Wells Fargo Bank NA v. Moise, No. 13450/2009 (Supreme Court, Kings County, NY)
Decided: April 27, 2010
Justice Wayne P. Saitta

KINGS COUNTY
Supreme Court

Justice Saitta

DECISION AND ORDER
Plaintiff, WELLS FARGO BANK, N.A., (hereinafter "Plaintiff), moves this Court for an Order pursuant to CPLR §3212 for Summary Judgment against the Defendants and Defendants cross move for an Order pursuant to CPLR §3016(b), 3212 & RPAPL Article 13 dismissing the action or, alternatively, a declaration subordinating Plaintiff's mortgage lien to that of the GOTESMANS, and granting further relief as this Court deems just and proper.

Upon reading the Notice of Motion for Summary Judgment and Appointing Referee to Compute by Hans H. Augustin, Esq., Attorney for Plaintiff WELLS FARGO BANK, N.A., dated August 28th, 2009, together with the proposed Order Granting Summary Judgment, Appointing Referee to Compute and Cancelling Satisfaction of Mortgage, together with the Affirmation of Regularity of Hans H. Augustin, Esq., dated August 28th, 2009, and all exhibits annexed thereto; the Supplemental Affirmation of Hans H. Augustin, Esq., dated August 28th, 2009; the Notice of Cross-Motion for Summary Judgment by Edward C. Kessleman, Esq., Attorney for Defendants NIKOLAI GOTESMAN, REGINA GOTESMAN, VS INTERNATIONAL, dated October 1st, 2009, together with the Affirmation in Support of Edward C. Kessleman, Esq., dated October 1st, 2009, together with the Affirmation in Support of Jacob Shayovitz, dated September 25th, 2009, and all exhibits annexed thereto; the Memorandum of Law by NIKOLAI GOTESMAN, REGINA GOTESMAN, VS INTERNATIONAL in Support of their Motion for Summary Judgment, dated October 1st, 2009; the Affirmation in Opposition of Hans H. Augustin, Esq., dated February 22nd, 2010, and all exhibits annexed thereto; the Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment by Hans H. Augustin, Esq.; and after argument of counsel and due deliberation thereon, Plaintiffs motion for Summary Judgment is denied, and Defendants cross motion for summary judgment and declaratory judgment is granted for the reasons set forth below.

FACTS
Defendant MURPHY MOISE purchased 457 Lafayette Avenue, Brooklyn, NY 11205, and took two mortgages, one in the amount of $693,000. The deed and mortgages on the property were recorded on January 24, 2006. MOISE sold the

property later in 2006 but did not satisfy the mortgages at that time. There were two subsequent transfers of the deed thereafter, and Lafayette Garden NY Corp., ("Lafayette"), purchased the property on or about March 11, 2008. On March 18, 2008, two satisfactions of mortgages given by MOISE were recorded, one of which indicated that MOISE had paid off the $693,000 mortgage, which is the subject of this action.

On or about March 31, 2008, Lafayette obtained a first mortgage on the property from Coney Island Capital Group, ("Coney Island"), in the amount of $350,000. This mortgage was recorded on April 21, 2008.

Coney Island then sold the mortgage to the Defendants, NIKOLAI GOTESMAN, REGINA GOTESMAN, and VS INTERNATIONAL, (hereinafter "the GOTESMANS" or "the Defendants"), as investors. The assignment to the GOTESMANS was recorded on May 1, 2008.

At the time the GOTESMANS recorded their assignment of the Lafayette mortgage, the satisfaction of the MOISE mortgage had been recorded and there were no other mortgages recorded on the property.

WELLS FARGO acquired the MOISE mortgage by assignment on December 18, 2009 and recorded its assignment on January 18, 2010. Plaintiff commenced an action to foreclose on its mortgage and filed a lis pendens on June 2, 2009.

