

Cella v Smith

2026 NY Slip Op 31647(U)

April 24, 2026

Supreme Court, Nassau County

Docket Number: Index No. 010785/2008

Judge: Gary M. Carlton

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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
COUNTY OF NASSAU

-----X
RICHARD M. CELLA and REGINA GAMBELLA,

Plaintiffs,

- against -

HAROLD E. SMITH, ALEXANDER J. CANTWELL, MARK A. ZIROGIANNIS, MARK A. ZIROGIANNIS, ESQ., CONSTANTINE GIANNAKOS, MARIE A. MARTIAL, MARIE A. MARTIAL, ESQ., DRESKIN & DRESKIN, EDWARD A. DRESKIN, P.C., EDWARD A. DRESKIN, ESQ., EDWARD A. DRESKIN, TICOR TITLE INSURANCE CO., LEGACY ABSTRACT, CORP., CHASE HOME FINANCE, LLC, KAREN O'HARE, TY EVANS, JOHN DOE #1, JOHN DOE #2, JOHN DOE #3, JOHN DOE #4, being fictitious names of any and all individuals involved,

Defendants.

-----X
The following papers were read on this motion:

- Order to Show Cause/Affirmation/Supporting Exhibits..... X
- US Bank Affirmation in Opposition..... X
- Chase Affirmation in Opposition/Supporting Exhibits..... X

Upon the foregoing papers, plaintiffs Richard Cella and Regina Gambella ("plaintiffs") move by order to show cause for an order (1) vacating the stipulation of discontinuance against defendant Alexander J. Cantwell ("Cantwell") pursuant to CPLR 5015(a)(3); (2) vacating the prior order dated February 5, 2016 (Peck, J.), which dismissed the complaint against defendant Chase Home Finance, LLC ("Chase"); (3) restoring this action to the active calendar; (4) granting plaintiffs leave to serve an amended complaint and to add U.S. Bank National Association, not in its individual capacity but solely as Trustee for the RMAC Trust, Series 2016-CTT ("US Bank") as a defendant, as successor in interest to Chase; (5) enforcing the 2016 settlement agreement against Cantwell by requiring him to satisfy or remove the mortgage; and (6) declaring the mortgage, dated December 27, 2007, in the principal amount of \$337,500.00 executed by Cantwell as void ab initio due to fraud; and (7) for other related relief. Chase and US Bank oppose the motion. For the reasons set forth herein, the motion is denied.

Index No. 010785/2008

Hon. GARY M. CARLTON
IAS/Trial Part 23

DECISION/ORDER

Motion Seq. 015

FACTS AND PROCEDURAL HISTORY

Following a residential real estate transaction that closed in December 2007, title to the premises known as 2240 Walsall Street, Seaford, New York (“the premises”), was transferred from plaintiffs to Cantwell. In connection with that transaction, Cantwell executed a mortgage on the premises in favor of Chase in the principal amount of \$337,500.00. Plaintiffs contend that the transaction was fraudulent, that Cantwell was merely a straw buyer, and that they received no net proceeds from the closing. In June 2008, plaintiffs commenced this action against Cantwell and others, seeking, among other things, to set aside the transfer. In 2010, plaintiffs commenced a second action arising from the same underlying events under index No. 23356/2010, which was later consolidated with this action by short form order dated June 26, 2012.

In the meantime, a separate foreclosure action on the mortgage was commenced under index No. 011968/2008 in Supreme Court, Nassau County.

In October 2015, Chase moved for summary judgment dismissing the complaint insofar as asserted against it. By short form order dated February 5, 2016 (Peck, J.), the court granted Chase’s motion in its entirety and dismissed the complaint as against Chase. In that order, the court noted that the amended complaint asserted causes of action sounding in, among other things, fraud, rescission, breach of contract, unjust enrichment, and negligence, and concluded that Chase had established its entitlement to judgment as a matter of law and that plaintiffs had failed to raise a triable issue of fact.

