, for an order granting summary judgment holding that BOKF, NA is a good faith encumbrancer for value, with a priority lien that shall not be extinguished or modified by this litigation.

**PAPERS
NUMBERED**

Notice of Motion - Affidavits - Exhibits - Memorandum of Law EF253 - EF278
Ans. Affs. - Exhibits - Memorandum of Law EF282 - EF297
ReplyAffs. - Exhibits - Memorandum of Law EF298 - EF307

Upon the papers filed in support of the within motion and the papers filed in opposition or relation thereto, is is ordered that the within motion is determined as follows:

In July, 2010, non-party, American Made Tire, Inc. (AMT), entered into a Mortgage Term Promissory Note (Mortgage Note) and Commercial Term Loan Note and Security Agreement (Commercial Note) with the plaintiff. Defendant Steven Georgilis guaranteed payment of the notes. Both notes were breached by AMT and Georgilis, resulting in an April 2017 judgment, in Chemung County, New York, in favor of the plaintiff, and against Georgilis, in an amount in excess of \$400,000.00, which Judgment has not been satisfied.

Prior to the commencement of the Chemung County action, in May 2013, Georgilis owned a one-half interest in the property, located at 37-22 59th Street, Woodside, New York. In December, 2013, during the pendency of the Chemung County action, Georgilis transferred his one-half interest in the Woodside property to defendant DiBenedetto Properties (DiBenedetto) for \$30,000.00. In July, 2014, DiBenedetto transferred its one-half share of the Woodside property to Jason Georgilis for \$200,000.00. It is alleged that, in 2017, the appraised market value of the Woodside property was \$990,000.00.

A previous motion by the plaintiff was granted to the extent that the Complaint and Notice of Pendency were amended to add Quontic Bank as a party defendant, which amendment was completed, and Quontic Bank has since appeared and answered. The branch of said motion seeking to set aside the transfer of property interest from Georgilis to DiBenedetto was denied, as premature, pending the inclusion and appearance of Quontic Bank. Thereafter, BOKF, NA (BOKF), as alleged assignee of Quontic Bank, successfully moved to intervene in this action.

BOKF now moves for summary judgment seeking dismissal of plaintiff's action, BOKF being the assignee of party defendant Quontic Bank. Alternatively, BOKF seeks summary judgment holding that it is a good faith encumbrancer for value, with a priority lien that shall not be extinguished or modified by this litigation.

The Court's function on a motion seeking summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must

clearly appear that no material and triable issue of fact is presented This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is ‘arguable’” [citations omitted] (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *see also Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Sukas v Streiter*, 83 Ad3d 18 [2d Dept 2011]; *Dykeman v Heht*, 52 AD3d 767 [2d Dept 2008]). Summary judgment “should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility” (*see Collado v Jiacono*, 126 AD3d 927, 928 [2d Dept 2014], citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; *see also Charlery v Allied Transit Corp.*, 163 AD3d 914 [2d Dept 2018]; *Chimbo v. Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v. Vargas*, 113 AD3d 579 [2d Dept 2014]).

“[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact” (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *see also Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2d Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*see Zuckerman v City of New York*, 4 NY2d 557 [1980]).

Liberally construing the evidence in a light most favorable to the nonmoving plaintiff, and affording it the benefit of every favorable inference (*see Liu v Margaret E. Pescator Printing, Inc.*, 30 NY3d 1025 [2017]; *Ruggiero v DePalo*, 153 AD3d 870 [2d Dept 2017]; *D’Esposito v Manetto Hill Auto Service, Inc.*, 150 AD3d 817 [2d Dept 2017]), BOKF has failed to demonstrate, *prima facie*, the absence of triable issues of fact sufficient to grant its application for summary judgment dismissing plaintiff’s complaint in its entirety. Indeed, this Court has already addressed two prior motions, one by plaintiff, and one by defendant Quontic, assignor of BOKF, seeking summary judgment referable to the allegations raised in plaintiff’s complaint, and in finding triable issues of fact, has denied those applications by Orders, dated July 13, 2019, and November 14, 2019.

Separately raised and to be addressed is BOKF's contention that, irrespective of the ultimate outcome of this suit, it should be found, as a matter of law, to be a good faith encumbrancer for value, and retain a priority lien referable to the Woodside property, it having acquired Quontic Bank's interest in the property by way of an assignment.

Initially, it is axiomatic, that "[a]n assignee stands in the shoes of the assignor and takes the assignment subject to any preexisting liabilities" (*Arena Constr. Co. v Sackaris & Sons*, 282 AD2d 489, 489 [2d Dept 2001]). Consequently, BOKF stands in the shoes of Quontic Bank, and in order for BOKF to be a bona fide encumbrancer, BOKF must initially prove that Quontic Bank was a bona fide encumbrancer. In this regard, the Court, in its decision, dated May 16, 2017, did indicate the existence of numerous triable issues of fact surrounding the transfer that resulted in the mortgage given by Quontic Bank, and subsequently assigned to BOKF, finding that

"Triable issues of fact exist regarding the total consideration received by Jason Georgilis from his purchase of the property. Moreover, there is an issue as to whether Steven Georgilis released his \$200,000 claim for damages against Jason Georgilis as additional consideration for Jason Georgilis' purchase. There is also an issue as to whether there were other obligations running between Steven and Jason Georgilis, which were released in consideration of Jason Georgilis' purchase. There also is an issue as to whether the total amount of consideration for Jason Georgilis' purchase includes rental income on the property. There is an issue as to whether Jason Georgilis purchased the property with the intent to defraud Steven Georgilis' creditors, since an inference is raised from the circumstances surrounding the transfer. Finally, the property could have been used to satisfy, in whole or in part, Steven Georgilis' prior indebtedness to Corning, had it not been conveyed to his son."

As such, as pointed out *supra*, a determination that BOKF is a bona fide purchaser for value necessarily would require that Quontic Bank have initially been a bona fide encumbrancer for value. To be a bona fide encumbrancer for value, "a mortgagee is under a duty to make inquiry where it is aware of facts 'that would lead a reasonable, prudent lender to make inquiries of the circumstances of the transaction at issue'" (*Stracham v Bresnick*, 76 AD3d 1009, 1010 [2d Dept 2010], quoting *LaSalle Bank Natl. Assn. v Ally*, 39 AD3d 597, 600 [2d Dept 2007]). "A mortgagee who fails to make such an inquiry is not a bona fide encumbrancer for

value” (*Booth v Ameriquest Mtge. Co.*, 63 AD3d 769, 769 [2d Dept 2009]). Upon this Court’s earlier recitation of those apparent triable issues of fact, it has not been established by BOKF that Quontic Bank was a bona fide encumbrancer and, accordingly, its application must be, and is hereby, denied.

BOKF’s remaining contentions and arguments are either without merit, or need not be addressed in light of the foregoing determination.

Accordingly, it is

ORDERED that intervenor-defendant BOKF’s motion seeking summary judgment dismissing plaintiff’s complaint and, alternatively, seeking summary judgment declaring that BOKF is a good faith encumbrancer for value, is denied, in its entirety.

The foregoing constitutes the decision and order of this Court.

Dated: May 12, 2020



TIMOTHY J. DUFFICY, J.S.C.

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QUEENS COUNTY**