

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: Honorable LAWRENCE V. CULLEN
Justice

IAS PART 6

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RITA MALLICK,

Plaintiff,

-against-

NAPOLEON FARFAN, EDUARDO RODRIGUEZ,
RENE RIVERA, and John Doe #1" through
"John Doe #2", the last twelve names being fictitious
and unknown to plaintiff, the person or parties intended
being tenants, occupants, persons or corporations, if any,
having or claiming an interest in or lien upon the
premises described in the complaint,

Defendants.

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Index No.: 28585/04

Motion Date: 1/15/08

Motion Cal. No.: 15

Motion Seq. No. 4

Decision

Defendants, NAPOLEON FARFAN and EDUARDO RODRIGUEZ (hereinafter referred to as "Farfan and Rodriguez") have by their attorney, Nishani D. Naidoo, Esq., moved this Court by motion dated November 6, 2007, for summary judgment in their favor: 1) declaring them to be the sole owners of the premises known as and by the street address of 104-37 44th Avenue, Corona, County of Queens, City and State of New York, further identified by the Office of the City Register for the County of Queens as being Lot 54, Block 1987; and 2) for the imposition of sanctions and attorneys fees upon plaintiff (and her title company) (sic).

Plaintiff, RITA MALLICK, (hereinafter referred to as "Mallick") has by her attorney, Helmut Borchert, Esq. cross-moved by motion dated November 28, 2007, for summary judgment declaring plaintiff, Mallick, to be the sole owner of the subject premises in fee simple absolute, and for such other and further relief as the Court may deem appropriate.

Background

The matter presently before the Court has a long and complicated history in both fact and law, and must first be put in chronological context.

On December 22, 1995, defendants, Farfan and Rodriguez, took title to the premises by Bargain and Sale deed from John Properties, Inc., said deed having been recorded at Reel 4277, Page 1781 in the Queens Register's Office.

On even date with the foregoing, Farfan and Rodriguez executed a Note in favor of Madison Home Mortgage in the amount of \$296,525.00 and gave as collateral therefor, a mortgage against the subject property.

On December 2, 1998, Farfan appointed Ramon Cruz as his attorney in fact by duly executed and notarized instrument, with the power, *inter alia*, to conduct real estate transactions.

On December 3, 1998, Rodriguez also appointed Cruz as his attorney in fact, by duly executed and notarized instrument, also with the power to conduct real estate transactions.

By deed dated January 16, 1999, Cruz, pursuant to his powers granted by Farfan and Rodriguez, conveyed the subject premises to Rene Rivera, said deed having been recorded at Reel 5143, page 1594. Precedent to that recordation, the respective powers of attorney were recorded on even date in the same Reel, pages 1586-1592.

It is worth noting at this point that there was not, at the time of transfer from Farfan and Rodriguez to Rivera, nor at any time thereafter, an assignment or assumption by or to Rivera of the underlying mortgage held by Madison Home Mortgage, nor was there ever a satisfaction, assignment or assumption of the Note upon which the mortgage was given as collateral security by Farfan and Rodriguez, relieving them of their obligations. Later in time, however, Madison assigned its interest to Prudential Home Mortgage Company, who further assigned said interest to Norwest Mortgage Inc.

Farfan and Rodriguez concede not only the validity of their respective powers of attorney granted by them unto their "friend", Ramon Cruz, but further recognize their consent and accession to the conveyance of the property by Cruz, acting under his power, to Rivera.

It is repeatedly stated throughout all pleadings by Farfan and Rodriguez that they could not successfully manage their multiple dwelling of four units, and that their sole consideration for the transfer were alleged promises made verbally to them by Rivera that he would either assume the mortgage itself, or the responsibility for its monthly payment, and at some point stated in their papers, that Rivera would satisfy the mortgage. It is well settled that a mortgage is a conveyance of an interest in real property, and that an interest in real property cannot be created, granted or assigned unless by act or operation of law or by a deed of conveyance in writing. (See, Sleeth v. Sampson, 237 N.Y. 69). Moreover, it is clear that a modification of the terms of a mortgage, is governed by the Statute of Frauds and must be in writing to be enforceable. (See, Pappas v. Resolution Trust Corporation, 255 A.D.2d 887).

