

Haque v Bank of N.Y. Mellon Corp.
2024 NY Slip Op 35609(U)
August 20, 2024
Supreme Court, Queens County
Docket Number: Index No. 712010/2020
Judge: Phillip Hom
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.

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

PRESENT: HON. PHILLIP HOM PART 14

Justice

-----X

MOHAMMAD HAQUE,

Plaintiff,

- v -

THE BANK OF NEW YORK MELLON CORP., SOLID
FOUNDATION PROPERTIES, LLC, MR. COOPER GROUP
INC., NATIONSTAR MORTGAGE, LLC, SHOFI A.
SIDDIQUE,

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 65, 66

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 62, 63, 64

were read on this motion to/for CONSOLIDATE/JOIN FOR TRIAL.

Upon the foregoing papers, it is ordered that the summary judgment motion (Seq. No. 1), the cross-motion to amend, and the motion to consolidate (Seq. No. 2), are determined as follows:

The plaintiff Mohammad Haque ("Plaintiff") allegedly was injured when, on December 25, 2019, he leaned against a railing on the second floor of the premises known as and located at 80-30 221st Street, Hollis, New York (the "Premises") and the railing collapsed, causing Plaintiff to fall to the ground below. Plaintiff commenced this action against The Bank of New York Mellon, as successor in interest to JP Morgan Chase Bank, N.A. as Trustee for Structures Asset Mortgage Investments II Trust 2006-AR7 Mortgage Pass-Through Certificates Series 2006-AR7, sued herein as The Bank of New York Mellon ("BONY"), Mr. Cooper Group Inc. ("Mr. Cooper Group"), and Nationstar Mortgage LLC, sued herein as Nationstar Mortgage, LLC d/b/a Mr. Cooper ("Nationstar"), among others, alleging that the dangerous and defective condition was caused by the defendants' negligence.

BONY, Mr. Cooper Group, and Nationstar (collectively "Moving Defendants") now move (Seq. No. 1) pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against them. Plaintiff opposes the motion and cross-moves pursuant to CPLR 3025 (b) for leave to amend his second amended verified complaint to allege that the Premises was vacant and abandoned, that BONY was a mortgagee in possession, and that the defendants failed to maintain the property in violation of RPAPL 1307 and 1308.

Plaintiff also moves (Seq. No. 2) pursuant to CPLR 602 (a) to consolidate the instant action with an action entitled *Haque v Hossain, et al.*, pending in the Supreme Court, Queens County, under Index No. 726747/2022.

By way of background, on June 8, 2006, Robyn and Brett Marmott (the “Marmotts”), purchased the Premises. On the same date, they executed a note, together with a mortgage as security for the note, in favor of Countrywide Bank, N.A. On April 1, 2013, the mortgage was assigned to BONY. In May 2014, BONY commenced an action against the Marmotts, among others, to foreclose the mortgage (the “foreclosure action”). On June 9, 2016, a judgment of foreclosure and sale was entered in the foreclosure action. On July 19, 2019, a foreclosure auction took place, and the Premises was sold to the highest bidder, Salim Chowdhury (“Chowdhury”) on behalf of Shopno Group, Inc. (“Shopno”). On October 14, 2019, Chowdhury on behalf of Shopno assigned its bid to MD Anwar Hossain (“Hossain”) and Shofi A. Siddique (“Siddique”). On January 13, 2020, the referee executed a deed conveying title to the Premises to Hossain and Siddique. On January 21, 2020, the referee’s deed was recorded.

Summary Judgment (Seq. No. 1)

First, the Court will address Moving Defendants’ motion for summary judgment (Seq. No. 1). Moving Defendants contend that they owed no duty of care to Plaintiff leading up to or on the date of the alleged accident insofar as they did not own, occupy, control, possess or make special use of the Premises. They argue that BONY was an out-of-possession mortgagee, that Nationstar was an out-of-possession mortgage servicer, and that Mr. Cooper Group is a parent company of Nationstar with no direct connection to the Premises.

“‘It is fundamental that, in order to be held liable in tort, the alleged tortfeasor must have owed the injured party a duty of care’” (*Karpovich v City of New York*, 162 AD3d 996, 997 [2d Dept 2018], quoting *Forbes v Aaron*, 81 AD3d 876, 877 [2d Dept 2011]). “The duty to maintain a property free and clear of dangerous and defective conditions generally arises from ownership, occupancy, control or special use of the premises” (*Kennedy v Hennessey*, 211 AD3d 833, 833 [2d Dept 2022]). “Thus, ‘(w)here none of these factors is present, a party cannot be held liable for injuries caused by a dangerous or a defective condition’” (*id.*, quoting *Suero-Sosa v Cardona*, 112 AD3d 706, 707 [2d Dept 2013]).

