

2018 NY Slip Op 31712(U)

ZUCKER REAL ESTATE CORP., Plaintiff,
v.
MILTON E. WILSON, ELIZABETH PEARSON, FRANKIE NEAL, and NEW YORK CITY
DEPARTMENT OF FINANCE, Defendants.

INDEX NO. 157614/2016

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK: PART 57

RECEIVED: March 29, 2018
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NYSCEF DOC. NO. 47

DECISION AND ORDER

JENNIFER G. SCHECTER, J.:

Plaintiff Zucker Real Estate Corp. (Zucker) commenced this action to quiet title to property located at 245 West 131st Street in Manhattan (Property). Defendant Milton E. Wilson (Wilson) moves to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7) and to cancel the lis pendens Zucker filed against the Property. Because the documentary evidence does not compel dismissal and because the complaint states a cause of action, Wilson's motion is denied.

Background

On this motion to dismiss, the court must accept the facts alleged by Zucker in the complaint to be true.

Susie Foote (Foote) owned the Property.

Wilson has a November 9, 1978, deed from Foote conveying the Property to him (Wilson Deed) (Affirmation in Support [Supp] at ¶ 11, Ex B). It is undisputed that, in November

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1978, the Wilson Deed was recorded but was improperly indexed against property at a different address with a different block and lot designation (Supp, Ex H [Complaint] at ¶ 13).

In 2016, Zucker purported to purchase the Property from Foote's heirs Frankie Neal (Neal) and Elizabeth Pearson (Pearson). On April 14, 2016, Zucker's deeds were recorded (Complaint at ¶ 8). A mere five days later, a Zucker representative went to the Property to "secure" it (Complaint at ¶ 12). Zucker then learned that Wilson was renting out the Property "and was first notified of Wilson's alleged ownership" (*id.*).

On May 5, 2016, the New York City Department of Finance issued a "correction" and indexed the Wilson Deed in the right place along with a memorandum stating that the deed had been indexed incorrectly at the time it was recorded and the "entry in the index [was] to provide notice of the recorded document" (Supp, Ex G). The memorandum further stated that one should "note the

date of the document and its appropriate place in the chain of title" (*id.*). That same day, the Department of Finance also filed a satisfaction of mortgage from December 1980, reflecting that Wilson had been the borrower and Foote the lender.

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Zucker subsequently commenced this action against Wilson seeking, among other things, to quiet title in its name. Zucker maintains that it is the sole owner of the Property and that Neal and Pearson had represented that they were Foote's sole remaining heirs and that they were the owners of the Property (Complaint at ¶¶ 7, 9).

Wilson now moves to dismiss based on documentary evidence and for failure to state a claim. Wilson urges that dismissal is appropriate because: (1) the improper indexing of his deed does not divest him of ownership (Supp at ¶¶ 6, 23, 25, 41), (2) Zucker's title company should have identified Wilson's interest (Supp at ¶¶ 4, 19), (3) Zucker was on notice of Wilson's interest through the May 2016 Department of Finance letter stating that the Wilson Deed was indexed incorrectly (Supp at ¶ 4), (4) Zucker had notice of Wilson's "open use and maintenance of the Property for almost 40 years" (Supp at ¶ 42) and (5) Zucker had notice of Wilson's ownership through settlement negotiations between the parties (Supp at ¶ 42).

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Analysis

On a motion to dismiss pursuant to CPLR 3211, the complaint is afforded a liberal construction and plaintiff is given the benefit of every possible inference ([Leon v Martinez, 84 NY2d 83, 87-88 \[1994\]](#)). The court only determines whether the facts as alleged fit within any cognizable legal theory (*id.*). "Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law In assessing a motion under CPLR 3211(a)(7), however, . . . the 'criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one'" (*id.* at 88 citing [Guggenheimer v Ginzburg, 43 NY2d 268 \[1977\]](#)).

Zucker has a cause of action. It alleges that it is a good-faith purchaser of the Property and that it had no notice of the improperly-indexed Wilson Deed or of Wilson's ownership interest. None of the documentary evidence that accompanies the motion papers establishes anything to the contrary. Wilson's evidence does not conclusively establish that Zucker had notice of his ownership of the Property before making its purchase. Because movant's documentary evidence does not definitively establish a defense as a matter of law to

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Zucker's viable causes of action, defendant's motion is denied.

Accordingly, it is

ORDERED that defendant's motion is denied; and it is further

ORDERED that defendant is to answer within 10 days of notice of entry of this decision and order (CPLR 3211[f]).

This is the decision and order of the court.

Dated: March 26, 2018

/s/ _____
HON. JENNIFER G. SCHECTER

Footnotes:

* In his motion, Wilson does not argue that Zucker had notice of his ownership of the Property based on Tax Lien Certificates that were filed listing him as the owner of the Property or based on a 2015 foreclosure action in which Pearson, Neal and Wilson are named defendants.