Emigrant Bank v Rosabianca
2026 NY Slip Op 31681(U)
April 15, 2026
Supreme Court, New York County
Docket Number: Index No. 850136/2014
Judge: Gerald Lebovits

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **07**

Justice

----------X

INDEX NO. 850136/2014

MOTION DATE 01/28/2026

MOTION SEQ. NO. 032

EMIGRANT BANK, AS SUCCESSOR-BY-MERGER WITH EMIGRANT SAVINGS BANK - MANHATTAN,

Plaintiff,

- v -

LUIGI ROSABIANCA, UNITED STATES OF AMERICA INTERNAL REVENUE SERVICE, CARMELO ROSABIANCA, VIVIAN ROSABIANCA, BOARD OF MANAGERS OF THE CIPRIANI CLUB RESIDENCES, SECURED LENDING CORP., FRANCIS GIBNER, DEBORAH A. GENGER, and SANTO ROSABIANCA,

Defendants.

DECISION + ORDER ON MOTION

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 032) 1017, 1018, 1019, 1020, 1021, 1022, 1023, 1024, 1025, 1026, 1027, 1028, 1029, 1030, 1031, 1032, 1033, 1034, 1035, 1036, 1037, 1038, 1039, 1040, 1041, 1042, 1043, 1044, 1045, 1046, 1047, 1048, 1049, 1050, 1051, 1052, 1053, 1056, 1057, 1058, 1059, 1060, 1063, 1064

were read on this motion for SUMMARY JUDGMENT.

Fidelity National Law Group, New York, NY (David J. Wolkenstein of counsel), for plaintiff.
Jed Goldfarb, Esq., Port Chester, NY, counsel for defendant Secured Lending Corp.

Gerald Lebovits, J.:

In May 2008, plaintiff, Emigrant Bank, loaned to defendant Luigi Rosabianca $1,760,000 that was secured by a mortgage against property located at 55 Wall Street in Manhattan. Using the funds from the Emigrant loan, Rosabianca paid off two senior mortgages held by nonparties Larry Levi and Andrew Berg for $1,440,000.

In August 2011, defendant Little Bay Investment Corp. extended a loan to Rosabianca for $500,000. The loan was secured by a mortgage against the property. The Little Bay mortgage was recorded on September 21, 2011; the Emigrant mortgage was recorded on April 20, 2012. In February 2014, the Little Bay mortgage was assigned to co-defendant Secured Lending Corp. LLC (SLC).

In March 2014, Emigrant sued both Rosabianca and SLC, seeking to foreclose on Rosabianca's mortgage and to establish lien priority over SLC.

On this motion, Emigrant moves under CPLR 3212 for partial summary judgment in its favor on its first and second causes of action and to dismiss the remaining affirmative defense asserted by SLC. Plaintiff argues that SLC is not a bona fide encumbrancer for value. According to plaintiff, Little Bay (and therefore SLC as Little Bay's assignee) was on notice of the Emigrant mortgage. Therefore, Emigrant says, its mortgage has priority over SLC's even though the Emigrant mortgage was recorded later. Alternatively, plaintiff argues that it is entitled to equitable subrogation to the extent that funds from the Emigrant loan were used to pay off prior mortgages on the property.

The branch of Emigrant's motion for summary judgment in its favor on its first cause of action, and to dismiss SLC's remaining affirmative defense, is granted. The branch of plaintiff's motion for summary judgment in its favor on its second cause of action is denied as academic.

DISCUSSION

Under CPLR 3212 (b), a motion for summary judgment "shall be granted if, upon all papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." The proponent of summary judgment has the burden to make out a prima facie showing of entitlement to judgment as a matter of law by producing "sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) If this showing has been made, the burden shifts to the motion opponent "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) To survive a motion for summary judgment, the opposing party must offer more than "mere conclusions, expressions of hope or unsubstantiated allegations or assertions." (*Van Dorn Realty Corp. v Sundec Intl. Corp.*, 190 AD2d 516, 518 [1st Dept 1993].)

I. Emigrant's Motion for Summary Judgment on its First Cause of Action (Foreclosure on Property)

Under the New York Recording Act, a bona fide encumbrancer for value that properly records its mortgage lien has priority over previous unrecorded mortgages encumbering the same property. (*See* Real Property Law (RPL) §§ 266, 291.) A subsequent lender that records first but is not a bona-fide encumbrancer is not entitled to these protections. A bona fide encumbrancer is a party that encumbers real property "in good faith, for valuable consideration, without actual or record notice of another party's adverse interests in the property and is the first to record the deed or conveyance." (*Irwin v Regal 22 Corp*., 175 AD3d 671, 672 [2d Dept 2019] [internal quotation marks omitted].)

