

COMMONWEALTH OF MASSACHUSETTS
Land Court
Department of the Trial Court
Miscellaneous Case No. 330244 (AHS)

(SEAL)

NEW CENTURY MORTGAGE CORPORATION,
Plaintiff,

vs.

RICHARD VINING and NISSA D. GIBERSON,
Defendants.

DECISION

Plaintiff filed its Verified Complaint on October 3, 2006, seeking a declaratory judgment, pursuant to G. L. c. 231A, to reform a mortgage given by Defendant Richard Vining (“Vining”) to Plaintiff, by adding Defendant Nissa D. Giberson (“Giberson”) as a mortgagor.¹ On the same day Plaintiff filed a Motion for Approval of Memorandum of Lis Pendens, which this court allowed at a hearing on October 13, 2006, at which neither Giberson nor Vining appeared. Vining and Giberson were defaulted on November 24, 2006 pursuant to Mass. R. Civ. P. 55(a).² A case management conference was held on December 27, 2006, which Giberson attended but at which Vining did not appear. Giberson filed an Answer on March 30, 2007.³

Plaintiff filed its Motion for Summary Judgment on November 9, 2007, together with supporting memorandum, Concise Statement of Undisputed Material Facts, Appendix, and Affidavits of Giles L. Krill, Esq., David Hadlock, Esq., and Stacey Lynn Brown, Esq. On

¹ Plaintiff filed an Amended Substitute Complaint on August 21, 2007, and August 24, 2007 (corrected version), adding a count to reform the Second Mortgage, as hereinafter defined.

² Since Giberson subsequently appeared and filed pleadings, her default should have been, and is hereby, removed.

³ Giberson filed an Answer to the Amended Substitute Complaint on September 21, 2007.

December 18, 2007, Giberson filed her Opposition, together with supporting memorandum, and Affidavit of Nissa D. Giberson. On January 25, 2008, Plaintiff filed a Reply Memorandum, together with Affidavit of Frank Mercado, Jr. (a vice-president of Plaintiff), and Motion to Strike Certain Affidavit and Deposition Testimony of Giberson. A hearing was held on all motions on February 6, 2008, and the matter was taken under advisement.

Summary judgment is appropriate where there are no genuine issues of material fact and where the summary judgment record entitles the moving party to judgment as a matter of law. See Cassesso v. Comm'r of Correction, 390 Mass. 419, 422 (1983); Cnty. Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976); Mass. R. Civ. P. 56(c).

The following material facts are not in dispute:

1. Vining, as buyer, and Matthew M. Keeney, as seller, executed a purchase and sale agreement for the property located at 51 Elmwood Avenue, West Springfield, MA ("Locus").⁴
2. To purchase Locus, Vining applied for two mortgages from Plaintiff to secure two notes in the amounts of \$116,800 and \$29,200.
3. Vining and Giberson own Locus as joint tenants by deed (the "Deed") dated August 15, 2003, and recorded with Hampden County Registry of Deeds (the "Registry") at Book 13499, Page 289. The consideration for the Deed was \$146,000.
4. The first purchase-money mortgage covering Locus, which was recorded with the Registry on August 19, 2003, at Book 13499, Page 291, and the underlying note for \$116,800 secured by the above-referenced mortgage, both dated August 18, 2003, referenced as

⁴ Giberson was named as a buyer on an Addendum to the purchase and sale agreement but she never signed the document.

mortgagor, and were executed only by, Vining (“First Mortgage”).⁵ A second purchase-money mortgage dated August 18, 2003, securing a note in the principal amount of \$29,200, both of which were also executed only by Vining, was recorded with the Registry on August 19, 2003, at Book 13499, Page 307 (“Second Mortgage”). Both the First Mortgage and the Second Mortgage, in addition to the Corrective Mortgage, are referred to collectively as the “Mortgages.”

5. Vining and Giberson jointly contributed to the mortgage payments to Plaintiff after the closing. Vining moved out from Locus in the fall of 2004, and Giberson continued to make the mortgage payments on her own.

6. Vining filed for bankruptcy in March of 2005 and was discharged in June of 2005. Giberson filed for bankruptcy in March of 2005 and was discharged in December of 2005.

7. On March 24, 2005, Giberson recorded a Declaration of Homestead with the Registry at Book 14897, Page 88.

8. Giberson ceased making mortgage payments in November of 2005 and attempted to put the house on the market. The Mortgages have been in default since that time.

9. Giberson continues to live at Locus.

10. Representatives of Plaintiff refused to talk with Giberson concerning the Mortgages because she was not a signatory to the Mortgages.