Plaintiffs thereafter settled their claims against Cantwell. According to plaintiffs, as part of that 2016 settlement, Cantwell executed and delivered a deed transferring the premises back to plaintiff Richard Cella and represented that the 2007 mortgage had been “dealt with.” Plaintiffs allege that they relied on that representation in agreeing to discontinue their claims against Cantwell. A stipulation of discontinuance with prejudice as against Cantwell was filed on April 11, 2016.

In the foreclosure action, US Bank, as successor in interest to Chase, later moved for summary judgment against Cella and the other defendants. Cella opposed the motion and cross-moved for summary judgment dismissing the complaint, arguing, among other things, that the mortgage had been executed as part of a scheme to defraud him. By order dated May 24, 2024 (DeStefano, J.), the court granted US Bank’s motion, denied Cella’s cross-motion, and issued an order of reference, concluding, among other things, that Cella’s fraud arguments were barred by res judicata in light of the February 5, 2016 order.

After further motion practice and the confirmation of the referee’s report, US Bank obtained a judgment of foreclosure and sale in January 2026.¹

¹ As of the date of this order, it appears that the property has not yet been sold. The foreclosure action is currently stayed as a result of Cella’s Chapter 13 bankruptcy filing on March 27, 2026 (NY St Cts Elec Filing [NYSCEF] Doc No. 314-316, in *U.S. Bank, N.A. v Cantwell*, Sup Ct, Nassau County, index No. 011968/2008). However, the filing of that petition does not automatically stay the instant action, which was commenced by plaintiffs, since the automatic stay under 11 USC § 362 only applies to actions “against the debtor” (11 USC § 362[a][1] [emphasis added]; see *Olick v Parker & Parsley Petroleum Co.*, 145 F3d 513, 516 [2d Cir 1998]).

In March 2026, plaintiffs filed the instant order to show cause. In support of the motion, plaintiffs contend, in substance, that they were induced to settle with Cantwell and to discontinue the action against him based on Cantwell's alleged misrepresentation that the mortgage had been satisfied or otherwise disposed of, and that they would not have authorized the discontinuance had they known the mortgage remained outstanding.

DISCUSSION

Vacatur of the February 5, 2016 Order & Relief against US Bank

Plaintiffs contend that vacatur of the February 5, 2016 order is warranted because it did not adjudicate the validity of the mortgage or whether it was void ab initio, and because later events demonstrated that the underlying transaction was fraudulent. US Bank argues that the application is untimely, that plaintiffs failed to show fraud in the procurement of the order, and that the requested relief is barred by preclusion principles in light of both the February 5, 2016 order and the judgment of foreclosure and sale entered in the related foreclosure action.

"CPLR 5015 (a) (3) permits a court to vacate a judgment or order upon the ground of fraud, misrepresentation, or other misconduct of an adverse party" (*Bank of N.Y., N.A. v Scarso*, 233 AD3d 739 [2d Dept 2024] [internal quotation marks omitted]). " 'While there is no specific time limit within which to move under this provision, the motion must be made within a reasonable time' " (*Wells Fargo Bank, N.A. v Olivo*, 241 AD3d 763, 765 [2d Dept 2025], quoting *Empire State Conglomerates v Mahbur*, 105 AD3d 898, 899 [2d Dept 2013]).

Here, plaintiffs failed to establish that the present application, made in March 2026, was brought within a reasonable time. The order sought to be vacated was issued more than ten years earlier, in February 2016. Additionally, the record demonstrates that plaintiffs were aware, long before 2026, that the mortgage remained outstanding and was being enforced. In the related foreclosure action, the Appellate Division, Second Department, noted that Cella was served in that action on October 17, 2018 and, in February 2019, moved to dismiss the complaint insofar as asserted against him (*see JP Morgan Chase Bank, NA v Cantwell*, 212 AD3d 720, 720-721 [2d Dept 2023]).² Thus, at least by 2018 or 2019, plaintiffs knew, or should have known, that the mortgage had not been extinguished and remained the subject of litigation. Under these circumstances, the present motion was not made within a reasonable time after discovery of the facts upon which plaintiffs now rely.

