NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Supreme Court, Kings County, New York.
ARGENT MORTGAGE COMPANY, LLC, Plaintiff,
v.
Leonard MENTESANA; New York City Parking Violations Bureau; "John Doe" Said Names Being Fictitious, it Being the Intention of Plaintiff to Designate Any and All Occupants of Premises Being Foreclosed Herein, Defendant.
No. 25828/2004.

April 17, 2009.

Fein, Such & Crane, LLP., for Plaintiff.

Harriet Thompson, Esq., Rita Hill, Esq., Special Referees Appointed.

LAURA L. JACOBSON, J.

***1** In this foreclosure proceeding, the plaintiff seeks *inter alia* a) the appointment of a referee to determine the monies owed to the plaintiff pursuant to the terms of a mortgage and thereafter, b) a judgment of foreclosure. Upon a review of the papers which were submitted, I noted that the summons and complaint had been served on the defendant mortgagor Leonard Mentesana (hereinafter defendant Mentesana) by service on a live-in nurse. I also made note of the fact that the defendant Mentesana never made any payments pursuant to the terms of the note and mortgage. In an effort to ascertain some additional information in this matter, I issued an Interim Order in May 2005 seeking, *inter alia,* a copy of the initial loan application.

Plaintiff submitted a copy of the defendant's loan application. The loan application revealed that the defendant was a taxi driver who earned $69,900 per year. Irrespective of that fact, he was applying for a mortgage in the amount of $319,500. Although the application listed some assets in bank accounts, the application did not contain any confirmation concerning this information. In fact, the application revealed that the total liability of the defendant was $91,807 and the total assets were $58,119.30. With all of this conflicting information contained in the application, I directed the plaintiff, defendant and those agents of the plaintiff who made the decision to grant the defendant a mortgage, to appear in Court.

The attorney for the plaintiff and one of its agents appeared at the conference. The defendant did not appear. At the conference, the attorney gave me copies of bank statements from an entity named LJ Monte Car Service Inc. that reflected deposits and withdrawals. The balances on many of the monthly statements was less than $5000. It was not clear what relation LJ Monte Car Service had to the defendant Mentesana. What was clear was that the application for a mortgage was made by the defendant Mentesana, not by any corporate or business entity.

As a result of the conference, I did not receive any clarification to assist me in determining why a mortgage in the amount of $315,000 had been given to the defendant. Although the attorney for the plaintiff assured me that

banks often made loans to lower income individuals and then charged a higher rate of interest, that rationale made absolutely no sense in this situation. In the instant matter, it was abundantly clear from the loan application that the defendant would not be able to repay the amount borrowed irrespective of the interest charged. As evidence of that fact, the defendant never made any payments towards the repayment of the loan.

As one of my learned colleagues recently wrote, "the Courts are not automotons," [FN1] mindlessly processing foreclosure papers irrespective of the red flags often raised by the papers. It was clear that there were many facts underlying the granting of the mortgage which were not being revealed to the Court. I sought to have an investigation into the circumstance surrounding the granting of the mortgage, which would be conducted by one of the State agencies. However, I was advised that no investigation could be had until I issued a final determination in this matter. But I could not issue a determination until I had more information. Needless to say, I found myself in the midst of a Catch 22.

FN1. The Hon, Herbert Kramer in *M & T Mortgage Corp. v. Foy et al,* 20 M3d 274, 280 (Sup Ct, Kings Co., 2008)

***2** Because the Courts should not be made parties to, or perpetuate, frauds, I was determined to ascertain as much information as possible. In June 2006, I appointed Harriet Thompson, Esq., an attorney with extensive experience in real estate matters, as a Special Referee to conduct an investigation into the capacity of defendant Mentesana to participate in these proceedings. Ms. Thompson then conducted several visits to 1235 East 69th Street, Brooklyn, New York, the address listed by defendant Mentesana as his residence when he signed the mortgage documents. Those premises contain three apartments. On the first floor, in Apt 1L, Ms. Gracie Murman Zaidman lived with her children; in apt 1R Leonard Mentesana and Michele Cohen Mentesana resided and in the rear apartment, Ms. Barbara Behr resided. In July, 2006, Ms. Thompson spoke with Ms. Zaidman, who identified herself as the daughter of the owner of the premises. She stated that defendant Mentesana had been a tenant in the premises for the last four years.Ms. Zaidman told Ms. Thompson that defendant Mentesana had never paid his rent on time and had vacated the apartment about six weeks earlier. Without notifying Ms. Zaidman's father, defendant Mentesana had moved all of his personal belongings out of the apartment in the middle of the night, and still owed Ms. Zaidman's father for two months rent.