ARGUMENTS
Plaintiff moves for summary judgment on the foreclosure of the premises located at 457 Lafayette Avenue, Brooklyn, New York (Block 1941, Lot 48, County of Kings). It argues that it holds a mortgage to which MURPHY MOISE is the mortgagor, and that the satisfaction of the mortgage which was recorded on March 18, 2008 is a forgery. Plaintiff therefore argues the satisfaction should be vacated and that it is entitled to foreclose on the mortgage, which is in default.

The GOTESMAN Defendants cross move for summary judgment, arguing that Plaintiff has failed to state a claim, and that Plaintiff lacks standing to commence this action as the assignment of the mortgage to Plaintiff was defective.

Defendants further argue that Plaintiff has failed to show that the mortgage satisfaction of Plaintiff's mortgage was a forgery. Finally, Defendants argue that Plaintiff's claim that the satisfaction was a forgery, some three years following the sale of the property, should not result in Plaintiff's mortgage having priority over Defendants' mortgage. Defendants seek a declaration that, if it is deemed that the Moise mortgage has not been satisfied, that Plaintiff's mortgage be deemed subordinate to that held by Defendants.

Plaintiff admits that the first assignment of mortgage submitted with its motion was defective, but claims that the defect was de minimus, and submits a "Correction Assignment of Mortgage", which it asks the Court to consider in support of its original motion.

ANALYSIS
In order to establish prima facie entitlement to summary judgment in a foreclosure action, a plaintiff must submit the mortgage and unpaid note, along with evidence of default. Capstone Business Credit, LLC v. Imperial Family Realty, LLC, 70 A.D.3d 882, 895 N.Y.S.2d 199 (2nd Dept 2010). The Second Department has also required a showing that the mortgage was valid. Washington Mut. Bank, FA v. Peak Health Club, Inc., 48 A.D.3d 793, 853 N.Y.S.2d 112 (2nd Dept 2008).

Fraudulent satisfaction of mortgage

As a threshold issue in this case, and before Plaintiff can move to foreclose on its mortgage, Plaintiff must demonstrate that the satisfaction of the mortgage was a fraud. The satisfaction was both acknowledged and recorded.

"A certificate of acknowledgment attached to an instrument such as a deed raises a presumption of due execution, which presumption, in a case such as this, can be rebutted only after being weighed against any evidence adduced to show that the subject instrument was not duly executed". Beshara v. Beshara, 51 A.D.3d 837, 858 N.Y.S.2d 351 (2nd Dept 2008); see also Paciello v. Graffeo, 32 AD3d 461, 462 [2006]. "[A] certificate of acknowledgment should not be overthrown upon evidence of a doubtful character, such as the unsupported testimony of interested witnesses, nor upon a bare preponderance of evidence, but only on proof so clear and convincing so as to amount to a moral certainty." Albany County Sav. Bank v. McCarty, 149 NY 71, 80 [1896]; Beshara v. Beshara, 51 A.D.3d, 837, 858 N.Y.S.2d 351 (2nd Dept 2008).

In interpreting what a "moral certainty" is, the court in Albany County Sav. Bank v. McCarty, supra, stated,

The following expressions of learned judges indicate the nature of the proof required to impeach a certificate of acknowledgment. It must be of a 'clear, complete and satisfactory character; (Young v. Duvall, 109 U.S. 573, 577): 'clear, cogent and convincing;' (Pierce v. Feagans, 39 Fed. Rep. 587, 592): 'clear, convincing and conclusive, reaching a high degree of certainty, leaving upon the mind no fair, just doubts;' (Smith v. McGuire, 67 Ala. 34): 'so full and satisfactory as to convince the mind that the certificate is false or forged;' (Griffin v. Griffin, 125 Ill. 431, 436): 'it should by its completeness and reliable character, fully and clearly satisfy the court that the certificate is untrue and fraudulent;' (Marston v.