In any event, there apparently never was, nor has there ever been, an effort expended by either Farfan, Rodriguez, or Rivera to seek leave of Madison for the assumption or assignment of its collateral instrument. Said lien represented thereby, continues as a matter of law, "to run with the land", to the present day. Likewise, the Note given by Farfan and Rodriguez remains a valid and enforceable promise on their behalf, or to their detriment as it appears to be, for the repayment of the loan. (See, National Sav. Bank of City of Albany v. Fermac Corporation, 241 A.D. 204, wherein the Appellate Division held when a mortgagor conveys the mortgaged premises to another who acquires the property subject to the mortgage, but does not assume payment of the same, the mortgagor remains the principal debtor.)

The affidavit of Farfan, dated November 5, 2007, asserts that “a few years after” (otherwise not specified) the transfer, when he attempted to buy a house with his wife, he discovered that the mortgage was still a lien against the property which remained his and Rodriguez’s responsibility.

Coincidentally, at the same time, Rodriguez allegedly became aware of his continuing obligation on the Madison Mortgage and Note, when he was rejected for Section 8 housing.

Communication apparently continued between Farfan, Rodriguez, and Rivera pursuant to the former’s affidavit, until in or about June 2004, when Farfan and Rodriguez commenced suit against Rivera and Cruz, under Index No. 13569/04, seeking *inter alia*, a declaratory judgment awarding them title to the premises, imposition of a constructive trust, and appointment of a referee to execute a deed conveying the premises back to them.

Prior to the commencement of the foregoing suit, it is alleged by plaintiff, Mallick, that on February 9, 2004 Rivera, the owner of record, did in fact convey the premises to her for a sum “in excess of \$400,000”, and “subject to the Madison mortgage which still encumbered the premises” (affidavit of Mallick, dated November 19, 2007; page 2; paragraph 5).

The Farfan and Rodriguez suit proceeded against Rivera alone, Cruz having been dropped from the matter. A default judgment was entered in favor of Farfan and Rodriguez, as Rivera never appeared in the matter. Accordingly a referee was appointed by the Court to convey title to the premises from Rivera back to Farfan and Rodriguez.

On November 8, 2004, the Court appointed referee, Joseph Baum, Esq., duly executed a deed conveying the premises to Farfan and Rodriguez; however, said deed was not recorded until January 10, 2005.

The plaintiff in the instant matter, Mallick, made a post-judgment motion to intervene, and sought vacatur of the default judgment, with leave to file a deed dated February 9, 2004 from Rivera to Mallick. Said motion was denied by decision of the Court (J. Weiss) on December 21, 2004, as was Mallick’s motion for reargument (J. Weiss) on March 21, 2005.

Mallick then proceeded to file the within action against Farfan, Rodriguez and Rivera. The defendants moved for summary judgment dismissing plaintiff’s claim, which was granted in their favor by Short Form Order dated April 20, 2005 (J. Price), on the grounds that the question of title was decided res judicata, by the decision of Justice Weiss.

The Order of Justice Price was appealed by Mallick and reversed by the Appellate Division, Second Department, in a decision dated October 17, 2006, which found that “because the appellant alleged that she obtained title from Rivera before the commencement of the action brought by Farfan and Rodriguez against Rivera, she was not in privity with Rivera for res judicata purposes and determination in that action does not bar her from litigating her claim”.

Further, the Appellate Division noted that RPL §291 has no application to this case in that defendants did not record their deed from the referee until after the commencement of this action. (See, Mallick v. Farfan, 33 A.D.3d 762, *citing* Yen-Te Hsveh Chen v. Geranium Dev. Corp., 243 A.D.2d 708; Morrocroy Marina v. Altengarten, 120 A.D.2d 500).

Plaintiff herein, Rita Mallick, alleges that she purchased the subject premises from Rene Rivera on February 9, 2004, for good and valuable consideration, part of which was her taking title subject to the underlying mortgage given to Madison by Farfan and Rodriguez on December 22, 1995, which encumbrance continued then and to the date hereof, to run with the land.

At the time of her closing on February 4, 2004, Mallick appeared at the Law Office of Meir Rosenfeld, Esq. an attorney duly admitted to practice before the Courts of the State of New York.