Ms. Thompson then visited 4904 Avenue M, Brooklyn, the subject premises. In the front yard of the premises, Ms. Thompson ran into defendant Mentesana. She was able to speak with the defendant, whom she described as being in a daze, sluggish but coherent. Defendant Mentesana stated that he was 64 years old and was ill. He showed Ms. Thompson a small bag with many vials of prescription drugs. He told Ms. Thompson that he was taking morphine sulphur in 30 and 200 mgs. dosage for a neck and back injury. He told Ms. Thompson that he took ten to twenty pills a day. Although Ms. Thompson asked for permission to enter the premises, defendant Mentesana refused to allow her entry. Every window of the subject premises appeared to be covered with white sheets.

Ms. Thompson then inquired into defendant Mentesana's application for a mortgage and the deed bearing his signature. Defendant Mentesana identified his signature on the documents and stated that he signed the documents because "Stevie (the son of the prior owner) was in a bind and he asked him (defendant Mentesana) to do him a favor."Ms. Thompson asked defendant Mentesana why he had not responded to the lawsuit and defendant Mentesana declared himself unaware that he was a party to the lawsuit. When asked why he did not make any payments on the mortgage, defendant Mentesana stated that he was

not supposed to make any mortgage payments, that he did not own the house and that Stevie owned the house. The Special Referee asked defendant Mentesana whether he received some of the mortgage money at the closing and received a negative response. Defendant then became quite nervous and started to shake. Ms. Thompson again asked for access to the premises, but was again refused. It was the Special Referee's belief that the premises was being used for unlawful purposes.

***3** The Special Referee then spoke with several neighbors. They were familiar with the Fischman family (the prior owners) and stated that the family had owned the property for many years. The neighbors did not know Leonard Mentesana, in spite of the fact that the sale of the house had occurred in February, 2004 more than two years prior to the appointment of the Special Referee.

After conducting her investigation, the Special Referee concluded that the transfer of title from Stanley Fischman, by Steven Fischman pursuant to a Power of Attorney, to Leonard Mentesana was not a conventional arms length transaction. However, it appeared to Ms. Thompson that there was some evidence of fraud in this matter and that the former owner may have used defendant Mentesana to obtain cash from the mortgagee at the time of the transfer of title, on February 23, 2004. Further, it was not clear to the Court, after reviewing the report of the Special Referee, that the actual title ever resided in defendant Mentesana. The latter may have been simply a "strawman" and allowed his name to be used to assist in the perpetuation of a fraud.

The Special Referee issued a report with a recommendation that a Guardian Ad Litem be appointed for defendant Mentesana. Accordingly, I appointed Margaret Halligan and then Rita Hill as the Guardian Ad Litem for defendant Mentesana. [FN2]

FN2. Ms. Halligan initially qualified as the Guardian Ad Litem. Then, because of a change of circumstances in her professional life, Ms. Halligan requested that I release her from her guardianship position. On March 26, 2007, I granted her request.

The Guardian Ad Litem (hereinafter the "GAL") had some difficulty in locating and then speaking with defendant Mentesana. In her report, GAL describes her visits to the subject premises in an effort to locate defendant Mentesana. The GAL left her card at the premises and on several occasions, defendant Mentesana called her but would not schedule a time and place to meet with her. Defendant Mentesana acknowledged to the GAL (and to the Special Referee) that he never intended to re-pay the mortgage since he only entered into the agreement to purchase the house and obtained the mortgage to help out Stevie (Steven Fischman), the son of the prior owner.

It is the GAL's belief that defendant Mentesana willingly and knowingly entered into the contract to purchase the house, and the note and mortgage and that he understood the associated risk. It was also her belief that defendant Mentesana signed all of the aforedescribed documents as a favor for Steven Fischman ("Stevie") to avoid a foreclosure sale of the premises and to allow "Stevie" to receive some of the proceeds of the mortgage at the closing. Interestingly, although the GAL requested copies of the closing documents and the checks distributed at the closing, those items were not submitted to the GAL. Perhaps if the GAL had seen those documents, the Court could have been apprised of the depth of "Stevie's" involvement in this process.

In any event, the purpose of appointing the GAL was to insure that the rights of the defendant Mentesana were protected. The GAL spoke with the attorney for the bank and was assured that upon the sale of the premises at a

public sale, if any deficiency occurred and the sale price was less than the judgment, the bank would not pursue defendant Mentesana for the difference. Although the GAL surmises that there may have been an agreement between defendant Mentesana and "Stevie" whereby "Stevie" would pay the mortgage and that this agreement was breached by "Stevie", it appears that the GAL has given these two gentlemen more integrity than they deserve.

