

<b>Bank of N.Y. Mellon v Regalbuto</b>
2021 NY Slip Op 30034(U)
January 5, 2021
Supreme Court, Kings County
Docket Number: 504444/2019
Judge: Dawn M. Jimenez-Salta
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At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5<sup>th</sup> day of January, 2021.

P R E S E N T:  
HON. DAWN JIMENEZ-SALTA,  
Justice.

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THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATEHOLDERS OF THE CWALT, INC., ALTERNATIVE LOAN TRUST 2006-OA6 MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-OA6, its successors and/or assigns,  
  
Plaintiff,

DECISION/ORDER

Index No. 504444/2019

Mot. Seq. 1 and 2

- against -

JOANNE REGALBUTO, AS THE EXECUTOR OF THE ESTATE OF JOSEPHINE LANZA, LOUIS REGALBUTO, JOANNE REGALBUTO INDIVIDUALLY, LINDA SPEZZACATENA, SAMANTHA LANZA, KATHERINE LANZA AND ELIZABETH LANZA,

Defendants.

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The following e-filed papers read herein:

NYSCEF Doc. Nos.

Notice of Motion/Order to Show Cause/  
Petition/Cross Motion and  
Affidavits (Affirmations) Annexed \_\_\_\_\_  
Opposing Affidavits (Affirmations) \_\_\_\_\_  
Reply Affidavits (Affirmations) \_\_\_\_\_

15-31      38-51  
61-68      54-60  
69-72      73-76

Upon the foregoing papers, defendants, Joanne Regalbuto, as the executor of the estate of Josephine Lanza, Louis Regalbuto, Joanne Regalbuto individually, Samantha Lanza, Katherine Lanza and Elizabeth Lanza, (collectively, defendants) move, in motion sequence one, for an order, pursuant to CPLR 3211(a)(5) and (a)(7), dismissing the complaint and cancelling the notice of pendency filed by plaintiff. Defendants also move, in motion sequence two, for an order cancelling of record the mortgage dated March 22, 2006 and recorded on May 8, 2020 in the Office of the City Register, Kings County, in CRFN 2020000143259 by plaintiff, the Bank of New York Mellon, (plaintiff) against the property located at 1963 61<sup>st</sup> Street, Brooklyn, New York, designated as Block 5520, Lot 52 (premises).

Plaintiff commenced this action by filing of the summons and complaint on February 28, 2019 pursuant to article 15 of the Real Property Actions and Proceedings Law seeking, inter alia, a judgment declaring that it holds a valid mortgage on the premises and that any interest Joanne Regalbuto and Louis Regalbuto (the Regalbutos) may have in the premises is subordinate to the aforesaid mortgage and the ownership interest of its mortgagor, the now-deceased Josephine Lanza.

Plaintiff contends that the Regalbutos conveyed the premises to Josephine Lanza by deed dated March 22, 2006. The original deed was lost or destroyed and not recorded. To finance her purchase of the premises from the Regalbutos, Lanza allegedly obtained a mortgage loan (the Lanza Mortgage) from plaintiff's assignor in the principal amount of \$572,000.00. The Lanza Mortgage was also lost and not recorded.

Prior to the commencement of the instant action, plaintiff commenced an action against defendants in Supreme Court, Kings County captioned *Bank of N.Y. Mellon et al. v Regalbuto et al.* under index No. 9820/2014 seeking, inter alia, an order declaring that it held an equitable mortgage and asserting causes of action sounding in equitable subrogation and unjust enrichment. By order dated January 24, 2019, this Court granted defendants' motion to dismiss the complaint pursuant to CPLR 3211(a)(5) and (a)(7) on the basis that, inter alia, plaintiff's claims for an equitable mortgage, equitable subrogation and unjust enrichment were barred by the applicable statute of limitations. Plaintiff also sought declaratory relief and to quiet title along with an order directing the City Register to record its mortgage interest. These causes of action were dismissed pursuant to CPLR 3211(a)(7) for failure to state a cause of action.<sup>1</sup> Plaintiff claims that it was unable to locate a copy of the Lanza Mortgage at that time.

Following the dismissal of the prior action, plaintiff commenced the instant action by filing of a complaint which purported to remedy any pleading defects and attached as exhibits both a copy of the Lanza Mortgage and a HUD-1 settlement statement allegedly signed by the Regalbutos. Plaintiff also obtained an affidavit from an individual employed by the servicer of the Lanza Mortgage in which he avers that plaintiff's predecessor loaned Josephine Lanza the sum of \$572,000.00 and that Lanza executed the subject mortgage as collateral. Based on his review of the pertinent records, he further avers that no payments were made on the mortgage. During the pendency of the instant action, plaintiff submitted to the City Register for recording a copy of the Lanza Mortgage, which was accepted and recorded on May 8, 2020.<sup>2</sup>

Defendants now move to dismiss the complaint pursuant to CPLR 3211(a)(5) and (a)(7). Defendants first argue that plaintiff's claims, which defendants characterize as sounding in equity, are

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<sup>1</sup> Contemporaneously with this order, on January 5, 2021, this Court issued an order in the first action denying plaintiff's motion for leave to renew and reargue the prior dismissal order (*see Bank of N.Y. Mellon et al. v Regalbuto, et al.*, Sup Ct, Kings County index No. 9820/14).