Brittenham, 76 Ill. 611); 'clear and conclusive, excluding every reasonable doubt;' (Strauch v. Hathaway, 101 Ill. 11): 'so clear, strong and convincing as to present no loophole of escape from its power;' (Canal & Dock Co. v. Russell, 68 Ill. 426, 438). The certificate 'makes a prima facie case. That is the least that can be claimed for it;' (Borland v. Walrath, 33 Iowa, 130): It 'is, of itself, entitled to more weight than the testimony by which it is attacked,' which was that of the two mortgagors; (Bearss v. Ford, 108 Ill. 26, 27): It 'ought to be regarded as of as high a grade of evidence as testimony given under oath;' (Warrick v. Hull, 102 Ill. 280, 283): 'Whenever the fact is fairly debatable, the presumption of law must prevail;' (Hughes v. Coleman, 10 Bush. (Ky.) 246).

Albany County Sav. Bank v. McCarty, 149 NY 71, 80 [1896].

Here, the prima facie showing of due execution was shown by the acknowledgment by the notary public on the satisfaction of mortgage. The satisfaction of mortgage at issue indicates that it was signed on February 21, 2008 and recorded March 18, 2008. The satisfaction was signed by Bonnie Bodine, Assistant Secretary of Mortgage Electronic Registration Systems, Inc., ("MERS"), as nominee for Security Home Mortgage. Her signature was acknowledged by Matthew L. Hanneman, notary public. The satisfaction reads, in relevant part, that MERS "does hereby acknowledge that it has received full payment and satisfaction" of the mortgage issued by America's Servicing Company, #1256031136 to Murphy Moise, in the amount of $693,00.00.

In support of its position that the satisfaction of mortgage was a fraud, Plaintiff submits the affidavit of Bonnie Lawler, formerly known as Bonnie Bodine, whose signature is purported to be on the satisfaction of mortgage. Lawler states that she did not sign the document, and that it contains certain errors that demonstrate that it is a forgery. Specifically Ms. Lawler states that the loan number on the satisfaction was incorrect, and that at the time the alleged satisfaction was signed, she was using her married name of Lawler, not her maiden name, Bonnie Bodine.

She also state that the fact that the satisfaction was submitted by MOISE rather than the loan servicer is evidence that it is a forgery. Significantly, Plaintiff fails to provide an affidavit of Matthew L. Hanneman, Notary Public in the County of San Bernadino, disavowing or contesting the acknowledgment.

The failure of Plaintiff to directly address the acknowledgment by Hanneman leaves significant questions of fact as to the Plaintiff's claim that the satisfaction is a forgery.

Lawler's allegations about the loan number and her maiden name, are sufficient to raise questions of fact as to whether the satisfaction was a forgery, but alone,

they are insufficient to rebut by proof amounting to a "moral certainty" the presumption of the satisfaction's validity created by the acknowledgment. Beshara v. Beshara, 51 A.D.3d 837, 858 N.Y.S.2d 351 (2nd Dept 2008). Therefore Plaintiff is not entitled to summary judgment to foreclose on its mortgage.

Plaintiff's Assignment

Defendants seek summary judgment based on the fact that Plaintiff has not shown a valid assignment of the mortgage and note.

Plaintiff originally submitted an assignment of the mortgage dated April 30, 2009. The assignment was signed by Yolanda Williams, Assistant Secretary of Mortgage Electronic Registration Systems, Inc. However, the notary public's acknowledgment states that she witnessed and acknowledged the signature of a Herman John Kennerty, whose name does not appear anywhere else on the document.

Plaintiff acknowledges that there was a mistake on the assignment and argues that the mistake was de minimis non curat lex. It also argues that the Court should simply replace the defective assignment with the correction assignment, and proceed with its action. In fact, the error was not de minimis as the signature of the purported assignor was not acknowledged, rendering the assignment a nullity.