In any event, plaintiffs failed to demonstrate fraud, misrepresentation, or other misconduct in the procurement of the February 5, 2016 order. Where a motion is based on allegations of fraud, misrepresentation, or misconduct of an adverse party, the movant "will not prevail by merely showing fraud in the underlying transaction but must show fraud in the very means by which the judgment was procured" (*Trimarco v Data Treasury Corp.*, 146 AD3d 1008, 1010 [2d Dept 2017])

² The Court also takes judicial notice of the records in the foreclosure action, which demonstrate filings by plaintiffs during the same time period (*see Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, 61 AD3d 13, 19-20 [2d Dept 2009]; *Chateau Rive Corp. v Enclave Dev. Assoc.*, 22 AD3d 445, 446 [2d Dept 2005] ["courts may take judicial notice of a record in the same court of either the pending matter or of some other action"]).

[internal quotation marks omitted]; see *U.S. Bank N.A. v Smith*, 132 AD3d 848, 851 [2d Dept 2015]). Here, plaintiffs' allegations are directed to the asserted fraud underlying the 2007 conveyance and mortgage transaction, and to Cantwell's alleged statements in connection with the 2016 settlement. They do not identify any fraud, misrepresentation, or misconduct by Chase in the motion practice that resulted in the February 5, 2016 order. Accordingly, plaintiffs failed to make the showing required for vacatur under CPLR 5015(a)(3).

To the extent plaintiffs contend that the February 5, 2016 order did not address, or incorrectly resolved, issues concerning the validity of the mortgage, the proper remedy was to move for reargument or to pursue an appeal from that order. Such relief may not now be obtained through a CPLR 5015(a)(3) motion premised on alleged fraud in the underlying transaction. Indeed, US Bank submitted proof that plaintiffs took an appeal from the February 5, 2016 order, which was dismissed for failure to perfect. Plaintiffs may not circumvent the finality of that order, or the consequences of their failure to perfect the appeal, by seeking to vacate it a decade later on grounds not cognizable under CPLR 5015(a)(3).

To the extent that plaintiffs seek other relief against US Bank, including restoration of the action for the purpose of asserting claims against US Bank as successor in interest to Chase, and a declaration that the mortgage is void ab initio, under the doctrine of res judicata, "a final adjudication of a claim on the merits precludes relitigation of that claim and all claims arising out of the same transaction or series of transactions by a party or those in privity with a party" (*Tromba v Eastern Fed. Sav. Bank, FSB*, 148 AD3d 753, 754 [2d Dept 2017] [internal quotation marks omitted]; see *Wheeler v Trifera, LLC*, 209 AD3d 862, 864 [2d Dept 2022]). In addition, "[a] judgment of foreclosure and sale is final as to all questions at issue between the parties, and concludes all matters of defense which were or could have been litigated in the foreclosure action" (*Tromba v Eastern Fed. Sav. Bank, FSB*, 148 AD3d at 754 [internal quotation marks omitted]).

Here, plaintiffs seek, in substance, to relitigate the validity and enforceability of the mortgage as against Chase's successor in interest, US Bank, notwithstanding the prior dismissal of this action as against Chase and the subsequent foreclosure proceedings. However, the February 5, 2016 order dismissed the complaint against Chase, and, in the foreclosure action, US Bank later obtained summary judgment, an order of reference, and ultimately a judgment of foreclosure and sale. Moreover, when Cella opposed summary judgment in the foreclosure action and cross-moved for summary judgment dismissing the complaint, arguing, among other things, that the mortgage had been executed as part of a fraudulent scheme, the court rejected those arguments. Plaintiffs may not now, through motion practice in this action, obtain relief that would effectively nullify those prior determinations and the final judgment of foreclosure and sale.