To begin, Plaintiff filed a Motion to Strike Certain Affidavit and Deposition Testimony of Giberson, arguing that paragraphs 11-16 of her Affidavit and parts of pages 23 and 24 of her

⁵ A corrective mortgage, also dated August 18, 2003, and securing the first note, which incorporated missing riders, referenced as mortgagor, and was executed only by, Vining, was recorded with the Registry on August 28, 2003, at Book 13529, Page 477 (“Corrective Mortgage”).

deposition were not admissible. However, Plaintiff acknowledges that the statements Giberson made in Paragraphs 11-13 of her Affidavit relative to Plaintiff's refusal to talk to Giberson about the Mortgages are, in fact, true based on Plaintiff's reliance on the privacy act and the fact that Giberson was not on the Mortgages, and as a result I shall not strike these paragraphs. I agree that paragraphs 14-16 of the Affidavit are speculative and strike them from the record. Plaintiff also argues that portions of Giberson's deposition should be struck because such portions were also based on speculation. I agree that the portions of the deposition where Giberson states that Plaintiff knew that she was a grantee on the Deed but not a mortgagor on the Mortgages is speculative and not based on any facts that Giberson cites. Moreover, Giberson appears to be assuming the intent of representatives of Plaintiff in such assertions, for which there is no basis or foundation. As a result, lines 16-24 on page 23 and lines 3-8 on page 24 of Giberson's deposition, in which Giberson speculates as to Plaintiff's state of mind, shall be struck.

Plaintiff argues that a mutual mistake occurred between all parties when Giberson failed to execute the Mortgages. Plaintiff reasons that because the loan secured by the Mortgages supplied 100% of the purchase price for Locus, the title for which was taken by Vining and Giberson as joint tenants, the Mortgages should be reformed.⁶ In the alternative, Plaintiff argues that the Deed should be reformed to delete Giberson as a joint tenant or that Plaintiff holds equitable first and second mortgages on Locus.⁷ Giberson argues that there was no mutual mistake, for Plaintiff was fully aware that Giberson was not intending to execute the Mortgages

⁶ Plaintiff does not seek to have either promissory note reformed.

⁷ Plaintiff notes that this is not the first time that this issue has come before the Land Court. Plaintiff references a 1992 Land Court case with similar facts, Dime Sav. Bank of New York, F.S.B. v. Sullivan, Land Court Misc. Case No. 160590 (Nov. 10, 1992) (Kilborn, J.), 37 Mass. App. Ct. 1107 (1994) (unpublished opinion pursuant to Rule 1:28 of the Rules of the Appeals Court). See also Wells Fargo Bank, N.A. v. Metcalf, 15 LCR 436 (2007) (Misc. Case No. 318647) (Piper, J.).

for financial reasons, and that there are material facts at issue relative to the knowledge of Plaintiff which requires a trial.

“It is well established that legal instruments, including deeds, may be reformed on the ground of mutual mistake.” Buk Lhu v. Dignoti, 431 Mass. 292, 294 (2000).

If the language of a written instrument does not reflect the true intent of both parties, the mutual mistake is reformable. . . . The mistake must either be mutual . . . or be made by one party and known to the other party To be entitled to reformation, a party must present full, clear, and decisive proof of mistake.

Polaroid Corp. v. Travelers Indem. Co., 414 Mass. 747, 756 (1993) (internal citations omitted).

To support its position, Plaintiff cites Giberson’s deposition where she states that “we were jointly going to be married, jointly income, so it didn’t really matter. We were buying a house together.” She also stated:

We did it jointly together. And the best way we were going to come out in an alternative route was leave Richard on by himself so we wouldn’t have a high interest and a high mortgage My debt-to-income was too high. I had low income and credit cards on the side here.

Q: So the broker told you that you would be able to obtain more advantageous -

A: Um-hum.

Q: - financing if your name came off the -

A: If my name was off and I’d just go on the deed.

It is clear from Giberson’s own testimony that she was not listed on the Mortgages solely for financial reasons and intended to be bound by the Mortgages.

Even though Giberson argues that there are material facts in dispute, it appears that she disputes the legal interpretation of the material facts, not the facts themselves. The summary judgment record shows that Giberson was not a signatory to the purchase and sale agreement, the addendum to the purchase and sale agreement, the loan applications, or the Mortgages. She admits that she knew that Plaintiff expected to be reimbursed for the amounts loaned on the

notes, and indicates that Plaintiff is entitled to be paid back what they loaned.⁸ Giberson seems frustrated that a sale of Locus fell through due to Plaintiff's refusal to communicate with her, but she understands that communications with Plaintiff were difficult because of the privacy statutes.