A simple typographical error can be amended, but a failure to properly acknowledge the signature of the person who signed the instrument cannot be. No affidavit is submitted by either Yolanda Williams or the notary Lisa Rhyne explaining what the alleged error was or how it occurred. In fact, the so called "correction" assignment in fact is acknowledged by a different notary on a different date.

The second assignment was executed on December 18, 2009, which post dates the commencement of Plaintiff's action, which was filed June 2, 2009.

A party cannot foreclose on a mortgage without having title, giving it standing to bring the action. (See Kluge v. Fugazy, 145 A.D.2d 537, 538 (2nd Dept 1988), holding that a "foreclosure of a mortgage may not be brought by one who has no title to it and absent transfer of the debt, the assignment of the mortgage is a nullity". Katz v. East-Ville Realty Co., 249 A.D.2d 243 (1st Dept 1998), holding that "[p]laintiff's attempt to foreclose upon a mortgage in which he had no legal or equitable interest was without foundation in law or fact". Based on its own submissions, as of the time of the commencement of this action, Plaintiff did not have title to the mortgage and therefore lacked standing at the time it sought to

foreclose. Therefore, the part of Defendants' cross-motion to dismiss the action should be granted.

Priority of the GOTESMAN MORTGAGE

Since there are questions of fact as to whether the MOISES mortgage should be reinstated and the Court is dismissing the action based on lack of standing, the Court will consider Defendants' cross motion for a judgment declaring that even if Plaintiff's mortgage is reinstated it would be subordinate to GOTESMANS' mortgage lien. If it can be proven that the satisfaction of mortgage was forged, it would provide a basis to reinstate the mortgage as the original mortgagee could not be deprived of its interest by a forged instrument. See Filowick v. Long, 201 A.D.2d 893, 608 N.Y.S.2d 753 (4th Dept 1994), where a daughter admitted she perpetrated a fraud upon her mother, the fraudulent deed was void ab initio and therefore legally impossible, for the property to be encumbered. Citing Marden v. Dorothy, 160 N.Y. 39, 54 NE 726

The Plaintiff, as an assignee of the mortgage, would normally step into the shoes of the original mortgagee. However, in this case, the mortgaged property was sold to an unrelated third party who mortgaged the property to a lender that sold the new mortgage to the GOTESMANS. The current owners' deed was recorded on March 11, 2008 and the new mortgage to Coney Island Capital was recorded on April 21, 2008, the assignment to the GOTESMANS was recorded on May 1, 2008. At the time the new owner and mortgagee acquired their interests, the public record showed the satisfaction and did not show any claims contesting the satisfaction. The new owner, Coney Island Capital and the GOTESMANS all recorded their interests before Plaintiff recorded its first, invalid assignment, on April 30, 2009, or filed its lis pendens on June 2, 2009.

The question, is whether Plaintiff's interest is superior to the prior recorded interests of the GOTESMANS even if the MOISE mortgage is reinstated.

Plaintiff does not argue that the GOTESMANS did not take the mortgage for value, nor do they allege that the GOTESMANS acted in bad faith or had notice of the alleged prior mortgage. Plaintiff simply argues that because the satisfaction was a forgery, it is entitled to have its mortgage reinstated.

Plaintiff cites Goldstein v. Gold, 106 AD2d 100 (2nd Dept 1984) for the proposition that when there is an action to set aside a fraudulent satisfaction of mortgage, the mortgage remains a valid lien and the holder does not lose its priority. However, in Goldstein, a notice of pendency to set aside the satisfaction had been filed prior to the new owner recording his deed.

The Goldstein Court stated, "in order to cut off a prior lien, such as a mortgage,

the purchaser must have no knowledge of the outstanding lien and win the race to the recording office".

The facts in Goldstein, however, differ materially from the present case. While the fraudulently obtained mortgage satisfaction was set aside and the mortgage was reinstated, the mortgage was then given priority over the intervening defendant buyer's deed because the lis pendens had been filed prior to the date the deed and the satisfaction of mortgage were recorded.