<sup>2</sup> The copy of the Lanza Mortgage recorded by plaintiff bears Josephine Lanza's signature with a notarized certificate of acknowledgment, which was signed and notarized by attorney and notary Chaim Liechtung on March 22, 2006. Plaintiff also submits an affirmation from Mr. Liechtung in which he affirms that he recalled the transaction and that he notarized Josephine Lanza's signature on the mortgage. He further affirms that, upon being presented with said copy by plaintiff's counsel on April 20, 2020, he "confirmed the original acknowledgment by signing his name next to the copy of his signature on the Mortgage." The copy of the Lanza Mortgage available on ACRIS and recorded in CRFN 2020000143259 appears to bear a second signature from Mr. Liechtung, which is undated.

time-barred whether subject to either a six- or ten-year statute of limitations as the instant action was commenced on February 28, 2019, more than ten years from the date the Lanza Mortgage and deed were executed. Defendants also contend that this action is barred by the doctrine of res judicata based on this Court's prior dismissal order in the first action. They further argue that plaintiff's claims pursuant to RPAPL article 15 must be dismissed because plaintiff's complaint does not meet the pleading requirements for an action to quiet title.

Defendants also separately move for an order "invalidating and cancelling the recording of the mortgage," alleging that plaintiff's submission of the aforementioned copy of the Lanza Mortgage to the City Register for recording was both improper and in contravention of this Court's prior dismissal order. The motion does not specify whether said relief is sought pursuant to Real Property Law § 329 (RPL) or RPAPL 1501(4). Defendants have not yet interposed an answer.

In opposition to defendants' motion to dismiss, citing the savings provision of CPLR 205(a), plaintiff argues that the instant action is timely because it was commenced within six months of the dismissal of the prior, timely action (*see Sokoloff v Schor*, 176 AD3d 120, 135 [2d Dept 2019]). Plaintiff asserts that its claims pursuant to RPAPL article 15 in the prior action relating to the Lanza Mortgage and the deed were timely as the action was brought within ten years of the date of the instruments. Plaintiff contends that it is entitled to the benefit of the six-month savings provision because the dismissal of the quiet title claims was not on the merits. Plaintiff argues that said claims are not barred by the doctrine of res judicata for the same reason. Plaintiff contends that the allegations in the complaint adequately state a cause of action to quiet title and for declaratory relief pursuant to article 15 of the RPAPL.

With respect to defendants' motion seeking cancellation of the recorded Lanza Mortgage, plaintiff argues that said mortgage was duly and properly recorded in compliance with the requirements of RPL § 291 and the pertinent case law (*see, e.g., JPMorgan Chase Bank, N.A. v Wright*, 174 AD3d 871, 872-873 [2d Dept 2019]). Plaintiff notes that defendants fail to cite any authority for the proposition that only an original deed or mortgage may be recorded pursuant to RPL § 291. Plaintiff also rejects defendants' claim that this Court's prior dismissal order prohibited it from recording its mortgage interest.

"On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired" (*Kolb v LJ Rabinowitz, CPA*, 117 AD3d 978, 979 [2d Dept 2014], citing *Kennedy v Fischer*, 78 AD3d 1016, 1017 [2d Dept 2014]; *see also Wells Fargo Bank, N.A. v Burke*, 155 AD3d 668, 669-670 [2d Dept 2017]). Defendants failed to meet this burden with respect to plaintiff's first, third and fifth causes of action seeking relief pursuant to RPAPL article 15. Defendants failed to adequately address the applicability of CPLR 205(a) and CPLR 212(a), which provides for a ten-year statute of limitations for certain actions involving real property (*see also* RPAPL 1501[1] ["where the estate or interest (in real property) claimed by the plaintiff is for a term of years, the action may not be maintained unless the balance remaining of such term of years is not less than five"]). The Court rejects defendants' arguments that the aforesaid causes of action are subject to the shorter six-year statute of limitations applicable to actions sounding in equity and those commenced pursuant to RPAPL 1501(4) and finds that plaintiff is entitled to the benefit of the six-month savings provision of CPLR 205(a). The Court finds that these causes of action are not barred by res judicata.

To the extent that the second cause of action seeks judicial reformation of the deed due to mistake, that action is time-barred as it is subject to six-year statute of limitations (*see* CPLR 213[6]; *Deutsche Bank Natl. Trust Co. v McAvoy*, 188 AD3d 808, 810 [2d Dept 2020]; *Lopez v Lopez*, 133 AD3d 722, 723 [2d Dept 2015]). The Court does not address the timeliness of the fourth cause of action seeking an order directing the City Register to record a copy of the Lanza Mortgage as it is now moot.

