Mortgagee's Interest in Property Was Not Rendered Null and Void Where Mortgagors Had Acquired Property by Fraudulent Means

The First Department of New York's Appellate Division recently held that a mortgagee's interest in a property was not rendered null and void where the mortgagors had acquired the property by fraudulent means. See Weiss v Phillips, 2017 WL 5575033 (N.Y. App. Div. Nov. 21, 2017). In the case, defendant purchased two distressed properties and transferred one of the properties to a relative. Defendant later sent a paralegal to obtain the relative's signature on a blank deed to transfer the property back to the defendant; instead, the paralegal inserted his mother's name as the grantee. The mother then deeded the property to herself and the paralegal. On or about the same date, plaintiff lent $500,000 to the paralegal and his mother, and they executed a note and mortgage on the property. Subsequently, defendant learned of the fraudulent transfer and sued the paralegal and his mother. He eventually settled, with the paralegal and his mother agreeing to transfer title on the property back to the defendant. Around this time, defendant learned that the loan was in default and plaintiff intended to foreclose on the property. Defendant thus executed a Consolidated Extension Mortgage Agreement Note ("CEMA") with plaintiff through which defendant acknowledged the loan and mortgage and agreed to waive all defenses and counterclaims in exchange for a one-year extension of the loan. After the year passed, plaintiff commenced this action and filed a motion for summary judgment seeking to foreclose. In the action, plaintiff provided a copy of the CEMA and the mortgage but did not provide a copy of the promissory note. The trial court granted the motion and, on appeal, the First Department affirmed.

First, the Court held that **PLAINTIFF'S FAILURE TO PRODUCE THE NOTE DID NOT PREVENT HIM FROM ESTABLISHING A PRIMA FACIE CASE FOR FORECLOSURE.** In this situation, the complaint's allegations were based on the mortgage and CEMA in which defendant ratified and affirmed all the terms of the note and mortgage and specifically warranted there were no deductions, counterclaims, defenses, and/or setoffs to any obligations under the note, as well as on defendant's deposition testimony in which he did not challenge the note's existence. Thus, plaintiff did not need to produce the note. The Court further held that the deed here was the result of a fraudulent inducement, and not a forgery, which made it only voidable rather than void. Further contrary to defendant's arguments, the Court held that plaintiff was a bona fide encumbrancer due to the

CEMA's provision that defendant acknowledged and ratified plaintiff's rights under the note. Thus, the mortgage obligation could not be avoided by defendant's myriad defenses. Finally, the Court held the CEMA was not unconscionable. Defendant executed it with the advice of counsel, in part because of counsel's advice that plaintiff would have had an equitable subrogation claim because the proceeds from its loan were used to discharge a prior lien on which defendant was liable. As such, summary judgment was appropriate.