

DLJ Mtge. Capital, Inc. v Hoey
2017 NY Slip Op 30303(U)
February 15, 2017
Supreme Court, New York County
Docket Number: 104675/2010
Judge: Charles E. Ramos
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

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DLJ MORTGAGE CAPITAL, INC.,

Plaintiff/Petitioner,

THOMAS HOEY and XIOMARA HOEY

Index No. 104675/2010

Third-Party Intervenors-Plaintiffs,

- against -

Thomas Kontogiannis, GEORGIA KONTOGIANNIS,
LISA DiPINTO a/k/a LISA KONTOGIANNIS a/k/a
LISA POLLATOS, ANNETTE APERGIS, CHLOE
KONTOGIANNIS, ADAM DiPINTO, ELIAS APERGIS,
JOHN T. MICHAEL, JONATHAN RUBIN, MICHAEL
A. GALLAN, ESQ., TED DOUMAZIOS, ESQ.,
THOMAS F. CUSACK, III, ESQ., STEPHEN P.
BROWN, ESQ., STEPHEN A. MARTINI, CARMINE
CUOMO, GREGORY HOLLAND, GEORGE HOLLAND,
COASTAL CAPITAL CORPORATION d/b/a THE
MORTGAGE SHOP, d/b/a CLEARLIGHT MORTGAGE,
EDGEWATER DEVELOPMENT INC., GROUP KAPPA
CORP., LORING ESTATES, LLC, PARKVIEW
FINANCIAL CENTER d/b/a PARKVIEW FINANCIAL
INC. d/b/a PARKVIEW CENTER, INC., CLEAR
VIEW ABSTRACT, LLC, TRIUMPH ABSTRACT INC.,
BOND & WALSH CONSTRUCTION COMPANY,
INTERAMERICAN MORTGAGE CORP., HALIFAX
GROUP, LLC, PLAZA REAL ESTATE HOLDINGS,
INC., PLAZA FUNDING GROUP, INC., CROSS
ISLAND PLAZA, INC., BROOKVILLE PLAZA
MANAGEMENT, INC., REAL ESTATE FUNDING
GROUP CORP., GREENVALE FINANCIAL CENTER,
INC., 161 HEMPSTEAD REALTY CORP., 3301
ATLANTIC AVENUE LLC, WESTSHORE 480
DEVELOPMENT LLC, YONAH REAL ESTATE, INC.,
BLOCK 12892 REALTY CORP., STOUT STREET
FUNDING LLC, STOUT STREET FUND I, LP, THE
AXXION GROUP LLC, GARDEN MARKET, INC.,
PLATO HOLDINGS LLC, MOONLIGHT MANAGEMENT
LTD., WASHINGTON TITLE INSURANCE COMPANY,
INC., CHICAGO TITLE INSURANCE COMPANY,
INC., UNITED GENERAL TITLE INSURANCE
COMPANY, INC., And DOE's 1 through 100
inclusive,

Defendants/Respondents,

HAHN & HESSEN LLP, JEFFREY SIEGEL, JUNE SIEGEL, Individually and as the Personal Representative of the Estate of Seymour Siegel, IDGAF TRUCKING INC., LCK SERVICES CORP., and BLOCK 13434 DEVELOPMENT LLC,

Respondents.

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Hon. C. E. Ramos, J.S.C.:

In motion 074, Amethyst ALT Asset Fund 2016, LLC ("Amethyst"), Randall Funding LLC ("Randall") and Merrick D Holding Inc. ("Merrick") (collectively, the "Assignees") move to correct the judgment entered in this action on December 9, 2011 (the "Judgment"), pursuant to CPLR 2001 and 5019(a). Stout Street Fund I, LP and Stout Street Funding, LLC (the "Stout Entities") cross-move to intervene, pursuant to CPLR 1012.

For the reasons set forth below, the Court denies the motion to correct the judgment, and denies the motion to intervene, as moot.

Background

For a full recitation of the factual background in this action, see this Court's decision of 41 Misc 3d 1237(A) (Sup Ct, NY County 2013). Non-party the Stout Entities holds mortgage loans issued to defendant Halifax Group LLC ("Halifax") on February 25, 2010 with seven properties as collateral, including 436 and 438 Sapphire Street, and 1389, 1391, 1417, 1419 and 1429 Stanley Avenue in Brooklyn, New York (the "Properties") (Affirmation of Hirsch ["Hirsch Aff."], ¶ 6). On April 5, 2010,

the mortgages were delivered to the Kings County Register's Office for recording (*id.*). The clerk did not record those mortgages until late April (*id.*).

On April 9, 2010, DLJ Mortgage Capital, Inc. ("DLJ") commenced the present action, seeking a money judgment and equitable relief against Thomas Kontogiannis, his family members and entities under their control, arising out of a massive mortgage fraud (NYSCEF Doc. No. 2). DLJ subsequently filed notices of pendency against some of the Properties between April 12, 2010 and June 2, 2010 (Hirsch Aff., ¶ 7). On April 14, 2011, DLJ secured and filed orders of attachment against those Properties (*id.*).

On November 4, 2011, the Stout Entities commenced a foreclosure action against Halifax and DLJ (the "Halifax Action") for foreclosure and sale of the Properties (Hirsch Aff., ¶ 8). On November 7, 2011, Stout Entities filed notices of pendency in that action with the Kings County clerk (*id.*).

