

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 22

THOMAS ROTH,

Plaintiff,

INDEX NO. 017484/1998
MOTION DATE: 11/21/2001
MOTION SEQUENCE: 008

- against -

DANIEL PORUSH, NANCY PORUSH,
DAVID SCHWARTZ and ESTHER SCHWARTZ,

X X X

Defendants.

The following papers read on this motion:

Notice of Motion/Order to Show Cause	X
Answering Affidavits	XXX
Replying Affidavits	XX
Memoranda of Law: Plaintiff's/Petitioner's	
Defendant's/Respondent's	

This motion by defendants David Schwartz and Esther Schwartz for leave to substitute First American Title Insurance Company of New York in place of David Schwartz and Esther Schwartz as their subrogee and as party defendant, and upon such substitution for an order pursuant to CPLR 3212 granting summary judgment on the cross-claim asserted against defendant Nancy Porush is granted.

Plaintiff, Thomas Roth, commenced this action to set aside a conveyance of real property from Daniel Porush and Nancy Porush to Nancy Porush as fraudulent against him. Plaintiff has a three million dollar judgment against defendant, Daniel Porush, as the result of an arbitration award of a securities fraud claim.

By order dated March 26, 2001, the Appellate Division for the Second Department determined that the conveyance was fraudulent insofar as there was no consideration paid for the transfer between the Porushs, the plaintiff's notice of pendency was filed prior to recording of the deed between Nancy Porush and the Schwartzs, and Nancy Porush had notice that there was a cloud on title prior to conveying to Schwartz because she had been served with process in this lawsuit. Defendant Nancy Porush's recent allegation that her signature on the original conveyance to her is a forgery is untimely, and should have been brought before the Appellate Division.

The matter was recently settled between David and Esther Schwartz, the First American Title Insurance Company of New York and plaintiff in the amount of \$700,000. Movant now seeks to recover from Nancy Porush, claiming that she had notice that she was unable to convey clear title although she closed title and collected the sum of \$1,225,000 from the purchasers.

The Schwartzs at the time of closing were bona fide purchasers. A bona fide purchaser is one who buys something for value without notice of another's claim to the item or of any defects in the seller's title. The Schwartzs purchased the house from Nancy Porush without knowledge of any lien. Although a bona fide purchaser is protected under Debtor and Creditor Law § 278, one is not protected under a race-notice recording act if they did not win the race of recording. New York State has a race-notice recording statutory scheme.

In order to cut off the plaintiff's lien, the Schwartz defendants "must have no knowledge of the outstanding lien and win the race to the recording office." Goldstein v Gold, 106 A.D.2d 100 (2d Dept. 1984). "Lack of knowledge is only the first hurdle

which must be met under a race-notice recording act. The purchaser still must win the race to the recording office.” Goldstein v Gold, supra at 103. Since the Plaintiff’s notice of pendency was recorded prior to the recording of the deed conveying the property to the Schwartz defendants, they would not be able to recover against Nancy Porush. “A person whose conveyance or incumbrance is recorded after the filing of the notice is bound by all proceedings taken in action after such filing to the same extent as if he were a party.” Goldstein v Gold, supra at 102; American Auto Ins. Co. of St. Louis v Sansone, 206 A.D.2d 445; Grid Realty Corp. v Winokur, 43 N.Y.2d 956. However, in this case, Nancy Porush is found to have conveyed with actual knowledge of the fraudulent transfer and she is, therefore, liable for the conveyance with a cloud upon title.

Accordingly, the caption is amended to substitute as a party defendant First American Title Insurance Company of New York in place of and instead of David Schwartz and Esther Schwartz, as subrogee of David Schwartz and Esther Schwartz, and First American Title Insurance Company of New York is granted summary judgment on the second counter-claim.

Dated: December 4, 2001


J.S.C.

XXX

ENTERED

DEC 06 2001

NASSAU COUNTY
COUNTY CLERK'S OFFICE