In this case, both Coney Island and the GOTESMANS acquired and recorded their interests before Plaintiff either acquired or recorded its interest.

Further, Plaintiff cannot show that it was a holder in due course of the MOISE mortgage. The UCC §3-305 states that a holder in due course is (1) a holder, (2) who takes a negotiable instrument (3) for value, (4) in good faith, and (5) without notice that the instrument is overdue or has been dishonored, or of any defense or claim against it on the part of another.

First, Plaintiff admits in its papers that MOISES defaulted on the mortgage in April of 2006. Thus, when Plaintiff took the mortgage, it was overdue and in default. Second, at the time Plaintiff took it, the mortgage was subject to claims against it, specifically the recorded satisfaction of mortgage, the recorded Coney Island mortgage and the recorded assignment of that mortgage to the GOTESMANS.

It is unclear from the motion papers whether Plaintiff performed a title search before acquiring the mortgage. If it did it, it had actual notice of the claims against the mortgage. If it performed no title search, it would still be charged with constructive notice of the claims in the public record which a title search would have disclosed.

Plaintiff argues that Defendants have failed to refute that the satisfaction was a forgery, and therefore they are not "bona fide lenders for value without knowledge of Plaintiff's mortgage". Plaintiff's contention is without merit. There was nothing in the public record to put anyone on notice that there was any challenge to or issues with the recorded satisfaction. Plaintiff alleges no facts that would support an inference that LAFAYETTE, CONEY ISLAND or the GOTESMANS had any knowledge or reason to believe the satisfaction was invalid.

"Pursuant to Real Property Law §266, a bona fide purchaser or encumbrancer for value is protected in his or her title unless he or she had previous notice of the alleged prior fraud by the seller" (Kagan v. Hopkins, 22 AD3d 638 [2005]; see Miner v. Edwards, 221 AD2d 934 [1995]; Emerson Hills Realty v. Mirabella, 220

AD2d 717 [1995]; see also Anderson v. Blood, 152, NY 285 [1897]). "It is only if the 'facts within the knowledge of the purchaser are of such a nature, as, in reason, to put him upon inquiry, and to excite the suspicion of an ordinarily prudent person and he fails to make some investigation, [that] he will be chargeable with that knowledge which a reasonable inquiry, as suggested by the facts, would have revealed'" (Miner v. Edwards, supra at 934, quoting Anderson v. Blood, supra at 293). Fischer v. Sadov Realty Corp.34 A.D.3d 630, 824 N.Y.S.2d 434 (2nd Dept 2006).

In his Affirmation in Support of the Defendants' motion, Jacob Shayovitz, President of Coney Island Capital Group, (hereinafter "Coney Island"), states that Coney Island conducted a title search on the property and it revealed that the prior mortgage was satisfied and recorded. He states that in reliance on the public records, including the satisfaction, Coney Island agreed to issue a mortgage to Lafayette. The GOTESMANS then purchased the mortgage. Whether or not the GOTESMANS conducted a further title search prior to acquiring the mortgage, such a search would not have disclosed any prior lien or claim against the property, nor notice of any fact of such a nature as to put them upon inquiry to conduct a further search.

Furthermore, Coney Island and the GOTESMANS attest to the fact that they neither had notice of the alleged fraud, nor were they in any way involved in the alleged fraud.

Accordingly, Plaintiff's motion for summary judgment and appointing a referee to compute is denied; Defendants' cross motion is granted, it is therefore,

ORDERED that Plaintiff's complaint is dismissed and it is further,

ORDERED that the GOTESMAN Defendants are granted judgment declaring that, in the event that the mortgage given by MURPHY MOISE recorded January 24, 2006 in the amount of $693,000 is reinstated, it will be subordinate to the mortgage given March 31, 2008, recorded April 21, 2008 and assigned to the GOTESMAN Defendants.

This constitutes the decision and order of this Court. ¦