On November 16, 2011, DLJ moved for summary judgment (sequence 049) in the present action, on the first, second, sixth, eighth, ninth, fourteenth, sixteenth and seventeenth causes of action in the second amended complaint (NYSCEF Doc. No. 536). On December 2, 2011, DLJ obtained a monetary judgment against Loring Estates LLC ("Loring") and other defendants (NYSCEF Doc. No. 576). On December 9, 2011, DLJ obtained a

judgment on its fraudulent conveyance claim against Halifax (the "Judgment"), which awarded DLJ the following relief:

"upon the eighth cause of action in the Second Amended Complaint, directing Halifax to convey title to certain real properties which were fraudulently conveyed" (NYSCEF Doc. No. 588).

The Judgment further adjudged that "[Halifax]...shall, for DLJ's benefit only, convey title to the real properties listed in the chart below to the named transferees by executing deeds and other such documents as may be necessary" (*id.*). The properties listed includes all of the Properties except 1389 Stanley Avenue (the "Listed Properties") (*id.*).

On November 17, 2011, DLJ named the Stout Entities as defendants in the third amended complaint in this action (NYSCEF Doc. No. 545). On April 16, 2012, this Court directed that all issues of priority between DLJ's interests in the Listed Properties (set forth in the order) and the Stout Entities' interests would be resolved in the Halifax Action pending in Kings County (NYSCEF Doc. No. 644). Subsequently, the Stout Entities and DLJ have litigated their priority dispute concerning the Listed Properties in the Kings County Supreme Court and the Appellate Division, Second Department (Hirsch Aff., ¶ 13). A summary judgment order ruled that the Stout Entities retained priority over DLJ (*id.* at ¶ 17). DLJ's appeal of the order is pending in the Appellate Division, Second Department (*id.* at ¶¶ 13, 19).

On March 5, 2014, Jeffrey Siegel, Richard Siegel and non-party Blue Ridge Farms, Inc. assigned Merrick a portion of the judgment that they obtained against Kontogiannis and others in the action *Blue Ridge Farms Inc. v Kontogiannis*, which was pending in Kings County Supreme Court and bearing Index No. 23246/2008 (the "Siegel Judgment") (Affirmation of Rodriguez-Mccloskey ["Rodriguez-Mccloskey Aff."], ¶ 4). On August 17, 2016, DLJ assigned to Delshah Ventures LLC ("Delshah") a portion of the Judgment, and another judgment that is obtained against Kontogiannis in *Thomas Hoey, et. al. v Loring Estate, LLC, et. al.*, Kings County Supreme Court, bearing Index No. 15619/2007 (*id.* at ¶ 2). Delshah then assigned its interest to Amethyst and Randall (*id.* at ¶ 3). On September 29, 2016, DLJ and Merrick stipulated to lift the injunction currently preventing Merrick from enforcing its rights to the Siegel Judgment (*id.* at ¶ 6). Based on those assignments, the Assignees collectively purportedly have a right to collect on \$10,315,580 as against Loring (*id.* at ¶ 7).

Discussion

The Assignees move to correct the Judgment, to clarify (1) whether the Judgment granted on the eighth cause of action for fraudulent conveyance should have also been granted as to the fifth and seventh causes of action seeking an equitable lien, a constructive trust and declaratory relief in the second amended

complaint, and (2) whether the Judgment relates back to the date the notices of pendency were filed by DLJ, so as to cut off subsequent creditors of Loring who knew or should have known of DLJ's interest. The Stout Entities cross move to intervene for the limited purpose of opposing the Assignees' motion.

A court has the inherent power to correct "any mistake, defect or irregularity in the papers or procedures in the action not affecting a substantial right of a party" (CPLR 5019). A motion to correct is properly denied when the correction "[does] not involve a mere mistake, defect, or irregularity in the judgement, but [raises] an issue which was not previously litigated in the action" (*Ward-Carpenter Engineers, Inc. v Sassower*, 193 AD2d 730, 731 [2nd Dept 1993]). *Nunc pro tunc* treatment may not be used "when third parties have substantive rights in play that may be altered by recording a fact as of a prior date when it did not then exist" (*Gletzer v Harris*, 12 NY3d 468, 476 [2009][internal quotation marks omitted]; see *Mansfield State Bank v Cohn*, 58 NY2d 179, 181 [1983] [a court may not correct clerical errors in a prior determination to effect the retroactive creation of substantive rights when the rights of third parties have intervened]).

Here, the Assignees have not established that the Judgment contains a mistake, defect or irregularity, and therefore, the judgment should not be changed. First, DLJ did not move for

summary judgment on the fifth and seventh causes of action in motion 049. In the Judgment, this Court only directed Halifax to convey title to certain real properties to the named transferees by executing deeds and other such documents as may be necessary. This Court neither declared DLJ to be a beneficial holder nor intended to impose an equitable lien on the fraudulently conveyed properties. Second, the issue of whether the Judgment relates back to the date the notices of pendency filed by DLJ was not previously litigated in motion 049, and therefore cannot be regarded as a mere mistake, defect, or irregularity in the Judgment.

In addition, the correction sought by the Assignees would alter other parties' substantive rights, including the Stout Entities. DLJ and the Stout Entities have stipulated to resolve all issues of priority in the Listed Properties in Kings County, Supreme Court, and the court has ordered that the Stout Entities have priority over DLJ. *Nunc pro tunc* treatments sought by the Assignees include declaring DLJ as a beneficial holder of the Listed Properties and imposing equitable lien on those properties, which is contrary to what the court held in the Halifax Action. Therefore, this Court cannot grant to the Assignees the relief they seek. Accordingly, it is

ORDERED that the motion to correct the judgment is denied;

and it is further

ORDERED that the cross-motion to intervene is denied as moot.

Dated: February 15, 2017

 ENTER:

CHARLES E. RAMOS
JESG