Plaintiff submitted an affirmation of Rosenfeld, dated November 19, 2007, which states that he drafted a deed conveying the within premises from Rene Rivera to Rita Mallick; that he witnessed the execution of said indenture by Rene Rivera; and that he disbursed cheques from his escrow account in connection with the closing. The closing attorney further affirmed that “immediately after Rivera signed the deed, the closer for Richmond Abstract gathered all the papers, including the deed, and left my office.”

The title company, Richmond Abstract, appeared at said closing in its capacity as an agent for Old Republic Title Insurance Group, which entity duly insured title in the name of plaintiff, Rita Mallick.

The deed aforesaid, executed on February 4, 2004, was never recorded by Richmond Abstract, and accordingly Mallick’s name was never on record as a title holder when Farfan and Rodriguez commenced their action against Rivera. Hence Mallick was never made a party to that action and Rivera, from his part, no longer had anything to lose by defaulting.

Richmond Abstract has apparently ceased to do business in the State of New York and stands accused in several pending actions in this State of breaching its fiduciary duties by failing to record instruments with which it was entrusted to so record.

The Court, in the course of these proceedings, resorted to ACRIS to confirm the time line of events hereinso concerned. It has been revealed that the premises, has not once, but twice again been allegedly conveyed since the recording of the referee’s deed on January 10, 2005.

It is noted herewith that Eduardo Rodriguez allegedly conveyed any interest he had in the subject premises to his co-defendant, Napoleon Farfan, by Quitclaim Deed dated and executed on November 4, 2004, which instrument was not recorded until March 22, 2005. On November 4, 2004, Rodriguez had in fact no recorded interest in the property. Defendants’ counsel, Nishani Naidoo, Esq., served as the attesting witness to that alleged conveyance.

It is further noted that on May 31, 2005 Farfan conveyed, by Bargain and Sale Deed, full title in the subject premises to one Angela Reyes. Defendants’ counsel, Nishani Naidoo, Esq., also served as the attesting witness to that alleged conveyance.

Ms. Naidoo has unequivocally stated on the record made before this Court on May 13, 2008, page 56, line 1 that title “is in the name of Farfan right now” a statement that she knew or should have known, to be patently false since she witnessed the conveyance of Farfan to Reyes.

Counsel for defendants, Nishani D. Naidoo, Esq., never informed this Court of the aforementioned transfers, despite the fact that she served as a witness on both executed deeds. Therefore, the Court presumes that said attorney made all parties aware of the fact that there was pending litigation encumbering the premises of record and that any such transfer of title was subject thereto.

It is also noted that the filed RP- 5217 NYC transfer report shows consideration of \$350,000.00 paid by Reyes to Farfan, and again the court re-notes its observation of the fact that the Madison Mortgage, akin to a certain power-charged rabbit, continues to run with the land. Additionally, the foregoing transfer report appears to be a contradiction, on its face, as it represents that the sale contract date was June 1, 2005, and the date of sale was June 10, 2005, while the hand written dates on the deed are either the 30th or 31st of May 2005.

Upon her assumption of title to the premises by the deed from Rivera, Mallick commenced payments on the Madison Mortgage, from in or about February 2004 to sometime after the recording of the referee's deed on January 10, 2005, when apparently Farfan and Rodriguez commenced making payments. The record is unclear and devoid of documentary support as to specific payments made on the mortgage and by whom.

Further, along with the foregoing, it must be determined by inquest what other encumbrances were satisfied, and by whom, as well as what benefits were accrued in the way of rent, and to whom said benefits adhered.

Findings

The Court, having reviewed all papers and pleadings herein filed, and having had a conference on this matter, in camera, on April 22, 2008, and again on May 13, 2008, the latter of which was placed on the record at the request of defendant's attorney, finds as follows:

1. That the defendants, Farfan and Rodriguez willingly and knowingly conveyed the premises known as 104-37 44th Avenue, Queens County on January 16, 1999 to Rene Rivera, through their attorney in fact, Ramon Cruz, whose instruments of appointment were duly recorded with the deed in the Office of the City Register for Queens County.
2. That no assignment or assumption of the mortgage given by Farfan and Rodriguez to Madison Home Mortgage was ever executed nor was any novation ever effected upon said mortgage. Therefore, as a matter of law, the mortgage continues to run with the land, and the Note, upon which said mortgage was given as collateral, continues against both Farfan and Rodriguez. It is clear to this Court that Rivera held legal and marketable title pursuant to his deed from Farfan and Rodriguez, a fact which is undisputed by the record.
3. That based upon the affirmation of Meir Rosenfeld, Esq., the affidavits of plaintiff, Rita Mallick, the evidence submitted therewith in the form of copies of cheques expended from the escrow account of Rosenfeld and made payable to Rene Rivera and others, the copy of the executed deed, and the issuance of a title

insurance policy to Mallick, this Court is satisfied that a valid conveyance of title from Rivera to Mallick took place on February 9, 2004 and that Mallick, in addition to paying good and valuable consideration for such conveyance, also took the property subject to the Madison mortgage.

4. That the deed from Rivera to Mallick was never recorded due to the misfeasance or malfeasance of Richmond Abstract and through no apparent fault of the purchaser.
5. That the latter conveyance took place before the commencement of proceedings between Farfan, Rodriguez and Rivera, and prior to the filing of a lis pendens.
6. That the Court, in the prior proceeding, before Justice Weiss, had no proof of the Rivera/Mallick conveyance when it appointed a referee to transfer title from Rivera to Farfan and Rodriguez, and that the referee could by law only convey that interest which was Rivera's to transfer at that time. Accordingly, since Rivera was no longer in title, the referee could not validly effectuate such conveyance.
7. That any representations by defendants, Farfan and Rodriguez, in their papers, that the Madison Mortgage was assumed by or assigned to Rivera are deemed to be false and an attempt to mislead the Court. As stated above, any such assumption or assignment, must be in writing and agreed to by those in privity.
8. The Quitclaim Deed executed by Rodriguez to Farfan on November 4, 2004, is nothing more than an ineffectual distraction herein or, at worst, an attempt to obfuscate a chain of title. Assuming its validity, Rodriguez quit any claim to the property in favor of Farfan as of November 4, 2004, only to come back into title on November 8, 2004, when the Referee's Deed was executed to both Farfan and him.
9. Likewise, Farfan's further subsequent transfer on May 3, 2005 of a 100% interest to Reyes, again witnessed by his attorney herein, Ms. Naidoo, and presumably based on the Quitclaim Deed, is in of itself rendered void, at least to a 50% interest; by the Referee's Deed of November 8, 2004, Rodriguez would have been back in title to a 50% interest which could only have been conveyed or alienated by Rodriguez as to that one half interest.

Decision

Based upon the foregoing, all papers and pleadings hereinbefore filed, and the conferences held before this Court, this matter is decided accordingly.

Defendants' request for summary judgment is denied in that the deed executed by Referee Baum dated November 8, 2004, conveying the premises known as and by the street address of 104-37 44th Avenue, Corona, Queens, to Farfan and Rodriguez, the defendants herein, and recorded on January 10, 2005, is hereby deemed a nullity as a matter of law.

Likewise, any conveyance or conveyances made by defendants Farfan and Rodriguez subsequent to the recording of the referee's deed and during the continuation of the *lis pendens* filed against the property by plaintiff herein, is/are deemed to be a nullity as a matter of law, due notice having been given to any such parties of the pendency of this action.

Plaintiff's cross motion for summary judgment is granted to the extent that the deed held by plaintiff, Mallick, dated February 9, 2004, unrecorded by the misfeasance or malfeasance of Richmond Abstract, the execution of which has been testified to by the closing attorney, Rosenfeld, and supported by further evidence submitted herein, shall be recorded in the Office of the City Register for the County of Queens and title to the subject premises is hereby deemed to have vested in the name of Rita Mallick as of the date of execution of said deed.

The mortgage against the premises held by Madison Home Mortgage or its assignees, shall continue to run thereon, and the payments upon such encumbrance shall become the burden of Mallick as of the date the deed in her name is recorded in the Register's Office.

Notice of the change in title shall be forthwith given to the mortgagee and said entity that may appear of record as the holder of the collateral instrument, shall be and hereby is made a party to the inquest to be had herein.

All parties are directed to appear for an inquest before this Court on January 13, 2009, at 9:30 A.M., in Courtroom 44A.

Dated: October 10, 2008

LAWRENCE V. CULLEN, J.S.C.