In considering a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, “the pleadings must be liberally construed” and “[t]he sole criterion is whether from [the complaint’s] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Bank of N.Y. Mellon Trust Co., N.A. v Universal Dev. LLC*, 136 AD3d 850, 850 [2d Dept 2016], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Lee Dodge, Inc. v Sovereign Bank, N.A.*, 148 AD3d 1007, 1008 [2d Dept 2017]).

Accepting the allegations in the complaint as true, the Court finds plaintiff’s complaint states a cause of action to quiet title and compel a determination of claims to real property pursuant to article 15 of the RPAPL. RPAPL 1501(1) provides that any person who “claims an estate or interest in real property... may maintain any action against any other person... to compel the determination of any claim adverse to that of the plaintiff which the defendant makes, or which it appears from the public records, or from allegations of the complaint, the defendant might make...” The mortgage interest alleged by plaintiff based on the Lanza Mortgage annexed to the complaint is an “interest in real property” within the meaning of the statute (RPAPL 1501(5); *see also Emigrant Sav. Bank v Walters*, 155 AD3d 829, 830 [2d Dept 2017]; *Bank of Am., N.A. v Snyder*, 154 AD3d 671, 672 [2d Dept 2017]). Plaintiff has adequately pleaded the elements required by RPAPL 1515 and the pertinent case law (*see Bank of N.Y. Mellon v West*, 183 AD3d 683, 683 [2d Dept 2020]; *Emigrant Sav. Bank v Walters*, 155 AD3d at 830 [“contrary to the Supreme Court’s determination, the plaintiff, as mortgagee of the subject premises, asserted a cause of action to quiet title pursuant to RPAPL 1501 based on its claim that the mortgage encumbered the entire premises”]; *Bank of Am., N.A. v Snyder*, 154 AD3d at 672 [“The plaintiff, who is the successor to the mortgagee, commenced this action pursuant to RPAPL article 15 seeking to quiet title and a judgment declaring that it holds a valid first mortgage on the subject property.”]; *Bank of N.Y. Mellon Trust Co., N.A. v Universal Dev. LLC*, 2014 WL 12638988, \*1 [Sup Ct, Queens County 2014], *affd* 136 AD3d 850 [2d Dept 2016] [“This is an action brought pursuant to RPAPL Article 15 to quiet title. The plaintiffs allege that they are holders of two mortgages... [and] that the defendants may claim an estate or interest in the premises ... which is adverse to their alleged mortgages. They allege that any such interest claimed by defendants is invalid and ineffective against their estate or interest... The allegations in the complaint are sufficient to state a cause of action under RPAPL Article 15.”]).

With respect to defendants’ motion to invalidate or cancel of record the Lanza Mortgage, defendants’ motion, whether made pursuant to RPL § 329 or RPAPL 1501(4), is procedurally improper and must be denied “since that relief must be sought in an action or counterclaim” (*Bank of N.Y. Mellon v 11 Bayberry St., LLC*, 186 AD3d 1596, 1596 [2d Dept 2020]; *see also Silverberg v Bank of N.Y. Mellon*, 165 AD3d 1193, 1193 [2d Dept 2018]; *Deutsche Bank Natl. Trust Co. v Gambino*, 153 AD3d 1232, 1234-1235 [2d Dept 2017]).

Plaintiff’s recording of the Lanza Mortgage was not in contravention of this Court’s prior dismissal order as that order merely held that plaintiff failed to state a cause of action to compel the City Register to record plaintiff’s mortgage interest. This Court issued no directives enjoining or prohibiting plaintiff from submitting any instrument to the City Register entitled to recording pursuant to RPL §§

290(3), 291 or other provisions of the Recording Act. In addition, the subject copy of the Lanza Mortgage with the re-executed acknowledgement submitted for recording was not before the Court previously.

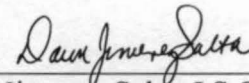
In light of the foregoing, defendants' motion (motion sequence number 1) to dismiss is granted to the extent that the second and fourth causes of action are dismissed. The fourth cause of action seeking an order directing the City Register to accept a copy of the mortgage for recording is dismissed as moot as said mortgage was recorded on May 8, 2020 in CRFN 2020000143259 by plaintiff against the premises. Defendants' motion (motion sequence number 2) to invalidate and cancel of record the mortgage is denied.

Defendants are directed to serve and file an answer to the complaint in accordance with the pertinent provisions of the CPLR within 20 days from the date service of notice of entry of this order.

This constitutes the Decision and Order of the Court.

Dated: January 5, 2021  
Brooklyn, New York

E N T E R,



Dawn Jimenez-Salta, J.S.C.

Hon. Dawn Jimenez-Salta  
Justice of the Supreme Court