Nor does the fact that plaintiffs characterize the mortgage as void ab initio alter the result. The present application seeks relief against US Bank arising out of the same mortgage transaction and based on the same core allegations of fraud and invalidity that either were litigated, or could have been litigated, in the prior proceedings. To permit plaintiffs to proceed against US Bank in this action at this juncture would constitute an improper collateral attack on both the February 5, 2016 order and the final judgment of foreclosure and sale.

Vacatur of the Stipulation of Discontinuance & Relief against Cantwell

Plaintiffs also seek to vacate the April 11, 2016 stipulation of discontinuance, contending that they were induced to settle with Cantwell by his alleged representation that the mortgage had been “dealt with” or “disposed of.” They also argue that Cantwell breached the settlement agreement. No copy of any written settlement agreement has been provided with the motion papers. The only recitation of the purported settlement terms is contained in Cella’s supporting affidavit, which was briefly summarized above. A copy of the deed transferring the premises from Cantwell to Cella, dated March 10, 2016, is annexed as an exhibit to the motion.

“A stipulation of settlement is a contract, enforceable according to its terms” (*ATS-I Corp. v Rodriguez*, 156 AD3d 674, 676 [2d Dept 2017] [internal quotation marks omitted]). “Stipulations of settlement are favored by courts and are not to be lightly set aside” (*id.* [internal quotation marks omitted]). “ ‘Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation’ ” (*Bethea v Thousand*, 127 AD3d 798, 799 [2d Dept 2015], quoting *Hallock v State of New York*, 64 NY2d 224, 230 [1984]).

Even assuming, without deciding, that plaintiffs’ allegations concerning Cantwell’s statements are sufficient to articulate a claim of fraudulent inducement as against him, plaintiffs failed to establish that their request for vacatur was made within a reasonable time after discovery of the alleged fraud. As discussed above, the record demonstrates that, no later than 2018 or 2019, plaintiffs were aware that the mortgage remained outstanding and was being enforced in the foreclosure action. Nevertheless, plaintiffs did not seek vacatur of the stipulation of discontinuance until March 2026. To the extent that plaintiffs claim that they first discovered the alleged falsity of Cantwell’s representation upon receipt of the 2026 notice of sale, that assertion is belied by the record.³ Under these circumstances, plaintiffs failed to demonstrate that the present application was made within a reasonable time after discovery of the alleged fraud.

To the extent plaintiffs seek an order removing the mortgage or quieting title to the premises, even assuming that Cantwell misrepresented the status of the mortgage, such statements do not furnish a basis, on this motion, to remove a mortgage that is the subject of a final foreclosure judgment in another action.

Since the stipulation of discontinuance terminated the action as against Cantwell, and plaintiffs have failed to establish a basis to vacate that stipulation, affirmative relief for breach of the alleged settlement may not be obtained against Cantwell by motion in this action, but instead must be sought in a plenary action (*see Teitelbaum Holdings v Gold*, 48 NY2d 51, 55 [1979]; *Town of Carmel v Melchner*, 105 AD3d 82, 98 [2d Dept 2013]; *Matter of Serpico*, 62 AD3d 887, 887 [2d Dept 2009]). The determinations herein are made without prejudice to any claim for monetary damages that plaintiffs may have against Cantwell to be litigated in that plenary action. Any argument concerning the statute of limitations, if raised, may be litigated in that action.

³ In the attorney affirmation supporting the order to show cause, counsel states the following: “[Cantwell’s] representation was false, as the mortgage persisted and was only revealed to Plaintiffs upon receipt of a 2026 auction notice for the property” (affirmation of plaintiffs’ counsel ¶ 8).

Accordingly, it is

ORDERED that plaintiffs' motion is denied.

This constitutes the Decision and Order of the Court.

Dated: April 24, 2026
Mineola, N.Y.



Hon. Gary M. Carlton, J.S.C.