Here, no allegations of fraud, bad faith, or lack of consideration have been made. It is also undisputed that Little Bay did not have actual notice of the Emigrant mortgage. The question is thus whether Little Bay was on constructive or inquiry notice of that mortgage at the time Little Bay took its mortgage against Rosabianca's property. If so, then Little Bay was not a bona fide encumbrancer for value; and the Little Bay/SLC mortgage does not have priority over the Emigrant mortgage.

In establishing that Little Bay had notice (constructive, inquiry, or both) of the Emigrant mortgage, plaintiff offers evidence in the form of tax bills against the property, a credit report, and other red flags indicating that a prior mortgage might exist. This court concludes that Emigrant has shown as a matter of law that Little Bay (and SLC as its assignee) had constructive or inquiry notice of the Emigrant mortgage as of 2011—and thus that Little Bay/SLC is not a bona fide purchaser for value for purposes of RPL §§ 266 and 291.

Plaintiff provides evidence of two tax bills from July 2011 that are riddled with references to amounts owed and paid by Emigrant Mortgage Co. and "You, The Property Owner." As plaintiff notes, the April and July tax bills state, in bold, "**If Emigrant Mortgage Co Wants To Pay All Property Tax Owed . . . Please Pay . . . .**" (*See* NYSCEF Nos. 1036, 1037 [emphasis in original].) These tax bills are sufficient to establish, prima facie, that Little Bay was on constructive or inquiry notice of the Emigrant Mortgage. (*See 7 Vestry LLC v 7 Vestry LLC v Department of Fin. of City of N.Y.*, 22 AD3d 174, 182-183 [1st Dept 2005] [holding that potential purchasers of condominium units are on constructive notice of tax bills for the property on which the condominium building is located]; *cf. Emigrant Bank v Drimmer*, 171 AD3d 1132, 1134 [2d Dept 2019] [holding that evidence that Emigrant's predecessor in interest paid real estate taxes on a parcel of real property before defendant purchased the property raised a triable issue of fact about whether "whether due diligence in examining the tax records for the property would have placed [defendant] on inquiry notice of the [unrecorded] Emigrant mortgage prior to his purchase"].[1]) Indeed, Manuel Asensio, SLC's managing member and the individual responsible for Little Bay's due diligence, admitted in deposition testimony that that he would have investigated why Emigrant's name was on the record had he seen the tax bills. (*See* NYSCEF No. 1049 at Tr. 221:20–222:9.)

In opposing summary judgment, SLC argues first that the existence of the July 2011 tax bills did not necessarily put Little Bay on notice of the Emigrant mortgage because it is unclear whether the July 2011 tax bills were publicly available. This argument is difficult to reconcile with *7 Vestry*'s conclusion—in 2005—that the existence of a New York City property-tax bill is discoverable with due diligence. (*See* 22 AD3d at 182.) More fundamentally, SLC provides no evidence that the tax bills were unavailable, such that Little Bay would have been unable to find them with reasonable effort had it gone looking for them before making a $500,000 mortgage loan. That SLC is now unsure about whether those bills were publicly available in 2011 merely underscores that Little Bay did not go looking in the first place.

SLC argues that *7 Vestry* is distinguishable. In particular, SLC says, because *7 Vestry* concerned whether the existence of tax bills sufficed to put potential purchasers on constructive notice of "publicly available tax records regarding application of a New York state tax credit," it

[1] In *Drimmer*, the purchaser established prima facie entitlement to summary judgment on whether he was a bona fide purchaser for value based on the fact that a title report he had obtained prior to closing did not show the unrecorded Emigrant mortgage. (*See* 171 AD3d at 1133.) In this case, it is undisputed that Little Bay neither took out a title-insurance policy nor obtained a conventional title report. (*See* NYSCEF No. 1049 at Tr. 203-205 [transcript of deposition of SLC's managing member].)

has little application to a question about constructive notice of a *mortgage*. (NYSCEF No. 1057 at 9-10 [emphasis omitted].) This argument reads *7 Vestry* too narrowly. The point for present purposes is that the First Department held in *7 Vestry* that potential purchasers were on constructive notice of the contents of tax bills for the property (*see* 22 AD3d at 182); and that the contents of the July 2011 tax bills in this case would have revealed the existence of the Emigrant mortgage to Little Bay.

Plaintiff also provides evidence of a December 2011 Equifax credit report showing that Rosabianca was late on payments on the Emigrant mortgage and had an unpaid mortgage-loan balance of over $1.75 million. SLC contends that it is unclear whether a credit report reflecting Rosabianca's payment obligations on the Emigrant mortgage was available before the date on which Little Bay made its loan to Rosabianca. But SLC offers no evidence either that Little Bay could not have obtained a credit report before August 2011, or that a credit report obtained at that time would have omitted any reference to the Emigrant mortgage. Moreover, SLC's ignorance about the existence of credit reports itself suggests that Little Bay failed to conduct due diligence—consistent with Asensio's admission that "no review of [Rosabianca's] personal or financial information" was conducted. (NYSCEF No. 1046 at ¶¶ 1, 8.)