Moreover, Giberson's deposition indicates that she was unclear as to the legal effect of signatures on documents which are in the summary judgment record, and she became confused as to these documents. She admits that she was also confused as to the difference between the notes and the Mortgages.⁹ Furthermore, her statements relative to what she determined to be disputed facts are speculative, as she states that Plaintiff knew that they were giving mortgages without all of the deed owners listed, but she provides no facts asserting a basis for this belief.¹⁰ In light of the above, I find that the record indicates a mutual mistake in that the Mortgages fail to reflect the true intent of both parties and, as such, the Mortgages are reformed so as to name Giberson as a mortgagor, nunc pro tunc, to the date and time of recording of the Mortgages. Giberson's interest in Locus is subject to the Mortgages as if she had been named therein, and

⁸ The deposition transcript reads:

Q: So just to recap, you admit that the bank, New Century, provided one hundred percent of the money used to acquire the property.

A: Yes.

Q: Is it your position that they should not be paid back what they put into the property?

A: My position is that they should be paid back but I should get my equity out of my house that I put in.

...

Q: And can you tell me why New Century shouldn't get paid first since they were the first ones to put money in.

A: I didn't say they shouldn't or should.

⁹ Confusion on the part of a borrower regarding the mortgage process is not uncommon. It appears that Giberson "joined the army of borrowers, past, present and future, who stagger glassy-eyed through suburban mortgage closings, emerging house rich and deep in debt." Dime Sav., Land Court Misc. Case No. 160590 at 5.

¹⁰ Other disputed statements raised by Giberson relative to the knowledge of Plaintiff have been struck from the record.

had executed the Mortgages as a co-mortgagor at the time of the execution and delivery of the Mortgages.

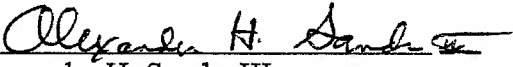
Plaintiff also argues that an equitable mortgage exists in the event that this court cannot find the basis for a reformation of the Mortgages. The concept of equitable mortgage is based on the concept of unjust enrichment, and Plaintiff argues that Giberson would be unjustly enriched where she obtained one-half interest in Locus without paying for it and where Plaintiff paid 100% of the purchase funds for her benefit. “A person who has been unjustly enriched at the expense of another is required to make restitution to the other.” Salamon v. Terra, 394 Mass. 857, 859 (1985) (quoting Restatement of Restitution s. 1 (1937)). “Even where a person has received a benefit from another, he is liable to pay therefor only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it.” Restatement of Restitution s. 1 cmt. c.; Keller v. O'Brien, 425 Mass. 774, 778 (1997). Whether the retention is unjust is “a quality that turns on the reasonable expectations of the parties.” The Cmtv. Builders, Inc. v. Indian Motorcycle Assoc., Inc., 44 Mass. App. Ct. 537, 560 (1998). Giberson does not address this argument in either her summary judgment brief or at oral argument, and, as discussed, supra, in her deposition she agrees that fairness dictates that Plaintiff be reimbursed for its lien. Moreover, Plaintiff argues that Massachusetts courts have equitable powers over mortgages, and such courts will “guard[] against the unjust enrichment of either party” E. Boston Sav. Bank v. Ogan, 428 Mass. 327, 329 (1998).¹¹ Given the finding of mutual mistake, as discussed supra, this court need not make any findings relative to an

¹¹ Plaintiff also points out that Giberson has lived at Locus rent-free for the last several years.

equitable mortgage.¹²

As a result of the foregoing, I ALLOW Plaintiff's Motion for Summary Judgment.

Judgment to enter accordingly.


Alexander H. Sands, III
Justice

Dated: February 27, 2009

¹² In light of the effective execution and delivery dates of the reformed Mortgages, as discussed supra, this court agrees with Plaintiff's assertion, in their brief in support of their motion for summary judgment, that Giberson is not protected under the Homestead Act, under which she did not file until March 24, 2005. See G. L. c. 188, §5 ("No estate of homestead shall affect a mortgage, lien or other encumbrance previously existing."). Moreover, Giberson does not appear to have raised this argument in her opposition. Furthermore, paragraph 24 within the Non-Uniform Covenants of the First Mortgage and the Corrective Mortgage, entitled "Waivers," states that "Borrower waives all rights of homestead exemption in the Property"