***4** This Court firmly believes, and has believed for a long time, that the unresolved issues that form the basis of this foreclosure matter represent the epitome of the fraud inherent in the mortgage market which has led to the serious economic problems this country now faces. Based on the reports issued by the Special Referee and the Guardian Ad Litem, and the supporting documentation supplied by the plaintiff, it is clear to this court that this case is permeated with deceit and deception The fact that defendant Mentesana, who earned less than $70,000 per year could obtain a mortgage for over $315,000 without any verification of his alleged assets underscores the permissiveness that was part of the mortgage business in the economy. Anyone casting a cursory glance at the Court Ordered reports and the loan application could not help but realize the depth to which the mortgage market has sunk. No one was minding the store because no one cared whether or not the mortgage would be repaid. Before the real estate bubble burst, many banks and mortgage brokers couldn't wait to hand out money as long as the value of the property matched or was greater than the value of the amount of money lent. Once the property values dipped, these lending institutions were unable to retrieve the value of the money lent and the economy, which was perched precariously on the backs and shoulders of the real estate industry, plummeted. This case is a microcosm of how the initial deception snowballed into a total catastrophe.

The Courts have a responsibility to society as a whole to not allow the perpetuation of a fraud. If this Court grants the application of the plaintiff, it will be giving the imprimatur of approval to a scenario as fraught with fraud as any of the worst Ponzi schemes. It has long been recognized that a litigant seeking affirmative judicial action in equity may not succeed if the litigant is asking for an inequitable or unconscionable result. *Monaghan v. May,* 242 A.D.2d 273, 279. In the instant matter, plaintiff requests that this court enforce the terms of a mortgage that is clearly fraudulent. To do so would create an unconscionable result. The fact that this case was submitted on default does not prevent this Court from examining the underlying elements of the cause of action. Actually, this Court has a responsibility to examine those elements and expose those aspects of the case that are contrary to public policy. Perhaps if more of the people charged with overseeing our financial institutions had focused on the improprieties being performed in the financial arenas, our economy might not have imploded as ferociously as it did.

My job is to ascertain whether or not plaintiff is entitled to the relief requested. In this matter, plaintiff as the mortgagee was initially in a position to ascertain the credit status of defendant Mentesana.[FN3]Plaintiff abrogated that responsibility. Defendant Mentesana acknowledged his part in the fraudulent transaction in which several people appear to have participated. Accordingly, I am not only denying the relief sought, I am referring this matter to the Office of the District Attorney; to the Attorney General's office, Fraud Division and to the Banking Department, Criminal Investigation Bureau. Several months ago I referred this matter to the Banking Department but I was never made aware as to whether or not those persons charged with the responsibility of ascertaining the facts were able to investigate this matter. However, now that a final determination has been reached by me and I have denied the relief requested, I am referring the matter to the three agencies above named, who are the guardians of law charged with the responsibility of rooting out corruption and fraud.

FN3. The Court has recently viewed the registry of this Block (7874) and Lot (42) online at the Office of the City Register. It would appear that on December 8, 2004, plaintiff assigned this mortgage to Ameriquest Mortgage Company, subsequent to the date of default. The assignment however, is only signed by Jule J. Keen who identified himself/herself as the Executive Vice President of Ameriquest Mortgage Company, the assignee. Clearly, an assignment signed by the entity who is *receiving* the assignment has no force and/or effect.

On December 8, 2004, Ameriquest Mortgage Company assigned its right title and interest to the mortgage to American Residential Equities XXXXI, LLC. The Court is not aware of what was assigned since the initial assignment to Ameriquest was ineffective.

Subsequently, it appears that a "Corrective Assignment of Mortgage" dated January 24, 2008 was filed with the City Register in 2008. This document professes to correct the initial assignment, to "show Argent Mortgage Company LLC as the signor in place of Ameriquest Mortgage Company", is the statement typed into the corrected assignment form. This statement is followed by a handwritten statement seeking to correct the mortgage recording information. There is no initial next to the handwritten note nor is it clear who wrote it and when it was written.

There is no new re-assignment from Ameriquest Mortgage Company to American Residential Equities XXXXI, LLC. Instead, by assignment dated April 17, 2008, American Residential Equities XXXXI, LLC. attempts to assign the mortgage to GMAC Mortgage, LLC. Let it be noted that the attempted assignment is of a mortgage in default for more than four years. Let it also be noted that the Court has never been appraised that the mortgage was assigned to any of the aforedescribed entities.

***5** With respect to the work performed by the Special Referee and the Guardian Ad Litem, those attorneys performed admirably in obtaining for the Court much of the information needed to prepare this decision. Accordingly, the Special Referee and the Guardian Ad Litem should be paid pursuant to Statute, for their extensive investigative work.

The Guardian Ad Litem has submitted a bill for $3451.25 and she is entitled to be paid by the plaintiff.

The Special Referee is directed to submit a bill to the Court and she too will be paid by the plaintiff.

Accordingly, plaintiff's application for the appointment of a referee is denied.

This matter is referred to the Criminal Investigation Bureau of the Banking Department of the State of New York, the Office of the District Attorney of the City of New York, County of Kings and the Attorney General's Office of the State of New York, Real Estate Fraud division.

The Special Referee is granted leave to apply for fees in this matter

The Guardian Ad Litem is awarded fees in the amount of $3451.25.

This constitutes the decision and Order of this matter.

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