Here, Moving Defendants’ evidentiary submissions establish the following: (1) that until the date of the foreclosure auction, July 19, 2019, the Marmotts retained their title and interest in the Premises (*see Ray v JP Morgan Chase Bank, N.A.*, 145 AD3d 812, 813 [2d Dept 2016]; *Forbes v Aaron*, 81 AD3d at 877; *Bethel United Pentecostal Church v Westbury 55 Realty Corp.*, 304 AD2d 689, 692-93 [2d Dept 2003]); (2) that on July 19, 2019, Salim on behalf of Shopno, as the successful bidder, became equitable owner of the Premises upon completion of the foreclosure sale (*see Norwest Mortg., Inc. v Brown*, 35 AD3d 682, 683 [2d Dept 2006]); (3) that on October 14, 2019, Hossain and Siddique became equitable owners when Salim on behalf of Shopno assigned its right and interest in the Premises (*see Haque v Hossain*, Sup Ct, Queens County, June 23, 2023, Unger, J., index No. 726747/2022); and (4) that on January 13, 2020, Hossain and Siddique became the titled owners of the Premises upon the execution of the referee’s deed.

As such, Moving Defendants make a prima facie showing that BONY did not own the Premises at the time of Plaintiff's accident. Under common law, a mortgage holder not in possession or control of real property is not liable in negligence for the condition of the property (*see Bowles v City of New York*, 154 AD2d 324, 325 [2d Dept 1989]; *see also Moran v Regency Sav. Bank, F.S.B.*, 20 AD3d 305, 306 [1st Dept 2005]). Moreover, the affidavit of Nationstar's assistant vice president, who averred that Nationstar did not own or control the Premises, and that Mr. Cooper Group was merely a parent company of Nationstar, demonstrates, prima facie, Nationstar and Mr. Cooper's entitlement to judgment as a matter of law dismissing Plaintiff's negligence claim insofar as asserted against them (*see Suero-Sosa v Cardona*, 112 AD3d at 707).

In opposition, Plaintiff fails to raise a triable issue of fact. Plaintiff's contention that Moving Defendants' summary judgment motion is premature is without merit.

"[W]hile a party is entitled to a reasonable opportunity to conduct discovery in advance of a summary judgment determination [], '(a) party contending that a summary judgment motion is premature must demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant'" (*Skura v Wojtowski*, 165 AD3d 1196, 1200 [2d Dept 2018], quoting *Antonyshyn v Tishman Constr. Corp.*, 153 AD3d 1308, 1310 [2d Dept 2017] [internal quotation marks and citations 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'" (*Branach v Belvedere VIII, LLC*, 189 AD3d 1531, 1532 [2d Dept 2020], quoting *Sterling Natl. Bank v Alan B. Brill, P.C.*, 186 AD3d 515, 518 [2d Dept 2020]).

Here, Plaintiff's proffered need to conduct depositions does not warrant denial of the motion to dismiss the common-law negligence claim. Plaintiff has knowledge of the relevant facts, and his mere hope or speculation that evidence might be uncovered is insufficient to deny the motion (*see Xia v Zeng*, 219 AD3d 914, 917 [2d Dept 2023]; *Quintanilla v Mark*, 210 AD3d 713, 715 [2d Dept 2022]).

Cross-Motion to Amend

Next, the Court will address Plaintiff's cross-motion for leave to file an amended complaint pursuant to CPLR 3025 (b). In addition to the common-law negligence claim, Plaintiff seeks to assert allegations that the Premises was vacant and abandoned, that BONY was a mortgagee in possession, and that the defendants failed to maintain the property in violation of RPAPL 1307 and 1308.

"Leave to amend a pleading shall be freely given absent prejudice or surprise to the opposing party, unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Ciminello v Sullivan*, 120 AD3d 1176, 1177 [2d Dept 2014]; *see also* CPLR 3025 [b]).

RPAPL 1307 requires a plaintiff in a mortgage foreclosure action who obtains a judgment of foreclosure and sale, pursuant to RPAPL 1351, involving residential property, as defined in RPAPL 1305, that is vacant, or becomes vacant after the issuance of such judgment, or is abandoned by the mortgagor but occupied by a tenant, as defined under RPAPL 1305, to maintain

such property until ownership has been transferred through the closing of title in foreclosure, or other disposition, and the deed for such property has been duly recorded. Additionally, RPAPL 1308 was enacted “to impose on mortgagees and their servicing agents a duty to inspect, secure, and maintain vacant or abandoned properties” (*Wilmington Sav. Fund Socy. FSB-TR v Rosado*, 78 Misc 3d 470, 2023 NY Slip Op 23010 [Sup Ct, Rockland County 2023]; *see also* RPAPL 1308).

