

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 11-6-15
ADJ. DATE 2-9-16
Mot. Seq. # 001 - MD

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WELLS FARGO BANK, NATIONAL	:	Law Office of Keith S. Garret, P.C.
ASSOCIATION, not in its individual or banking	:	Attorneys for Plaintiff
capacity but solely as trustee for the SRMOF II	:	1801 Argyle Square
2011-1 Trust, its successors and/or assigns,	:	Babylon, New York 11702
	:	
	:	Rubin and Licatesi, P.C.
Plaintiff(s),	:	Attorneys for Defendant
	:	591 Stewart Avenue, 4 th Floor
- against -	:	Garden City, New York 11530
	:	
	:	
ROBIN L. DUNN,	:	
	:	
	:	
Defendant(s).	:	
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated October 9, 2015, and supporting papers; (2) Affirmation in Opposition by the defendant, dated December 7, 2015, and supporting papers; (3) Reply Affirmation by the plaintiff, dated February 5, 2016, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion (seq. #001) by the plaintiff, which seeks an order granting summary judgment in favor of plaintiff pursuant to CPLR 3212, and pursuant to RPAPL 1501, quieting title and establishing plaintiff's mortgage documents of record, is hereby denied; and it is further

ORDERED that all parties are directed to appear for a Preliminary Conference scheduled for November 29, 2016, at 9:30 a.m., in the DCM Part, located at One Court Street, Room A-338, Riverhead, New York 11901, at which time the parties shall enter into a discovery schedule to be so-ordered by the Court; and it is further

ORDERED that counsel for the plaintiff shall promptly serve a copy of this Order upon counsel for the defendant via First Class Mail and shall promptly thereafter file the affidavit of such service with the Suffolk County Clerk.

In this action, the plaintiff seeks to establish of record plaintiff's mortgage interest in the subject property, located at 19 Riverleigh Place, Amityville. According to plaintiff's complaint, plaintiff wishes to remove clouds upon title resulting from plaintiff's predecessor-in-interest's failure to record the mortgage documents and assignments with the Suffolk County Clerk. Plaintiff now seeks summary judgment declaring that plaintiff is the owner and holder of a lien against the premises superior to the interests of the defendant-premises owner of record, Robin L. Dunn.

It is well settled that the remedy of summary judgment is a drastic one and there is considerable reluctance to grant summary judgment in negligence actions (see *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). Summary judgment should not be granted where there is any doubt as to the existence of a triable issue of fact or where an issue of fact is even arguable since it deprives a party of his day in court (*id*; see also, *Schwartz v Epstein*, 155 AD2d 524, 547 NYS2d 382 [2d Dept 1989]; *Henderson v City of New York*, 178 AD2d 129, 576 NYS2d 562 [1st Dept 1991]).

Issue finding rather than issue determination is the key to the procedure (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). Since summary judgment is the procedural equivalent of a trial, if there is any doubt as to the existence of a triable issue, or where a material issue of fact is even "arguable," summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307, 338 NYS2d 882 [1982]); *Rotuba v Cepsos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Freeman v Easy Glider Roller Rink Inc.*, 114 AD2d 436, 494 NYS2d 351 [2d Dept 1985]). Furthermore, the proof of the party opposing the motion must be accepted as true and considered in a light most favorable to the opposing party (*Dowsey v Megerian*, 121 AD2d 497, 503 NYS2d 591 [2d Dept 1986]; *Museums at Stony Brook v The Village of Patchogue Fire Department*, 146 AD2d 572, 536 NYS2d 177 [2d Dept 1989]; *Matter of Benincasa v Garrubbo*, 141 A.D.2d 636, 529 N.Y.S.2d 797 [2d Dept 1988]).

A necessary element of a cause of action to compel a county clerk to record a mortgage is that the copy of the mortgage was valid on its face (see *Matter of Merscorp, Inc. v Romaine*, 24 AD3d 673, 808 NYS2d 307 [2005], *affd* 8 NY3d 90, 828 NYS2d 266 [2006]; *JP Morgan Chase Bank v Mbanefo*, 123 AD3d 669, 998 NYS2d 415 [2d Dept 2014]; *Astoria Bank v Verso*, 2015 NY Slip Op 31974(U) [Sup Ct, Suffolk County 2015]). To be entitled to an order compelling the Clerk who serves as the registrar of conveyances to record a lost instrument, the plaintiff must plead and prove that the mortgage is valid on its face (see *JP Morgan Chase Bank, N.A. v Mbanefo*, 123 AD3d 669, 998 NYS2d 415 [2d Dept 2015]; *Mortgage Elec. Regis. Sys., Inc. v Bukowski*, 2016 NY Slip Op 30365(U) [Sup Ct, Suffolk County 2016]).

Here, the motion papers and opposition thereto present questions of fact regarding the validity of the mortgage on its face. Such questions of fact preclude summary judgment in favor of plaintiff. Therefore, plaintiff's motion for summary judgment is both denied.

This constitutes the Decision and Order of the Court.

Dated: October 27, 2016


PETER H. MAYER, J.S.C.

[] FINAL DISPOSITION

[X] NON FINAL DISPOSITION