Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

ARTHUR BROWN,

Plaintiff(s),

-against-

ELCHONON KASS,

Defendant(s).

Index No. 20937/07

Action No. 1

ARTHUR BROWN,

Plaintiff(s),

-against-

ELCHONON KASS and 79 WEST 127 REALTY LLC,

Defendant(s).

Index No. 925/10

Action No. 2

ARTHUR BROWN,

Plaintiff(s),

-against

AARON FEINBERG and ELCHONON KASS,

Defendant(s).

Index No. 9493/08

Action No. 3

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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ARTHUR BROWN,

Plaintiff(s),

-against-

ELCHONON KASS and SHERI ANN MARGOLIS a/k/a SHERI ANN KASS,

Defendant(s).

---x

Index No. 6032/10

Action No. 4

U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR CSMC TRUST 06-CF1,

Plaintiff(s),

-against-

ELCHONON KASS, FLEET NATIONAL BANK, ARTHUR BROWN, RITA LOMBARDI, ET AL.,

Defendant(s).

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Index No. 19667/07

Action No. 5

Motion Submitted: 5/7/12
Motions Sequence: 006, 007

BANK OF AMERICA, N.A. SUCCESSOR BY MERGER TO FLEET NATIONAL BANK, N.A.,

Plaintiff(s),

-against-

ELCHONON KASS, ARTHUR BROWN, ET AL.,

Defendant(s).

---x

Index No. 9777/08

Action No. 6

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....XX
Reply.....X
Briefs: Plaintiff's/Petitioner's.....XX
Defendant's/Respondent's.....

Motion by plaintiff in Action #5 for summary judgment dismissing defendant Arthur Brown's affirmative defense of mortgage rescue fraud is granted. Plaintiff's further request for judgment in its favor, and the appointment of a referee to compute the amount due upon the note and mortgage being foreclosed, is denied, without prejudice to renewal by plaintiff upon proper papers.

Motion by plaintiff in Action #5 for an order pursuant to CPLR §3126 striking defendant Brown's answer for dilatory and abusive discovery tactics, or an order of preclusion, is denied.

The history of these six actions, which have been joined for trial, is set forth in this Court's Orders dated September 14, 2009, July 28, 2010, April 4, 2011, May 17, 2011, June 22, 2011, July 22, 2011, August 10, 2011, and December 8, 2011 and ***Brown v. Kass***, 91 AD3d 894, 938 N.Y.S.2d 155 [2d Dept., 2012].

Plaintiff in Action #5 had sought summary judgment in its favor in the past, but such relief was denied without prejudice to renewal upon completion of discovery (Order dated July 22, 2011). This case was certified for trial on September 26, 2011. As discovery has ended, plaintiff again seeks summary judgment in its favor.

Plaintiff argues that defendant Brown should be equitably estopped from asserting his sole defense of mortgage rescue fraud and that plaintiff "facilitated" defendant Kass' taking of Brown's property (Brown answer, par. 25). Plaintiff's basis for this argument is that Brown was both aware of the mortgage that is now the subject of this foreclosure action, and complicit in the scheme to trick plaintiff into originating the loan to save Brown's home due to the fact that Brown's credit was so poor.

An estoppel rests upon the word or deed of one party upon which another rightfully relies, and so relying, changes its position to its injury (***Nassau Trust Co v. Montrose***

Concrete Prods Corp., 56 N.Y.2d 175, 184, 436 N.E.2d 1265, 451 N.Y.S.2d 663 [1982]). The elements of estoppel, with respect to the party to be estopped are: (1) conduct which amounts to a false representation or concealment of material facts; (2) intention that such conduct will be acted upon by the other party; and (3) knowledge of the real facts. The party asserting estoppel must show (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in its position (***First Union Natl. Bank v. Tecklenburg***, 2 A.D.3d 575, 577, 769 N.Y.S.2d 573 [2d Dept., 2003]). Estoppel will lie when an individual has accepted the benefits of an agreement (***1602 Avenue Y v. Markowitz***, 274 A.D.2d 506, 711 N.Y.S.2d 473 (2d Dept., 2000); *see* ***Savasta v. 470 Newport Assocs.***,180 A.D.2d 624, 579 N.Y.S.2d 167 (2d Dept., 1992), affd 82 N.Y.2d 763 [1993]).

Here, Brown testified numerous times that he signed the deed to Kass (Brown transcript, pp. 117, 122), and Brown's property was thereby "parked" in Kass' name for Brown's "benefit" (Brown transcript, pp.122, 155-160, 220). When asked what that meant Brown stated "I was the equity owner and Kass was the owner on the deed" (Brown transcript, p. 161-162). Brown specifically knew that there was a new mortgage on the property, that his prior mortgage has been paid off, and that Kass was making payments on that new mortgage (Brown transcript, pp. 237-242).

The record also contains a handwritten document dated 11/09/03, (with a typed copy attached), signed by Brown wherein he discusses various options to enable him to make the new mortgage payments such as "by working as dog trainer or medical assistant"(part of exhibit F), as well as an affidavit by Brown in an action entitled *Jon Halpern v. Arthur Brown*, (First District Court of Nassau County/, SP5998/03), wherein Brown swears that Kass is "the owner of the premises and my landlord" (Brown affidavit, par. 3, part of Exhibit F).

Brown's deposition testimony (Exhibit E to the moving papers), together with documentary evidence noted above, unquestionably demonstrates the validity of plaintiff's argument. Brown was well aware that he could not refinance when his mortgages went into foreclosure, so he agreed to allow Kass to do the refinancing, and willingly put Kass' name on the deed to facilitate the refinancing. He intended that the new mortgagee would believe that Kass was the owner, while he and Kass allegedly agreed that the property was simply "parked" in Kass' name. Brown benefitted from the payoff of his prior mortgages that were in foreclosure, and he continued to live at the property.

As for plaintiff, there has been no showing that it knew Kass was not the owner of the premises which secured its loan. Plaintiff relied on the deed to make the loan, and has been harmed by making a loan that has ended up in foreclosure. While there were irregularities in the making of the loan that this Court has noted in the past, the record contains no evidence that plaintiff was aware of the Kass/Brown refinance scheme. Whatever redress Brown may have is against Kass, not plaintiff. Under these circumstances Brown is equitably estopped from alleging mortgage rescue fraud as an affirmative defense in this mortgage foreclosure action, and plaintiff's motion for summary judgment dismissing that affirmative defense is granted.

Plaintiff further seeks summary judgment in its favor. In order to make a *prima facie* showing of entitlement to judgment as a matter of law, the mortgagee must submit the mortgage and note, and an affidavit attesting to the default (***Flagstar Bank v. Bellafiore***, 94 A.D.3d 1044, 943 N.Y.S.2d 551 (2d Dept., 2012); ***HSBC Bank USA NA v. Schwartz,*** 88 A.D.3d 961, 931 N.Y.S.2d 528 (2d Dept., 2011); ***JP Morgan Chase Bank NA v. Agnello***, 62 A.D.3d 662, 878 N.Y.S.2d 397 [2d Dept., 2009]). While the note and mortgage have been presented, plaintiff has failed to present evidence of default by a person with knowledge. Plaintiff cannot rely on the verified complaint herein because the complaint was verified by the former plaintiff's attorneys. For this reason plaintiff has failed to make out a *prima facie* case of entitlement to summary judgment, and its motion for summary judgment in its favor is denied without prejudice to renewal upon proper papers.

Plaintiff seeks an order striking defendant Brown's answer pursuant to CPLR §3126 for wilfully failing to provide discovery, or in the alternative precluding Brown from offering evidence at trial of this action related to undisclosed items, namely the mortgage rescue scheme and the closing. The factual basis for this motion is that less than a week before an alleged trial date Brown disclosed three audio cassette tapes to plaintiff's counsel which contain recorded conversations with Aaron Feinberg (Kass' counsel at closing), Madison Title (the title company at closing), and other unidentified individuals.

In opposition defendant Brown insists on his innocence. He allegedly just discovered the tapes and immediately gave them to his attorney. Furthermore, Brown argues that as plaintiff has all of the documents from the closing, the tapes are cumulative.

The drastic remedy of striking a complaint is inappropriate absent a clear showing that the plaintiff's failure to comply with discovery demands was willful and contumacious (***Bernardis v. Town of Islip***, 95 A.D.3d 1050, 944 N.Y.S.2d 626 (2d Dept., 2012); ***Polsky v. Tuckman***, 85 A.D.3d 750, 924 N.Y.S.2d 830 (2d Dept., 2011); ***Mazza v. Seneca***, 72

A.D.3d 754, 899 N.Y.S.2d 294 [2d Dept., 2010]). On this record plaintiff has failed to make such a showing. Consequently, plaintiff's motion for an order striking defendant Brown's answer, or in the alternative for an order of preclusion, is denied.

The foregoing constitutes the Order of this Court.

Dated: July 10, 2012
Mineola, N.Y.

Karen V. Murphy
J. S. C.