Although Plaintiff seeks to assert that the defendants had an obligation to maintain the Premises until the referee’s deed was recorded on January 21, 2020, this Court finds that there is no private right of action pursuant to RPAPL 1307 and 1308 under which Plaintiff can recover. The text of RPAPL 1307 (3) clearly indicates that only the municipality in which the premises is located, any tenant lawfully in possession, a board of managers of a condominium, or a homeowners association “shall have the right to enforce the obligations described in this section [...]” (RPAPL 1307 [3]; *see also Snellinger v Fed. Natl. Mtge. Assn.*, 2021 WL 1063344, *2 [SD NY, Mar. 18, 2021, No. 19-CV-6574 (NSR)]). Plaintiff does not plead that he falls into any of these categories. Moreover, the legislative history behind RPAPL 1308 is clear that there exists no private cause of action to bring suit under it (*see id.*; *Cretcher v U.S. Bank N.A.*, 2021 WL 1062057, *4 [ED NY, Mar. 19, 2021, No. 19-CV-6764 (LDH)(LB)]).

As such, Plaintiff’s allegations that the Premises was vacant and abandoned for the purposes of RPAPL 1307 and 1308, that BONY was a mortgagee in possession, and that the defendants violated RPAPL 1307 and 1308 are palpably insufficient and patently devoid of merit. Therefore, Plaintiff’s cross-motion pursuant to CPLR 3025 (b) to amend his complaint is denied.

Motion to Consolidate (Seq. No. 2)

Finally, the Court turns to Plaintiff’s motion to consolidate the instant action with the with an action entitled *Haque v Hossain, et al.*, pending in the Supreme Court, Queens County, under Index No. 726747/2022. “Where common questions of law or fact exist, a motion to consolidate or join for trial pursuant to CPLR 602 should be granted absent a showing of prejudice to a substantial right by the party opposing the motion” (*Oboku v New York City Tr. Auth.*, 141 AD3d 708, 709 [2d Dept 2016]).

Here, the subject actions involve common questions of law and fact, and a joint trial will avoid unnecessary duplication of proceedings, save unnecessary costs and expenses, and prevent the injustice that would result from divergent decisions based on the same facts (*see Moses v B & E Lorge Family Trust*, 147 AD3d 1043, 1045 [2d Dept 2017]). Furthermore, since the defendants did not oppose Plaintiff’s motion to consolidate, they failed to show that consolidation would result in prejudice to a substantial right (*see id.*; *Oboku v New York City Tr. Auth.*, 141 AD3d at 709).

In accordance with the foregoing, it is hereby **ORDERED** that Moving Defendants’ motion (Seq. No. 1) for summary judgment dismissing the complaint insofar as asserted against them is granted; and it is further

ORDERED that Plaintiff’s cross-motion pursuant to CPLR 3025 (b) for leave to amend his complaint is denied; and it is further

ORDERED that Plaintiff's motion (Seq. No. 2) pursuant to CPLR 602 (a) to consolidate the instant action under Index No. 712010/2020 with an action entitled *Haque v Hossain, et al.*, pending in the Supreme Court, Queens County, under Index No. 726747/2022, is granted; and it is further

ORDERED that the actions are hereby consolidated for all purposes under Index No. 712010/2020, and the caption is amended; and it is further

ORDERED that the caption of the consolidated actions shall read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY

-----X
MOHAMMAD HAQUE,

INDEX NO. 712010/2020

PLAINTIFF,

-AGAINST-

MD ANWAR HOSSAIN,
SALIM CHOWDHURY,
SHOPNO GROUP, INC.,
SOLID FOUNDATION PROPERTIES, LLC, AND
SHOFI A. SIDDIQUE,

DEFENDANTS.
-----X

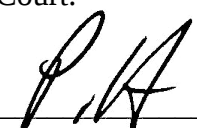
It is further **ORDERED** that Plaintiff shall serve a copy of this Order with Notice of Entry upon all parties to *both* actions, and the Queens County Clerk, within twenty (20) days from the date of entry; and it is further

ORDERED that, upon being served with a copy of this Order with Notice of Entry, the Queens County Clerk is directed to consolidate the files of each action under this Index No. 712010/2020; and it is further

ORDERED that any requested relief and/or remaining contentions not expressly addressed herein have nonetheless been considered and are hereby expressly rejected.

This constitutes the Decision and Order of this Court.

Dated: August 20, 2024



PHILLIP HOM, J.S.C.