SLC's assertion that a lender has no duty to run a credit report may be accurate. But a failure to run a credit report, for whatever reason, will not excuse a lender from the fruits of what due diligence would have yielded. A lender is chargeable with notice of facts that a proper inquiry would have disclosed. (*Fairmont*, 301 AD2d at 564.) In this case, a search for a credit report would have disclosed the Emigrant mortgage or, at a minimum, have caused a reasonable and prudent lender to inquire further. Little Bay might have had valid *financial* reasons for conducting mere cursory due diligence, but it did so at its own *legal* risk (a legal risk assumed by SLC through the assignment of the Little Bay mortgage).

SLC argues that even had Little Bay obtained a credit report, that, by itself, would not be sufficient to have put it on notice of the Emigrant mortgage. However, SLC provides no case that holds that a lender was not on notice of a prior lien even after obtaining a credit report. Instead, SLC argues that in the cases cited by plaintiff, *Miller-Francis v Smith-Jackson* (113 AD3d 28 [1st Dept 2013]) and *US Bank National Association v Moultrie* (2012 NY Slip Op 33314[U] [Sup Ct, NY County 2012]), the lenders were deemed to have had notice of a prior lien, not just because of credit reports, but because of a combination of various other due-diligence red flags as well. Those decisions do not, however, say that a credit report alone would be *insufficient* to create notice.

In any event, even assuming that constructive or inquiry notice would require not only a credit report, but also other red flags, Emigrant has offered evidence that additional red flags existed here as well. In particular, it is undisputed that at the time of the Little Bay loan to Rosabianca, Little Bay was aware that Rosabianca recently had taken out—and then somehow paid off—two mortgage loans totaling $1.44 million. (*See* NYSCEF No. 1058 at ¶ 10 [SLC attorney aff.].) Little Bay went so far as to require Rosabianca to file a satisfaction of the larger of those mortgages as a condition of extending its own mortgage loan. (*See id.* at ¶ 11.)

Little Bay nonetheless made no effort to figure out where Rosabianca had gotten the money to pay off those two prior mortgages; nor why, if Rosabianca had been able to repay the prior mortgage loans, he would need a $500,000 short-term loan from Little Bay no more than a year or two later. To the contrary, Asensio admitted during his deposition that Little Bay had not even gone to the basic step obtaining title insurance or a typical title report for the property. (*See* NYSCEF No. 1049 at Tr. 203-205.)

SLC emphasizes that in "many instances . . . highly sophisticated, bona fide lenders make rational decisions to extend loans without significant comfort as to the borrower's creditworthiness because . . . the value of the collateral provides sufficient comfort and protection against the risk of borrower default." (NYSCEF No. 1057 at 11-12 [mem. of law].) But again, whether Little Bay had sound business reasons for its conduct is different from whether it acted with due diligence within the meaning of RPL § 266 and the caselaw applying that statute. Here, given the existence of the July 2011 tax bills, the December 2011 Equifax credit report, and Rosabianca's recent past mortgage history, there is no genuine dispute that Little Bay, and therefore SLC as assignee, were on constructive or inquiry notice of the Emigrant mortgage. As such, SLC is not a bona fide incumbrancer for value shielded by RPL § 266 or § 291.

Emigrant's motion for summary judgment in its favor on the first cause of action, and summary judgment dismissing SLC's remaining affirmative defense, is granted.

II. Emigrant's Motion for Summary Judgment on its Second Cause of Action (Equitable Subrogation)

Given this court's ruling on the first cause of action—that SLC is not a bona fide encumbrancer for failure, and that Emigrant is entitled to lien priority over SLC in the foreclosure of the property—this court need not reach Emigrant's arguments for summary judgment in its favor on the second cause of action for equitable subrogation. The request for summary judgment on that cause of action is denied as academic.

Accordingly, it is

ORDERED that the branch of plaintiff's motion seeking summary judgment in its favor as against SLC on plaintiff's first cause of action is granted; and it is

ORDERED, ADJUDGED, AND DECLARED that plaintiff's mortgage lien on the premises located at 55 Wall Street, Unit 540, New York, New York 10005, is the senior lien against the proceeds of the foreclosure sale of those premises; and it is further

ORDERED that the branch of plaintiff's motion seeking summary judgment dismissing SLC's first affirmative defense is granted; and it is further

ORDERED that the branch of plaintiff's motion seeking summary judgment in its favor against SLC on plaintiff's second cause of action is denied as academic; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of its entry on all parties; and on the office of the County Clerk (using the NYSCEF document type "Notice to the County Clerk - CPLR § 8019 (c)"), which shall update its records accordingly.

4/15/2026
DATE

HON. GERALD LEBOVITS
J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE