



New Jersey Court Grants Lender Summary Judgment on Grounds of Estoppel, Ratification, Equitable Mortgage and Equitable Subrogation

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In an opinion issued earlier this month in a case successfully argued by the firm's Co-Managing Partner, Michael O'Donnell, the Superior Court of New Jersey, Chancery Division, Bergen County held that a property's transfer to an LLC was not fraudulent, and that plaintiff Bank of America therefore could exercise the right of foreclosure because the mortgage was legal and, alternatively, the doctrines of ratification, equitable mortgage, and equitable subrogation would have applied. See Bank of America Nat'l Association v. R.H. Surgent, LLC, et al., BER-F-9209-17 (July 3, 2018). This Opinion is significant in the Court's application of several doctrines, including ratification, equitable mortgage, equitable subrogation, judicial estoppel and sham affidavit.

This case involves a multi-million dollar property located in Franklin Lakes, New Jersey (the "Property"), purchased by Defendant Regina Surgent ("Regina") in 1988 for \$1,350,000. The Property was briefly transferred to her husband, Defendant John Surgent ("John"), in 1995 to obtain a secured business loan from Hudson City Savings, and was then immediately transferred back to Regina. In August of 1999, Defendant RH Surgent, LLC (the "LLC") was formed in the state of Nevada, with Regina identified as manager and organizer. The Property was then transferred to the LLC. A special meeting of the LLC was held and corporate documents filed to make John the manager of the LLC. In January 2000, Bank of America ("Plaintiff") issued a loan to John and the LLC, to be used to refinance and renovate the Property, as evidenced by a note executed by John on his own behalf and on behalf of the LLC. The loan was secured by a mortgage on the Property. On July 6, 2005, John was convicted of three federal crimes, after which the federal Government (the "Government") filed a motion for the forfeiture of John's

property, including the Property, in the Eastern District of New York (the “Forfeiture Action”).

Regina ceased making mortgage payments one year later and Plaintiff filed a foreclosure complaint in 2007 (the “2007 Foreclosure”). A Consent Order was entered into between Plaintiff and the Government in both the 2007 Foreclosure and the Forfeiture Action memorializing an agreement that Plaintiff had a legitimate interest in the Property superior to the Government’s, that the Government would forbear from divesting Plaintiff’s interest in the forfeiture action, and that Plaintiff would be permitted to proceed with the 2007 Foreclosure. Regina retained Steven Kessler, Esq. (“Kessler”) to represent her in the Forfeiture Action, where he represented to the court on her behalf that the Property was held solely by the LLC, the transfer of interest to the LLC was not fraudulent and was done for estate planning purposes, and Regina was the sole interest holder in the LLC. Regina subsequently prevailed in the Forfeiture Action in 2009, with the Court holding that John held no interest in the Property. Kessler later filed suit for amounts due and owing from Regina in the Supreme Court of the State of New York and prevailed, thus becoming a judgment creditor. Eventually, the 2007 Foreclosure stalled and was dismissed for lack of prosecution. Plaintiff reinstated the foreclosure proceedings in a 2017 complaint, and John, Regina and Kessler all answered, arguing, among other things, that John did not have the authority to encumber the Property with the mortgage on the LLC’s behalf. Following discovery, Plaintiff moved for summary judgment.

The Court granted Plaintiff’s motion. First, it agreed with Plaintiff and held that the transfer of the Property from Regina to the LLC was not fraudulent, accepting her prior assertion in the Forfeiture Action that the transfer was made for estate planning purposes. Second, the Court found that the mortgage held by Plaintiff is valid because it was granted by the LLC in exchange for a loan of \$1,750,000, and the loan was used to pay off prior mortgages and for home improvement, as required by the loan documents. Moreover, the Court held that John had the ability to bind the LLC due to the internal LLC documents that granted him this authority. The Court further held that Regina could not challenge John’s authority to bind the LLC under the judicial estoppel and sham affidavit doctrines, as she had argued to the contrary in the Forfeiture Action. Similarly, although Kessler was not judicially estopped from making these arguments on his own behalf simply because he made the opposite representations as counsel on Regina’s behalf in the Forfeiture Action, “the court does not look favorably or attach great weight to statements and arguments made in direct contravention of statements and arguments made in earlier judicial proceedings where no explanation for the discrepancy has been provided.” Further, the Court found that Kessler, as a stranger to the dispute between Plaintiff and John and Regina, lacked standing as a third party judgment creditor.

Finally, the Court found that most of the opponents’ arguments were moot because of Plaintiff’s equitable arguments. Specifically, even if the mortgage were legally deficient, the Court held that Plaintiff has a right to foreclose based on doctrines of ratification, equitable mortgage, and equitable subrogation. The Court reasoned that, even if John was not authorized to bind the LLC, Regina and the LLC ratified the mortgage by their conduct in continuing to make mortgage payments after John was incarcerated. Further, Regina was not only aware of the

mortgage, she executed corporate documents for the express purpose of giving John the authority to obtain a loan and execute a mortgage on behalf of the LLC. When combined with the fact that she unquestionably benefited from the loan because the proceeds were used to pay off prior liens and improve the Property where she has been living since 2006 without paying expenses, the Court found sufficient grounds to impose an equitable mortgage. Lastly, the Court held that Plaintiff is equitably subrogated to the lien position enjoyed because the prior liens it satisfied.

For a copy of the decision, please contact Michael O'Donnell at modonnell@riker.com, Michael Crowley at mcrowley@riker.com, or Dylan Goetsch at dgoetsch@riker.com.

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